Input by civil society organisations to the Asylum Report 2025

Dear Colleagues,

The production of the *Asylum Report 2025* is currently underway. The annual Asylum Report presents an overview of developments in the field of international protection in Europe.

The report includes information and perspectives from various stakeholders, including experts from EU+ countries, civil society organisations, researchers and UNHCR. To this end, we invite you, our partners from civil society, academia and research institutions, to share your reporting on developments in asylum law, policies or practices in 2024 by topic as presented in the online survey (**'Part A' of the form**).

We also invite you to share with us any publications your organisation has produced throughout 2024 on issues related to asylum in EU+ countries (**'Part B' of the form**).

These may be:

- reports;
- articles;
- recommendations to national authorities or EU institutions;
- open letters and analytical outputs.

Your input can cover information for a specific EU+ country or the EU as a whole. You can complete all or only some of the sections.

Please note that the Asylum Report does not seek to describe national systems in detail but rather to present key developments of the past year, including improvements and challenges which remain.

All submissions are publicly accessible. For transparency, contributions will be published on the EUAA webpage and contributing organisations will be listed under the Acknowledgements of the report.

All contributions should be appropriately referenced. You may include links to supporting material, such as:

- analytical studies;
- articles;
- reports;
- websites;
- press releases;
- position papers.

Some sources of information may be in a language other than English. In this case, please cite the original language and, if possible, provide one to two sentences describing the key messages in English.

The content of the Asylum Report is subject to terms of reference and volume limitations. Contributions from civil society organisations feed into EUAA's work in multiple ways and inform reports and analyses beyond the Asylum Report.

NB: This year's edition of the Asylum Report will be significantly revamped to achieve a leaner, more analytical report with streamlined thematic sections. The focus will be on key trends in the field of asylum rather than on individual developments. For this reason, information shared by respondents to this call may be incorporated in the Asylum Report in a format different than in the past years.

Your input matters to us and will be much appreciated!

*Please submit your contribution to the Asylum Report 2025 by **Friday, 10 January 2025**.*

Contact details

Name of organisation: AsyLex

Name and title of contact person: Joëlle Spahni, Head International

Email: international@asylex.ch, joelle.spahni@asylex.ch

X I accept the provisions of the EUAA Legal and Privacy Statements

General Observations

Before sharing information by thematic area, please provide your general observations on asylum developments as indicated in the following three fields:

1. **What areas would you highlight where important developments took place in the country/countries you cover?**

In 2024, the Swiss Federal Council **extended Status S** until 4 March 2026 due to the ongoing war in Ukraine (See: SEM Media release).

In 2024, the State Secretariat for Migration (SEM) resumed issuing **non-entry decisions under the Dublin Regulation for cases involving Greece**, specifically concerning men from Turkey. This marks a significant shift in practice, as since 2009, the SEM had largely avoided Dublin transfers to Greece, particularly for vulnerable individuals. Currently, appeals against these recent non-entry decisions are pending before the court. By August 2024, 69 transfer requests to Greece had been made, with 42 accepted and already carried out (See: SFH Greece). This change followed Germany's announcement of plans to resume deportations of certain nationalities to Greece (See: asyl.net).

The **EU Pact on Migration and Asylum (EU Pact)** was adopted in May 2024. Subsequently, the consultation on the implementation in Switzerland took place. Switzerland is only directly affected by those aspects of the EU Pact that represent a development of the Schengen/Dublin acquis. AsyLex participated in the consultation on the implementation of the EU Pact in Switzerland. The detailed consultation is attached to this report (**Annex 1**)

In June 2024, Switzerland implemented legislative changes to **simplify the process for individuals with temporary residence permits to change cantons**, especially if they are

employed in another canton. These amendments aim to ease relocation for those facing long commutes or job-related challenges. The Federal Council adopted these changes during its meeting on May 1, 2024, bringing them into effect on June 1, 2024 (See: Website Swiss Federal Administration).

Switzerland has also introduced a reform to **facilitate access to vocational training for rejected asylum seekers and young sans-papiers.** Under the new regulation, individuals now only need to have completed two years of compulsory schooling in Switzerland—down from the previous requirement of five years—to be eligible to submit a hardship application for vocational training. This amendment, adopted by the Federal Council on May 1, 2024, took effect on June 1, 2024 (See: Website Swiss Federal Administration).

The Federal Administrative Court (FAC) issued a decision in November of 2024 regarding **asylum seekers from Turkey** (BVGer E-3829/2024). First, the court decided that persons who are being investigated in Turkey for "insulting the president" and/or "propaganda for a terrorist organisation" in general do not have to fear persecution in their home country. Second, the FAC has revoked the 2013 practice, whereby deportations to the Turkish provinces of Hakkâri and Şırnak were generally excluded (BVGE 2013/2). Now, the court no longer considers deportations to these provinces to be unreasonable and has ruled that they must be examined on a case-by-case basis. By doing so, the FAC reinforces the increasingly stringent approach towards Turkey, despite the fact that the human rights situation in the country remains unchanged and there is no guarantee of fair or independent criminal proceedings for those facing prosecution. This is deeply concerning.

Further developments will be outlined in the sections below.

2. **What are the areas, where only few or no developments took place?**

Please see our comments below, when we refer to AsyLex's Input on Asylum Report, 2024 to identify where no development took place.

3. **Would you have any observations to share specifically about the implementation of the Pact on Migration and Asylum in the national context of the country/ countries you cover?**

Switzerland is only affected by those legal texts that represent further developments of the Schengen/Dublin acquis. Specifically, this includes the Screening Regulation, the Eurodac Regulation, the Asylum and Migration Management Regulation, and the Crisis and Force Majeure Regulation. Additionally, Switzerland may decide to voluntarily become part of the solidarity measures. Switzerland now has two years to align its legal framework with the new provisions of the Schengen/Dublin acquis. Stakeholders had the opportunity to provide feedback on this implementation until mid-November 2024. Since amendments to Swiss legislation are required, a bill will be submitted to Parliament, which will be subject to a potential referendum. If more than 50'000 signatures are collected within 100 days, the Swiss population will have the opportunity to vote on it.

AsyLex has participated in the consultative process. We emphasized that we view the adoption and implementation of the legal frameworks of the EU Migration and Asylum Pact critically. The primary concern is the significant restriction of asylum seekers' protection in Europe under the Pact. We highlighted that while Switzerland's Schengen association must not be jeopardized, it should not be at any cost and certainly not at the expense of human rights. Therefore, the implementation in national law must focus specifically on safeguarding human rights and refugee protection. The detailed consultation is attached to this report (**Annex 1)**

PART A: Contributions by topic

Please share **your reporting on developments in asylum law, policies or practices in 2024 by topic**. Kindly make sure that you provide information on:

- ✓ New developments and improvements in 2024 and new or remaining challenges;
- ✓ Changes in legislation, policies or practices, or institutional changes during 2024.

1. **Access to territory and access to the asylum procedure** (including first arrival to territory and registration, arrival at the border, application of the *non-refoulement* principle, the right to first response (shelter, food, medical treatment) and issues regarding border guards)

Since the fall of Bashar Al-Assad's regime on 8th December 2024 in **Syria**, Switzerland responded swiftly by suspending the processing of asylum claims on 9th December 2024. The SEM argues that the situation does not allow for a thorough examination of the reasons for asylum. This is highly problematic, as many Syrians who have been waiting for long periods for a decision on their asylum applications are now left in even greater uncertainty. Meanwhile, the situation in Syria remains volatile, with little indication of a rapid stabilization of the country.

From February to December 2024, a further moratorium on decisions for individuals from **Sudan** created additional uncertainty, leaving many in limbo with pending asylum claims. Now that the moratorium has been lifted, their claims will be processed once again and, hopefully, decided upon in the near future.

Otherwise, we refer to our observations provided in the AsyLex Input on Asylum Report, 2024

2. **Access to information and legal assistance** (including counselling and representation)

We refer to the AsyLex Input on Asylum Report, 2024 for the issues regarding legal assistance which mostly pertained throughout the year.

Following further developments can be observed:

Following the re-tendering of the mandate for state-appointed **legal representation in the Northwestern Switzerland asylum region,** the criteria and obligations of the mandate have undergone minor adjustments in 2024. These changes primarily address the issue of ensuring

the presence of legal representatives during so-called Dublin interviews — a topic that generated significant public debate in the past. From spring 2025 onwards, a new organisation will assume responsibility for providing state-appointed legal representation for asylum seekers in Northwestern Switzerland. This transition aims to uphold the quality of legal representation and prevent absences during critical stages of the asylum process, particularly during Dublin system interviews.

However, the opportunity to revise the **lump-sum compensation system** as part of this reallocation was missed. This is particularly relevant when comparing the conditions in the Northwestern Asylum Region to those in other regions. In this regard, we reiterate the criticism of the misaligned incentives inherent in the lump-sum compensation model, as detailed in our 2024 report. These misaligned incentives frequently result in state-appointed legal representatives refraining from lodging appeals, even in cases where subsequent appeals filed by private legal representatives are later deemed by the FAC to be "not without merit" at least. This practice continued to be true throughout 2024 as a report from Pikett Asyl titled "Work of the service providers legal protection in the federal asylum centres. Based on a survey of asylum seekers" shows, which will be published in January 2025 on their website. In addition, this report even highlights that in the first half of 2024, 61.11% of successful appeals in the Zurich region were brought forward by privately appointed legal representatives or even as layperson appeals, rather than by state-appointed legal representatives, with this number increasing compared to 2023 (**See Pikett Asyl's report and statistics in Annex 3**). Given that the state-appointed legal representatives can only terminate their mandate if they see no chance of success (See Art.102h Asylum Act), these findings are very worrying.

Regarding the ban on deportations to Afghanistan highlighted in our 2024 report, it is deeply concerning to note that the practice of **deportations back to Afghanistan** resumed in October 2024. This practice was reintroduced without prior notice, for convicted offenders, leaving most affected individuals unable to secure legal assistance to contest their imminent deportation to a country where their lives are at risk. Since it is obvious that there is a real risk of violating the principle of non-refoulement in the current context in Afghanistan, this new practice of Switzerland is deeply concerning.
In this context, in one case involving an individual at risk of deportation to Afghanistan due to a previous conviction, AsyLex secured interim measures from the Committee Against Torture, halting his deportation (No. 1231/2024). This decision signals that the Committee recognizes a risk of imminent and irreparable harm.

Similarly, Switzerland has, for the first time since the war began in February 2022, **deported two individuals back to Ukraine** via a special flight, despite the ongoing Russian invasion. The SEM emphasized that the potential risk of military recruitment was not considered a valid reason to refrain from their deportation. This practice is also deeply concerning to AsyLex.

What concerns legal representation in administrative detention, a particularly troubling statement came from **a judge at the Zug Cantonal Court, who dismissed the value of legal representation in administrative procedures**. She stated: 'In fact, a lawyer has no place in this procedure. It is not sensible to appoint legal representation here, as the court conducts the process ex officio and independently investigates the matters at hand. Moreover, it is not truly possible for a lawyer to make a meaningful contribution here; rather, they are more of a

hindrance (**Annex 2, p.15**)." This comment from an elected judge reveals a clear misunderstanding of Article 29(3) of the Federal Constitution, which guarantees every person the right to free legal representation in court, and Article 31(2), which ensures that individuals deprived of their liberty are informed of their rights and the reasons for their detention

Finally, a deeply concerning development is the **systematic reduction and rejection of free legal assistance before the FAC**, the sole appellate body in asylum matters. This issue is particularly pressing because the denial of free legal assistance cannot be appealed to a higher court. Compounding this problem, compensation for legal costs (Parteientschädigung) in cases where appellants prevail has significantly decreased. In contentious cases, such compensation is often denied on the grounds of insufficient legal complexity, even when the cases raise substantial issues. This trend is particularly troubling for non-governmental organizations **(**NGOs), as it not only effectively hinders access to justice but also prevents or significantly complicates the work of NGOs.

3. **Provision of interpretation services** (e.g. introduction of innovative methods for interpretation, increase/decrease in the number of languages available, change in qualifications required for interpreters)

We refer to the AsyLex Input on Asylum Report, 2024 for the issues regarding interpretation services which mostly pertained throughout the year.

4. **Dublin procedures** (including the organisational framework, practical developments, suspension of transfers to selected countries, detention in the framework of Dublin procedures)

Drawing from our 2024 Report, the l**ack of consideration by the Swiss authorities and courts for each individual case during the Dublin procedure** remains a pressing concern. The procedures are still executed at a fast pace, making it challenging to identify highly vulnerable asylum seekers, particularly those with serious mental health issues.

The 2023 annual report of the Swiss Refugee Council (SFH) (Swiss Refugee Council, 2023, the report for 2024 is not yet published) highlights several pressing concerns, including **the calls for an immediate suspension of transfers of asylum seekers to Bulgaria, Croatia, and Greece,** citing precarious and unsafe reception conditions in these countries. Such transfers are viewed as violations of human rights, and the SFH urges Switzerland to meet its obligations by refraining from deporting asylum seekers to countries where their safety cannot be guaranteed. We at AsyLex echo this call for suspension of deporting asylum seekers to these countries.

However, recent developments have moved in the opposite direction. In July 2024, SEM attempted to reinstate Dublin transfers to Greece. In this context, Switzerland submitted 69 transfer requests under the Dublin Regulation. Greece agreed to 42 of these requests (See: SEM, asylum statistics 7-50 and for further information above under general observation Q1). This occurred despite the fact that the landmark European Court of Human Rights (ECtHR) judgment in *M.S.S. v. Belgium and Greece* (Application No. 30696/09) remains legally binding.

Our concern regarding **individuals being forcibly deported directly from psychiatric clinics,** unfortunately pertains in 2024. For further information, we refer to the AsyLex Input on Asylum Report, 2024 and to the report by the the National Commission for the Prevention of Torture (NCPT, §77, p.29).

On a more positive note, we **successfully challenged cases where transfer deadlines were unjustly extended by authorities in numerous cases,** and more than before. In cases the authorities claimed that asylum seekers were "absconding." In the case F-6170/2024 we argued that the extension of such deadlines requires clear evidence of intentional evasion to avoid transfer, rather than a lack of constant knowledge of the individual's exact location. Authorities only need to be able to reach the person within a reasonable time frame. In another case D-6964/2023 we demonstrated that the mere absence of the appellants during a 20-minute police check was not sufficient evidence of intentional evasion. The appellants were not required to remain in their accommodation at all times, no measures had been taken to ensure their presence, and they had not been informed of the transfer attempt in advance. Further, in the case F-6375/2024, the appellant argued that Switzerland had become responsible for his asylum process after the expiration of the 18-month transfer deadline. We successfully contended that the reconsideration request was valid and that the SEM was unjustified in rejecting it solely based on the appellant's failure to pay an advance fee. In case D-814/2024 an appellant argued that his brother had informed the migration office about his whereabouts in several phone calls, which was deemed enough to not be called absconded, as the intention was solely to not stay in the camp, but not to abscond.

Additionally, and in a case similar to those outlined in the AsyLex Input on Asylum Report, 2024, **AsyLex successfully obtained an interim measure from the Committee on the Rights of the Child** (No. 246/2024), halting the deportation of a family to Croatia under the Dublin procedure. The family, which included two children deeply traumatized by the violence they had experienced in their home country, during their journey, and in Croatia, was facing forced return to Croatia despite the country being unable to ensure the children's access to necessary medical care and recovery, and the authorities had previously subjected the family to violence.

5. **Special procedures** (including border procedures, procedures in transit zones, accelerated procedures, admissibility procedures, prioritised procedures or any special procedure for selected caseloads)

Building on our comments from 2023 and 2024, we recognize and welcome the retention of protection status S ("S Permit") introduced on March 11, 2022, for people seeking refuge in Switzerland as a result of Russia's war in Ukraine. This permit undeniably speeds up the procedure by eliminating the need to examine the grounds for asylum. On September 4, 2024, the Swiss Federal Council decided to **extend the S status protection for Ukrainian individuals seeking refuge in Switzerland** until March 4, 2026. This decision aligns with the protective measures of the EU member states, reaffirming Switzerland's commitment to the Schengen area. Yet, it must be stated that groups within the Swiss Parliament continue to push for a withdrawal of the status, at least partially. One of these motions, drafted in March 2024, has been accepted by one of the parliamentary chambers in June 2024, and continues to be relevant.

By the end of October 2023, around 66'000 Ukrainians in Switzerland had an active S status. Recognizing the need for better professional integration, the Federal Council has set a target: by the end of 2024, 40% of S status holders should be employed. At its meeting on 8 May 2024, the Federal Council therefore decided on new concrete measures for labour market integration, which complement the measures to promote integration in the cantons. To achieve this, collaborative efforts will be intensified between various federal departments, and cantons will follow stricter guidelines for the use of federal contributions, including specific integration measures (The Federal Council, 2023). At its meeting on 8 May 2024, the Federal Council even decided on intensifying these measures for labour market integration.

While AsyLex welcomes the extensive rights that accompany the S permit, the striking difference in rights when juxtaposed with those of asylum seekers from other regions, and the dichotomy between S and F permit holders, remain evident. Based on this observation, AsyLex firmly reiterates its position: we advocate that rights equivalent to those enjoyed by Ukrainian asylum seekers and S permit holders be uniformly extended to all individuals granted temporary admission.

6. **Reception of applicants for international protection** (including information on reception capacities – increase/decrease/stable, material reception conditions – housing, food, clothing and financial support, contingency planning in reception, access to the labour market and vocational training, medical care, schooling and education, residence and freedom of movement)

In several Swiss cantons, a significant change has been introduced regarding the **payment of asylum social assistance.** Instead of providing the funds in cash, asylum seekers now receive their social assistance through a debit card system. The primary objective behind this shift, as expressed by some cantonal parliaments, is to prevent the alleged misuse of social assistance funds. This measure reflects broader concerns about ensuring that public resources are used appropriately (see for an overview SRF). However, organizations such as Caritas have raised critical objections to this approach. They emphasize that the level of asylum social assistance in Switzerland is already so low that any misuse or diversion of funds is highly unlikely. The limited financial support is typically insufficient to cover more than the most basic needs, leaving little room for discretionary or unintended spending. From this perspective, the debit card system might address a problem that is largely perceived rather than real.

On a more positive note, the introduction of debit cards could help asylum seekers gain more structured access to the financial system. By providing a means to engage with banking infrastructure, debit cards may facilitate the establishment of personal bank accounts, which can foster greater financial inclusion for refugees and asylum seekers. This step could be particularly beneficial in helping them integrate into the local economy and society.

Furthermore, the debate around **asylum social assistance** has been enriched by a noteworthy study published in 2024 (there is also a factsheet available). The study highlights an important correlation between the level of asylum social assistance and the incidence of petty crime. According to the findings, higher levels of social assistance are associated with lower rates of petty crime among asylum seekers. This suggests that ensuring an adequate level of financial support can help reduce economic pressures that may otherwise drive individuals toward

unlawful activities. Furthermore, the study demonstrates that higher levels of social assistance do not discourage individuals from seeking employment.

The Swiss Refugee Council (SFH) emphasizes that low levels of asylum social assistance significantly hinder successful integration, a finding confirmed by the study. To address these issues, the SFH advocates for asylum seekers and temporarily admitted persons to receive social assistance in line with the Swiss Conference for Social Welfare (SKOS) guidelines. These standards are based on scientifically grounded calculations of what is necessary to sustain life in Switzerland and are designed to promote effective integration. Additionally, the SFH criticizes the substantial disparities in social assistance levels across Swiss cantons, arguing that such inconsistencies cannot be justified from a professional standpoint. The SFH supports the introduction of nationwide guidelines or minimum recommendations for asylum social assistance, using the SKOS standards as a benchmark to ensure fair and consistent support across the country.

The **Federal Commission on Migration (FCM) commissioned a study on the living conditions of children and young people in emergency aid** (press release). In September 2024, the results were published and it was clear to the FCM that 'measures are needed at all political levels'. The emergency aid structures massively harm the psychosocial development and mental health of children and young people. A legal report on this topic, commissioned from the University of Neuchatel, clearly stated that the living conditions of children in emergency aid are not compatible with the Swiss Federal Constitution and the UN Convention on the Rights of the Child.

The study makes a number of important recommendations to mitigate the violation of children's rights. These include, for example, avoiding long-term exposure to the emergency aid system, ensuring social participation, family-friendly accommodation, psychological care services, clear responsibilities and procedures for identifying risks, etc. What measures the cantons or the federal authorities will take in this regard is still to be seen.

7. **Detention of applicants for international protection** (including detention capacity – increase/decrease/stable, practices regarding detention, grounds for detention, alternatives to detention, time limit for detention)

Following on from our 2024 Report, AsyLex continues to face the same challenges as in the previous years, related not only to the worrying cantonal practices in detention matters but also to the recently stricter case law of the Federal Supreme Court.
The already mentioned trend, where **courts and cantonal authorities try to hinder the work of NGOs** which represent clients in administrative detention by delaying the inspection of case files as well as by denying the (full) compensation of the legal representatives, sadly remains relevant. In some cantons, **the first instance courts are not or only minimally compensating the work of legal representatives,** by covering administrative but not legal fees. It is important to remember that organizations that offer legal representation, which are not state-funded, are

reliant on the compensation of the courts, in order to be able to survive and continue to provide legal representation for persons in detention.

Besides these worrying practices, AsyLex was nevertheless able to **achieve important victories in 2024,** mostly in front of cantonal Courts:

- In February 2024 **AsyLex won a State liability case** in front of the Federal Supreme Court (BGE 2C_361/2022 verdict from 06.02.2024). The case turned around the question on whether AsyLex's Client was entitled to compensation for unlawful detention on the basis of Art. 5 para. 5 ECHR. Whereby the Federal Supreme Court recognizes that the independent liability standard of Art. 5 para. 5 ECHR does not require culpability, nor are additional requirements to be complied with in the event of a violation of one of the formal or substantive provisions of Art. 5 para. 1-4 ECHR. For the application of Art. 5 para. 5 ECHR, it is thus in principle sufficient that the unlawfulness of the detention has been established by the domestic courts or by the ECtHR (in this case the applicant's detention pending deportation violated Art. 5 para. 1 lit. f ECHR, as concluded by the Federal Supreme Court in a previous verdict: BGE 2C_768/2020 of 21.10.2020). Finally, the Court stated that the requirements for proving non-material damages do not have to be too strict. The case has been referred back to the prior instance for reassessment.
- In July 2024, the Administrative Court of the Canton of Ticino finally rendered its judgement (Verdict 52.2022.286 of 03.07.2024, **Annex 4**) in a case appealed by AsyLex in 2022 **regarding the administrative fee (CHF 55) charged by the Canton of Ticino for each request for inspection of files.** The Court granted the appeal by concluding that the charged fee was manifestly disproportionate in relation to the work needed for the processing of the request, since the files are already in a digital form and the request does not create any additional work and costs for the Migration Office. Therefore, the Court concluded that the fee charged violated the principle of equivalence. Thanks to this decision, requests for inspection of (electronic) files are now free of charge (also) in the Canton of Ticino.
- In August 2024, **AsyLex managed to win a case in front of the Administrative Court of the Canton of Zurich** (Verdict VB.2024.00340 of 25.07.2024) **regarding the detention length in a Dublin Detention case** (Art. 76a FNIA). The court agreed with AsyLex's argumentation that the so-called "Schubert"-Praxis is not applicable, so that the Dublin Detention in preparation for departure (Art. 76a FNIA) cannot be ordered for seven weeks as stated in the provision, as Art. 28 para. 3 of the Dublin Regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013) clearly states that six weeks is the maximum period of detention in Dublin cases.
- In November 2024, the Administrative Court of the Canton of Ticino rendered a judgement (Verdict 52.2024.299 of 05.11.2024, **Annex 5**) in a **detention case appealed**

by AsyLex on the ground of a violation of the right to be heard. Although the Court rejected the appeal, it nevertheless concluded that the Client's right to be heard has been violated by the Migration Office, since AsyLex - as his legal representation - has not been informed nor involved in the procedure of extension of the detention. The violation was considered restored through the appeal procedure. AsyLex welcomed this judgement with the hope that it will change the common practice in the Canton of Ticino, where AsyLex still faces some challenges in being recognized as a legal representative.

Due to the ongoing stricter practice of the Federal Supreme Court in cases of unlawful or unreasonable administrative detention - which has already been mentioned in the 2024 Report (AsyLex's Input on Asylum Report, 2024) - **AsyLex had to ponder even more carefully which cases are eligible for an appeal, in order not to create any negative case law.** As a result, AsyLex did not bring any detention case in front of the Federal Supreme Court in 2024. This tendency is worrying and reason for serious concern, since the fear of new restrictive case law indirectly restricts the right to access to the courts for detainees.

Finally, also in 2024 **issues of access to (free) legal assistance and mental health treatment for persons in administrative detention as well as a lack of assessment of alternative measures to administrative detention persist** as outlined in AsyLex's Input on Asylum Report, 2024.

8. **Procedures at first instance** (including relevant changes in: the authority in charge, organisation of the process, interviews, evidence assessment, determination of international protection status, decision-making, timeframes, case management – including backlog management)

Regarding procedures related to **Ukrainians** and S permits, see our comments to Q5.

Furthermore, Art. 29a Asylum Act has entered into force in January 2024. According to this new regulation, **the translators which are employed by the SEM can be ordered to undergo a trustworthiness check.**

An issue observed by AsyLex, which has worsened in 2024, is that the **SEM often provides only superficial translations of the submitted evidence, if any at all.** Moreover, these **translations are typically made available only after the decision has been rendered.** This practice significantly hinders legal representatives' ability to fully understand the facts during first-instance proceedings due to language barriers.

Another growing concern in 2024 is that the **SEM's accusations of evidence falsification are often inadequately substantiated, with an increasing number of documents being deemed forged.**These accusations extend to official documents, such as those from the Turkish Criminal Record (UYAP). **The SEM refuses to provide detailed explanations, citing concerns that potential forgers could learn from the identified mistakes.** It even rejects on-site inspections

by the legal representative for the same reason. As a result, it is practically impossible to challenge these allegations, as legal representatives are not given access to information about the alleged deficiencies.

Finally, for further aspect, we refer to AsyLex's Input on Asylum Report, 2024

9. **Procedures at second instance** (including organisation of the process, hearings, written procedures, timeframes, case management – including backlog management)

The insights from our Asylum Report, 2024 largely remain relevant and indicative of the persistent challenges within the asylum process.

By December 15, 2023 the **COVID-19 ordinance were seized** (see: announcement Federal Council, 2023)**, this made the situation regarding accessing a legal representation in case the state-paid representatives terminate their mandate more problematic**. Lifting the COVID-19 ordinance shortened the appeal period for material decisions from 30 days to seven working days and for interim measures from ten working days to seven working days. This means that asylum seekers are often only able to get new legal representation in the last few days before the short deadline expires - if at all. It is very difficult for the legal representative to prepare a detailed complaint and initiate meaningful evidence within a few days.

The procedural timelines for Dublin cases remain critically short at five working days, leaving asylum seekers unaided at a crucial juncture, particularly if the mandate of the state-paid legal representation is terminated- AsyLex continues to encounter individuals attempting to lodge appeals on their own, often resulting in incomplete or flawed submissions. Despite our efforts to file supplementary appeals and request deadline extensions, the FAC frequently denies these requests, citing that asylum seekers had their initial opportunity to appeal—disregarding the absence of legal representation at this critical juncture (See: AsyLex Input on Asylum Report, 2023).

What concerns the deeply concerning development is the **systematic reduction and rejection of free legal assistance before the FAC** we refer to in our answer in Q2.

Continuously relevant is also that the FAC's approach to evidence in cases involving Dublin transfers or returns to so-called "safe third countries" has not improved substantially. As already noted in our AsyLex Input on Asylum Report, 2023 the court frequently defaults to the legal obligations of the states involved rather than c**onducting an in-depth, individualized risk assessment.** This approach is alarming, as it risks deporting individuals in need of protection to countries where they may face repeated human rights violations.

The **absence of oral hearings before the second instance continues to be a significant deficit**. AsyLex maintains that this is a critical flaw in the asylum process, since the written files alone do not offer an adequately comprehensive impression of a person, especially in terms of assessing credibility, compared to an in-person hearing.

Regarding the humanitarian visa process, there is a **stark contrast between the intended purpose of the instrument — to allow Swiss authorities to intervene when an individual faces imminent, serious and concrete danger (Art. 4 Abs. 2 VEV) — and the excessively long processing times.** The period between submitting a humanitarian visa application and receiving a final decision, often after an appeal to the Federal Administrative Court, can span over 2 to 3 years. In its ruling (12T_3/2023), the Federal Court, which addressed the prolonged waiting times contested by AsyLex, did not find any systemic flaws in the lower court's proceedings, even though individuals in urgent emergency situations were left waiting for several months for a decision.

Additionally, AsyLex successfully filed appeals in 2025 in several cases concerning the rejection of applications for S-status. **The Federal Administrative Court repeatedly reprimanded the State Secretariat for Migration (SEM), emphasizing that its practices were too strict.** The court ruled that SEM must not lightly rely on potential residence rights in third countries, as a form of subsidiary protection, to justify rejecting S-status applications without thoroughly examining the actual conditions of reception in those countries.

Finally, as noted earlier in the general observations section (Q1), **the FAC has revised its approach to asylum seekers from Turkey (**BVGE 2013/2). Given that the human rights situation in Turkey remains unchanged, and fair or independent criminal proceedings cannot be guaranteed, this shift in practice is deeply concerning.

10. **Issues of statelessness in the context of asylum** (including identification and registration)

We refer to our Input in scope of the Asylum Report 2024 as the raised issues largely remain relevant.

11. **Children and applicants with special needs** (special reception facilities, identification mechanisms/referrals, procedural standards, provision of information, age assessment, legal guardianship and foster care for unaccompanied and separated children)

In 2024, an important study by the Federal Migration Commission (FMC) highlighted that **the emergency aid structures in Switzerland are not in line with the Convention on the Rights of the Child,** to which Switzerland is party. One of the main issues identified is housing. Specifically, there are no appropriate separate accommodations for families and unaccompanied children, and the overall living conditions are not child-friendly. There are no playrooms or activities for children, and the environment is generally unsuitable for their development.

Furthermore, **many of these emergency aid shelters are located in remote areas, leading to a lack of social interaction.** This isolation negatively impacts the development and mental health of children, further violating their rights under the Convention. Most concerning is that, due to their remote location, some cantons are unable to provide access to schools, and children are instead taught within the facility. Experts have raised serious concerns about the

quality of the education provided, which again constitutes a violation of the rights of the child under the Convention.

Finally, as outlined previously in our Asylum Report 2024 the Swiss practice of **age assessment** is worrying. This has been confirmed in May 2024 by the UN Committee on the Rights of the Child (CRC) which has adapted views, identifying procedural deficiencies in the age assessment of minor asylum seekers in Switzerland.

Otherwise, our observations from previous years continue to apply (Asylum Report 2024).

12. Content of protection (including access to social security, social assistance, health care, housing and other basic services; integration into the labour market; measures to enhance language skills; measures to improve attainment in schooling and/or the education system and/or vocational training)

Concerning social assistance, we hereby refer to our answer in **Q6.** Otherwise, we refer to our Input in scope of the Asylum Report 2024.

13. Return of former applicants for international protection

Our observations from the previous years continue to apply, the risks associated with potential harm upon return have not dissipated. **The situation regarding forced returns has not improved, and we remain deeply concerned about the procedures involved and the potential risks returnees may face upon their arrival in another country.** This includes returns to other Dublin member states, so-called "safe" third countries, or the country of origin. These risks continue to be a significant concern.

The practice of **"surprise returns"** continues, meaning that we are often not informed in advance about the return date, even in cases involving families with children. This is particularly problematic in Dublin return cases. Without prior knowledge of flight details, it is impossible to properly prepare or ensure a humane reception upon arrival for returnees. This lack of information further hinders our ability to provide effective legal support and to safeguard the well-being of those affected.

The European country receiving the most deportations from Switzerland, **Croatia, only accepts transfers via special flights.** This creates an inhumane situation where families are deported under level 4 deportations—the highest and last resort under Article 28 of the Coercive Measures Regulation (SR 364.3). According to the wording of the regulation, deportation via special flights should only occur in cases where physical resistance is expected. However, in practice, deportations to Croatia under the Dublin III regulations are carried out exclusively via special deportation flights.

The **inhuman treatment during forced deportations,** as highlighted in the AsyLex input on the Asylum Report 2024, persists, while the opportunities for legal remedies against these deportations are exceedingly difficult to pursue. Part of the issue lies in the complete lack of

prior notice: individuals are woken in the early hours of the morning by police, forced to the airport, and placed on a flight without any warning or preparation

Several of these return practices were also criticized by NCPT in its newest report.

The issue with OSEARA's medical assessments remains unresolved, as only one doctor continues to sign all the reports. This raises serious concerns about the thoroughness and accuracy of these assessments, particularly given that individuals with severe health conditions—including mental health issues, victims of sexual and gender-based violence, and survivors of torture (e.g., from Xinjiang)—are often inadequately evaluated or have their medical concerns dismissed as implausible.
These assessments are typically based solely on existing medical certificates, without any direct examination of the individuals involved. Additionally, the evaluations are often conducted one or two months in advance, even in cases requiring urgent or intensive medical care, further exacerbating the risk to those affected.

A small but significant improvement is that **OSEARA will now be required to share the mandate for determining transportability for special deportation flights and providing medical accompaniment on these flights.** From 2025 onward, these responsibilities will be shared between OSEARA and JDMT Medical Services AG, following substantive criticism of the arbitrary nature of OSEARA's medical evaluations. While OSEARA will continue to make the medical assessments ahead of a deportation, JDMT Medical Services AG will accompany the deportation flights (Media release SEM from the 15th of November 2024).

What concerns the renewed returns to Afghanistan and Ukraine, we refer to **Q2.**

14. Resettlement and humanitarian admission programmes (including EU Joint Resettlement Programme, national resettlement programme (UNHCR), National Humanitarian Admission Programme, private sponsorship programmes/schemes and ad hoc special programmes)

In special cases, e.g. in the case of immediate, serious and concrete danger to life and limb, Switzerland provides for the possibility that foreigners who do not meet the requirements for entry into Switzerland may exceptionally be allowed entrance into Switzerland for a longer-term stay in accordance with Art. 5 para. 3 FNIA i.C.w. 4 para. 2 Regulation on entry and the issue of visas (OEV). However, in practice, Swiss authorities issue such visas in exceedingly few instances, even when all legal conditions are fulfilled. While the newest numbers from 2024 are not published yet, in 2020, 66 humanitarian visas were granted and 928 were denied. In 2021, 94 humanitarian visas were granted and 1'476 were denied. In 2022, 142 humanitarian visas were granted and 3'561 were denied and between January 1 and June 30, 2023, 20 humanitarian visas were granted, while 594 were denied. Hence, **the percentage of granted visas is decreasing.**

The apparent change in legal doctrine in favour of Afghan applicants through decisions by the FAC in 2023, has neither continued in 2024 in front of the Court, nor has it positively impacted the number of humanitarian visas issued in 2024. For instance, in decision F-1451/2022 of March 27, 2024, the FAC confirmed that the 2023 change of practice by the SEM – recognizing female Afghan asylum applicants as victims of both discriminatory legislation and religious persecution, thereby generally qualifying them for asylum – does not extend to the issuance of humanitarian visas.

AsyLex achieved only one partial **success before the FAC in 2024 regarding humanitarian visa matters**. In decision F-1113/2023 of September 6, 2024, the Court ruled that the SEM had incompletely and incorrectly assessed the facts of the case and breached its duty to maintain proper records. Consequently, the matter was referred back to the SEM to reassess the current risk situation and make a new decision on the visa applications. In particular, the Court instructed the SEM to reexamine the deportation risks and determine the extent of specific threats facing applicants if returned to Afghanistan.

A persistent challenge in humanitarian visa applications is **the inability of severely threatened individuals to access Swiss embassies** in countries like Pakistan, Iran, and Turkey to schedule appointments for visa applications. Additionally, the prolonged duration of objection procedures following initial negative decisions from embassies remains a critical issue. First-instance decisions often take half a year, and in some cases, exceed a year. Given that applicants are frequently in life-threatening situations and often reside illegally in third countries to apply for visas, **these delays are deeply troubling**.

Moreover, Switzerland's **resettlement program for 2024/2025**, approved by the Federal Council on June 16, 2023, is yet to be activated. This program aims to welcome 1,600 particularly vulnerable refugees from Egypt, Lebanon, and Turkey. However, its implementation remains dependent on consultations with cantons and municipalities and the significant improvement of conditions for housing and caring for asylum seekers (SEM Press Release Resettlement, 2023). As of December 2024, no substantial progress has been made. **AsyLex urges Federal Councillor Beat Jans, Head of the Federal Department of Justice and Police, to speed up consultations with cantons and municipalities and provide them with necessary support to ensure the timely activation of the resettlement program**.

15. **National jurisprudence on international protection in 2024** (please include a link to the relevant case law and/or submit cases to the EUAA Case Law Database)

General National Decisions

- Decision **F-1451/2022** of 27 March 2024: it was found that the FAC upholds the decision of the **SEM according to which humanitarian visas cannot be granted to an applicant merely because there is no male head of the family, in the case of an Afghan widow applying for a humanitarian visa.**

- Decision F-1113/2023 of 6 September 2024: **the Court ruled that the SEM had incompletely and incorrectly assessed the facts of the case and breached its duty to maintain proper records.** Consequently, the matter was referred back to the SEM to reassess the current risk situation and make a new decision on the visa applications. In particular, the Court instructed the SEM to reexamine the deportation risks and determine the extent of specific threats facing applicants if returned to Afghanistan.
- Decision E-3829/2024 of 7 November 2024: **First, the court decided that persons who are being investigated in Turkey for "insulting the president" and/or "propaganda for a terrorist organisation" in general do not have to fear persecution** in their home country. Second, the FAC has revoked the 2013 practice **(BVGE 2013/2),** whereby d**eportations to the Turkish provinces of Hakkâri and Şırnak were generally excluded.**
- Decision F-6375/2024 of 13 November 2024: the appellant argued that Switzerland had become responsible for his asylum process after the expiration of the 18-month transfer deadline. The court found that the SEM was unjustified in rejecting it solely based on the appellant's failure to pay an advance fee.

Decisions involving AsyLex:

- Decision D-6964/2023 of 26 March 2024: **AsyLex demonstrated that the mere absence of the appellants during a 20-minute police check was not sufficient evidence of intentional evasion.** The appellants were not required to remain in their accommodation at all times, no measures had been taken to ensure their presence, and they had not been informed of the transfer attempt in advance.Decision F-6170/2024 of 15 October 2024: **AsyLex argued that the extension of such deadlines requires clear evidence of intentional evasion to avoid transfer, rather than a lack of constant knowledge of the individual's exact location**. Authorities only need to be able to reach the person within a reasonable time frame.
- Decision D-814/2024 of 30 September 2024: **an appellant argued that his brother had informed the migration office about his whereabouts in several phone calls, which was deemed enough to not be called absconded,** as the intention was solely to not stay in the camp, but not to abscond.
- Decision 2C_361/2022 of 06.02.2024**:** the Federal Supreme Court concluded that **AsyLex's Client was entitled to compensation for unlawful detention on the basis of Art. 5 para. 5 ECHR, as the independent liability standard of Art. 5 para. 5 ECHR does not require culpability, nor are additional requirements to be complied with in the event of a violation of one of the formal or substantive provisions of Art. 5 para. 1-4 ECHR.** For the application of Art. 5 para. 5 ECHR it is in principle sufficient that the unlawfulness of the detention has been established by the domestic courts or by the ECtHR.

Decisions of cantonal Tribunals:

- Verdict 52.2022.286 of 03.07.2024 of the Administrative Court of the Canton of Ticino: the **administrative fee** charged by the Canton of Ticino for each request for inspection of files (CHF 55) was considered manifestly disproportionate in relation to the work

needed for the processing of the request. Therefore the Court concluded that the fee charged violated the principle of equivalence and granted the appeal.

- Verdict VB.2024.00340 of 25.07.2024 of the Administrative Court of the Canton of Zurich: following AsyLex's argumentation, the Court concluded that the **Dublin Detention in preparation for departure** (Art. 76a FNIA) cannot be ordered for seven weeks as Art. 28 para. 3 of the Dublin Regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013) clearly states that six weeks is the maximum period of detention in Dublin cases.
- Verdict 52.2024.299 of 05.11.2024 of the Administrative Court of the Canton of Ticino: the Court concluded that the **Client's right to be heard has been violated by the Migration Office,** since AsyLex - as his legal representation - has not been informed nor involved in the procedure of extension of the detention.

16. Other important developments in 2024

Switzerland rejected to sign the UN Pact on Migration, which AsyLex views as concerning (See: Input SFH)

Part B: Publications

1. If available online, please provide links to relevant publications produced by your organisation in 2024:

2. If not available online, please share your publications with us at: Asylum.Report@euaa.europa.eu

3. For publications that due to copyright issues cannot be easily shared, please provide references using the table below.

	Title of publication	Name of author	Publisher	Date
1				
2				
3				
4				
5				

European Union Agency for Asylum
www.euaa.europa.eu

Tel: +356 2248 7500
info@euaa.europa.eu

Winemakers Wharf
Valletta, MRS 1917, MALTA

Annex 1.1 - EN translation

Michael Meyer
Joëlle Spahni
AsyLex
Gotthardstrasse 52
8002 Zürich
info@asylex.ch

Bundesrat Beat Jans
Eidgenössisches Justiz und
Polizeidepartement EJPD
3003 Bern
per Email an:
helena.schaer@sem.admin.ch;
gael.buchs@sem.admin.ch;
michelle.truffer@sem.admin.ch
vernehmlassungsbre@sem.admin.ch

Zürich, den 7. November 2024

Consultation

Dear Federal Councilor Jans,
Dear Ms. Schär, Ms. Truffer, Mr. Buchs,
Ladies and Gentlemen,

On behalf of the association AsyLex, we thank you for the opportunity to comment on the planned adoption and implementation of the legal foundations for the EU Migration and Asylum Pact (further development of the Schengen/Dublin acquis). Below, you will find our detailed response.
We appreciate your considerate attention to our consultation response.
Best regards

Mit freundlichen Grüssen

Michael Meyer
Head Dublin AsyLex
AsyLex

Joëlle Spahni
Head International AsyLex
AsyLex

Inhalt

General Remarks 3

Detailed Comments on the Proposed Changes 3

2.1. Regulation (EU) 2024/1351 ("AMMR Regulation") 3

2.2. Solidarity Mechanism 13

2.3. Die Pact (EU) 2024/1358 («Eurodac-Verordnung») 15

2.3.2. Comments and Suggested Changes to the New Eurodac Regulation 15

2.3.3. Comments and Suggestions for Amendments to the New Eurodac Regulation Regarding the Best Interests of the Child 17

2.4 Regulation (EU) 2024/1358 ("Crisis Regulation") 19

2.5. Regulation (EU) 2024/1347 ("Qualification Regulation") / Subsidiary Protection 19

2.6. Regulation (EU) 2020/894 ("Screening Regulation") 20

General Remarks
AsyLex views the adoption and implementation of the legal foundations of the EU Migration and Asylum Pact critically. Primarily, the significant restriction of protection for asylum seekers in Europe through the pact is objectionable. However, we do not fundamentally oppose adopting the regulations included in the pact, as Switzerland's Schengen association must not be jeopardized—albeit not at any cost and certainly not at the expense of human rights. Therefore, implementation in national law must be carried out with a specific focus on upholding human rights and refugee protection. Below, we highlight essential aspects to prevent further curtailment of the fundamental rights of asylum seekers.

Detailed Comments on the Proposed Changes

2.1. Regulation (EU) 2024/1351 ("AMMR Regulation")

The use of the term "management" in connection with asylum and migration is problematic and euphemistic. While processes and procedures can indeed be "managed," this does not apply to people and their protection needs. The notion that asylum and migration can be controlled like an administrative process fails to recognize the reality and historical experiences with migration. The focus should not be on controlling migration movements—an impossible task since they are driven by sheer necessity. Instead, the emphasis should be on implementing fairer and more efficient procedures in a coordinated manner to uphold human rights and asylum law.

2.1.1. C omments on the Core Principle of the AMMR Regulation: Prevention of Secondary Migration

The new pact aims to prevent secondary migration. However, scientific studies and our experiences show that stricter regulations do not deter asylum seekers from secondary migration.[1]

1. **Lack of Familiarity with Legal Systems:**
   Those seeking protection in Europe are typically unfamiliar with the legal system and cannot base their decisions on asylum law when choosing which country to travel to.
2. **Conditions in Reception Countries:**
   Reception and living conditions significantly influence secondary migration. Poor conditions in one country are a major incentive to move elsewhere. As long as there are no equivalent and humane living standards across the Dublin area, as well as fair asylum procedures for those seeking protection, strict sanctions will not prevent secondary migration.

[1] U.a. siehe Eiko R. Thielmann, How Effective are National and EU Policies in the Area of Forced Migration?, Refugee Survey Quarterly 4 2012, S. 21, abrufbar unter: https://academic.oup.com/rsq/article/31/4/21/1572612; *m.w.H.* Daniel Thym, *Secondary Movements: Lack of Progress as the Flipside of Meagre Solidarity, EU Immigration and Asylum Law and Policy*.

3. **Family and Ethnic Networks:**
   Family and ethnic connections play a central role in the choice of destination country. Asylum seekers often aim for countries where family members or acquaintances already reside. Expanding the definition of "family members" to include adult siblings and incorporating spouses under the dependency clause could effectively reduce secondary migration by taking family ties into greater account within the Dublin system.

Given these realities, it is evident that the new EU pact will not prevent secondary migration despite its goals. Instead, it leads to stricter measures against asylum seekers without creating solutions and risks further human rights violations..[2]

2.1.2. Kommentare zur neuen europäischen Rechtslage

To counteract secondary migration, the AMMR Regulation introduces a series of adjustments that further tighten the already problematic Dublin system. The following changes are particularly notable:

2.1.2.1. Definition of "Family Members" (Art. 2 Para. 8, Art. 34 AMMR Regulation):

AsyLex welcomes that the definition of "family members" now includes familial relationships that were established before entering the territory of the Member States, and not only those that existed in the country of origin.

However, it is regrettable that the opportunity to adapt the legal definition of "family members" more closely to reality was missed.

1. **Exclusion of Siblings:**
   Siblings remain excluded from the definition, despite the EU Commission's proposal to expand it[3]. In practice, this would have meant that, for example, a Syrian man applying for asylum at the European border could have Belgium deemed responsible for his application if his adult sister held a residence permit there. Except for unaccompanied minors (Art. 25 Para. AMMR Regulation) and the situation under the discretionary clause that allows Member States to express their explicit willingness (Art. 35 Para. 2 AMMR Regulation), this adjustment, which aligns more closely with reality, was unfortunately not adopted. Since family networks are a primary reason for secondary migration, this serves as a clear example of why the AMMR Regulation will not reduce asylum applications across multiple European states, subsequent responsibility clarifications, or the residence of rejected asylum seekers, as is currently known under the Dublin III Regulation.
2. **Exclusion of Unrecognized Marital Relationships:**
   The exclusion of marital relationships not yet officially recognized from the dependency

[2] A.a.O.

[3] Vgl. EU-Kommission, Explanatory memo on the Pact on Migration and Asylum, abrufbar unter: https://ec.europa.eu/commission/presscorner/detail/en/qanda_24_1865.

clause's definition of family (Art. 34 AMMR Regulation) is also regrettable. Civil recognition of marriages concluded abroad requires numerous documents and certified translations, which can exclude vulnerable individuals in many cases, such as those requiring independence from social assistance for disabled persons. The inequality criticized by the European Court of Justice (ECJ) in its judgment C-745/21 of February 16, 2023, remains at the legal level: a severely traumatized or ill applicant who would typically remain with or be reunited with their sister under Art. 34 AMMR Regulation, formerly Art. 16 Dublin III Regulation, would still be separated from or removed from their spouse.

Recommendations:

- We consider it urgent to include siblings in the definition of "family members" under Art. 2 Para. 8 AMMR Regulation. If Switzerland seeks to address secondary migration, this is a fundamental step.
- Additionally, it is essential to implement the ECJ judgment C-745/21 of February 16, 2023, into law and include marital relationships not yet officially recognized in Switzerland under the family definition of the dependency clause (Art. 34 AMMR Regulation).

2.1.2.2. Audio Recording of the Personal Hearing (Art. 22 para. 7 AMMR-V; Art. 26 para. 3bis-3quater VE-AsylG)

AsyLex welcomes the planned audio recording of the personal hearing (formerly the "Dublin conversation") in principle, as it can be used as evidence in case of inconsistencies or differing views, helping to resolve any doubts and playing a central role.
However, it should be critically noted that the implementation provisions (Art. 26 para. 3bis - 3quater VE-AsylG) allow the Federal Council to waive the audio recording of a hearing in specific cases and restrict its access and use. AsyLex emphasizes that the AMMR-V does not foresee any exceptions to the audio recording (Art. 22 para. 7 AMMR-V). It does not give states discretion as to whether and when the audio recording can be waived. Therefore, the planned Swiss implementation provision contradicts the AMMR-V, and the Federal Council should not have the possibility to limit Art. 22 para. 7 AMMR-V on an exceptional basis.
According to Art. 22 para. 7 AMMR-V, national legislation must ensure that asylum seekers have both the right to access the audio recording and the right to use it as evidence. This ensures procedural guarantees according to Art. 29 of the Federal Constitution (BV). This means that audio recordings of the personal hearing can be used in court proceedings to protect the right to a fair hearing, especially when doubts about the procedure exist.
Furthermore, it should be emphasized that, in line with data protection law, the rights of asylum seekers must be protected. This means that audio recordings must not be stored longer than absolutely necessary for the procedure and that their use remains purpose-bound, which should be explicitly regulated in the implementation provisions. Additionally, the persons concerned must be given the opportunity to object to the inclusion of the recordings in the procedure.

2.1.2.2. Introduction of Transfers of Unaccompanied Minor Asylum Seekers (Art. 25 para. 5 AMMR-V)

With regard to the protection of children's rights, the AMMR-V provides for significant changes. The wording of the original Art. 8 Dublin-III-Regulation "if it is in the best interests of the child" is replaced in Art. 25 para. 2 AMMR-V by "if it does not demonstrably contravene the best interests of the child." Furthermore, in the future, the state of first entry will be responsible for children, rather than the state in which they are located at the time. This would mean that unaccompanied minor asylum seekers (UMAs) would increasingly face transfers.[4]
The dangers of forced deportations for children are evident. A regulation that takes into account the overriding priority of the child's best interests according to Art. 3 of the Convention on the Rights of the Child is hardly conceivable in this context. If a child leaves the originally responsible member state independently and continues their journey, it should generally be assumed that a transfer is not in the best interest of the child. No other conclusion can be drawn from the independent onward travel of an unaccompanied child. AsyLex therefore calls for the abandonment of transfers of unaccompanied minor asylum seekers. In these cases, the SEM should continue to examine the asylum application of the UMA itself, as any other regulation demonstrably contradicts the primary obligation to prioritize the best interests of the child.

2.1.2.3. Clear Definition of the Situations Leading to Switzerland's Own Acceptance of an Asylum Application (Article 35; Discretionary Clause)

AsyLex strongly supports the application of the discretionary clauses outlined in Article 17 of the Dublin-III-Regulation in Switzerland to consider humanitarian reasons and promote a fairer distribution of burdens. According to practical experience, these central clauses have so far been rarely applied in Switzerland. Therefore, we call on the Federal Council to establish clear criteria for when self-entry is required, also taking into account family ties, language skills, health issues, or experiences of violence in the destination country. In the interest of the right to a remedy, an independent avenue for complaints regarding self-entry should also be created.

A mandatory self-entry should at least always be provided in the following scenarios:

- When a transfer is practically impossible, either due to deficiencies in the destination country, admission stops, or significant migration pressure (e.g., like the current Dublin-Italy situation).
- When the crisis regulation in the responsible member state extends the transfer deadline to 12 months; if the crisis situation persists after six months, self-entry should be considered due to the long procedural duration.
- For individuals who are dependent on long-term medical treatment or whose health condition would significantly deteriorate due to the transfer.

[4] Lara Hoeft, *Asyl- und Migrationsmanagementverordnung: Dublin ist tot, lange lebe Dublin?,* 13. August 2024*:* *https://www.sosf.ch/de/article/asyl-und-migrationsmanagement-verordnung-dublin-ist-tot-lang-lebe-dublin*.

- If the responsibility procedure lasts more than twelve months for reasons not attributable to the asylum seeker, which contradicts the purpose of the procedure.
- For unaccompanied minors without family in other states, if self-entry is in the best interest of the child.
- When there is close family relationship in Switzerland, as per the above definition of the family concept (see 2.1.2.1 above).
- If there are family reunification reasons that have not been adequately considered so far.

2.1.2.4. Restriction of the Admissible Grounds for Appeal Against a Transfer (Art. 43 AMMR-V; Art. 64a VE-AIG)

Furthermore, the admissible grounds for appeal against a transfer are reduced to three specific situations:
First, whether the person concerned is exposed to a real danger or inhuman or degrading treatment as defined in Article 4 of the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights);
Second, whether, after the transfer decision, there are circumstances that are crucial for the correct application of the AMMR Regulation;
And third, whether individuals who have been admitted in accordance with Article 36 paragraph 1 letter a of the AMMR Regulation have violated the provisions of Articles 25–28 (unaccompanied minors, family members, family).
In contrast, the previous legal situation provided for a comprehensive review that included both factual and legal questions. This restriction overturns the previous case law of the European Court of Justice (ECJ). According to Recital 62 of the preamble of the AMMR-V, it is argued that this restriction is in line with the case law of the ECJ, particularly concerning Article 47 of the EU Charter of Fundamental Rights. However, this assessment is incorrect, as the earlier case law allowed for a comprehensive review of many Dublin-III provisions..[5]

It is particularly important to highlight the obvious violation of Article 43 AMMR-V, which directly contradicts the case law of the European Court of Human Rights (ECtHR) concerning Article 13 of the European Convention on Human Rights (ECHR).
According to Article 13 ECHR, every person who credibly claims that their Convention rights have been violated has the right to an effective remedy. However, under Article 43 AMMR-V, one can only rely on Article 3 ECHR, which does not even include the right to family life. If Article 43 AMMR-V indeed violates Article 13 ECHR, it would also violate Article 47 of the EU Charter of Fundamental Rights, which incorporates and even expands the minimum standards of Article 13 ECHR (see C-682/15 of May 16, 2017).

[5] u.a. EuGH-Urteile C-63/15 Ghezelbash ECLI:EU:C:2016:409; C-155/15 Karim ECLI:EU:C:2016:410; C-201/16 Shiri EU:C:2017:805; C-490/16 AS ECLI:EU:C:2017:585; C-670/16 Mengesteab ECLI:EU:C:2017:587; C-194/19 HA ECLI:EU:C:2021:270; C-19/21 I und S ECLI:EU:C:2022:605; C-228/21, C-254/21, C-297/21, C-315/21, und C-328/21 ECLI:EU:C:2023:934; und C-323/21 bis C-325/21, ECLI:EU:C:2023:4.

Even if Article 43 AMMR-V could somehow be reconciled with higher law, its introduction would represent a significant restriction on the rights of asylum seekers. Apart from the reasons listed in Article 43 paragraph 1, asylum seekers would be denied the right to a comprehensive judicial review of decisions that significantly affect them. Regardless of how serious the errors in applying the criteria or the violations of their procedural rights at first instance may be, no remedy would be available to them. In this context, the purported expansion of procedural rights in the first-instance Dublin procedure appears to be a mere façade that significantly limits the actual rights of the applicants..[6]

These developments significantly restrict access to justice and contradict the planned expansion of legal protection.
AsyLex therefore demands that all grounds for appeal that could previously be invoked under the Dublin-III Regulation continue to be admissible. The subjective rights to the correct application of the regulation, as established in various ECJ rulings, must be fully taken into account. It must be ensured that all asylum seekers have access to an effective remedy that guarantees access to comprehensive judicial review.

2.1.2.5. Extension of Responsibility Deadlines/Periods (Art. 29, 33, 37, 46 AMMR-V)

The planned amendments to the AMMR Regulation foresee a significant extension of the current responsibility and transfer deadlines. This particularly affects situations of so-called "fleeing" and the prevention of transfers, after which the transfer deadline can be extended up to three years (Art. 46 AMMR-V). AsyLex considers these measures to be disproportionate and with severe consequences for the individuals concerned and their fundamental rights.
In principle, the previous transfer deadline of the Dublin-III Regulation of six months remains unchanged. However, according to Art. 46 para. 2 AMMR-V, this deadline can be extended up to three years if the person concerned or a family member to be transferred with them is "fleeing," resisting the transfer, or does not meet the medical requirements necessary for the transfer.
Expansion of the Definition of "Fleeing":
The definition of "fleeing" is significantly expanded and now includes situations in which asylum seekers, for valid reasons, are not staying in a reception center or fail to report to the competent authorities. This contradicts the case law of the ECJ, which called for a restrictive interpretation. In the Jawo case (C-163/17), the ECJ stated: "Since it cannot be ruled out that there are valid reasons for the applicant not informing the competent authorities of his absence, he must be given the opportunity to prove that he did not intend to evade the authorities."
The new regulation, however, leads to a blanket assumption of "fleeing," without considering individual circumstances, thus resulting in an unjustified prejudgment. Based on experience, the administrative assumption of "fleeing" does not follow a consistent standard. In some cases, "disappearing" is reported prematurely, and the correction can only be made through an appeal to the Federal Administrative Court — a process in which there is no entitlement to state legal representation, meaning the asylum seekers depend on assistance from civil organizations. As a result, the Federal

[6] Francesco Maiani, *Responsibility-Determination under the New Asylum and Migration Management Regulation: plus ça change…,* abrufbar unter: https://eumigrationlawblog.eu/responsibility-determination-under-the-new-asylum-and-migration-management-regulation-plus-ca-change/.

Administrative Court frequently has to intervene to correct situations where the transfer deadline was extended due to (already one-day, alleged) "fleeing." Furthermore, extending the transfer deadline automatically excludes the cantonal emergency assistance. If this practice is extended to hospital stays of vulnerable individuals, it could lead to them being excluded from basic (and minimal) state support in addition to their mental distress, which must be urgently avoided.
AsyLex therefore calls for a restrictive application of this regulation in order to meet the requirement for procedural efficiency and ensure a fair assessment of the individual situation.

Resistance to Transfer and Deliberate "Incapacitation":

The AMMR-V allows for interpretations regarding the resistance to transfer and deliberate "incapacitation." This creates the risk that physical or mental health issues could be falsely interpreted as intentional hindrances to the transfer. This poses a high risk of arbitrary and unjustified decisions, which could significantly impair the procedural rights and well-being of the affected individuals.

Medical Requirements as a Barrier:

An extension of the transfer deadline due to medical requirements constitutes an unreasonable burden for individuals with illnesses that are not their fault. However, the AMMR-V does not clearly define whether the illness must be short-term or long-term, which creates uncertainty and, in the case of mental illnesses, can lead to chronic deterioration. AsyLex insists that for long-term illnesses, self-entry should be ordered in principle, and for short-term illnesses, a new transfer date should be set within the regular six-month deadline rather than extending the transfer period.
The situation of rejected asylum seekers is often psychologically untenable for them. They are required to stay in a return center under precarious conditions, as they are also prohibited from returning independently. Time spent in these centers is a significant psychological burden and should generally be as short as possible. It can frequently lead to mental overload, which is why access to psychological or psychiatric treatment must be unrestricted, without a deterioration of their legal situation due to an extension of the transfer deadline from six months to three years.
These changes lead to significant uncertainty and disenfranchisement for the individuals affected, who are forced to spend years in a state of uncertainty and social isolation. The extended transfer deadline means years of uncertainty for asylum seekers and makes it harder to credibly present their flight history. The long waiting time results in a significant psychological burden and impairs both their mental health and their chances for successful integration. Additionally, many legal questions arise about when a causal "fleeing" occurs that justifies an extension of the transfer deadline. In this regard, the legislator should already provide clear regulations, respecting the rights of the individuals involved.
AsyLex therefore calls for Switzerland to only allow extensions of the transfer deadlines in strictly limited exceptional cases and to adhere to a restrictive and fair interpretation. The expansion of the current practice of deadline extensions and the definition of "fleeing" leads to significant legal uncertainty and disproportionate psychological and mental burdens for the affected individuals.
The definition of "fleeing" should only encompass intentional actions through which a person deliberately and intentionally evades the authorities. The Jawo ruling by the ECJ establishes that such an act must not be based on circumstances beyond the control of the person concerned. Nevertheless, the assumption of "fleeing" is often prematurely applied in practice, without considering the individual's circumstances, for example, if the person could not temporarily contact the authorities due to health restrictions. This approach clearly contradicts the ECJ's ruling, which stipulates that asylum seekers must be given the opportunity to prove that their behavior is not aimed at evading the authorities' control.

Such an interpretation also leads to significant legal and human problems: If a short-term hospital stay or a health-related absence is considered "fleeing," this can disproportionately extend the transfer deadline and place the asylum seeker in a precarious situation. In such cases, the authorities must carefully examine the situation and clearly demonstrate that there is intentional, deliberate evasion. Otherwise, the blanket assumption of "fleeing" violates the right of the affected individuals to a fair procedure and the principle of proportionality.
AsyLex therefore calls for clear and transparent regulations to prevent deadline extensions due to unintentional health issues or other unforeseen circumstances that are beyond the control of the asylum seeker. The unclear handling of "fleeing" and deadline extensions significantly increases legal uncertainty and leads to an unjust burden on the affected individuals, who often can only challenge such classifications through a time-consuming appeal process. Furthermore, there is no entitlement to state legal representation, which represents an unreasonable obstacle, especially for vulnerable individuals.
Furthermore, regulations are necessary ensuring that all asylum seekers are fully informed, in a language they understand, about the consequences of a deadline extension. This information should be detailed and in a language the affected person understands, to ensure that they are aware of and can exercise their rights and obligations. Only in this way can it be ensured that the rights of asylum seekers are preserved and that the decisions of the authorities withstand transparent and fair scrutiny.

2.1.2.6. Expanded Grounds for Detention (Art. 44 AMMR-V and Art. 76a para. 1 letter a VE-AIG)

Finally, the new regulation provides for expanded grounds for detention. The threshold for detention has been lowered from "substantial flight risk" to "mere flight risk." An additional reason for detention has been introduced, which now allows for detention "for the protection of national security or public order."
Given the administrative and non-criminal nature of these detention measures, this expansion is disproportionate and should only be used as a last resort. Switzerland should interpret the AMMR-V in such a way that the existence of a substantial flight risk is still required for the imposition of administrative detention. The broadly formulated provisions also give cantonal authorities much more discretionary power, which will lead to greater divergence in cantonal practices. Furthermore, the newly introduced ground for detention, "for the protection of national security or public order," is not suitable for justifying the imposition of administrative detention. The term "flight risk" is used without clear reference to criminally relevant acts and serves to arbitrarily expand interpretative possibilities, without requiring the commission of a criminal act. AsyLex clearly opposes the proposed grounds for detention.
To ensure that detention decisions are legally transparent and fair, a strict individual case examination and a justification requirement for detention orders and their duration must be consistently implemented. Although Article 44 AMMR-V requires an individual examination of the grounds for detention and its duration, and that each decision must be adequately justified, in practice, Dublin detention is often imposed in a blanket manner, and the maximum detention duration is applied without individual examination. However, a blanket and briefly justified order of foreign detention does not meet legal requirements, even under the Federal Court's case law. To ensure fair and consistent handling, the mandatory individual justification of the grounds for detention and its duration should therefore be explicitly stipulated in the law.

AsyLex further recommends adopting the possibility of regular detention reviews by the authorities, as permitted by Article 44 AMMR-V for member states. Only through regular reviews of the grounds for detention and its duration can it be ensured that detention decisions comply with the justification requirement enshrined in Article 29 para. 2 of the Swiss Constitution (BV). In practice, this is not always the case, which has often led to unjustified and disproportionate detention that has required correction by the Federal Court.[7]
Furthermore, AsyLex calls for ensuring that all detainees are immediately and clearly informed of their right to a detention review. The provision of free and independent legal representation should also be guaranteed, so that detainees can exercise their rights in a fair process.

2.1.2.7. Extension of the Detention Period (Art. 45 AMMR-V; Art. 76a para. 3 AIG)

The planned national implementation of detention regulations for the Dublin procedure exceeds the deadlines set in European law and thus contradicts the legal framework established in the AMMR Regulation. According to Article 45 AMMR-V, the maximum detention period for Dublin preparation detention is set at three weeks. This period ensures that the Dublin procedure is carried out swiftly and that the freedom of movement of the asylum seeker is only restricted in unavoidable cases. The proposed four-week preparation detention according to Article 76a para. 3 letter a AIG would therefore be in violation of European law.
According to the AMMR-V, the Dublin procedure must be completed within three weeks: The transfer or readmission request must be made within two weeks after a EURODAC hit or the registration of the asylum application, and the responsible member state must respond no later than one week thereafter. From the moment of approval or confirmation, the period for Dublin deportation detention begins. This means that the four-week preparation detention proposed by the Federal Department of Justice and Police (EJPD) has no legal basis and thus violates European law.
The AMMR Regulation and case law, including the judgment of the Administrative Court of Zurich from July 25, 2024 (VB.2024.00340, E.4.2.2.4 ff.), confirm that delays in administrative procedures that are not attributable to the asylum seeker do not justify an extension of detention. The additional week mentioned in the explanatory report for decision-making and notifying the decision is also in violation of European law, with reference to Article 11 para. 1 of the EU Reception Directive.[8] Delays caused by the administration must not influence the duration of detention and constitute an unlawful interference with the freedom of movement. Therefore, the maximum period set in the AMMR-V must be legislatively respected in order to avoid a further judicial correction, which in this case would be foreseeable.
Regarding Dublin deportation detention, Article 76a para. 3 letter c AIG provides for a legally compliant five-week detention period. However, according to the national regulation, this period starts only when the deportation decision is issued, while Article 45 para. 3 AMMR-V requires that the detention period begins from the moment the transfer or readmission request is approved. The deviation in Swiss law leads to a longer detention period without legal basis, which represents a significant infringement on the individuals' rights to freedom. The explanatory report justifies this interpretation with an "extended discretion" that, however, has no basis in the AMMR Regulation and is also contrary to European law.

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[7] Vgl. BGer 2C_549/2021 vom 3. September 2021, E. 3.4.2.
[8] Richtlinie 2013/33/EU des Europäischen Parlaments und des Rates vom 26. Juni 2013 zur Festlegung von Normen für die Aufnahme von Personen, die internationalen Schutz beantragen (Aufnahmerichtlinie).

AsyLex therefore calls for an adjustment of the Swiss regulation to limit the detention periods to the maximum prescribed by the AMMR Regulation. Dublin preparation detention must not exceed the three-week maximum, and the period for Dublin deportation detention must start from the approval of the receiving state, as stipulated in the AMMR Regulation.
Article 22 para. 7 AMMR-V provides that asylum seekers have access to legal assistance, particularly in case of detention. It is essential that individuals deprived of their freedom receive free legal representation, as asylum seekers are often unable to afford legal representation, do not speak the local language, and are unfamiliar with the legal system. Therefore, providing such support from the moment of detention is crucial to ensure that detention measures comply with international legal standards and that individuals can navigate the procedure and have the opportunity to request legal review. The provision of free legal representation ensures access to justice and ultimately strengthens the rule of law.[9] Analogous to Article 22 paragraph 7 of the AMMR-V, the right to free legal representation should therefore be explicitly established at the national level throughout the procedure..[10]

Um die Rechte der Asylsuchenden zu wahren und eine gerechte Anwendung der Haftregelungen sicherzustellen, fordert AsyLex konkret:

1. eine strengere gesetzliche Verpflichtung zur umfassenden Begründung von Haftanordnungen und deren Dauer;
2. dass Dublin- und Administrativhaft nur aufgrund einer richterlichen Anordnung verhängt werden und, wo möglich, eine zwingende Überprüfung der Dublin-Haft von Amtes wegen stattfindet;
3. die Bereitstellung einer unentgeltlichen Rechtsvertretung ab Haftanordnung.

2.2. Solidarity Mechanism

AsyLex clearly opposes the planned implementation of the solidarity mechanism in Switzerland, as it stipulates that Switzerland's participation is not mandatory but rather voluntary and occasional. Participation occurs only if the Swiss Federal Council deems it necessary, considering the specific migration situation. Although associated states are not legally obligated to participate in the solidarity pool under Articles 56 et seq. of the AMMR regulation, this option is explicitly available to them. AsyLex believes that Switzerland must make use of this opportunity in order to fully assume its political responsibility in European migration policy, to which it contributes significantly, and to honor its humanitarian tradition.
Specifically, given Switzerland's political position in Europe, mandatory participation in the solidarity mechanism is consistent. Since the beginning of the reform discussions, Switzerland has had an advisory voice at the negotiating table with European Justice and Interior Ministers. It is deeply

[9] David Gjon, Handlungsbedarf beim Rechtsschutz, Plädoyer 2024 3 S. 13.
[10] Vgl. hierzu BGer 2C_101/2017 vom 1. März 2017, E. 3.

integrated into the entire European asylum and migration system, both contributing to and financing it. This results in a political shared responsibility for the whole system, which should not be ignored. The new Migration and Asylum Pact effectively strengthens Europe's isolation by increasing border controls and the associated violence at the external borders..[11] Moreover, the Migration and Asylum Pact stipulates that the solidarity mechanism itself allows for a certain degree of flexibility. However, this flexibility scarcely takes the needs of vulnerable refugees into account, as it treats them, without regard to their opinions, as 'products' being shuffled between the member states..[12]

In this context, AsyLex demands that, with regard to the protection of refugee and human rights, there should not be a flexible ad-hoc participation and opt-out options in favor of financial support or alternative measures. Rather, a systematic, long-term, and legally regulated participation is required. Switzerland must enshrine its participation in the Relocation Mechanism in law.
Financial contributions to support measures that, for example, target border protection, deportations, or the operation of closed-control centers at the EU external borders without civil society access, do not, from AsyLex's perspective, constitute genuine solidarity. These funds do not contribute to the protection of the affected people but merely strengthen the system of isolation. Solidarity in the sense of the mechanism should solely include the transfer of asylum seekers, as only the reception of individuals reflects the true purpose of solidarity: helping those in need. Financial participation that does not directly support the protection and reception of these people misses the core of solidarity.
The current migration situation, with its intensification, increases the need for safe and legal access routes through which vulnerable people can reach Europe and Switzerland. In this context, AsyLex rejects the present proposal, which allows the Federal Council to decide on solidarity support ad hoc in the event of migration pressure. AsyLex demands that it be explicitly stated in the law that Switzerland is obliged to participate in the solidarity pool. The law must ensure that Switzerland does not limit itself to financial contributions but also actively participates in the reception of refugees. If financial contributions are made, the law must clearly stipulate that these may not be used for border protection or for the deportation of people.
To ensure, and in line with Switzerland's humanitarian tradition, AsyLex demands a binding, proportional participation in European solidarity measures through the reception of people seeking protection from other European states. Article 35, paragraph 1 of the AMMR Regulation allows each Dublin state to examine an asylum application independently of the jurisdictional criteria, even if, formally, another Dublin state would be responsible. Switzerland should apply this sovereignty clause mandatorily and always process the application in its own country when the protection needs of the affected person are evident—particularly in the case of unaccompanied minors, family reunifications, or particularly vulnerable groups such as people with severe illnesses or trauma.

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[11] vgl. dazu Amnesty International, 'Migrationspakt führt zu mehr leid an EU-Aussengrenzen,' abrufbar unter https://www.amnesty.ch/de/laender/europa-zentralasien/europa-und-zentralasien-kontinent/dok/2023/migrationspakt-fuehrt-zu-mehr-leid-an-eu-aussengrenzen, zuletzt besucht am 6. Oktober 2024;
Schweizerische Flüchtlingshilfe, 'EU-Pakt zu Migration und Asyl,' abrufbar unter https://www.fluechtlingshilfe.ch/themen/migrationspolitik/eu-pakt-zu-migration-und-asyl, zuletzt besucht am 6. Oktober 2024.

[12] Juan Santos Vara, Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?' in European Papers 3/2022, S. 1263; Eleni Karageorgiou und Gregor Noll, What Is Wrong with Solidarity in EU Asylum and Migration Law? Jus Cogens 4/2022, S. 151; Francesco Maiani, Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact in Daniel Thym (ed), *Reforming the Common European Asylum System* 2022, S. 56.

In order for Switzerland to make a truly solidaristic contribution to states under particular strain, it must go beyond the regular Dublin self-entries and allow legal entry to people seeking protection who are not yet on Swiss territory. A too great discretion of the authorities carries the risk of circumventing responsibility within the framework of the European solidarity mechanism. Therefore, clear, legally anchored obligations are required to ensure that Switzerland consistently, effectively, and proportionally contributes to the protection of vulnerable people, thus creating a sustainable solidaristic added value in the European asylum system.

2.3. Die Pact (EU) 2024/1358 («Eurodac-Verordnung»)

2.3.1. Current situtation

Eurodac was established to compare fingerprint data with the aim of effectively implementing the Dublin Agreement. Furthermore, it helps to determine which EU member state is responsible for examining an asylum application according to Article 1(1) and (2) of the previous Eurodac Regulation (EU Regulation 603/2013). In addition, the regulation governs the conditions under which fingerprints may be used by authorities for crime prevention. The Eurodac database stores asylum seekers who do not possess the nationality of a Dublin state. Furthermore, it also records individuals who unlawfully cross the border of the Dublin area and are not returned.[13]. Under the current Eurodac Regulation, according to Article 9(1) of Regulation (EU) 603/2013, fingerprints are only taken from individuals who are at least 14 years old. Member states must always prioritize the best interests of the child.

2.3.2. Comments and Suggested Changes to the New Eurodac Regulation

2.3.2.1 Contradiction to the Fulfillment of Purpose through the Expansion of Data Usage

The new Eurodac Regulation 2024/1358 expands both the scope and data collection for asylum seekers. In addition to the fingerprints previously collected, the new regulation now also includes the collection of name, facial image, date of birth, nationality, as well as identity and travel documents..[14] AsyLex is highly critical of this expansion, as it excessively intrudes into the private lives of asylum seekers. It leads to a misuse of the regulation, which was originally intended to clarify the responsibility for asylum applications, not to collect comprehensive personal data of the applicants. AsyLex therefore maintains that data collection and storage must be limited to the absolute minimum necessary to fulfill the purpose of the regulation, while keeping intrusions into the privacy of the affected individuals as minimal as possible.

[13] https://www.sem.admin.ch/sem/de/home/asyl/dublin/eurodac.html
[14] Wissenschaftlicher Dienst des Europäischen Parlaments: Neufassung der Eurodac-Verordnung, 2024, abrufbar unter: https://www.europarl.europa.eu/RegData/etudes/ATAG/2024/760383/EPRS_ATA(2024)760383_DE.pdf, S. 1.

2.3.2.2. Widerspruch zur Zweckerfüllung durch Stigmatisierung

The new Eurodac regulation stipulates that in the future, not only data from asylum seekers will be collected, but also from those who have been admitted as part of a national or EU resettlement program, persons with temporary protection status, as well as individuals who are residing in Europe without legal authorization[15].In the future, other institutions, such as law enforcement agencies, will also be able to carry out data queries. If a match is found in the Common Identity Repository (CIR), these authorities will have more direct access to Eurodac, creating a direct connection between asylum and law enforcement authorities. Additionally, Eurodac will be interconnected with other EU systems, such as the Entry-Exit System (EES), the Visa Information System (VIS), ETIAS, and the Schengen Information System (SIS)[16].
The expansion of the groups of individuals whose data is collected, as well as the linking of asylum and law enforcement databases, is highly problematic. This represents an intrusion into the right to privacy of asylum seekers and leads to a misuse of the previous Eurodac regulation, thereby violating its original purpose. Initially, Eurodac was intended to determine the responsibility for asylum procedures, not for comprehensive surveillance or supporting law enforcement actions. Using such data for law enforcement purposes carries the risk that individuals seeking international protection will be stigmatized and unjustly criminalized. This results in a further erosion of trust in the asylum system and perpetuates the image of the "criminal foreigner," which is not supported by various quantitative surveys and statistics. AsyLex believes that a clear legal distinction between asylum/migration data and law enforcement data is necessary, as the former serves an administrative purpose, while the latter falls under criminal law. This separation should be ensured through strictly separate access rights and procedures. At the very least, automatic access by law enforcement authorities to migration databases and biometric information should be avoided. It could be considered that law enforcement agencies submit a formal request for access to the relevant data. This request should include a clear justification for the need for access and specify the connection to a serious criminal offense. Only in this way can it be ensured that the principle of purpose limitation is upheld and the fundamental rights of the affected individuals are not disproportionately impaired or violated.

2.3.3. Comments and Suggestions for Amendments to the New Eurodac Regulation Regarding the Best Interests of the Child

[15] https://www.sem.admin.ch/sem/de/home/international-rueckkehr/kollab-eu-efta/eu-migrations-asylpakt.html.
[16] a.a.O.

2.3.3.1 *Disproportionate Lowering of the Age and Limiting to Fingerprints*

The age for collecting biometric data is reduced from 14 to six years according to Article 20(1) of the Eurodac Regulation 2024/1358. AsyLex strongly rejects this lowering, as it contradicts the original purpose of the regulation. Eurodac was created to determine which member state is responsible for processing an asylum application. However, collecting biometric data from children as young as six years old goes far beyond this original purpose. Biometric data primarily serves the purpose of identification and the prevention of multiple applications..[17] The collection of data from such young children, however, contributes little to promoting the actual purpose of the regulation, as children at this age are not capable of independently influencing asylum procedures or manipulating their identity. This measure is inappropriate in relation to the significant lowering of the age without a clear legal purpose. In this context, it is especially questionable why it is necessary to collect facial images and other biometric data from such young children. It would be in the best interest of the child to limit data collection exclusively to fingerprinting and to children aged at least 14 or older, in order to ensure the protection of the child's well-being.

2.3.3.2. *Unclear Definitions and Contradictions in the Protection of the Child's Well-being*

Although Article 14(1) of the new Eurodac Regulation stipulates that the collection of biometric data from minors should be conducted "in a child-friendly and child-appropriate manner and with full respect for the best interests of the child and the protective clauses enshrined in the United Nations Convention on the Rights of the Child," minors are still subjected to an intrusive, unjustified, and potentially discriminatory procedure.
In this context, Article 14 of the new Eurodac Regulation raises several concerns. In particular, there is a lack of a clear definition of the terms "child-friendly" and "child-appropriate." AsyLex believes that a precise interpretation of these terms is essential in order to guarantee the child's welfare and to comprehensively protect their fundamental rights. The vague wording creates room for interpretation, increasing the risk of legal uncertainty and potential harm.
Furthermore, the wording of Article 14(1) is problematic because it contains an obvious contradiction. On the one hand, it demands that "any form of violence be avoided," implying that the use of force is fundamentally inadmissible. On the other hand, however, it expressly permits the use of "a proportionate degree of force," thereby legitimizing violence to a certain extent and under certain circumstances.
Additionally, the obligation to "respect the dignity and physical integrity of minors" does not clearly state that any physical intervention on children is inadmissible. While it suggests that dignity and

[17] Forschungszentrum Migration, Integration und Asyl, Forschungsbericht 37 vom Juni 2021, abrufbar unter: https://www.ssoar.info/ssoar/bitstream/handle/document/73261/ssoar-2021-Evaluation_der_AnkER-Einrichtungen_und_der.pdf?isAllowed=y&lnkname=ssoar-2021-Evaluation_der_AnkER-Einrichtungen_und_der.pdf&sequence=1 , S. 26.

integrity should be respected, it leaves room for interpretation regarding the extent to which physical actions, such as touching or holding, may be permissible.
This ambiguity carries the risk of uncertainty in the practical application and interpretation of the provision. As a result, there is no clear delineation between permissible coercion and inadmissible violence, increasing the risk of abuse. Furthermore, this regulation contradicts the Swiss principle of proportionality, as it allows disproportionate infringements on the physical integrity of children.
AsyLex demands that, in order to safeguard the best interests of the child and ensure that children are not exposed to physical interventions that could jeopardize their dignity and integrity, the clause on the "proportionate degree of force" should be completely removed. Moreover, the term "child-friendly and child-appropriate manner" in Article 14(1) of the new Eurodac Regulation should be more clearly defined to prevent potential abuses.

2.3.3.3 D*isproportionate Retention Period for Biometric Data of Minors: Need for a Shorter Duration and Stricter Criteria*

The retention period for data is ten years according to Article 29 of the Eurodac Regulation. A retention period of ten years is unjustified in light of the special protection needs of children. The collection and storage of biometric data constitutes a significant infringement on the right to informational self-determination. It is also important to consider that children and adolescents change rapidly during this developmental phase, and their identity may change as well. Therefore, a longer storage period is not only disproportionate but also inaccurate.
AsyLex strongly recommends significantly shortening the retention period for minors and establishing strict criteria for extending it, which should only be possible in absolute exceptional cases and with judicial approval.

2.4 Regulation (EU) 2024/1358 ("Crisis Regulation")

The Crisis Regulation aims to facilitate the management of increased migration challenges by improving operational coordination, capacity support, and the availability of financial resources. The goal is for affected states to deviate from the normally applicable regulations in such situations.
AsyLex recognizes that fluctuating migration movements can make processing return requests more difficult. However, AsyLex is particularly concerned about the proposed automatic extension of the transfer deadline to one year. This regulation leaves affected individuals in a legal vacuum, without access to the asylum procedure and only supported by emergency aid, even though the extension is not due to their fault. Crises in individual member states should not be at the expense of the affected asylum seekers.
In this context, it should also be added that emergency aid structures in Switzerland may also be burdened. Therefore, AsyLex demands that the regulation explicitly stipulates that Switzerland, under the discretion clause, processes the asylum applications of the affected individuals.
AsyLex also deems it necessary that Switzerland, particularly in crisis situations, participates in the solidarity mechanism, by accepting asylum seekers under "relocation" measures and processing their asylum applications in Switzerland. AsyLex believes that such participation should be made legally binding for Switzerland even in normal times (as outlined above in 2.2), but especially in times of crisis.

2.5. Regulation (EU) 2024/1347 ("Qualification Regulation") / Subsidiary Protection

Since the Common European Asylum System (CEAS) aims to harmonize the asylum laws of member states and thus create comparable reception and protection conditions, the new Qualification Regulation – even though it does not represent a further development of the Schengen-Dublin framework and is therefore not binding for Switzerland – still offers an opportunity to align the rights of asylum seekers in Switzerland.
This is particularly relevant regarding the temporary protection status in Switzerland (Status F), which has been criticized for a long time: the movement of the affected individuals is restricted, access to the labor market remains difficult, family reunification is only possible later, social assistance is lower, canton transfers are more challenging, and there is often a lack of a perspective for permanent residence permits. Given that the temporary nature of the status is often not applicable in practice – for example, for refugees from war zones like Syria or Afghanistan, where return will be virtually impossible for the long term – it is essential to offer these individuals a reliable future perspective for successful integration.
Aligning the legal status with the subsidiary protection status according to Articles 20 to 36 of the Qualification Regulation would therefore be a step in the right direction. AsyLex demands that the legal position of subsidiary protection status be adopted for persons under temporary protection, thus supporting the demand of the Swiss Refugee Council.

2.6. Regulation (EU) 2020/894 ("Screening Regulation")

The Screening Regulation governs the first contact between refugees and authorities as a subsequent border check. It includes a preliminary health check, determining "protection needs," identity verification, the collection of data in Eurodac, and a security check. The screening is supposed to last a maximum of seven days. Since the SEM is expected to deny entry during the screening and the refugees are required to remain available to the authorities during this period, this constitutes, in effect, a deprivation of liberty. According to Article 102h (1) of the Screening Regulation, asylum seekers are only assigned legal representation after this procedure.
The proposed implementation of the Screening Regulation is critical in many respects. The most problematic aspect is the assignment of legal representation only after the screening process. This contradicts current practice in Swiss asylum law, which has provided that asylum seekers are legally represented from the outset since the most recent asylum law revision. Legal representation is essential, especially for the screenings being conducted.
Moreover, the term "preliminary protection needs check" in Article 26(1-1, 1 quater c) is misleading. It should be clarified that this is likely referring to the examination of vulnerability. Especially for a unified and thorough assessment of the vulnerabilities of asylum seekers – such as identifying victims of human trafficking, torture, sexual violence, or a precise determination of the best interests of the child – clear definitions and a standardized methodology, as well as careful and precise execution, are necessary. Additionally, the presence of legal representation is indispensable. Experiences from the Dublin procedure also show that key factors, such as the presence of family members in other Schengen states, must be clarified from the outset. This makes legal support from the first contact essential.
Furthermore, the fictional "non-entry" under the Screening Regulation is legally problematic since the person in question is already within the state's territory and, thus, Swiss law applies. In this situation,

the lack of legal representation is particularly risky as the asylum seekers are unfamiliar with the legal system and are highly vulnerable without legal assistance.
AsyLex also demands that the "protection needs check" in Article 26 (1-1, 1 quater c) be replaced by the term "vulnerability check," which should be clearly defined, and it should be explained how this check is to be carried out. Additionally, Article 102h (1) should be amended as follows: "Legal representation shall be immediately assigned to every person undergoing the verification procedure under Regulation (EU) 2024/1356, unless they explicitly waive it."
Finally, AsyLex criticizes the automatic detention during the screening process as unlawful. Temporary detention should only occur in exceptional cases, such as violation of cooperation duties, flight risk, or threat to public safety (Article 73(1) (d) and (2bis) VE-AIG), and it must always be proportionate, with a maximum of three days. The maximum seven-day period for the screening is disproportionate, particularly as it involves the restriction of a fundamental right. Moreover, legal remedies should be available in such cases. Asylum seekers are thus automatically subjected to detention under suspicion, which is especially problematic as most of them are seeking protection, and detention can have severe consequences for their health (e.g., trauma survivors, victims of torture, etc.). AsyLex demands that it be specified where the refugees should stay during the screening period. Detention should only be considered as a last resort, with freedom guaranteed for the other individuals.

Michael Meyer
Joëlle Spahni
AsyLex
Gotthardstrasse 52
8002 Zürich
info@asylex.ch

Bundesrat Beat Jans
Eidgenössisches Justiz und
Polizeidepartement EJPD
3003 Bern
per Email an:
helena.schaer@sem.admin.ch;
gael.buchs@sem.admin.ch;
michelle.truffer@sem.admin.ch
vernehmlassungsbre@sem.admin.ch

Zürich, den 7. November 2024

Vernehmlassung

Sehr geehrter Herr Bundesrat Jans
Sehr geehrte Frau Schär, sehr geehrte Frau Tuffer, sehr geehrter Herr Buchs
Sehr geehrte Damen und Herren

Im Namen des Vereins AsyLex bedanken wir uns für die Möglichkeit zur Stellungnahme zu der vorgesehenen Übernahme und Umsetzung der Rechtsgrundlagen zum EU-Migrations- und Asylpakt (Weiterentwicklung des Schengen-/ Dublin-Besitzstandes). Nachfolgend finden Sie unsere detaillierte Stellungnahme.

Wir bedanken uns für die wohlwollende Berücksichtigung unserer Vernehmlassungsantwort.

Mit freundlichen Grüssen

Michael Meyer
Head Dublin AsyLex
AsyLex

Joëlle Spahni
Head International AsyLex
AsyLex

Inhaltsverzeichnis

1. Grundsätzliche Bemerkungen 3
2. Detaillierte Bemerkungen zu den vorgeschlagenen Änderungen 3-25
   2.1. Die Verordnung (EU) 2024/1351 («AMMR-Verordnung») 3-16
   2.2. Solidaritätsmechanismus 16-18
   2.3. Die Verordnung (EU) 2024/1358 («Eurodac-Verordnung») 18-22
   2.4. Die Verordnung (EU) 2024/1358 («Krisenverordnung») 22-23
   2.5. Die Verordnung (EU) 2024/1347 («Qualifikationsverordnung») / Subsidiärer Schutz 23
   2.6. Die Verordnung (EU) 2020/894 («Überprüfungsverordnung») 23-25

1. Grundsätzliche Bemerkungen

AsyLex sieht die Übernahme und Umsetzung der Rechtsgrundlagen des EU-Migrations- und Asylpakts kritisch. In erster Linie ist die erhebliche Einschränkung des Schutzes von Asylsuchenden in Europa durch den Pakt zu beanstanden. Wir lehnen die Übernahme der im Pakt enthaltenen Verordnungen jedoch nicht grundsätzlich ab, da die Schengen-Assoziierung der Schweiz nicht gefährdet werden darf – allerdings nicht um jeden Preis und keinesfalls zulasten der Menschenrechte. Daher muss die Umsetzung im nationalen Recht mit einem spezifischen Fokus auf die Wahrung der Menschenrechte und des Flüchtlingsschutzes erfolgen. Im Folgenden heben wir wesentliche Aspekte hervor, um eine zusätzliche Beschneidung der Grundrechte von Asylsuchenden zu verhindern.

2. Detaillierte Bemerkungen zu den vorgeschlagenen Änderungen

2.1. Die Verordnung (EU) 2024/1351 («AMMR-Verordnung»)

Die Verwendung des Begriffs «Management» im Zusammenhang mit Asyl und Migration ist problematisch und euphemistisch. Während Verfahren und Abläufe tatsächlich «gemanagt» werden können, trifft dies auf Menschen und deren Schutzbedürfnisse nicht zu. Die Vorstellung, Asyl und Migration liesse sich wie ein administrativer Ablauf steuern, verkennt die Realität sowie die historischen Erfahrungen mit Migration. Im Mittelpunkt sollte nicht die Steuerung der Fluchtbewegungen stehen – eine ohnehin unmögliche Aufgabe, da diese durch pure Not ausgelöst werden (der Begriff führt, ähnlich wie in Art. 108 BV der Begriff der «Masseneinwanderung», zu einem falschen Verständnis). Vielmehr sollte der Fokus darauf liegen, fairere und effizientere Verfahren koordiniert zu implementieren, um dem Schutz der Menschenrechte und dem Asylrecht gerecht zu werden.

2.1.1. Kommentare zum Grundprinzip der AMMR-V: Verhinderung von Sekundärmigration

Der neue Pakt zielt darauf ab, Sekundärmigration zu verhindern. Wissenschaftliche Studien, sowie unsere Erfahrungen zeigen aber, dass härtere Regelungen Asylbewerber:innen nicht von Sekundärmigration abhalten.[1]

[1] U.a. siehe Eiko R. Thielmann, How Effective are National and EU Policies in the Area of Forced Migration?, Refugee Survey Quarterly 4 2012, S. 21, abrufbar unter: https://academic.oup.com/rsq/article/31/4/21/1572612; *m.w.H.* Daniel Thym, *Secondary Movements: Lack of Progress as the Flipside of Meagre Solidarity, EU Immigration and Asylum Law and Policy*.

Einerseits ist anzumerken, dass die Personen, die in Europa Schutz suchen, nicht mit dem rechtlichen System vertraut sind und ihre Entscheidungen, in welche Länder sie reisen um Schutz zu suchen, nicht vom Asylrecht abhängig machen (können).

Zweitens beeinflussen die Aufnahme- und Lebensbedingungen die Sekundärmigration erheblich. Schlechte Bedingungen in einem Aufnahmeland sind ein bedeutender Anreiz zur Weiterreise. Solange im gesamten Dublin-Raum keine gleichwertigen und menschenwürdigen Lebensstandards sowie faire Asylverfahren für asylsuchende Personen gewährleistet sind, werden auch strenge Sanktionen asylsuchende Personen nicht davon abhalten, weiter zu reisen.

Schliesslich sind insbesondere familiäre und ethnische Netzwerke zentral bei der Wahl des Ziellandes. Asylsuchende Personen haben oft Länder als Ziel, in denen bereits Familienmitglieder oder andere Bekannte leben. Um dieser Tatsache entgegenzuwirken und Sekundärmigration zu verhindern, wäre zum Beispiel die Definition von «Familienangehörigen» auf mindestens erwachsene Geschwister auszuweiten und dazu Ehegatten in die Abhängigkeitsklausel einzubeziehen. Diese Anpassungen könnten Sekundärmigration wirksam reduzieren, indem familiäre Bindungen im Dublin-System stärker berücksichtigt werden. Es liegt auf der Hand, dass Personen sich besser und schneller in einem Land integrieren, in dem sie schon Anschluss haben.

Der naheliegende Schluss daraus ist, dass der neue EU-Pakt trotz seiner Zielsetzung die Sekundärmigration nicht verhindern wird. Stattdessen führt er lediglich zu strengeren Massnahmen gegen Asylbewerbende anstatt Lösungen zu kreieren und birgt das Risiko vermehrter Menschenrechtsverletzungen.[2]

2.1.2. Kommentare zur neuen europäischen Rechtslage

Um der Verhinderung von «Sekundärmigration» entgegenzuwirken, sieht die neue AMMR-V eine Reihe von Anpassungen vor, die das bereits menschenrechtlich bedenkliche Dublin-System weiter verschärfen. Im Folgenden werden insbesondere die folgenden Änderungen näher erläutert:

[2] A.a.O.

2.1.2.1. Definition der «Familienangehörigen» (Art. 2 Abs. 8, 34 AMMV-R)

AsyLex begrüsst, dass die Definition des Begriffs «Familienangehörigen» neu auch familiäre Beziehungen, die vor der Einreise in das Hoheitsgebiet der Mitgliedstaaten bestanden haben, und nicht nur für diejenigen, die bereits im Herkunftsland existierten, mit einbezieht.

Zu bedauern ist aber, dass die Gelegenheit, die rechtliche Definition von «Familienangehörigen» näher an die Realität anzupassen, verpasst wurde.

Erstens sind Geschwister vom Begriff weiterhin ausgeschlossen, und dies trotz des entsprechenden Vorschlags der EU-Kommission, die Definition auszudehnen.[3] In der Praxis hätte dies bedeutet, dass beispielsweise für einen syrischen Mann, der an der europäischen Aussengrenze einen Asylantrag stellt, Belgien zuständig ist, wenn dort seine erwachsene Schwester eine Aufenthaltsbewilligung besitzt. Unter Vorbehalt von unbegleiteten Minderjährigen (Art. 25 Abs. AMMR-V) und der in der Ermessensklausel vorgesehenen Situation des ausdrücklichen Willens eines Mitgliedstaates (Art. 35 Abs. 2 AMMR-V) ist diese der Lebensrealität nahestehende Anpassung leider nicht vorgenommen worden. Da familiäre Netzwerke ein Hauptgrund für Sekundärmigration sind, ist dies ein Paradebeispiel dafür, weshalb die AMMR-V Asylgesuche in mehreren europäischen Staaten, darauffolgende Zuständigkeitsabklärungen und den Aufenthalt weggewiesener Asylsuchender, wie nun unter der Dublin-III-Verordnung bekannt, nicht eindämmen wird.

Zweitens ist zu bedauern, dass der Ausschluss der ehelichen Beziehungen, welche noch nicht staatlich anerkannt wurden, aus der Familiendefinition der Abhängigkeitsklausel (Art. 34 AMMR) beibehalten wurde. Die zivilrechtliche Anerkennung einer im Ausland geschlossenen Ehe erfordert zahlreiche Dokumente und beglaubigte Übersetzungen und kann vulnerable Personen in einer Vielzahl von Fällen ausschliessen, beispielsweise durch das Erfordernis der Sozialhilfeunabhängigkeit invalider Personen. Die vom EuGH im Urteil C-745/21 vom 16. Februar 2023 beanstandete Ungleichbehandlung, dass eine schwer traumatisierte oder kranke Antragstellerin gemäss Art. 34 AMMR-V, vormals Art. 16 Dublin-III-VO, die normalerweise mit ihrer Schwester zusammenbleibt oder zusammengebracht wird, aber von ihrem Ehemann getrennt oder weggebracht wird, bleibt damit auf gesetzlicher Ebene bestehen.

Im Sinne dieser Ausführungen erachten wir es als dringend, dass der Begriff der «Familienangehörigen» von Art. 2 Abs. 8 AMMR-V Geschwister mitumfasst. Wenn sich die Schweiz der Verhinderung von Sekundärmigration widmen will, stellt dies einen

[3] Vgl. EU-Kommission, Explanatory memo on the Pact on Migration and Asylum, abrufbar unter: https://ec.europa.eu/commission/presscorner/detail/en/qanda_24_1865.

grundlegenden Schritt dar. Zweitens sehen wir es als unumgänglich, das EuGH-Urteil C-745/21 vom 16. Februar 2023 gesetzlich umzusetzen und damit auch eheliche Beziehungen, die in der Schweiz (noch) nicht zivilstandsamtlich anerkannt wurden, unter den Familienbegriff der Abhängigkeitsklausel (Art. 34 AMMR) aufzunehmen.

2.1.2.2. Tonaufzeichnung der persönlichen Anhörung (Art. 22 Abs. 7 AMMR-V; Art. 26 Abs. 3^{bis}-3^{quater} VE-AsylG)

AsyLex begrüsst die geplante Tonaufzeichnung der persönlichen Anhörung (vormals «Dublin-Gespräch») grundsätzlich, da sie im Nachhinein bei Unstimmigkeiten oder unterschiedlichen Ansichten als Beweismittel herangezogen werden kann und so mögliche Zweifel beseitigt eine zentrale Rolle spielen wird.

Kritisch ist dabei zu beachten, dass die Umsetzungsbestimmungen (Art. 26 Abs. 3bis - 3quater VE-AsylG) dem Bundesrat die Möglichkeit geben, in bestimmten Fällen ausnahmsweise den Verzicht auf die Tonaufnahme einer Anhörung zu verfügen sowie deren Zugriff und Verwendung einzuschränken. AsyLex betont, dass die AMMR-V keine Ausnahme der Tonaufzeichnung vorsieht (Art. 22 Abs. 7 AMMR-V). Sie gibt den Staaten auch keinen Ermessensspielraum darüber, ob und wann auf eine Tonaufzeichnung verzichtet werden kann. Die geplante Schweizerische Umsetzungbestimmung widerspricht folglich der AMMR-V, weshalb dem Bundesrat keine ausnahmsweise Einschränkungsmöglichkeit von Art. 22 Abs. 7 AMMR-V zukommen sollte.

Gemäss Art. 22 Abs. 7 AMMR-V ist in der nationalen Gesetzgebung sicherzustellen, dass asylsuchende Personen sowohl ein Einsichtsrecht in die Tonaufzeichnung haben als auch das Recht, diese als Beweismittel zu verwenden. Dadurch werden die Verfahrensgarantien gemäss Art. 29 BV (Bundesverfassung) gewahrt. Dies bedeutet, dass Tonaufnahmen der persönlichen Anhörung im Gerichtsverfahren zur Wahrung des rechtlichen Gehörs eingesetzt werden können, insbesondere wenn Zweifel am Verfahren bestehen.

Weiter ist hervorzuheben, dass im Sinne des Datenschutzgesetzes die Rechte der Asylsuchenden zu wahren sind. Dies bedeutet, dass Tonaufnahmen nicht länger verwahrt werden dürfen, als für das Verfahren absolut notwendig ist, und dass ihre Verwendung zweckgebunden bleibt, was explizit in den Umsetzungsbestimmungen geregelt werden sollte. Zudem muss den betroffenen Personen die Möglichkeit gegeben werden, sich im Rahmen des Verfahrens gegen deren Einbringung aussprechen zu können.

2.1.2.2. Einführung von Überstellungen unbegleiteter minderjähriger Asylsuchender (Art. 25 Abs. 5 AMMR-V)

Hinsichtlich der Wahrung der Kinderrechte sieht die AMMR-V einschneidende Veränderungen vor. Die Formulierung des ursprünglichen Art. 8 Dublin-III-VO «sofern dies dem Kindeswohl dient» wird in Art. 25 Abs. 2 AMMR-V durch «sofern dies dem Kindeswohl nicht nachweislich zuwiderläuft» ersetzt. Weiterhin soll zukünftig auch bei Kindern der Staat der ersten Einreise zuständig sein, anstatt der Staat, in dem sie sich zu dem Zeitpunkt aufhalten. Dies würde bedeuten, dass unbegleitete minderjährige Asylsuchende (UMAs) vermehrt Überstellungen ausgesetzt sind.[4]

Die Gefahren von Zwangsausschaffungen bei Kindern sind offensichtlich. Eine Regelung, die den übergeordneten Vorrang des Kindeswohls gemäss Art. 3 der Kinderrechtskonvention berücksichtigt, ist in diesem Zusammenhang kaum vorstellbar. Verlässt ein Kind den ursprünglich zuständigen Mitgliedstaat eigenständig und reist weiter, sollte grundsätzlich angenommen werden, dass eine Rücküberstellung nicht im Interesse des Kindeswohls liegt. Ein anderer Schluss lässt sich aus der eigenständigen Weiterreise eines unbegleiteten Kindes schlichtweg nicht ziehen. AsyLex fordert daher, auf die Überstellung unbegleiteter minderjähriger Asylsuchender zu verzichten. Das SEM sollte in diesen Fällen das Asylgesuch des UMAs weiterhin selbst prüfen, da jegliche andere Regelung nachweislich der vorrangigen Pflicht, das Kindeswohl ins Zentrum zu stellen, widerspricht.

2.1.2.3. Klare Definition der Situationen, die zum Schweizer Selbsteintritt auf ein Asylgesuch führen (Artikel 35; Ermessensklausel)

AsyLex unterstützt nachdrücklich die Anwendung der in Artikel 17 der Dublin-III-Verordnung festgelegten Ermessensklauseln in der Schweiz, um humanitäre Gründe zu berücksichtigen und eine gerechtere Lastenverteilung zu fördern. Gemäss Praxiserfahrung finden diese zentralen Klauseln in der Schweiz bislang nur selten Anwendung. Wir fordern den Bundesrat daher auf, klare Kriterien festzulegen, wann ein Selbsteintritt zwingend geboten ist, und dabei auch familiäre Bindungen, Sprachkenntnisse, gesundheitliche Probleme oder Erfahrungen von Gewalt im Zielland zu berücksichtigen. Im Sinne der Rechtsweggarantie muss dieZudem sollte eine eigenständige Beschwerdemöglichkeit für den Selbsteintritt geschaffen werden.

[4] Lara Hoeft*, Asyl- und Migrationsmanagementverordnung: Dublin ist tot, lange lebe Dublin?,* 13. August 2024*:* *https://www.sosf.ch/de/article/asyl-und-migrationsmanagement-verordnung-dublin-ist-tot-lang-lebe-dublin*.

Ein zwingender Selbsteintritt sollte mindestens in folgenden Szenarien immer vorgesehen werden:

1. Wenn eine Überstellung faktisch unmöglich ist, sei es wegen Mängeln im Zielland, Aufnahmestopps oder starkem Migrationsdruck (z. B. wie die derzeitige Dublin-Italien-Konstellation).
2. Wenn die Krisenverordnung im zuständigen Mitgliedstaat die Überstellungsfrist auf 12 Monate verlängert; sollte nach sechs Monaten die Krisensituation andauern, ist ein Selbsteintritt wegen der langen Verfahrensdauer angebracht.
3. Bei Personen, die langfristig auf eine medizinische Behandlung angewiesen sind oder deren Gesundheitszustand sich durch die Überstellung erheblich verschlechtern würde.
4. Wenn das Zuständigkeitsverfahren aus unverschuldeten Gründen der asylsuchenden Person länger als zwölf Monate dauert, was dem Zweck des Verfahrens widerspricht.
5. Bei unbegleiteten Minderjährigen ohne Familie in anderen Staaten, wenn der Selbsteintritt dem Kindeswohl dient.
6. Bei Vorliegen eines engen Verwandtschaftsverhältnisses in der Schweiz im Sinne obiger Definition des Familienbegriffs (siehe oben unter 2.1.2.1).
7. Wenn familiäre Gründe für eine Zusammenführung bestehen, die bisher nicht ausreichend berücksichtigt wurden.

2.1.2.4. Einschränkung der zulässigen Beschwerdegründe gegen eine Überstellung (Art. 43 AMMR-V; Art. 64a VE-AIG)

Des Weiteren werden die zulässigen Beschwerdegründe gegen eine Überstellung auf drei spezifische Situationen reduziert: Erstens, ob die betroffene Person einer tatsächlichen Gefahr oder einer unmenschlichen bzw. erniedrigenden Behandlung im Sinne von Artikel 4 der Europäischen Charta der Grundrechte (EU-Grundrechtecharta) ausgesetzt ist; zweitens, ob nach dem Überstellungsentscheid Umstände vorliegen, die für die korrekte Anwendung der AMMR-Verordnung entscheidend sind; und drittens, ob bei Personen, die gemäss Artikel 36 Absatz 1 Buchstabe a der AMMR-Verordnung aufgenommen wurden, gegen die Bestimmungen der Artikel 25–28 (unbegleitete Minderjährige, Familienangehörige, Familie) verstossen wurde.

Die bisherige Rechtslage sah hingegen eine umfassende Überprüfung vor, die sowohl Sach- als auch Rechtsfragen einbezog. Diese Einschränkung hebt die bisherige Rechtsprechung des EuGH auf. Nach Erwägungsgrund 62 der Präambel der AMMR-V wird argumentiert, dass diese Beschränkung mit der Rechtsprechung des EuGH, insbesondere in Bezug auf Artikel

47 der EU-Grundrechtecharta, übereinstimmt. Diese Einschätzung ist jedoch unzutreffend, da die frühere Rechtsprechung eine umfassende Überprüfung vieler Dublin-III-Bestimmungen zuliess.[5]

Besonders hervorzuheben ist der offensichtliche Verstoss gegen Artikel 43 AMMR-V, der in direktem Widerspruch zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte (EGMR) in Bezug auf Artikel 13 EMRK steht. Nach Artikel 13 EMRK hat jede Person, die glaubhaft macht, dass ihre Konventionsrechte verletzt wurden, das Recht auf einen wirksamen Rechtsbehelf. Gemäss Artikel 43 AMMR-V kann man sich jedoch nur auf Artikel 3 EMRK berufen, was nicht einmal das Recht auf Familienleben einschliesst. Sollte Artikel 43 AMMR-V tatsächlich gegen Artikel 13 EMRK verstossen, verletzt er ebenfalls Artikel 47 der EU-Grundrechtecharta, der die Mindeststandards von Artikel 13 EMRK aufgreift und sogar erweitert (siehe C-682/15 vom 16. Mai 2017).

Selbst wenn Artikel 43 AMMR-V in irgendeiner Weise mit höherem Recht in Einklang gebracht werden könnte, würde seine Einführung eine erhebliche Einschränkung der Rechte der Asylsuchenden bedeuten. Abgesehen von den in Artikel 43 Absatz 1 aufgezählten Gründen würde Asylsuchenden das Recht auf eine umfassende gerichtliche Überprüfung von Entscheidungen, die sie erheblich betreffen, verwehrt. Unabhängig davon, wie schwerwiegend die Fehler bei der Anwendung der Kriterien oder die Verletzungen ihrer Verfahrensrechte in der ersten Instanz sind, stünde ihnen kein Rechtsmittel zur Verfügung. Vor diesem Hintergrund erscheint die angebliche Erweiterung der Verfahrensrechte im erstinstanzlichen Dublin-Verfahren als eine Scheinmassnahme, die die tatsächlichen Rechte der Antragsteller erheblich einschränkt.[6]

Diese Entwicklungen schränken den Zugang zu Recht erheblich ein und stehen im Widerspruch zum geplanten Ausbau des Rechtsschutzes.

AsyLex fordert daher, dass sämtliche Beschwerdegründe, die bisher unter der Dublin-III-Verordnung geltend gemacht werden konnten, auch weiterhin zulässig bleiben. Die in verschiedenen EuGH-Urteilen festgestellten subjektiven Rechte auf die korrekte Anwendung der Verordnung müssen uneingeschränkt berücksichtigt werden. Es muss

[5] u.a. EuGH-Urteile C-63/15 Ghezelbash ECLI:EU:C:2016:409; C-155/15 Karim ECLI:EU:C:2016:410; C-201/16 Shiri EU:C:2017:805; C-490/16 AS ECLI:EU:C:2017:585; C-670/16 Mengesteab ECLI:EU:C:2017:587; C-194/19 HA ECLI:EU:C:2021:270; C-19/21 I und S ECLI:EU:C:2022:605; C-228/21, C-254/21, C-297/21, C-315/21, und C-328/21 ECLI:EU:C:2023:934; und C-323/21 bis C-325/21, ECLI:EU:C:2023:4.

[6] Francesco Maiani*, Responsibility-Determination under the New Asylum and Migration Management Regulation: plus ça change…,* abrufbar unter: *https://eumigrationlawblog.eu/responsibility-determination-under-the-new-asylum-and-migration-management-regulation-plus-ca-change/*.

sichergestellt werden, dass allen Asylsuchenden ein effektiver Rechtsbehelf zur Verfügung steht, der den Zugang zu einer umfassenden gerichtlichen Überprüfung gewährleistet.

2.1.2.5. Verlängerung der Zuständigkeitsfristen/-perioden (Art. 29, 33, 37, 46 AMMR-V)

Die geplanten Änderungen der AMMR-Verordnung sehen eine erhebliche Verlängerung der bisherigen Zuständigkeits- und Überstellungsfristen vor. Dies betrifft insbesondere Situationen des sogenannten «Flüchtigseins» und der Verhinderung von Überstellungen, woraufhin die Frist zur Überstellung auf bis zu drei Jahre verlängert werden kann (Art. 46 AMMR-V). AsyLex betrachtet diese Massnahmen als unverhältnismässig und mit schwerwiegenden Konsequenzen für die betroffenen Personen und ihre Grundrechte.

Grundsätzlich bleibt die bisherige Überstellungsfrist der Dublin-III-Verordnung von sechs Monaten bestehen. Diese Frist kann jedoch gemäss Art. 46 Abs. 2 AMMR-V auf bis zu drei Jahre verlängert werden, wenn die betroffene Person oder ein mit ihr zu überstellendes Familienmitglied «flüchtig» ist, sich der Überstellung widersetzt oder die für die Überstellung erforderlichen medizinischen Anforderungen nicht erfüllt.

1. **Erweiterung des Begriffs «Flüchtigsein»**: Die Definition von «Flüchtigsein» wird erheblich ausgeweitet und umfasst nun auch Situationen, in denen sich Asylsuchende aus triftigen Gründen, nicht in einem Unterbringungszentrum aufhalten oder nicht bei den zuständigen Behörden melden. Dies widerspricht der Rechtsprechung des EuGH, die eine restriktive Auslegung forderte. Im Fall *Jawo* (C-163/17) stellte der EuGH fest: «Da zudem nicht ausgeschlossen werden kann, dass es stichhaltige Gründe dafür gibt, dass der Antragsteller den zuständigen Behörden seine Abwesenheit nicht mitgeteilt hat, muss ihm die Möglichkeit des Nachweises erhalten bleiben, dass er nicht beabsichtigte, sich den Behörden zu entziehen.»

   Die neue Regelung führt hingegen zu einer pauschalen Annahme von «Flüchtigsein», ohne individuelle Umstände zu berücksichtigen und damit zu einer unhaltbaren Vorverurteilung. Erfahrungsgemäss folgt die behördliche Annahme von «Flüchtigsein» keinem einheitlichen Massstab. In manchen Fällen wird das «Untertauchen» voreilig gemeldet, und die Korrektur ist nur über eine Beschwerde beim Bundesverwaltungsgericht möglich – einem Verfahren, bei dem kein Anspruch auf staatliche Rechtsvertretung besteht, weshalb die Geflüchteten auf die Hilfe von zivilen Organisationen angewiesen sind. So muss das Bundesverwaltungsgericht heute regelmässig korrigierend eingreifen, wenn die Überstellungsfrist aufgrund eines (bereits eintägigen, angeblichen) «Flüchtigseins» verlängert wurde. Zudem bringt die Verlängerung der Überstellungsfrist automatisch einen Ausschluss der kantonalen Nothilfe mit sich. Wird diese Handhabung auf stationäre Spitalaufenthalte von

vulnerablen Personen ausgeweitet, führt dies dazu, dass sie neben ihrer psychischen Not auch noch von elementarster (und minimaler) staatlicher Unterstützungsleistung ausgeschlossen werden können, was dringend zu vermieden werden muss.

AsyLex fordert daher eine restriktive Handhabung der Verwendung dieser Regelung, um dem Beschleunigungsgebot gerecht zu werden und eine faire Bewertung der individuellen Situation zu gewährleisten.

2. **Widersetzung der Überstellung und absichtliche** «**Untauglichmachung**»: Die AMMR-V lässt Spielraum für Interpretationen bezüglich der Widersetzung der Überstellung und des absichtlichen «Untauglichmachens». Dadurch besteht die Gefahr, dass körperliche oder psychische Gesundheitsprobleme fälschlich als absichtliche Behinderung der Überstellung interpretiert werden. Dies birgt ein hohes Risiko für willkürliche und ungerechtfertigte Entscheidungen, die die Verfahrensrechte und das Wohl der Betroffenen erheblich beeinträchtigen können.

3. **Medizinische Anforderungen als Hindernis**: Eine Verlängerung der Überstellungsfrist aufgrund medizinischer Anforderungen stellt eine unzumutbare Belastung für Personen mit unverschuldeten Krankheiten dar. Die AMMR-V definiert jedoch nicht klar, ob die Krankheit kurzfristig oder langfristig sein muss, was Unsicherheit schafft und im Falle psychischer Erkrankungen zu einer chronischen Verschlechterung führen kann. AsyLex fordert mit Insistenz, bei langfristigen Krankheitsverläufen grundsätzlich einen Selbsteintritt anzuordnen und bei kurzfristigen Erkrankungen einen neuen Überstellungstermin innerhalb der regulären sechsmonatigen Frist anzusetzen, statt die Überstellungsfrist zu verlängern.

   Die Situation von abgewiesenen Asylsuchenden ist für diese psychisch oft unhaltbar. Sie sind verpflichtet, sich in einem Rückkehrzentrum unter prekären Umständen aufzuhalten, da ihnen eine eigenständige Rückreise ebenfalls untersagt ist. Die Zeit in diesen Zentren sind eine grosse psychische Belastung und sollte generell so kurz wie möglich sein. Sie kann häufig zu psychischer Überforderung führen, weshalb der Zugang zu psychologischer resp. psychiatrischer Behandlung uneingeschränkt möglich sein muss, ohne eine Verschlechterung ihrer rechtlichen Situation durch Verlängerung der Überstellungsfrist von sechs Monaten auf drei Jahre.

Diese Veränderungen führen zu einer erheblichen Unsicherheit und Entrechtung für die Betroffenen, die Jahre in einem Zustand der Ungewissheit und sozialen Isolation verbringen müssen. Die verlängerte Überstellungsfrist bedeutet für Asylsuchende jahrelange Ungewissheit und erschwert die glaubhafte Darlegung ihrer Fluchtgeschichte. Die lange Wartezeit führt zu einer erheblichen psychischen Belastung und beeinträchtigt sowohl ihre

mentale Gesundheit als auch die Chancen auf eine gelingende Integration. Zudem stellen sich viele rechtliche Fragen, ab wann ein kausales «Flüchtigseins» vorliegt, welches eine Verlängerung der Überstellungsfrist rechtfertigt. In dieser Hinsicht sollte bereits vom Gesetzgeber klare Regelungen vorgebracht werden, unter Achtung der Rechte der Betroffenen.

Diesbezüglich fordert AsyLex, dass die Schweiz die Verlängerung der Überstellungsfristen nur in streng begrenzten Ausnahmefällen zulässt und sich hierbei an eine restriktive und faire Auslegung hält. Die Ausweitung der derzeitigen Fristverlängerungspraxis und der Definition von «Flüchtigsein» führt zu erheblicher Rechtsunsicherheit und unverhältnismässigen psychischen und mentalen Belastungen für die betroffenen Personen.

Die Definition von «Flüchtigsein» darf demnach nur vorsätzliche Handlungen umfassen, durch die sich eine Person gezielt und absichtlich dem Zugriff der Behörden entzieht. Die Jawo-Rechtsprechung des EuGH legt fest, dass eine solche Handlung nicht auf Umständen beruhen darf, die ausserhalb des Einflussbereichs der betroffenen Person liegen. Dennoch wird die Annahme von «Flüchtigsein» in der Praxis oft vorschnell angewandt, ohne die individuellen Umstände der Person zu prüfen, beispielsweise wenn diese aufgrund gesundheitlicher Einschränkungen vorübergehend keinen Behördenkontakt herstellen konnte. Diese Handhabung widerspricht klar den Vorgaben des EuGH, nach denen Asylsuchenden die Möglichkeit eingeräumt werden muss, nachzuweisen, dass ihr Verhalten nicht dem Ziel dient, sich dem Zugriff der Behörden zu entziehen.

Eine derartige Auslegung führt zudem zu erheblichen rechtlichen und menschlichen Problemen: Wird ein kurzzeitiger Spitalaufenthalt oder eine krankheitsbedingte Abwesenheit als «Flüchtigsein» gewertet, kann dies die Überstellungsfrist unverhältnismässig verlängern und die asylsuchende Person in eine prekäre Lage bringen. In solchen Fällen müssen die Behörden die Situation sorgfältig prüfen und klar belegen, dass ein absichtliches, also vorsätzliches Untertauchen vorliegt. Andernfalls verstösst die pauschale Annahme von «Flüchtigsein» gegen das Recht der Betroffenen auf eine faire Verfahrensführung und den Grundsatz der Verhältnismässigkeit.

AsyLex fordert daher klare und transparente Regelungen zur Verhinderung von Fristverlängerungen aufgrund unverschuldeter gesundheitlicher oder anderer unvorhergesehener Umstände, die ausserhalb des Einflussbereichs der asylsuchenden Person liegen. Der unklare Umgang mit «Flüchtigsein» und Fristverlängerungen erhöht die Rechtsunsicherheit erheblich und führt zu einer ungerechten Belastung der Betroffenen, die sich oft gegen eine solche Einstufung nur durch eine aufwändige Beschwerde wehren können. Dabei besteht kein Anspruch auf staatliche Rechtsvertretung, was besonders für vulnerable Personen ein unzumutbares Hindernis darstellt.

Weiterhin sind Regelungen notwendig, wonach alle asylsuchenden Personen umfassend und in einer für sie verständlichen Sprache über die Konsequenzen einer Fristverlängerung informiert werden. Diese Information sollte detailliert und in einer Sprache erfolgen, die die betroffene Person versteht, um sicherzustellen, dass sie ihre Rechte und Pflichten kennt und wahrnehmen kann. Nur so kann gewährleistet werden, dass die Rechte der asylsuchenden Personen gewahrt bleiben und die Entscheidungen der Behörden einer transparenten und fairen Prüfung standhalten.

2.1.2.6. Erweiterte Inhaftierungsgründe (Art. 44 AMMR-V und Art. 76a Abs. 1 Bst. a VE-AIG)

Schliesslich sieht die neue Regelung erweiterte Inhaftierungsgründe vor. Die Schwelle für eine Inhaftierung wurde von einer «erheblichen Fluchtgefahr» auf die «blosse Fluchtgefahr» herabgesetzt. Dazu wurde ein zusätzlicher Haftgrund eingeführt, der nun die Inhaftierung zum «Schutz der nationalen Sicherheit oder der öffentlichen Ordnung» ermöglicht.

Angesichts des administrativen und nicht strafrechtlichen Charakters dieser Haftmassnahmen ist diese Erweiterung unverhältnismässig und sollte nur als letzte Massnahme eingesetzt werden. Die Schweiz sollte die AMMR-V so auslegen, dass weiterhin das Vorliegen einer erheblichen Fluchtgefahr erforderlich ist, um eine administrative Haft anzuordnen. Die breit gefasste Formulierung verleiht den kantonalen Behörden zudem erheblich mehr Ermessensspielraum und wird folglich zu einer stärkeren Divergenz in den kantonalen Praktiken führen. Der neu eingefügte Haftgrund, «Schutz der nationalen Sicherheit oder der öffentlichen Ordnung» eignet sich zudem nicht, um die Anordnung einer administrativen Haft zu rechtfertigen. Der Begriff «Fluchtgefahr» wird dabei ohne klaren Bezug zu strafrechtlich relevanten Taten genutzt und dient einer beliebigen Erweiterung der Interpretationsmöglichkeiten, ohne dass dazu die Begehung einer Straftat erforderlich wäre. AsyLex spricht sich deshalb klar gegen die vorgesehenen Haftgründe aus.

Um sicherzustellen, dass Haftentscheidungen rechtlich nachvollziehbar und fair sind, ist die Einhaltung der Einzelfallprüfung und die Begründungspflicht für Haftanordnungen und deren Dauer konsequent umzusetzen. Zwar ist gemäss Art. 44 AMMR-V vorgesehen, dass eine Einzelfallprüfung der Haftgründe und der Haftdauer zwingend notwendig ist und jeder Entscheid ausreichend begründet werden muss. In der Praxis wird jedoch die Anordnung einer Dublin-Haft oft pauschal ausgesprochen und die maximale Haftdauer ohne individuelle Prüfung ausgeschöpft. Eine pauschale und nur kurz begründete Anordnung der Ausländerhaft genügt jedoch selbst nach bundesgerichtlicher Rechtsprechung nicht den gesetzlichen Anforderungen. Um eine faire und einheitliche Handhabung zu gewährleisten, ist die verpflichtende individuelle Begründung der Haftgründe und der Haftdauer daher im Gesetz explizit festzuhalten.

AsyLex empfiehlt weiter, die Möglichkeit zur regelmässigen Haftüberprüfung von Amtes wegen, wie es Art. 44 AMMR-V den Mitgliedstaaten ermöglicht, zu übernehmen. Nur durch eine regelmässige Überprüfung der Haftgründe und -dauer kann sichergestellt werden, dass Haftentscheide dem in Art. 29 Abs. 2 BV verankerten Begründungserfordernis entsprechen. Erfahrungsgemäss ist dies nicht immer der Fall, was in der Praxis zu ungerechtfertigter und unverhältnismässiger Haft führt und bereits häufig bundesgerichtlicher Korrektur bedurfte.[7]

Darüber hinaus fordert AsyLex, dass sichergestellt wird, dass alle Personen in Haft unmittelbar und verständlich über ihre Möglichkeit einer Haftüberprüfung informiert werden. Die Bereitstellung einer kostenlosen und unabhängigen Rechtsvertretung sollte dabei ebenfalls gewährleistet sein, damit die Betroffenen ihre Rechte in einem fairen Verfahren wahrnehmen können

2.1.2.7. Verlängerung der Haftdauer (Art. 45 AMMR-V; Art. 76a Abs. 3 AIG)

Die geplante nationale Umsetzung der Haftregelungen für das Dublin-Verfahren überschreitet die im europäischen Recht vorgesehenen Fristen und widerspricht somit der in der AMMR-Verordnung gesetzten Rechtsrahmen. Gemäss Art. 45 AMMR-V ist für die Dublin-Vorbereitungshaft eine maximale Haftdauer von drei Wochen vorgesehen. Diese Frist stellt sicher, dass das Dublin-Verfahren zügig durchgeführt wird und die Bewegungsfreiheit der asylsuchenden Person nur in unvermeidbaren Fällen eingeschränkt wird. Die vorgesehene vierwöchige Vorbereitungshaft gemäss Art. 76a Abs. 3 Bst. a AIG hingegen wäre somit europarechtswidrig.

Laut AMMR-V ist das Dublin-Verfahren innerhalb von drei Wochen abzuschliessen: Das Aufnahme- oder Wiederaufnahmegesuch muss innerhalb von zwei Wochen nach EURODAC-Treffer oder Registrierung des Asylantrags gestellt werden, und spätestens eine Woche später muss der zuständige Mitgliedstaat darauf antworten. Ab der Zustimmung oder Bestätigung beginnt die Frist für die Dublin-Ausschaffungshaft. Dies bedeutet, dass die vierwöchige Vorbereitungshaft gemäss der Vorlage des EJPD keinen Raum hat und somit gegen europäisches Recht verstösst.

Die AMMR-Verordnung und die Rechtsprechung, darunter das Urteil des Verwaltungsgerichts Zürich vom 25. Juli 2024 (VB.2024.00340, E.4.2.2.4 ff.), bestätigen, dass Verzögerungen in den Verwaltungsverfahren, die nicht der asylsuchenden Person anzulasten sind, keine Haftverlängerung rechtfertigen. Die im erläuternden Bericht genannte zusätzliche Woche für Entscheidfällung und Mitteilung des Entscheids ist auch unter Verweis auf Art. 11 Abs. 1 der

[7] Vgl. BGer 2C_549/2021 vom 3. September 2021, E. 3.4.2.

EU-Aufnahmerichtlinie[8] europarechtswidrig. Verzögerungen, die durch die Verwaltung entstehen, dürfen die Haftdauer nicht beeinflussen und stellen einen unzulässigen Eingriff in die Bewegungsfreiheit dar. Die Maximalfrist der AMMR-V ist deshalb bereits legislativ zu beachten, damit es zur Vermeidung einer erneuten gerichtlichen Korrektur kommt, die in diesem Fall absehbar wäre.

Bezüglich der Dublin-Ausschaffungshaft sieht Art. 76a Abs. 3 Bst. c AIG eine regelkonforme fünfwöchige Haftdauer vor. Diese Frist beginnt jedoch gemäss der nationalen Regelung erst ab Eröffnung des Wegweisungsentscheids zu laufen, während Art. 45 Abs. 3 AMMR-V verlangt, dass die Haftfrist ab dem Zeitpunkt beginnt, an dem dem Aufnahme- oder Wiederaufnahmegesuch stattgegeben wird. Die Abweichung im schweizerischen Recht führt zu einer längeren Inhaftierungsdauer ohne rechtliche Grundlage, was einen erheblichen Eingriff in die Freiheitsrechte der Betroffenen darstellt. Der erläuternde Bericht rechtfertigt diese Auslegung mit einem «erweiterten Ermessensspielraum», der in der AMMR-Verordnung jedoch keine Grundlage hat und ebenfalls europarechtswidrig ist.

AsyLex fordert daher eine Anpassung der schweizerischen Regelung, um die Haftzeiten auf das durch die AMMR-Verordnung vorgesehene Maximum zu begrenzen. Die Dublin-Vorbereitungshaft darf die dreiwöchige Maximaldauer nicht überschreiten, und die Frist für die Dublin-Ausschaffungshaft muss ab der Zustimmung des Aufnahmestaates beginnen, wie es die AMMR-Verordnung festlegt.

Art. 22 Abs. 7 AMMR-V sieht vor, dass asylsuchende Personen Zugang zu rechtlicher Unterstützung haben, insbesondere bei Inhaftierung. Es ist zentral, dass Personen, deren Freiheit entzogen wurde, unentgeltliche Rechtsvertretung erhalten, da Asylsuchende Personen meistens nicht in der Lage sind, eine Rechtsvertretung zu bezahlen, der hiesigen Sprache nicht mächtig sind und sich nicht mit dem Rechtssystem auskennen. Daher ist die Bereitstellung solcher Unterstützung ab einer Haftanordnung unerlässlich, um sicherzustellen, dass Haftmassnahmen im Einklang mit internationalen rechtlichen Standards stehen und die Personen sich im Verfahren rechtlich zurechtfinden sowie die Möglichkeit besitzen, die rechtliche Überprüfung zu verlangen. Die Gewährung einer unentgeltlichen Rechtsvertretung sorgt dafür, dass der Zugang zum Recht sichergestellt ist und stärkt so schlussendlich den Rechtsstaat.[9] Analog zu Art. 22 Abs. 7 AMMR-V sollte folglich auf nationaler Ebene das Recht der unentgeltlichen Rechtsvertretung explizit durchgehend festgehalten werden.[10]

[8] Richtlinie 2013/33/EU des Europäischen Parlaments und des Rates vom 26. Juni 2013 zur Festlegung von Normen für die Aufnahme von Personen, die internationalen Schutz beantragen (Aufnahmerichtlinie).
[9] David Gjon, Handlungsbedarf beim Rechtsschutz, Plädoyer 2024 3 S. 13.
[10] Vgl. hierzu BGer 2C_101/2017 vom 1. März 2017, E. 3.

Um die Rechte der Asylsuchenden zu wahren und eine gerechte Anwendung der Haftregelungen sicherzustellen, fordert AsyLex konkret:

1. eine strengere gesetzliche Verpflichtung zur umfassenden Begründung von Haftanordnungen und deren Dauer;
2. dass Dublin- und Administrativhaft nur aufgrund einer richterlichen Anordnung verhängt werden und, wo möglich, eine zwingende Überprüfung der Dublin-Haft von Amtes wegen stattfindet;
3. die Bereitstellung einer unentgeltlichen Rechtsvertretung ab Haftanordnung.

2.2. Solidaritätsmechanismus

AsyLex spricht sich klar gegen die vorgesehene Umsetzung des Solidaritätsmechanismus in der Schweiz aus, da dieser vorsieht, dass sich die Schweiz nicht verpflichtend, sondern lediglich freiwillig und punktuell beteiligt. Die Beteiligung erfolgt nur dann, wenn es der Bundesrat unter Berücksichtigung der konkreten Migrationslage für nötig hält. Obwohl assoziierte Staaten rechtlich nicht zur Teilnahme am Solidaritätspool gemäss Art. 56 ff. AMMR-Verordnung verpflichtet sind, steht ihnen diese Möglichkeit explizit offen. AsyLex ist der Meinung, dass die Schweiz von dieser Möglichkeit Gebrauch machen muss, um ihre politische Mitverantwortung in der europäischen Migrationspolitik, zu der sie massgeblich beiträgt, tatsächlich wahrzunehmen und um ihrer humanitären Tradition nachzukommen.

Speziell im Hinblick auf die politische Position der Schweiz in Europa ist eine verbindliche Teilnahme am Solidaritätsmechanismus konsequent. Seit Beginn der Reformarbeiten sitzt die Schweiz mit beratender Stimme am Verhandlungstisch der europäischen Justiz- und Innenminister*innen. Sie ist fest in das gesamte europäische Asyl- und Migrationssystem eingebunden, trägt und finanziert dieses ebenfalls mit. Daraus ergibt sich eine politische Mitverantwortung für das gesamte System, die nicht ignoriert werden sollte

Der neue Migrations- und Asylpakt verstärkt faktisch die Abschottung Europas durch vermehrte Kontrollen und die damit verbundene Gewalt an den Aussengrenzen.[11] Zudem sieht der Migrations- und Asylpakt vor, dass der Solidaritätsmechanismus selbst ein gewisses Mass an Flexibilität zulässt. Diese Flexibilität berücksichtigt die Bedürfnisse der vulnerablen

[11] vgl. dazu Amnesty International, 'Migrationspakt führt zu mehr leid an EU-Aussengrenzen,' abrufbar unter https://www.amnesty.ch/de/laender/europa-zentralasien/europa-und-zentralasien-kontinent/dok/2023/migrationspakt-fuehrt-zu-mehr-leid-an-eu-aussengrenzen, zuletzt besucht am 6. Oktober 2024;
Schweizerische Flüchtlingshilfe, 'EU-Pakt zu Migration und Asyl,' abrufbar unter https://www.fluechtlingshilfe.ch/themen/migrationspolitik/eu-pakt-zu-migration-und-asyl, zuletzt besucht am 6. Oktober 2024.

Geflüchteten jedoch kaum, indem sie diese, ohne Rücksicht auf deren Meinung, wie «Produkte» zwischen den Mitgliedstaaten hin- und herschiebt.[12]

Vor diesem Hintergrund fordert AsyLex, dass es im Hinblick auf den Schutz der Flüchtlings- und Menschenrechte nicht bei einer flexiblen *ad-hoc*-Beteiligung und *Opt-Out*-Möglichkeiten zugunsten finanzieller Unterstützung oder alternativer Massnahmen bleiben darf. Vielmehr ist eine systematische, langfristige und gesetzlich geregelte Beteiligung erforderlich. Die Schweiz muss ihre Teilnahme am Relocation-Mechanismus verbindlich im Gesetz festschreiben.

Finanzielle Beiträge zur Unterstützung von Massnahmen, die beispielsweise auf Grenzschutz, Rückführungen oder den Betrieb der *Closed-Control*-Centers an den EU-Aussengrenzen ohne zivilgesellschaftlichen Zugang abzielen, stellen aus Sicht von AsyLex keine echte Solidarität dar. Diese Gelder tragen nicht zum Schutz der betroffenen Menschen bei, sondern verstärken lediglich das System der Abschottung. Solidarität im Sinne des Mechanismus sollte einzig und allein die Übernahme von asylsuchenden Personen umfassen, denn nur die Aufnahme von Personen reflektiert den eigentlichen Zweck der Solidarität: die Hilfe für jene, die in Not sind. Eine finanzielle Beteiligung, die nicht direkt den Schutz und die Aufnahme dieser Menschen unterstützt, verfehlt den Kern der Solidarität.

Die aktuelle Migrationslage mit vorliegender Verschärfung erhöht den Bedarf an sicheren und legalen Zugangswegen, über die schutzbedürftige Menschen nach Europa und in die Schweiz gelangen können. Vor diesem Hintergrund lehnt AsyLex die vorliegende Vorlage ab, die es dem Bundesrat ermöglicht, im Falle von Migrationsdruck *ad hoc* über solidarische Unterstützung zu entscheiden. AsyLex fordert, dass gesetzlich explizit festgehalten wird, dass sich die Schweiz verbindlich am Solidaritätspool beteiligt. Das Gesetz muss sicherstellen, dass sich die Schweiz nicht nur auf finanzielle Beiträge beschränkt, sondern sich auch aktiv an der Aufnahme von Geflüchteten beteiligt. Falls finanzielle Beiträge geleistet werden, muss im Gesetz klar festgehalten sein, dass diese nicht für den Schutz der Aussengrenzen oder für die Rückführung von Menschen verwendet werden dürfen.

Um sicherzustellen, und im Sinne der humanitären Tradition der Schweiz, fordert AsyLex eine verbindliche, anteilsmässige Beteiligung an europäischen Solidaritätsmassnahmen durch die Aufnahme von schutzsuchenden Menschen aus anderen europäischen Staaten. Artikel 35 Absatz 1 der AMMR-Verordnung ermöglicht jedem Dublin-Staat, ein Asylgesuch unabhängig

[12] Juan Santos Vara, Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?' in European Papers 3/2022, S. 1263; Eleni Karageorgiou und Gregor Noll, What Is Wrong with Solidarity in EU Asylum and Migration Law? Jus Cogens 4/2022, S. 151; Francesco Maiani, Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact in Daniel Thym (ed), *Reforming the Common European Asylum System* 2022, S. 56.

von den Zuständigkeitskriterien inhaltlich zu prüfen, selbst wenn formal ein anderer Dublin-Staat zuständig wäre. Die Schweiz sollte diese Souveränitätsklausel verbindlich anwenden und das Verfahren immer dann im eigenen Land führen, wenn die Schutzbedürftigkeit der betroffenen Person offenkundig ist – insbesondere bei unbegleiteten Minderjährigen, im Rahmen von Familienzusammenführungen oder bei besonders vulnerablen Gruppen wie Menschen mit schweren Krankheiten oder Traumata.

Damit die Schweiz einen tatsächlich solidarischen Beitrag für besonders belastete Staaten leisten kann, muss sie über die regulären Dublin-Selbsteintritte hinausgehen und schutzsuchenden Menschen, die sich noch nicht auf Schweizer Staatsgebiet befinden, die legale Einreise ermöglichen. Ein zu grosser Ermessensspielraum der Behörden birgt das Risiko, dass die Verantwortung im Rahmen des europäischen Solidaritätsmechanismus umgangen wird. Daher sind klare, gesetzlich verankerte Verpflichtungen erforderlich, die sicherstellen, dass die Schweiz dauerhaft, wirkungsvoll und anteilsmässig zum Schutz vulnerabler Menschen beiträgt und so einen nachhaltigen solidarischen Mehrwert im europäischen Asylsystem schafft.

2.3. Die Verordnung (EU) 2024/1358 («Eurodac-Verordnung»)

2.3.1. Aktuelle Ausgangslage

Eurodac wurde eingerichtet, um Fingerabdruckdaten abzugleichen, mit dem Ziel, das Dublin-Übereinkommen effektiv anzuwenden. Darüber hinaus hilft es, festzustellen, welcher EU-Mitgliedstaat gemäss Art. 1 Abs. 1 und 2 der bisherigen Eurodac-Verordnung (EU-VO 603/2013) für die Prüfung eines Asylantrags verantwortlich ist. Zusätzlich regelt die Verordnung, unter welchen Bedingungen Fingerabdrücke von Behörden zur Verbrechensbekämpfung genutzt werden dürfen. In der Eurodac-Datenbank werden Asylsuchende gespeichert, die keine Staatsangehörigkeit eines Dublin-Staates besitzen. Darüber hinaus werden auch Personen erfasst, die widerrechtlich die Grenze des Dublin-Raums überschreiten und dabei nicht zurückgewiesen werden[13]. Dabei werden in der derzeitigen Eurodac-Verordnung gemäss Art. 9 Abs. 1 der Verordnung (EU-VO 603/2013) nur Fingerabdrücke von Personen verfasst, die mindestens 14 Jahre alt sind. Stets müssen die Mitgliedstaaten vorrangig das Kindeswohl berücksichtigen.

2.3.2. Kommentare und Änderungsvorschläge zur neuen Eurodac-Verordnung

2.3.2.1 Widerspruch zur Zweckerfüllung durch Ausweitung der Datennutzung

Die neue Eurodac-Verordnung 2024/1358 erweitert sowohl den Anwendungsbereich als auch die Datenerfassung für asylsuchende Personen. Neben den bisher erfassten

[13] https://www.sem.admin.ch/sem/de/home/asyl/dublin/eurodac.html

Fingerabdrücken sollen nun zusätzlich Name, Gesichtsbild, Geburtsdatum, Staatsangehörigkeit sowie Identitäts- und Reisedokumente erfasst werden.[14] AsyLex steht dieser Ausweitung höchst kritisch gegenüber, da sie übermässig in das Privatleben der asylsuchenden Personen eingreift. Sie führt zu einer Zweckentfremdung der Verordnung, die ursprünglich darauf ausgerichtet war, die Verantwortlichkeit für Asylanträge zu klären und nicht umfassende persönliche Daten der Antragstellenden zu erfassen. AsyLex vertritt daher den Standpunkt, dass die Datenerfassung und -speicherung auf das unbedingt erforderliche Minimum beschränkt werden muss, um den Zweck der Verordnung zu erfüllen und die Eingriffe in die Privatsphäre der Betroffenen so gering wie möglich zu halten.

2.3.2.2. Widerspruch zur Zweckerfüllung durch Stigmatisierung

Die neue Eurodac-Verordnung sieht vor, dass künftig nicht nur vorwiegend Daten von asylsuchenden Personen erfasst werden, sondern neu auch von jenen, die im Rahmen eines nationalen oder EU-Resettlement-Programms aufgenommen wurden, Personen mit temporärem Schutzstatus, sowie Personen, die sich ohne Aufenthaltsberechtigung in Europa aufhalten[15]. Zukünftig sollen zudem auch weitere Institutionen wie Strafverfolgungsbehörden Datenabfragen durchführen können. Bei einem Treffer im Common Identity Repository (CIR) erhalten diese Behörden einen direkteren Zugang zu Eurodac, was eine unmittelbare Verknüpfung zwischen Asyl- und Strafverfolgungsbehörden schafft. Zudem wird Eurodac mit weiteren EU-Systemen wie dem Entry-Exit-System (EES), dem Visa Information System (VIS), ETIAS und dem Schengen Information System (SIS) vernetzt[16].

Die Ausweitung der erfassten Personengruppen sowie die Verknüpfung von Asyl- und Strafverfolgungsdatenbanken sind äusserst problematisch. Dies stellt einen Eingriff in das Recht auf Privatsphäre der asylsuchenden Person dar und führt zu einer Zweckentfremdung der vorherigen Eurodac-Verordnung und somit zu dessen Verletzung. Ursprünglich diente Eurodac der Ermittlung der Zuständigkeit für Asylverfahren, und nicht der umfassenden Überwachung oder der Unterstützung von Strafverfolgungsmassnahmen. Die Nutzung solcher Daten für Zwecke der Strafverfolgung birgt das Risiko, dass Personen, die internationalen Schutz suchen, stigmatisiert und ungerechtfertigt kriminalisiert werden. Dies führt zu einem weiteren Vertrauensbruch im Asylsystem und bedient das durch diverse quantitative Erhebungen und Statistiken nicht gedeckte Bild des «kriminellen Fremden». AsyLex vertritt die Ansicht, dass eine klare gesetzliche Trennung zwischen Asyl-/Migrations-

[14] Wissenschaftlicher Dienst des Europäischen Parlaments: Neufassung der Eurodac-Verordnung, 2024, abrufbar unter: https://www.europarl.europa.eu/RegData/etudes/ATAG/2024/760383/EPRS_ATA(2024)760383_DE.pdf, S. 1.
[15] https://www.sem.admin.ch/sem/de/home/international-rueckkehr/kollab-eu-efta/eu-migrations-asylpakt.html.
[16] a.a.O.

und Strafverfolgungsdaten notwendig ist, da erstere einem verwaltungsrechtlichen Zweck dienen, während letztere dem Strafrecht unterliegen. Diese Trennung sollte durch streng getrennte Zugriffsrechte und Verfahren sichergestellt werden. Zumindest sollte von einem automatischen Zugriffsrecht durch Strafverfolgungsbehörden auf in Migrationsdatenbanken und biometrischen Informationen abgesehen werden. Denkbar wäre, wenn die Strafverfolgungsbehörden einen formellen Antrag auf Zugriff auf die relevanten Daten stellen könnten. Dieser Antrag sollte eine klare Begründung für die Notwendigkeit des Zugriffs enthalten und den Bezug zu einem schwerwiegenden Straftatbestand darlegen. Nur so kann gewährleistet werden, dass der Grundsatz der Zweckbindung gewahrt bleibt und die Grundrechte der betroffenen Personen nicht unverhältnismässig beeinträchtigt oder gar verletzt werden.

2.3.3. Kommentare und Änderungsvorschläge zur neuen Eurodac-Verordnung in Bezug auf Kindeswohl

2.3.3.1 Unverhältnismässige Senkung des Alters und Beschränkung auf Fingerabdrücke

Das Alter zum Erfassen von biometrischen Daten wird von 14 auf sechs Jahre gesenkt gem. Art. 20 Abs. 1 Eurodac-Verordnung 2024/1358. Diese Herabsetzung lehnt AsyLex entschieden ab, da sie dem ursprünglichen Zweck der Verordnung widerspricht. Eurodac wurde geschaffen, um festzustellen, welcher Mitgliedstaat für die Bearbeitung eines Asylantrags zuständig ist. Die Erfassung biometrischer Daten von Kindern im Alter von sechs Jahren geht jedoch weit über diesen ursprünglichen Zweck hinaus. Biometrische Daten dienen in erster Linie der Identifikation und der Verhinderung von Mehrfachanträgen.[17] Die Erfassung von Daten bei so jungen Kindern trägt jedoch wenig dazu bei, den eigentlichen Zweck der Verordnung zu fördern, da Kinder in diesem Alter nicht in der Lage sind, eigenständig Asylverfahren zu beeinflussen oder ihre Identität zu manipulieren. Diese Massnahme ist ohne klaren Rechtszweck für die erhebliche Senkung des Alters unangemessen. In diesem Zusammenhang stellt sich insbesondere die Frage, weshalb es erforderlich ist, Gesichtsbilder und andere biometrische Daten von solch jungen Kindern zu erfassen. Es wäre im Interesse des Kindeswohls, die Erfassung ausschliesslich auf das Erheben von Fingerabdrücke und auf Kinder ab frühestens 14-jährigen oder Älteren zu beschränken, um den Schutz des Kindeswohls zu gewährleisten.

[17] Forschungszentrum Migration, Integration und Asyl, Forschungsbericht 37 vom Juni 2021, abrufbar unter: https://www.ssoar.info/ssoar/bitstream/handle/document/73261/ssoar-2021-Evaluation_der_AnkER-Einrichtungen_und_der.pdf?isAllowed=y&lnkname=ssoar-2021-Evaluation_der_AnkER-Einrichtungen_und_der.pdf&sequence=1 , S. 26.

2.3.3.2. Unklare Definitionen und Widersprüche im Schutz des Kindeswohls

Zwar bestimmt Art. 14 Abs. 1 der neuen Eurodac-Verordnung, dass die Erhebung biometrischer Daten bei Minderjährigen «in einer kindgerechten und kinderfreundlichen Weise sowie unter uneingeschränkter Achtung des Kindeswohls und der im Übereinkommen der Vereinten Nationen über die Rechte des Kindes verankerten Schutzklauseln« erfolgen soll, dennoch werden Kinder einem tief eingreifenden, unbegründeten und potenziell diskriminierenden Verfahren ausgesetzt.

In diesem Zusammenhang wirft Art. 14 der neuen Eurodac-Verordnung mehrere Bedenken auf. Insbesondere fehlt es an einer klaren Definition der Begriffe «kinderfreundlich» und «kindgerecht». AsyLex ist der Auffassung, dass eine präzise Auslegung dieser Begriffe unerlässlich ist, um das Wohl des Kindes zu gewährleisten und seine Grundrechte umfassend zu schützen. Die unbestimmte Formulierung schafft Interpretationsspielraum, die das Risiko von Rechtsunsicherheiten und potenziellen Gefährdungen erhöhen.

Ferner erweist sich die Formulierung nach Art. 14 Abs. 1 als problematisch, da sie einen offensichtlichen Widerspruch enthält. Einerseits wird gefordert, dass «von jeglicher Form von Gewalt abgesehen« werden soll, was impliziert, dass Gewaltanwendung grundsätzlich unzulässig ist. Andererseits wird jedoch die Anwendung eines «verhältnismässigen Grades an Zwang» ausdrücklich gestattet, wodurch Gewalt in bestimmtem Umfang und unter bestimmten Umständen legitimiert wird.

Hinzu kommt, dass die Verpflichtung, «auf die Würde und die physische Integrität der Minderjährigen zu achten», keine klare Festlegung darüber enthält, dass jegliche physische Einwirkung auf Kinder unzulässig ist. Die Formulierung legt zwar nahe, dass die Würde und Integrität respektiert werden sollen, lässt jedoch den Interpretationsspielraum dahingehend offen, inwieweit physische Handlungen, wie etwa das Anfassen oder Festhalten, zulässig sein könnten.

Diese Unbestimmtheit birgt das Risiko von Unsicherheiten in der praktischen Anwendung und Auslegung der Bestimmung. Somit fehlt eine klare Abgrenzung zwischen erlaubtem Zwang und unzulässiger Gewalt, was das Risiko von Missbrauch erhöht. Zudem widerspricht diese Regelung dem Schweizer Verhältnismässigkeitsprinzip, da sie unverhältnismässige Eingriffe in die körperliche Unversehrtheit von Kindern zulässt. AsyLex fordert, um das Wohl des Kindes zu gewährleisten und sicherzustellen dass Kinder keinerlei physischen Eingriffen ausgesetzt werden, die ihre Würde und Integrität gefährden könnten, dass die Klausel über den «verhältnismässigen Grad an Zwang» vollständig gestrichen werden soll. Ferner sollte

der Begriff in Art. 14 Abs. 1 der neuen Eurodac-Verordnung «kindgerechten und kinderfreundlichen Weise» näher definiert werden, um allfällige Missbräuche zu verhindern.

2.3.3.3 Unverhältnismässige Speicherdauer biometrischer Daten von Minderjährigen: Notwendigkeit einer Verkürzung und strengerer Kriterien

Die Speicherdauer der Daten beträgt zehn Jahre nach Art. 29 Eurodac-Verordnung. Eine Speicherdauer von zehn Jahren ist im Hinblick auf den besonderen Schutzbedarf von Kindern nicht gerechtfertigt. Die Erfassung und Speicherung biometrischer Daten stellt einen erheblichen Eingriff in das Recht auf informationelle Selbstbestimmung dar. Es ist zudem zu berücksichtigen, dass Kinder und Jugendliche in dieser Entwicklungsphase sich innert kürzester Zeit verändern und ihre Identität sich verändern kann. Eine längere Speicherung ist daher nicht nur unverhältnismässig, sondern auch ungenau. AsyLex empfiehlt daher dringend, die Speicherdauer für Minderjährige erheblich zu verkürzen und strenge Kriterien für eine Verlängerung zu etablieren, die nur in absoluten Ausnahmefällen und mit richterlicher Genehmigung möglich sein sollte.

2.4. Die Verordnung (EU) 2024/1358 («Krisenverordnung»)

Die Krisenverordnung soll die Bewältigung von erhöhten Migrationsherausforderungen erleichtern, indem sie die operative Koordinierung, kapazitätsbezogene Unterstützung und die Verfügbarkeit finanzieller Mittel verbessert. Ziel ist, dass betroffene Staaten in solchen Situationen von den normalerweise geltenden Verordnungen abweichen können.

AsyLex erkennt an, dass fluktuierende Migrationsbewegungen die Bearbeitung von Rückübernahmeersuchen erschweren kann. AsyLex sieht jedoch insbesondere die vorgeschlagene automatische Verlängerung der Überstellungsfrist auf ein Jahr als besonders besorgniserregend. Diese Regelung lässt die betroffenen Personen in einem rechtlichen Vakuum zurück, ohne Zugang zum Asylverfahren und einzig unterstützt durch Nothilfe, obwohl die Fristverlängerung nicht durch eigenes Verschulden entstanden ist. Krisen in einzelnen Mitgliedstaaten dürfen nicht zulasten der betroffenen Schutzsuchenden gehen. In diesem Zusammenhang ist zudem anzufügen, dass gerade auch die Nothilfestrukturen in der Schweiz Deshalb fordert AsyLex, dass die Verordnung ausdrücklich festlegt, dass die Schweiz in solchen Fällen gemäss der Ermessensklausel auf das Asylgesuch der betroffenen Personen eintritt.

AsyLex erachtet es zudem als notwendig, dass sich die Schweiz insbesondere in Krisensituationen im Sinne der Solidarität verbindlich am Solidaritätsmechanismus beteiligt, indem sie Asylsuchende im Rahmen von «Relocation»-Massnahmen aufnimmt und deren

Asylgesuche in der Schweiz prüft. Aus Sicht von AsyLex sollte eine solche Beteiligung auch in regulären Zeiten für die Schweiz verbindlich festgeschrieben sein (siehe oben unter 2.2), in Krisenzeiten jedoch umso mehr.

2.5. Die Verordnung (EU) 2024/1347 («Qualifikationsverordnung») / Subsidiärer Schutz

Da das Gemeinsame Europäische Asylsystem (GEAS) darauf abzielt, das Asylrecht der Mitgliedsstaaten zu vereinheitlichen und damit vergleichbare Aufnahme- und Schutzbedingungen zu schaffen, bietet die neue Qualifikationsverordnung – auch wenn sie keine Weiterentwicklung des Schengen-Dublin-Besitzstands darstellt und somit für die Schweiz nicht verbindlich ist – dennoch eine Chance, die Rechte von Schutzsuchenden in der Schweiz ebenfalls anzugleichen.

Dies gilt besonders in Bezug zur vorläufigen Aufnahme in der Schweiz (Status F), welche seit langem in der Kritik steht: Die Bewegungsfreiheit der Betroffenen ist eingeschränkt, der Zugang zum Arbeitsmarkt bleibt erschwert, Familiennachzug ist erst verspätet möglich, die Sozialhilfe fällt geringer aus, Kantonswechsel sind schwieriger und es fehlt häufig an einer Perspektive auf eine unbefristete Aufenthaltsbewilligung. Angesichts der Tatsache, dass die temporäre Natur des Status in der Praxis oft nicht gegeben ist – etwa bei Geflüchteten aus Kriegsgebieten wie Syrien oder Afghanistan, wo eine Rückkehr langfristig kaum möglich sein wird – ist es für eine erfolgreiche Integration entscheidend, den Betroffenen eine verlässliche Zukunftsperspektive zu bieten.

Eine Angleichung der Rechtsstellung an den subsidiären Schutzstatus gemäss Art. 20 bis 36 der Qualifikationsverordnung wäre folglich ein Schritt in die richtige Richtung. Daher fordert AsyLex, dass die Rechtsposition des subsidiären Schutzstatus für vorläufig aufgenommene Personen übernommen wird, womit sich AsyLex folglich der Forderung der Schweizerischen Flüchtlingshilfe anschliesst.

2.6. Die Verordnung (EU) 2020/894 («Überprüfungsverordnung»)

Die Überprüfungsverordnung regelt den ersten Kontakt zwischen Geflüchteten und Behörden als nachträgliche Grenzkontrolle. Sie umfasst eine vorläufige Gesundheitsprüfung, die Feststellung der «Schutzbedürftigkeit», die Identitätsprüfung, die Erfassung der Daten in Eurodac und eine Sicherheitsüberprüfung. Die Überprüfung soll maximal sieben Tage dauern. Da vorgesehen ist, dass das SEM die Einreise während der Überprüfung verweigert und die Geflüchteten verpflichtet sind, den Behörden während dieser Zeit zur Verfügung zu stehen, konstituiert dies de facto einen Freiheitsentzug. Gemäss Art. 102h Abs. 1 der

Überprüfungsverordnung soll Asylsuchenden eine Rechtsvertretung jedoch erst nach Abschluss dieses Verfahrens zugeteilt werden.

Die vorgeschlagene Umsetzung der Überprüfungsverordnung ist in vieler Hinsicht kritisch zu sehen. Besonders problematisch ist die Zuteilung der Rechtsvertretung erst nach dem Überprüfungsverfahren. Dies widerspricht der aktuellen Praxis im Schweizer Asylrecht, das seit der jüngsten Asylgesetzrevision vorsieht, dass Asylsuchende von Beginn an rechtlich vertreten sind. Gerade bei den im Screening durchgeführten Prüfungen ist eine Rechtsvertretung unerlässlich.

Ferner ist der gewählte Begriff «vorläufige Schutzbedürftigkeitsprüfung« in Art. 26 Abs. 1-1, 1 quater c) irreführend. Es müsste präzisiert werden, dass es sich dabei wohl um die Prüfung der Vulnerabilität handeln sollte. Gerade für eine einheitliche und gründliche Prüfung der Vulnerabilitäten von asylsuchenden Personen – etwa die Identifizierung von Opfern von Menschenhandel, Folter, sexueller Gewalt oder die genaue Abklärung des Kindeswohls – sind klare Definitionen und eine vereinheitlichte Methodik sowie eine sorgfältige sowiepräzise Durchführung erforderlich. Zudem ist die Anwesenheit einer Rechtsvertretung unerlässlich. Erfahrungen aus dem Dublin-Verfahren zeigen zudem, dass wesentliche Faktoren, wie die Anwesenheit von Familienangehörigen in anderen Schengen-Staaten, bereits zu Beginn geklärt werden müssen. Auch dies macht eine rechtliche Unterstützung ab dem ersten Kontakt unabdingbar.

Darüber hinaus ist die fiktive «Nicht-Einreise« im Rahmen der Überprüfungsverordnung rechtlich problematisch, da die betroffene Person de facto bereits auf dem Hoheitsgebiet des Staates ist und somit das Schweizer Recht Anwendung findet. In diesem Zustand ist die fehlende Rechtsvertretung besonders risikobehaftet, da die Schutzsuchenden das Rechtssystem nicht kennen und ohne Rechtsvertretung besonders verletzlich sind.

AsyLex fordert ausserdem, dass die «Schutzbedürftigkeitsprüfung» in Art. 26 Abs. 1-1, 1 quater c) durch den Begriff «Vulnerabilitätsprüfung» ersetzt und präzise definiert wird sowie dargelegt wird wie sich dieses ausgestaltet. Zudem sollte Art. 102h Abs. 1 wie folgt angepasst werden: «Jeder Person wird für die Überprüfung nach der Verordnung (EU) 2024/135628 unverzüglich eine Rechtsvertretung zugeteilt, sofern sie nicht ausdrücklich darauf verzichtet.«

Schliesslich kritisiert AsyLex, dass eine automatische Inhaftierung im Rahmen des Screenings unzulässig ist. Eine vorübergehende Festhaltung darf nur in Ausnahmefällen erfolgen, etwa bei Verletzung von Mitwirkungspflichten, Fluchtgefahr oder Gefährdung der öffentlichen Sicherheit (Art. 73 Abs. 1 Bst. d und Abs. 2bis VE-AIG), muss zudem immer Verhältnismässig sein und darf auch dann lediglich für höchstens drei Tage angeordnet werden. Die Höchstfrist von sieben Tagen für die Prüfung steht in keinem Verhältnis dazu,

insbesondere da es dabei um die Einschränkung eines Grundrechtes geht. Weiter sollten diesbezüglich Rechtsmittel offen stehen. Asylsuchende Personen werden dadurch eine automatische Inhaftierung erneut pauschal unter Verdacht gestellt, was besonders problematisch ist, da es sich überwiegend um Personen handelt, die Schutz suchen und eine Inhaftierung schwerwiegende Folgen für die Gesundheit der Personen haben kann (z.B. Traumatisierte Persone, Personen Opfer von Folter etc.). AsyLex fordert, zudem dass vorgängig festgelegt wird, wo sich die geflüchteten Personen während der Überprüfungsphase aufhalten sollen. Dabei sollte eine Inhaftierung nur als *ultima ratio* in Betracht gezogen werden, während im übrigen die Freiheit der Personen gewährleistet ist.

‘Handlungsbedarf beim Rechtsschutz’

Translation Olivia Moor, 03.01.2025

Detention for Deportation
For foreigners, administrative detention of up to 18 months is possible. Affected individuals often do not know the Swiss legal system. However, legal representation is not required. Now, experts are calling for better legal protection.

Last year, 2,305 people were held in administrative detention under foreigner laws in Switzerland. Formally, this detention is not considered a punishment but rather an administrative measure under foreigner laws. Its purpose is to ensure the individual's departure from Switzerland. Detention can last up to 18 months according to the Foreign Nationals and Integration Act (AIG).

Given the severity of this deprivation of liberty, questions arise about the legal protection available to detainees.

In principle, detention review procedures are mandated by federal law. However, the specific implementation is left to the responsible administrative authorities. This includes the issue of representation for the affected individuals and, consequently, the right to free legal counsel. The AIG itself contains no explicit regulation on this matter.

According to the Federal Supreme Court, during the first judicial review of detention, legal representation must be provided upon request only if the case involves particular substantive or legal complexities. After three months, legal counsel may generally not be denied to those in need, upon request, in judicial detention review proceedings (Federal Supreme Court Decisions 122 I 49 and 139 I 206).

The State Has an Obligation
This practice has faced criticism. “Legal representation must be provided much earlier,” demands Tamara De Caro, a lawyer from Baden. “From the moment the state deprives a person of their freedom, legal representation is indispensable. The state must ensure that the affected individual receives legal support.”

De Caro, who worked for the Aargau Migration Office until 2020, speaks from experience: “The majority of detainees are extremely frightened, some are traumatized, and many are overwhelmed by what is happening.” Additionally, many do not understand the official languages at all or only insufficiently.

Peter Uebersax, an honorary professor at the University of Basel, agrees. Deprivation of liberty leads to confusion among many affected individuals. “They mistakenly believe they are in criminal proceedings.”

"Many affected individuals are confused and believe they are in criminal proceedings." Peter Uebersax.

In the asylum sector, “official legal representation is institutionalized,” and it has been recognized that affected individuals need legal counsel from the beginning. According to Uebersax, this step should also be implemented in the area of administrative detention.

In his view, it is insufficient for a migration office to merely inform detainees that they can hire a lawyer at their own expense. “This hardly helps at all. Most affected individuals lack the financial means to pay for legal representation themselves.”

The First Judicial Detention Review is Crucial
Thomas Hugi Yar also calls for an improvement in legal protection. The long-time Federal Court clerk and former scientific advisor at the Federal Court has an overview of the practice of administrative detention across various cantons. He acknowledges that the Federal Supreme Court jurisprudence considers that foreigners subjected to freedom-restricting coercive measures, as mandated by federal law, are typically unfamiliar with local conditions and languages and should therefore be regarded as "vulnerable."

However, he criticizes: “The severity of the infringement on the legal positions of those affected by deprivation of liberty is insufficiently weighted.” The jurisprudence focuses on the complexity of the legal questions raised while largely ignoring the impact of the detention. “The longer the detention lasts, the more it infringes on the rights of the affected person.”

Hugi Yar agrees with Uebersax that legal counsel is particularly important during the first judicial detention review. Subsequent decisions largely rely on this initial ruling. Therefore, it is crucial to set the right course during this phase. At this moment, the need for legal advice is greatest.

The expert on foreigner law points out that the various types of judicial detention review procedures, as practiced, are highly challenging even for lawyers outside the field of migration law. Additionally, the number of people in administrative detention varies greatly between cantons.

Cantons Reject Applications Due to Lack of Prospect for Success
In the past two years, the cantons of Bern, Geneva, Lucerne, St. Gallen, and Zurich recorded the highest numbers of administrative detainees. Conversely, there were no administrative detentions in Appenzell Innerrhoden and Obwalden (see table). Hugi Yar calls for "harmonization aimed at constitutional and convention-compliant legal protection."

The justification for the differing detention review procedures needs to be reconsidered, and the issue of legal representation should then be aligned with the needs of the unified judicial procedure chosen.

According to the expert, a notable trend in some cantons is to assume "a lack of prospects for success in applications" as a reason to deny free legal representation. This is corroborated by migration law practitioners in the cantons of Basel-Stadt, Bern, Lucerne, Thurgau, and Zug.

A judge from Zug sees no value in providing legal counsel in administrative procedures. She stated: “A lawyer has no place in these proceedings. It is not sensible to appoint legal representation here, as the court conducts the procedure ex officio and independently examines the questions. It is not really possible for a lawyer to provide meaningful input here; they are more of a disruption.”

Currently, practitioners see models for better legal protection at the cantonal level only in Aargau and Fribourg. Both cantons have established legal provisions requiring that individuals in administrative detention must automatically receive legal representation if their detention is planned to exceed one month or is extended by such a duration.

Aargau: Legal Representation After 30 Days of Detention
In Aargau, official legal representation was established by Marc Busslinger, who has served as a detention judge since 1996. Based on his experience, detainees generally have limited knowledge of the local legal system and national languages. “Legal counsel is indispensable for this reason alone, as well as considering the severe infringement on the right to liberty of the affected individuals,” he asserts.

Busslinger maintains a court list of lawyers who are well-versed in foreigner law and willing to take on administrative detention cases. “Detainees are assigned official legal representation when the migration office orders detention of 30 days or more,” Busslinger explains. The selection of lawyers is based on availability and a random process.

If Busslinger finds that a lawyer is not adequately representing their client’s rights or is unprepared, he issues a verbal warning. “I am not interested in compliant legal representatives; I aim for legally sound judgments,” he emphasizes.

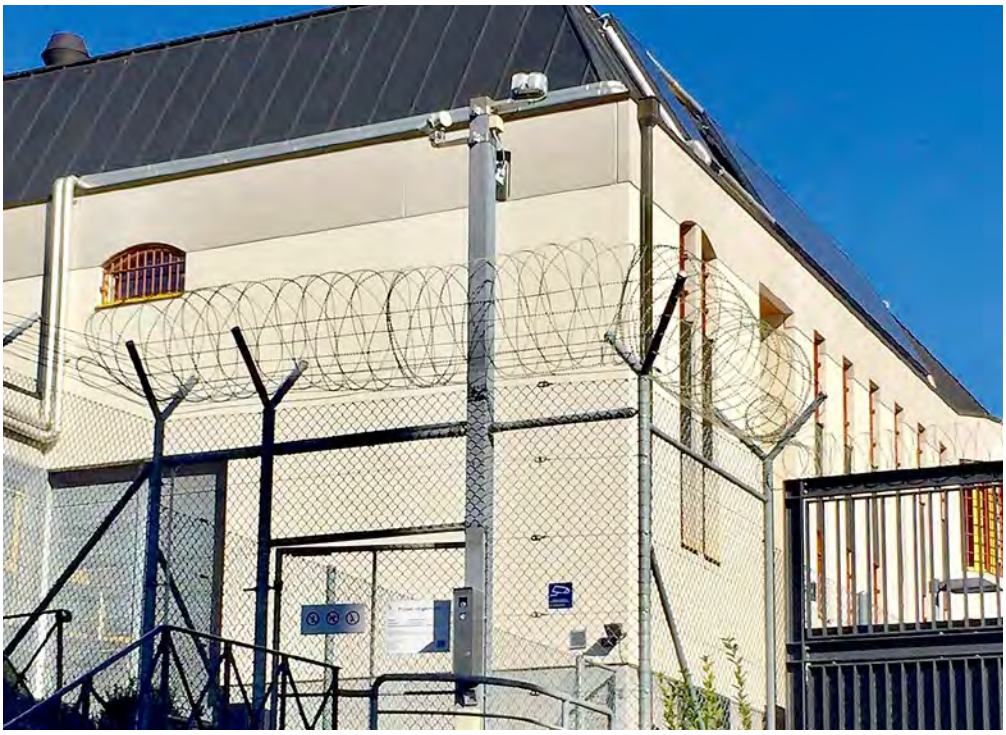
In Zurich, legal protection has improved thanks to efforts from the Democratic Lawyers of Zurich. In 2021, they were involved in founding the **Pikettsystem Administrativhaft**, a roster system for administrative detention. According to co-president Antigone Schobinger, many cases have a claim to free legal representation. Piket lawyers take on representation before the Coercive Measures Court regardless of payment guarantees.

In Bern, the **Church Contact Point for Coercive Measures in Canton Bern (KAZ)** has been advocating for improved legal protection for 25 years. The initiative was developed in consultation with the cantonal government and is supported by the regional churches and the Jewish community. Detainees can contact KAZ’s director and legal advisor, Thomas Wenger, to have their detention files reviewed. “I examine whether any potential legal steps can be initiated,” Wenger explains. All detainees are given an information sheet in their language immediately after detention, which also directs them to KAZ.

Expanding the Dublin Detention Regulation
Thomas Hugi Yar advocates for extending the Dublin detention regulation to all cases of administrative detention: “In cases of need, legal representation should be granted during the first judicial detention review—either automatically or upon request—without requiring a special legal or factual complexity or an assessment of the prospects of success.” For detention extensions or release applications, representation could be granted upon request, provided the general conditions, such as financial need, lack of hopelessness, and the *necessity of legal counsel, are met.*

"In cases of need, legal representation should already be granted during the first judicial detention review—without any additional requirements."
—Thomas Hugi Yar, Migration Law Expert

By Gjon David



Ausschaffungsgefängnis, Moutier BE: Rechtsbeistand laut Bundesgericht erst nach drei Monaten zwingend

Handlungsbedarf beim Rechtsschutz

Ausschaffungshaft · Bei Ausländern sind bis zu 18 Monate Administrativhaft möglich. Betroffene kennen das Schweizer Rechtssystem oft nicht. Eine Rechtsvertretung ist dennoch nicht vorgeschrieben. Nun fordern Experten einen besseren Rechtsschutz.

Vergangenes Jahr befanden sich in der Schweiz 2305 Personen in ausländerrechtlicher Administrativhaft. Formal ist sie keine Strafe, sondern eine Verwaltungsmassnahme im Rahmen des Ausländerrechts. Sie zielt darauf ab, die Ausreise aus der Schweiz sicherzustellen. Der Freiheitsentzug kann gemäss Ausländer- und Integrationsgesetz (AIG) bis zu 18 Monate dauern. Angesichts dieses schwerwiegenden Eingriffs stellt sich die Frage nach dem Rechtsschutz für die Inhaftierten.

Im Grundsatz sind Haftprüfungsverfahren durch Bundesrecht vorgegeben. Die konkrete Ausgestaltung obliegt den zuständigen Administrativbehörden. Dazu gehört auch die Frage der Vertretung der Betroffenen und damit des Rechts auf einen unentgeltlichen Rechtsbeistand. Das AIG selbst enthält keine Regelung. Laut Bundesgericht muss bei der ersten richterlichen Haftprüfung auf Antrag hin eine Rechtsvertretung nur gewährt werden, wenn der Fall besondere sachliche oder rechtliche Komplexitäten aufweist. Nach Ablauf von drei Monaten darf der Rechtsbeistand bei Bedürftigkeit dann auf Gesuch hin im richterlichen Haftprüfungsverfahren grundsätzlich nicht mehr verweigert werden (BGE 122 I 49 und 139 I 206).

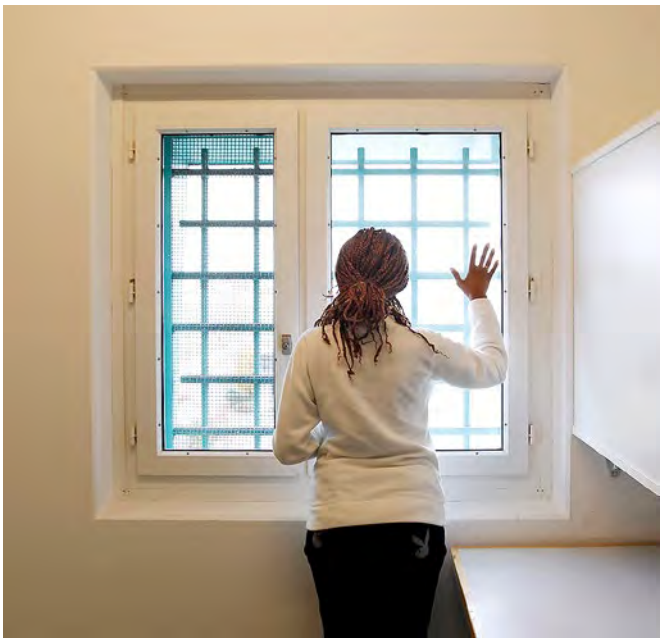
Der Staat steht in der Pflicht

Diese Praxis stösst auf Kritik. «Eine Rechtsvertretung muss viel früher erfolgen», fordert beispielsweise die Badener Rechtsanwältin Tamara De Caro. «Ab dem Moment, in dem der Staat einer Person die Freiheit entzieht, ist eine

rechtliche Vertretung unerlässlich. Der Staat muss sicherstellen, dass die betroffene Person rechtliche Unterstützung erhält.» De Caro arbeitete bis 2020 für das Aargauer Migrationsamt. Sie sagt aus Erfahrung: «Die Mehrheit der Inhaftierten ist enorm verängstigt, zum Teil traumatisiert und mit dem, was geschieht, überfordert.» Ausserdem verstünden viele die Amtssprachen entweder gar nicht oder nur ungenügend.

Der Basler Titularprofessor Peter Uebersax pflichtet ihr bei. Der Freiheitsentzug führe bei vielen Betroffenen zu Verwirrung. «Sie nehmen fälschlicherweise an, dass sie sich in einem Strafverfahren befinden.» Im Asylbereich sei «die amtliche Rechtsvertretung institutionalisiert», und es wurde erkannt, dass die Betroffenen von Anfang an einen Rechtsbeistand benötigen. Dieser Schritt sollte gemäss Uebersax auch im Bereich der Administrativhaft umgesetzt werden. Nach seiner Einschätzung genügt es nicht, wenn ein Migrationsamt die Betroffenen lediglich darauf hinweise, dass sie einen Anwalt hinzuziehen können, dafür aber selbst aufkommen müssten. «Dies hilft kaum je weiter. Denn die meisten Betroffenen verfügen nicht über ausreichende Mittel, um eine Rechtsvertretung selbst zu bezahlen.»

> «Viele Betroffene sind verwirrt und nehmen an, dass sie sich in einem Strafverfahren befinden»
>
> **Peter Uebersax, Titularprofessor Uni Basel**



KEYSTONE

Flughafengefängnis Zürich: Pikett Administrativhaft vermittelt Anwälte

Entscheidend ist die erste richterliche Haftprüfung

Auch Thomas Hugi Yar fordert eine Verbesserung des Rechtsschutzes. Der langjährige Bundesgerichtsschreiber und ehemalige wissenschaftliche Berater am Bundesgericht hat einen Überblick über die Praxis rund um die Administrativhaft der verschiedenen Kantone. Er hält der bundesgerichtlichen Rechtsprechung zugute, dass sie berücksichtigt, dass Ausländer, denen eine freiheitsentziehende Zwangsmassnahme droht, in der Regel nicht mit den hiesigen Verhältnissen und Sprachen vertraut sind und daher als «vulnerabel» zu gelten hätten. Doch kritisiert er: «Die Schwere des Eingriffs eines Freiheitsentzugs in die Rechtspositionen der Betroffenen wird zu wenig gewichtet.» Die Rechtsprechung knüpfe an die Komplexität der aufgeworfenen Fragen an und blende die Auswirkungen der Haft zu sehr aus. «Je länger die Haft dauert, umso schwerer greift sie in die Rechtsposition der betroffenen Person ein.»

Hugi Yar stimmt Uebersax darin zu, dass die Rechtsberatung bei der ersten richterlichen Haftprüfung von besonderer Bedeutung ist. In der Folge werde weitgehend auf diesen Entscheid abgestellt. Deshalb sei wichtig, dass die Weichen richtig gestellt würden. In diesem Moment sei das Bedürfnis nach Rechtsberatung am grössten.

Der Ausländerrechtsexperte verweist darauf, dass die verschiedenen Arten von richterlichen Haftprüfungsverfahren, wie sie vom Bundesrecht vorgegeben sind, selbst für Anwälte ausserhalb des Migrationsrechts sehr herausfordernd sind. Die Zahl der administrativ Inhaftierten ist in den Kantonen höchst unterschiedlich.

Kantone lehnen Anträge wegen Aussichtslosigkeit ab

Am meisten Administrativhäftlinge verzeichneten in den vergangenen zwei Jahren die Kantone Bern, Genf, Luzern, St. Gallen und Zürich. Keine administrativen Einweisungen gab es in Appenzell Innerrhoden und Obwalden (siehe Tabelle). Hugi Yar fordert «eine Vereinheitlichung im Hinblick auf einen verfassungs- und konventionskonformen Rechtsschutz». Die Rechtfertigung der unterschiedlichen Haftprüfungsverfahren sei zu überdenken und die Verbeiständungsfrage danach gemäss den Bedürfnissen des gewählten vereinheitlichten richterlichen Verfahrens festzulegen.

Laut dem Experten fällt auf, dass in manchen Kantonen eine Tendenz dazu bestehe, «von einer

Aussichtslosigkeit der Begehren auszugehen», um eine unentgeltliche Rechtsvertretung ablehnen zu können. Das bestätigen Migrationsrechtspraktiker in den Kantonen Basel-Stadt, Bern, Luzern, Thurgau und Zug. Eine Zuger Richterin sieht überhaupt keinen Sinn in einer rechtlichen Verbeiständung in Administrativverfahren. Sie sagt: «Eigentlich hat ein Anwalt in diesem Verfahren nichts zu suchen. Es ist nicht sinnvoll, hier eine Rechtsvertretung zu bestellen, da das Gericht das Verfahren von Amtes wegen führt und unabhängig den Fragen nachgeht. Es ist auch nicht wirklich möglich, dass ein Anwalt hier sinnvolle Arbeit leistet. Er stört vielmehr.»

Vorbilder für einen besseren Rechtsschutz auf Kantonsebene orten Praktiker aktuell einzig in den Kantonen Aargau und Freiburg. Beide halten gesetzlich fest, dass Personen in Administrativhaft bei einer vorgesehenen Inhaftierung von über einem Monat oder einer Verlängerung um eine solche Dauer automatisch eine Rechtsvertretung erhalten müssen.

Ausländerrechtliche Administrativhaft

	2022	2023
AG	58	69
AI	0	0
AR	2	9
BE	378	443
BL	50	41
BS	87	96
FR	117	120
GE	233	178
GL	8	17
GR	21	33
JU	13	21
LU	246	244
NE	8	9
NW	2	0
OW	0	0
SG	280	191
SH	0	6
SO	129	149
SZ	10	29
TG	101	99
TI	44	49
UR	14	10
VD	135	193
VS	86	50
ZG	85	69
ZH	247	180
Total	2354	2305

Aargau: Ab 30 Hafttagen eine Rechtsvertretung

Im Aargau wurde die amtliche Rechtsvertretung durch Marc Busslinger aufgebaut, der seit 1996 als Haftrichter amtet. Seiner Erfahrung nach haben die Inhaftierten in der Regel nur beschränkte Kenntnisse des hiesigen Rechtssystems und der Landessprachen. «Ein rechtlicher Beistand ist schon aus diesem Grund sowie mit Blick auf den gravierenden Eingriff in das Freiheitsrecht der Betroffenen unumgänglich.» Busslinger führt am Gericht eine Liste mit Anwälten, die sich im Ausländerrecht gut auskennen und sich bereit erklärt haben, Administrativhaftfälle zu übernehmen. «Den Betroffenen wird eine amtliche Rechtsvertretung zugewiesen, wenn das Migrationsamt eine Haft von 30 Tagen oder mehr anordnet», sagt Busslinger. Die Auswahl richte sich nach Verfügbarkeit und Zufallsprinzip.

Stellt Busslinger fest, dass sich ein Anwalt nicht angemessen für die Rechte seines Mandanten einsetzt oder dass er unvorbereitet ist, erhält er eine mündliche Ermahnung. «Ich bin nicht an willfährigen Rechtsvertretern interessiert, ich strebe rechtskonforme Urteile an», bekräftigt er.

Im Kanton Zürich verbesserte sich der Rechtsschutz dank dem Engagement aus Kreisen der Demokratischen Juristinnen und Juristen Zürich. Sie waren 2021 an der Gründung des Piketts Administrativhaft beteiligt. Gemäss der Co-Präsidentin Antigone Schobinger besteht in vielen Fällen ein Anspruch auf unentgeltliche Rechtsvertretung. Die Pikettanwälte würden unabhängig von der Sicherstellung der Bezahlung die Vertretung vor dem Zwangsmassnahmengericht übernehmen.

In Bern setzt sich seit 25 Jahren die Kirchliche Anlaufstelle Zwangsmassnahmen Kanton Bern (KAZ) für einen verbesserten Rechtsschutz ein. Sie entstand in Absprache mit dem Regierungsrat und wird von den Landeskirchen und der Jüdischen Gemeinde getragen. So können Inhaftierte den KAZ-Geschäftsführer und Fürsprecher Thomas Wenger kontaktieren und ihre Haftakten von ihm überprüfen lassen. «Ich schaue dann, ob mögliche rechtliche Schritte einzuleiten sind», sagt Wenger. Alle Inhaftierten würden unmittelbar nach der Festnahme ein Merkblatt in ihrer Sprache erhalten, in dem auch auf die KAZ aufmerksam gemacht wird.

Regelung zur Dublin-Haft ausweiten

Thomas Hugi Yar spricht sich dafür aus, die Regelung zur Dublin-Haft auf alle Fälle von Administrativhaft auszuzweiten: «Bei Bedürftigkeit sollte eine Rechtsvertretung bereits bei der ersten richterlichen Haftprüfung – entweder von Amtes wegen oder auf Antrag – gewährt werden, ohne das Erfordernis einer besonderen rechtlichen oder tatsächlichen Komplexität oder der Prüfung der Erfolgsaussichten.» Bei Haftverlängerungen oder Anträgen auf Entlassung könnte die Rechtsvertretung auf Antrag erfolgen, unter der Bedingung, dass die allgemeinen Voraussetzungen wie Bedürftigkeit, fehlende Aussichtslosigkeit und Notwendigkeit der anwaltlichen Vertretung erfüllt sind.

Gjon David

«Bei Bedürftigkeit sollte eine Rechtsvertretung bereits bei der ersten richterlichen Haftprüfung gewährt werden – ohne weitere Erfordernisse»

Thomas Hugi Yar, Migrationsrechtsexperte

New asylum procedures. Evaluation by asylum region and representation ratio

Period from 01.01.2024
to 30.06.2024

Date 10.07.2024
Time 14:00:00

Unadjusted figures	Asylum region Bern				Asylum region Zurich / Flg ZH				Asylum region Eastern Switzerland				Asylum region Western Switzerland / Flg GE				Asylum region Ticino/Central Switzerland				Asylum region Northwestern Switzerland				Total regions			
	Total	Added V	Gewill.V	withoutV	Total	Added V	Gewill.V	without V	Total	Added V	Gewill.V	without V	Total	Added V	Gewill.V	without V	Total	Added V	Gewill.V	without V	Total	Added V	Gewill.V	without V	Total	Addition V	Gewill.V	withoutV
Pending items at the beginning of the period	49	21	18	10	110	48	34	28	36	23	6	7	202	141	25	36	108	73	15	20	59	43	7	9	564	349	105	110
Inputs	143	17	61	65	330	71	111	148	137	84	26	27	206	61	31	114	187	70	27	90	160	71	26	63	1'163	374	282	507
Accomplishments	146	18	62	66	274	63	70	141	130	74	24	32	257	91	41	125	188	82	25	81	141	64	20	57	1'136	392	242	502
Rejections	*106*	*10*	*52*	*44*	*178*	*45*	*47*	*86*	*92*	*54*	*19*	*19*	*187*	*66*	*31*	*90*	*112*	*56*	*16*	*40*	*94*	*42*	*17*	*35*	*769*	*273*	*182*	*314*
Approvals	*3*	*2*	*0*	*1*	*4*	*2*	*0*	*2*	*0*	*0*	*0*	*0*	*8*	*6*	*0*	*2*	*3*	*3*	*0*	*0*	*0*	*0*	*0*	*0*	*18*	*13*	*0*	*5*
Rejections	*3*	*1*	*2*	*0*	*14*	*5*	*5*	*4*	*4*	*4*	*0*	*0*	*7*	*5*	*2*	*0*	*9*	*8*	*1*	*0*	*9*	*8*	*0*	*1*	*46*	*31*	*10*	*5*
Formal decisions	*34*	*5*	*8*	*21*	*78*	*11*	*18*	*49*	*34*	*16*	*5*	*13*	*55*	*14*	*8*	*33*	*64*	*15*	*8*	*41*	*38*	*14*	*3*	*21*	*303*	*75*	*50*	*178*
Pending items at the end of the period	46	20	17	9	166	56	75	35	43	33	8	2	151	111	15	25	107	61	17	29	78	50	13	15	591	331	145	115

Note: Differences to the figures from previous evaluations are due to changes during the current evaluation period (separation and merger of proceedings, subsequent entries, shifts in subject matter, etc.)

Neue Asylverfahren. Auswertung nach Asylregion und Vertretungsverhältnis

Periode von 01.01.2024
bis 30.06.2024

Datum 10.07.2024
Zeit 14:00:00

Unbereinigte Zahlen	Asylregion Bern				Asylregion Zürich / Flg ZH				Asylregion Ostschweiz				Asylregion Westschweiz / Flg GE				Asylregion Tessin/Zentralschweiz				Asylregion Nordwestschweiz				Total Regionen			
	Total	Zugew.V	Gewill.V	ohneV	Total	Zugew.V	Gewill.V	ohneV	Total	Zugew.V	Gewill.V	ohneV	Total	Zugew.V	Gewill.V	ohneV	Total	Zugew.V	Gewill.V	ohneV	Total	Zugew.V	Gewill.V	ohneV	Total	Zugew.V	Gewill.V	ohneV
Pendenzen zu Beginn Periode	49	21	18	10	110	48	34	28	36	23	6	7	202	141	25	36	108	73	15	20	59	43	7	9	564	349	105	110
Eingänge	143	17	61	65	330	71	111	148	137	84	26	27	206	61	31	114	187	70	27	90	160	71	26	63	1'163	374	282	507
Erledigungen	146	18	62	66	274	63	70	141	130	74	24	32	257	91	41	125	188	82	25	81	141	64	20	57	1'136	392	242	502
Abweisungen	*106*	*10*	*52*	*44*	*178*	*45*	*47*	*86*	*92*	*54*	*19*	*19*	*187*	*66*	*31*	*90*	*112*	*56*	*16*	*40*	*94*	*42*	*17*	*35*	*769*	*273*	*182*	*314*
Gutheissungen	*3*	*2*	*0*	*1*	*4*	*2*	*0*	*2*	*0*	*0*	*0*	*0*	*8*	*6*	*0*	*2*	*3*	*3*	*0*	*0*	*0*	*0*	*0*	*0*	*18*	*13*	*0*	*5*
Rückweisungen	*3*	*1*	*2*	*0*	*14*	*5*	*5*	*4*	*4*	*4*	*0*	*0*	*7*	*5*	*2*	*0*	*9*	*8*	*1*	*0*	*9*	*8*	*0*	*1*	*46*	*31*	*10*	*5*
Formelle Entscheide	*34*	*5*	*8*	*21*	*78*	*11*	*18*	*49*	*34*	*16*	*5*	*13*	*55*	*14*	*8*	*33*	*64*	*15*	*8*	*41*	*38*	*14*	*3*	*21*	*303*	*75*	*50*	*178*
Pendenzen am Ende Periode	46	20	17	9	166	56	75	35	43	33	8	2	151	111	15	25	107	61	17	29	78	50	13	15	591	331	145	115

Anmerkung: Differenzen zu den Zahlen aus früheren Auswertungen sind durch Änderungen während der aktuellen Auswertungsperiode bedingt (Verfahrenstrennungen, -vereinigungen, nachträgliche Eintragungen, Materienverschiebungen usw.)

In the name of the Republic and Canton of Ticino
Administrative Court

Case no. 52.2022.286
Lugano, July 3, 2024

Composition of the court:
Judges: Flavia Verzasconi, President; Matteo Cassina; Fulvio Campello
Clerk: Elisa Bagnaia

Ruling on the appeal dated September 14, 2022, of:
[Name of the appellant]
Represented by: Attorney Lea Hungerbühler, 8002 Zurich

Against

The decision of July 13, 2022 (no. 3551) of the Council of State rejecting the appeal filed by the appellant against the invoice dated May 7, 2020, issued by the Migration Office, charging the amount of CHF 55.- for electronic document transmission and related postage/expenses.

Considering the facts

A. The appellant, a citizen who has now returned to their home country, was subject to an asylum procedure and administrative detention. In the context of these proceedings, the appellant's attorney requested, in a letter dated April 24, 2020, to receive electronically the documents constituting the case file from the Migration Office (UM). By email dated May 7, 2020, the authority sent the necessary hyperlinks, and the documents were downloaded the same day via the internet. By invoice dated May 7, 2020, the same authority charged the appellant CHF 55.-, including CHF 50.- for electronic document transmission and CHF 5.- for postage/expenses.

B. In its judgment of July 13, 2022, the Council of State rejected the appeal filed against the aforementioned invoice. Referring to the applicable legal framework, the cantonal government confirmed the imposed fee, considering it lawful and consistent with relevant constitutional principles.

C. The appellant appealed this decision before the Cantonal Administrative Court, requesting primarily the annulment of the decision and the contested invoice or, alternatively, a reduction of the amount. The appellant alleged, in summary, an excessive exercise of discretion by the respondent authority, a violation of Article 7, paragraph 3 of the Law on the Application of Federal Legislation on Foreign Nationals and their Integration (LALSI; RL 143.100), and of the cost-coverage principle. The appellant claimed that the imposed fee constituted an impermissible obstacle to the defense of their rights and also requested to benefit from legal aid and free legal representation.

D. The Council of State opposed the appeal without submitting specific observations. The UM reached the same conclusion with arguments that will be addressed if necessary.

E. In their reply and rejoinder, the parties reaffirmed their arguments and requests for judgment.

Considering the legal arguments

1. The jurisdiction of the Cantonal Administrative Court is established under Article 84, letter a, of the Law on Administrative Procedure dated September 24, 2013 (LPAmm; RL 165.100). The standing of the appellant, directly affected by the contested decision and a party to the first-instance

proceedings (Article 65, paragraph 1, letters a and b LPAmm), as well as the timeliness of the appeal (Article 68, paragraph 1, and Article 16, paragraph 1 LPAmm), are evident. The appeal is therefore admissible and can be decided on the basis of the case files, without further investigation (Article 25, paragraph 1 LPAmm).

2.

2.1. Pursuant to Article 123 of the Federal Law on Foreign Nationals and their Integration dated December 16, 2005 (LStrI; RS 142.20), fees may be charged for decisions and administrative acts provided under the legislation on foreign nationals. Costs associated with procedures under the LStrI may be billed separately (paragraph 1). The Federal Council has established the amount of federal fees and the maximum amount of cantonal fees (paragraph 2) through the Ordinance on Fees under the Federal Law on Foreign Nationals and their Integration dated October 24, 2007 (OEmol-LStrI; RS 142.209). This ordinance stipulates that fees are payable by those who request a decision or service under Article 1 OEmol-LStrI (Article 3, paragraph 1 OEmol-LStrI); for cantonal fees, the procedure is governed by cantonal law (Article 7 OEmol-LStrI). Article 8 OEmol-LStrI establishes maximum amounts for cantonal fees related to permits, preparation, and issuance of residence permits, as well as the collection and recording of data. The cantons may set their own fees for other decisions or services not covered by Article 8 OEmol-LStrI, as well as for decisions on labor market matters under the Ordinance on Admission, Residence, and Employment dated October 24, 2007 (OASA; RS 142.201).

In the Canton of Ticino, Article 7 LALSI provides that for decisions regarding foreign nationals, a maximum fee of CHF 250.- may be charged (paragraph 1); fees may be reduced or waived for individuals without means or with limited resources, public law entities, applications from associations with cultural or public utility purposes, and in specific cases provided for by federal law (paragraph 3). According to Article 8, paragraph 1 LALSI, the costs for specific expert opinions, translations, information abroad, ordered for justified reasons, as well as other necessary expenses related to the processing of an application, are borne by the foreign national, the employer, or the applicant.

2.2. Causal fees constitute the counterpart of a service or specific benefit provided by the state and are divided into various categories (Federal Tribunal Decision [DTF] 135 I 130, consid. 2). Among these are administrative fees, which represent the remuneration for state activities that lack intrinsic economic value, including office fees. Office fees are characterized by the simplicity of the service provided and the modesty of their amount (DTF 125 I 173, consid. 9b; Adelio Scolari, *Tasse e contributi di miglioria*, Lugano 2005, p. 44). Office fees must comply with the principle of equivalence, which requires that there be a reasonable relationship between the amount of the fee and the economic value of the service provided, as well as with the cost-coverage principle (DTF 135 I 130, consid. 2; Federal Tribunal Decision [STF] 2C_521/2015 dated March 17, 2017, consid. 4.2.2; Adelio Scolari, *op. cit.*, pp. 44 and 51).

3.
3.1. As mentioned in the facts, the appellant claims an improper exercise of discretion by the respondent authority and a violation of Article 7, paragraph 3 LALSI. The appellant argues that, despite having demonstrated a lack of financial means to cover the imposed fee, the authority did not explain why the amount in question could not be waived or at least reduced. The imposed fee would also violate the cost-coverage principle as it does not adequately reflect the labor expenses incurred for creating a digital dossier. Specifically, the appellant points out that private companies charge approximately CHF 0.20 per page for similar tasks and that the CHF 5.- fee for electronic transmission is entirely unjustified. Finally, the appellant contends that the imposed financial burden constitutes an impermissible obstacle to the defense of their rights. Given their financial situation, the appellant also requests the granting of legal aid.

3.2. First, it should be noted that Article 7 LALSI concerns fees for decisions related to foreign nationals; however, in this case, the contribution in question is clearly not a decision fee, which the appellant does not contest. Therefore, paragraph 3 of the aforementioned article, invoked by the appellant, is evidently not directly applicable to this case. The fee in question also does not pertain to the decisions or services specified in Article 8 OEmol-LStrI. Consequently, under Article 9 OEmol-LStrI, federal law does not set any maximum limit; such fees are therefore governed exclusively by cantonal law.

It is undisputed that the fee in question is an administrative fee, specifically an office fee (as it is ultimately modest in amount and linked to secretarial activity; cf. DTF 125 I 173, consid. 9b; Scolari, *op. cit.*, p. 44). For other expenses, Article 8 LALSI and Article 15 of the Regulation on the Application of Federal Legislation on Foreign Nationals and their Integration dated June 23, 2009 (RLALSI; RL 143.110) set a maximum limit of CHF 500.-.

The invoice issued to the appellant concerns costs related to the exercise of the right to examine case files, a situation common to all administrative procedures (not just administrative detention). Given that the appellant no longer contests the existence of a legal basis, which is present in this case (on the principle of legality, cf. *pro multis*, STF 2C_80/2020 dated October 15, 2020, consid. 6.2), it is observed that, irrespective of the specific sector, administrative procedure already provides that, as part of the right to examine case files in proceedings where one is a party (Article 32, paragraph 1 LPAmm), the authority may charge an office fee for providing copies or transmitting documents (Article 32, paragraph 3 LPAmm; cf. Government Message No. 6645 dated May 23, 2012, on the complete revision of the Administrative Procedure Law of April 19, 1966, point 10.2, p. 19).

In this sense, it must be considered that while the right to examine documents is part of the right to be heard because it constitutes the necessary precondition for expressing one's arguments, this prerogative is satisfied when the individual concerned has been able to review the decisive documents underlying the decision by examining them at the authority's office and taking notes if necessary (DTF 132 II 485, consid. 3.2; Alfred Kölz/Isabelle Häner, *Verwaltungsverfahren und Verwaltungsrechtspflege des Bundes*, 3rd ed., Zurich 2013, N. 296 ff.; STA 52.2010.265 dated September 24, 2010, consid. 2.2; Borghi/Corti, *op. cit.*, n. 2a and 3 on Article 20 and references). It is possible to request copies, or in certain cases, for the documents to be sent to the legal representative. These activities, however, particularly when carried out by public staff using public resources, are subject to office fees, provided they respect the principles of equivalence and cost coverage (Adrien Ramelet, *Le droit de consulter le dossier en procédure administrative, pénale et civile*, Bern 2021, n. 49, p. 25; François Bellanger/Milena Pirek, *Les procédures en droit fiscal*, Bern 2021, p. 49), without infringing on the procedural rights of the parties.

3.3. Regardless of the maximum limits set by cantonal legislation, the legitimacy of the fee in question must still be assessed in relation to the fundamental principles governing causal fees. Specifically, office fees must comply, as the appellant argues, with the cost-coverage principle, which requires a reasonable correlation between the total revenue from fees and the overall costs incurred by the public authority, including general expenses (STF 2C_80/2020 dated October 15, 2020, consid. 6.3 and references; 2C_226/2015 dated December 13, 2015, consid. 5.3; 2C_768/2007 dated July 29, 2008, consid. 6.3). Verifying compliance with this principle would, however, require a detailed review of the accounts of the authority concerned (STF 2C_80/2020 dated October 15, 2020, consid. 6.4; Pierre Moor/François Bellanger/Thierry Tanquerel, *Droit administratif*, vol. III, 2nd ed., Bern 2018, p. 534), something that is not deemed necessary in this case for the reasons outlined below.

Causal fees must also respect the principle of equivalence. According to this principle, the amount of an individual fee must be reasonably proportionate to the service provided by the public authority: the fee must not be grossly disproportionate to the objective value of the service and must remain within reasonable limits. The value of the service is determined based on its utility for the fee payer or its cost relative to the total expenses incurred for the administrative activity in question. This does

not exclude a certain degree of standardization or the use of averages based on experience. However, fees must be established according to objectively justifiable criteria and must not create distinctions without reasonable grounds (RtiD 1-2005 no. 32; DTF 143 I 220, consid. 5.2.2; 143 I 227, consid. 4.2.2; 126 I 180, consid. 3a/bb; 122 I 279, consid. 6e and references).

For the principle of equivalence to be considered respected, it is sufficient that the fee, calculated according to schematic criteria, appears reasonably proportional to the service provided: the principle of equivalence is violated only in cases of manifest disproportionality (RDAT 1-1995 no. 18 and references therein; STA 52.2016.200 dated July 9, 2018, consid. 5.1; 52.2014.251 dated October 14, 2014, consid. 2.3).

Now, in the case at hand, it should first be noted that the authority also charged the amount of CHF 5.- as postage/expenses, which clearly relates to the transmission of the documents. However, in this case, the dossier was not sent by post; no postage or use of physical materials such as envelopes was involved, as the transmission occurred via the internet. While it is true that the public entity inevitably incurs costs to ensure that various administrative offices have the necessary connections to perform their numerous tasks, the amount charged for a single transmission appears excessive compared to the actual cost borne by the public entity to ensure the necessary internet connection, which, in any case, is not used solely for transmitting case files electronically.

Regarding the other cost item, it is known to this court that, given the frequent need to also transmit information about foreign nationals present in Swiss territory to other authorities, the Migration Office (UM) systematically scans case files, and this has been the case even prior to the recent pandemic. This is, moreover, a straightforward operation in which the entire file is placed in a photocopier that (automatically) creates a single file (usually in PDF format). Therefore, it should be considered that, even if this operation had not already occurred, the UM would still have digitized the documents, an activity that, therefore, was not exclusively intended to fulfill the appellant's request.

The file, as the appellant points out, consists of numerous repeated documents and sheets that are entirely digitized for practical reasons but evidently do not contain useful information (for example, those containing only headings) and which, therefore, the legal representative would not have requested. Taking into account the volume of the file (cf. in this regard DTF 118 Ib 349), the fee applied by the UM amounts to approximately CHF 0.70 per page, a rate that again appears inappropriate.

As a comparison, Article 1, paragraph 1, no. 7 of the Regulation concerning office fees for judicial authorities dated December 18, 2012 (RL 178.210) provides for a fee of CHF 1.- per photocopy (on paper) if performed by public office staff, and CHF 0.50 if the copies are made by third parties at the authority's office. However, in these cases, the file is physically reproduced, and the cost includes the use of office machinery (notably photocopiers) and, above all, the use of material supplies, i.e., paper and printer ink.

In this sense, the per-page rate applied by the UM for transmitting a file solely in electronic format does not appear proportionate to the actual cost that such an activity generates for the authority. In this case, the activity is essentially limited to the time required by the office staff to prepare the photocopier and send the file to the legal representative's email address. The fact that foreign nationals' authorities in other cantons do not charge any fee for this type of transmission, something that also occurs with various authorities in Ticino, is not decisive in itself but allows for the conclusion that, in general, this activity does not generate more than minimal costs, which are predominantly linked to the general infrastructure that each administrative unit requires.

It follows, therefore, that in the specific circumstances, the amount of the imposed office fee is manifestly disproportionate to the activity performed by the authority and, consequently, violates the principle of equivalence. Taking into account everything outlined above, particularly the fact that the UM's case files are already regularly scanned and that transmission occurs electronically—thus

without any physical support or specific shipping costs—and given that this is a straightforward operation that does not involve significant time expenditure, it is justified in this case to refrain from charging any fee for the service provided.

The appeal must therefore be upheld, and the contested decision annulled, along with the disputed invoice. Given the outcome, it is unnecessary to address the other grievances raised in the appeal, particularly regarding the possibility of a fee waiver in cases of financial hardship for the appellant.

4.
4.1. In light of the above, the appeal must be upheld, and the contested governmental decision and the invoice issued by the Migration Office must be annulled.

4.2. Given the outcome, no judicial fees will be charged (Article 47, paragraph 6 LPAmm). The State of Ticino shall reimburse the appellant, represented by a lawyer, with an appropriate compensation of CHF 1,600.- for both instances (Article 49, paragraph 1 LPAmm), rendering the request for legal aid and free legal representation submitted before the Council of State and the Court moot.

For these reasons, the Court decides:

1. The appeal is upheld. Consequently, the resolution of July 13, 2022 (no. 3551) of the Council of State and the invoice dated May 7, 2020, issued by the Migration Office, are annulled.
2. No fees or judicial costs will be charged.
3. The State of Ticino shall reimburse the appellant a total of CHF 1,600.- as compensation for both instances.
4. The request for legal aid and free legal representation is moot.
5. An appeal in public law matters against this decision may be filed with the Federal Court in Lausanne within 30 days from notification (Articles 82 ff. of the Federal Court Act of June 17, 2005; LTF; RS 173.110).
6. Notification to:
    - Attorney Lea Hungerbühler, 8002 Zurich, on behalf of the appellant;
    - Department of Institutions, Population Section, 6501 Bellinzona;
    - Council of State, 6501 Bellinzona.

Incarto n.
52.2022.286

Lugano
3 luglio 2024

[redacted]

05 JUL 2024

In nome
della Repubblica e Cantone
Ticino

Il Tribunale cantonale amministrativo

04 LUG. 2024
INTIMAZIONE ALLE PARTI
A MEZZO RACCOMANDATA

composto dei giudici: Flavia Verzasconi, presidente,
Matteo Cassina, Fulvio Campello

cancelliera: Elisa Bagnaia

statuendo sul ricorso del 14 settembre 2022 di

[redacted],
patrocinato da: avv. Lea Hungerbühler, 8002 Zurigo,

contro

la decisione del 13 luglio 2022 (n. 3551) del Consiglio di Stato che ha respinto il ricorso inoltrato dall'insorgente avverso la fattura del 7 maggio 2020 con cui l'Ufficio della migrazione ha posto a suo carico l'importo di fr. 55.- per trasmissione di atti elettronici e spese/porto;

ritenuto, **in fatto**

A. [redacted], cittadino [redacted] ormai rientrato in patria, è stato oggetto di una procedura d'asilo e di una detenzione amministrativa. Nell'ambito di tali procedimenti, con scritto del 24 aprile 2020 la sua patrocinatrice ha chiesto all'Ufficio della migrazione (UM) di ricevere per via elettronica gli atti formanti l'incarto. Con e-mail del 7 maggio 2020 l'Autorità ha pertanto trasmesso

all'avvocato i collegamenti ipertestuali necessari e gli atti sono stati scaricati il giorno stesso tramite internet.
Con fattura del 7 maggio 2020 la medesima Autorità ha posto a carico del richiedente l'importo di fr. 55.-, di cui fr. 50.- a titolo di trasmissione atti elettronici e fr. 5.- per spese/porto.

B. Con giudizio del 13 luglio 2022 il Consiglio di Stato ha respinto il ricorso inoltrato da [redacted] avverso la suddetta fatturazione. Richiamato il quadro giuridico applicabile in specie, il Governo cantonale ha confermato il tributo imposto ritenendo, in sostanza, che lo stesso fosse conforme alla legge e ai pertinenti principi costituzionali.

C. Avverso quest'ultima pronuncia, [redacted] si aggrava dinanzi al Tribunale cantonale amministrativo chiedendone, in via principale, l'annullamento, unitamente a quello della contestata fattura, e in subordine la riduzione dell'importo. Eccepisce, in sintesi, un eccesso di potere di apprezzamento da parte dell'Autorità resistente, una violazione dell'art. 7 cpv. 3 della legge di applicazione alla legislazione federale sugli stranieri e la loro integrazione dell'8 giugno 1998 (LALSI; RL 143.100) e del principio della copertura dei costi e sostiene che il tributo impostogli costituisce un inammissibile ostacolo alla difesa dei suoi diritti.
Chiede inoltre di essere posto al beneficio dell'assistenza giudiziaria e del gratuito patrocinio.

D. All'accoglimento dell'impugnativa si oppone il Consiglio di Stato senza formulare osservazioni. A identica conclusione perviene l'UM con argomenti di cui si dirà, ove necessario, in seguito.

E. In sede di replica e di duplica le parti si sono riconfermate nei propri argomenti e domande di giudizio.

Considerato, **in diritto**

1. La competenza del Tribunale cantonale amministrativo è data dall'art. 84 lett. a della legge sulla procedura amministrativa del 24 settembre 2013 (LPAmm; RL 165.100). La legittimazione attiva dell'insorgente, direttamente toccato dalla decisione impugnata e parte del procedimento di prima istanza (art. 65 cpv. 1 lett. a e b LPAmm), e la tempestività del gravame (art. 68 cpv. 1 e art. 16 cpv. 1 LPAmm), sono certe. Il ricorso è dunque ricevibile in ordine e può essere evaso in base agli atti, senza istruttoria (art. 25 cpv. 1 LPAmm).

2. 2.1. Giusta l'art. 123 della legge federale sugli stranieri e la loro integrazione del 16 dicembre 2005 (LStrI; RS 142.20) per le decisioni e gli atti amministrativi previsti dalla legislazione sugli stranieri possono essere riscossi emolumenti. Esborsi connessi a procedure secondo la LStrI possono essere computati a parte (cpv. 1). Il Consiglio federale ha stabilito l'ammontare degli emolumenti federali e l'ammontare massimo degli emolumenti cantonali (cpv. 2) mediante l'ordinanza sugli emolumenti della legge federale sugli stranieri e la loro integrazione del 24 ottobre 2007 (OEmol-LStrI; RS 142.209). Quest'ultima stabilisce il principio per cui è tenuto a pagare un emolumento chi sollecita una decisione o una prestazione ai sensi dell'art. 1 OEmol-LStrI (art. 3 cpv. 1 OEmol-LStrI); per gli emolumenti cantonali, la procedura è retta dal diritto cantonale (art. 7 OEmol-LStrI). L'art. 8 OEmol-LStrI stabilisce poi gli importi massimi per gli emolumenti cantonali relativi a autorizzazioni, all'allestimento e alla produzione di carte di soggiorno e al rilevamento e alla registrazione dei dati. I Cantoni possono fissare loro stessi gli emolumenti per altre decisioni o prestazioni di diritto degli stranieri non previsti dall'art. 8 OEmol-LStrI nonché per le decisioni prese in materia di mercato del lavoro in applicazione dell'ordinanza sull'ammissione, il soggiorno e l'attività lucrativa del 24 ottobre 2007 (OASA; RS 142.201).
Nel Canton Ticino, l'art. 7 LALSI prevede che per le decisioni in materia di persone straniere viene prelevata una tassa massima di fr. 250.- (cpv. 1); le tasse possono essere ridotte o condonate alle persone senza mezzi o di modeste risorse, agli enti di diritto

pubblico, per le domande di associazioni con fini culturali o di pubblica utilità e in casi particolari previsti dal diritto federale (cpv. 3). Giusta l'art. 8 cpv. 1 LALSI le spese per apposite perizie, traduzioni, informazioni all'estero, ordinate per motivi giustificati, nonché altri esborsi necessari, in relazione al trattamento di una domanda, sono a carico della persona straniera, del datore di lavoro o dell'istante.

2.2. Le tasse causali costituiscono la contropartita di una prestazione o un vantaggio particolare accordati dallo Stato e si suddividono in diverse categorie (DTF 135 I 130 consid. 2). Tra queste vi sono le tasse amministrative, che costituiscono la remunerazione di un'attività statale di per sé sprovvista di valore patrimoniale, di cui fanno parte le tasse di cancelleria; quest'ultime si distinguono per la semplicità della prestazione e per la modicità del loro ammontare (DTF 125 I 173 consid. 9b; ADELIO SCOLARI, Tasse e contributi di miglioria, Lugano 2005, pag. 44). Le tasse di cancelleria devono obbedire al principio dell'equivalenza, secondo il quale tra l'ammontare della tassa e il valore economico della prestazione fornita vi deve essere un rapporto perlomeno ragionevole, e al principio della copertura dei costi (DTF 135 I 130 consid. 2; STF 2C_521/2015 del 17 marzo 2017 consid. 4.2.2; ADELIO SCOLARI, op. cit., pag. 44 e 51).

3. 3.1. Come accennato in narrativa, l'insorgente eccepisce un eccesso negativo del potere di apprezzamento da parte dell'Autorità resistente e una violazione dell'art. 7 cpv. 3 LALSI; sostiene che nonostante abbia comprovato di non avere i mezzi finanziari per far fronte al tributo posto a suo carico, l'Autorità non avrebbe spiegato le ragioni per le quali l'importo in parola non potesse essere condonato o quantomeno ridotto. La tassa imposta sarebbe poi lesiva del principio della copertura dei costi poiché non terrebbe debitamente conto del dispendio lavorativo causato dalla creazione di un dossier digitale. Lamenta, segnatamente, che per simili lavori ditte private applicherebbero tariffe di fr. 0.20 a pagina e che l'importo di fr. 5.- per la trasmissione per via elettronica sarebbe del tutto ingiustificato. Sostiene infine che l'onere contributivo impostogli costituirebbe un ostacolo inammissibile

alla difesa dei suoi diritti. Data la sua situazione economica, postula altresì la concessione dell'assistenza giudiziaria.

3.2. Anzitutto va considerato che l'art. 7 LALSI concerne gli emolumenti per decisioni in materia di persone straniere; nel caso concreto tuttavia il contributo in esame, con ogni evidenza, non è una tassa di decisione, ciò che invero nemmeno il ricorrente sostiene, per cui il cpv. 3 del suddetto articolo, invocato dall'insorgente, non è all'evidenza direttamente applicabile in specie. Il tributo in questione non concerne neppure le decisioni e prestazioni di cui all'art. 8 OEmol-LStrI, per cui conformemente all'art. 9 OEmol-LStrI, il diritto federale non pone nessun limite massimo; tali oneri sono dunque fissati unicamente dal diritto cantonale. Incontestato che il tributo in questione è una tassa amministrativa, segnatamente un emolumento di cancelleria (poiché di importo tutto sommato modico e legato ad un'attività di segretariato; cfr. DTF 125 I 173 consid. 9b; SCOLARI, op. cit., pag. 44), per le altre spese l'art. 8 LALSI e l'art. 15 del regolamento della legge di applicazione della legislazione federale sugli stranieri e la loro integrazione del 23 giugno 2009 (RLALSI; RL 143.110) stabiliscono un limite massimo di fr. 500.-.
La fattura emessa a carico dell'insorgente concerne poi costi relativi all'esercizio del diritto di esaminare gli atti, situazione invero comune a tutte le procedure amministrative (e non solo amministrative). Premesso che il ricorrente non contesta (più) l'esistenza di una base legale, ad ogni modo data in specie (sul principio di legalità cfr. *pro multis* STF 2C_80/2020 del 15 ottobre 2020 consid. 6.2), si osserva che indipendentemente dal settore specifico, la procedura amministrativa già prevede che, nell'ambito del diritto di esaminare gli atti di un procedimento di cui si è parte (art. 32 cpv. 1 LPAmm), per il rilascio di copie e la trasmissione degli atti l'Autorità possa prelevare una tassa di cancelleria (art. 32 cpv. 3 LPAmm; cfr. messaggio governativo n. 6645 del 23 maggio 2012 sulla revisione totale della legge di procedura per le cause amministrative del 19 aprile 1966, punto 10.2, pag. 19). In questo senso va considerato che benché il diritto di consultare gli atti rientri nel diritto di essere sentito poiché costituisce la premessa necessaria del diritto di esprimersi e di esporre i propri argomenti, tale prerogativa è soddisfatta quando l'interessato ha potuto prendere conoscenza dei documenti decisivi posti

a fondamento della decisione, esaminandoli presso la sede dell'autorità e prendendo, ove occorra, i necessari appunti (DTF 132 II 485 consid. 3.2; ALFRED KOLZ/ISABELLE HÄNER, Verwaltungsverfahren und Verwaltungsrechtspflege des Bundes, 3. ed., Zurigo 2013, N. 296 e segg.; STA 52.2010.265 del 24 settembre 2010 consid. 2.2; Borghi/Corti, op. cit., n. 2a e 3 ad art. 20 e rif.). È possibile chiedere il rilascio di copie, rispettivamente in determinati casi gli atti possono essere trasmessi al patrocinatore; tali attività tuttavia, in particolare se eseguite da personale e con materiale dell'ente pubblico, sono prestazioni soggette alla riscossione di tasse di cancelleria, a condizione che queste siano rispettose dei principi dell'equivalenza e della copertura dei costi (ADRIEN RAMELET, Le droit de consulter le dossier en procédure administrative, pénale et civile, Berna 2021, n. 49, pag. 25; FRANÇOIS BELLANGER/MILENA PIREK, Les procédure en droit fiscal, Berna 2021, pag. 49), senza che ciò leda i diritti procedurali delle parti. In specie, d'altronde, l'avvocato dell'insorgente ha prontamente ricevuto l'incarto completo per cui, di fatto, le procedure principali si sono svolte correttamente e non vi è stata alcuna limitazione dei diritti di difesa dell'insorgente.

3.3. Indipendentemente dai limiti massimi posti dalla legislazione cantonale, la legittimità del tributo in parola va comunque determinata in rapporto ai principi fondamentali in materia di contribuzioni causali. In particolare, le tasse di cancelleria devono obbedire, come sostiene il ricorrente, al principio di copertura dei costi, il quale postula l'esistenza di una ragionevole correlazione fra il gettito globale delle tasse e l'ammontare complessivo dei costi anticipati dall'ente pubblico, incluse le spese generali (STF 2C_80/2020 del 15 ottobre 2020 consid. 6.3 e rinvii, 2C_226/2015 del 13 dicembre 2015 consid. 5.3, 2C_768/2007 del 29 luglio 2008 consid. 6.3). Il controllo del rispetto di tale principio tuttavia implicherebbe una verifica attenta della contabilità dell'autorità interessata (STF 2C_80/2020 del 15 ottobre 2020 consid. 6.4.; PIERRE MOOR/FRANÇOIS BELLANGER/THIERRY TANQUEREL, Droit administratif, vol. III, II ed., Berna 2018, pag. 534), ciò che in specie non si avvera necessario per le ragioni che seguono.
Le tasse causali devono infatti rispettare anche il principio dell'equivalenza. Secondo detto principio, l'ammontare della singola

tassa deve rimanere in un rapporto adeguato con la prestazione dell'ente pubblico: la tassa non deve trovarsi in evidente sproporzione con il valore oggettivo della prestazione e deve contenersi entro limiti ragionevoli. Il valore della prestazione si determina in base alla sua utilità per il contribuente oppure in base al suo costo per rispetto all'insieme delle spese sostenute per l'attività amministrativa in questione, ciò che non esclude un certo schematismo né la facoltà di ricorrere a delle medie fondate sull'esperienza. Le tasse devono tuttavia essere allestite in base a criteri obiettivamente sostenibili e non devono operare distinzioni sfornite di motivi ragionevoli (RtiD I-2005 n. 32; DTF 143 I 220 consid. 5.2.2, 143 I 227 consid. 4.2.2, 126 I 180 consid. 3a/bb, 122 I 279 consid. 6c e riferimenti). Affinché il principio dell'equivalenza possa essere considerato ossequiato basta quindi che la tassa, calcolata secondo criteri schematici, appaia come ragionevolmente proporzionata alla prestazione: il principio dell'equivalenza è violato solo in caso di sproporzione manifesta (RDAT I-1995 n. 18 e riferimenti ivi contenuti; STA 52.2016.200 del 9 luglio 2018 consid. 5.1, 52.2014.251 del 14 ottobre 2014 consid. 2.3).
Ora, nel caso in esame va anzitutto osservato che l'Autorità ha fatturato anche l'importo di fr. 5.- a titolo di spese/porto, posta riferita all'evidenza alla trasmissione dei documenti. In specie tuttavia il dossier non è stato spedito per posta, per cui non vi è stata alcuna affrancature né uso di supporti materiali come buste di spedizione, ma è stato inviato tramite internet; seppur vero che l'ente pubblico affronta chiaramente dei costi per garantire che i vari uffici dell'amministrazione dispongano dei collegamenti necessari all'espletamento dei loro numerosi compiti, l'importo fatturato a tale titolo per un unico invio appare eccessivo rispetto al costo effettivo sopportato dall'ente pubblico per garantire il necessario collegamento internet, che d'altra parte non serve solo per inviare elettronicamente gli incarti. Per quanto attiene invece all'altra posta di spesa, è noto a questa Corte che, data la frequente necessità di trasmettere anche ad altre Autorità le informazioni sulle persone straniere presenti sul territorio svizzero, l'UM scansiona sistematicamente gli incarti, e questo già da prima della recente pandemia. Si tratta d'altronde di un'operazione semplice in cui l'intero fascicolo in blocco viene inserito nella fotocopiatrice che (in modo automatizzato) ne crea un unico file (solitamente in formato pdf). Va pertanto considerato

che, quand'anche ciò non fosse ancora avvenuto, l'UM avrebbe comunque eseguito la digitalizzazione degli atti, attività che pertanto non serviva unicamente ad evadere la richiesta del ricorrente. Il dossier poi, come osserva l'insorgente, è formato invero da numerosi documenti che si ripetono e di fogli che vengono digitalizzati interamente per questioni di praticità ma che all'evidenza non contengono informazioni utili (per esempio quelli contenenti solamente intestazioni) e di cui, pertanto, il patrocinatore non avrebbe chiesto di disporre. Tenendo conto anche del volume dell'incarto (cfr. in proposito DTF 118 Ib 349), la tariffa applicata dall'UM ammonta a circa fr. 0.70 per foglio, importo che di nuovo non risulta adeguato. A titolo di paragone, giusta l'art. 1 cpv. 1 n. 7 del regolamento concernente le tasse di cancelleria delle autorità giudiziarie del 18 dicembre 2012 (RL 178.210) è prevista una tassa di fr. 1.- per fotocopia (cartacea) se eseguita dal personale dell'ente pubblico e di fr. 0.50 se le copie vengono eseguite da terzi presso l'autorità. Va tuttavia considerato che in questi casi l'incarto viene riprodotto fisicamente per cui il costo comprende l'uso dei macchinari da ufficio (segnatamente la fotocopiatrice) e, soprattutto, l'impiego del supporto materiale, ovvero la carta e l'inchiostro di stampa. In questo senso la tariffa per foglio applicata dall'UM per la trasmissione di un incarto unicamente in formato elettronico non risulta proporzionata al costo effettivo che tale attività genera per l'Autorità e che in specie si limita, in sostanza, al tempo necessario al personale di cancelleria per predisporre la fotocopiatrice e inoltrare un file all'indirizzo di posta elettronica del patrocinatore. Il fatto che le Autorità degli stranieri in altri Cantoni non applichino alcuna tassa per questo genere di trasmissione, ciò che invero avviene anche presso svariate Autorità in Ticino, non è di per sé dirimente ma permette di ritenere che in generale tale attività non determina che costi del tutto esigui, legati prevalentemente all'istallazione generale di cui ogni unità amministrativa necessita.
Ne consegue dunque che, nelle evenienze concrete, l'importo della tassa di cancelleria imposta risulta manifestamente sproporzionato rispetto all'attività prestata dall'Autorità e pertanto viola il principio dell'equivalenza. Tenuto conto di tutto quanto precede, segnatamente del fatto che gli incarti dell'UM vengono già regolarmente scansionati e che la trasmissione avviene elettronicamente, pertanto senza alcun tipo di supporto fisico né

specifiche spese di spedizione, che si tratta di un'operazione per nulla complessa e che non implica un dispendio di tempo rilevante, si giustifica in specie di prescindere dalla riscossione di un contributo per la prestazione erogata.
Il ricorso deve dunque essere accolto e la decisione impugnata annullata, unitamente alla contestata fatturazione. Dato l'esito non è necessario chinarsi sulle ulteriori censure sollevate nel gravame, segnatamente sulla possibilità di esonero in caso di situazione economica difficile del richiedente.

4. 4.1 Stante quanto precede, il ricorso deve essere accolto, annullando la decisione governativa impugnata e la fattura emessa dall'UM.

   4.2. Visto l'esito si prescinde dal prelievo della tassa di giustizia (art. 47 cpv. 6 LPAmm). Lo Stato del Cantone Ticino rifonderà a [redacted], assistito da un avvocato, un'adeguata indennità a titolo di ripetibili per entrambe le sedi (art. 49 cpv. 1 LPAmm), di modo che la sua domanda di assistenza giudiziaria e di gratuito patrocinio formulata dinnanzi al Consiglio di Stato e al Tribunale diviene priva di oggetto.

Per questi motivi,

decide:

1. Il ricorso è accolto.
   Di conseguenza la risoluzione del 13 luglio 2022 (n. 3551) del Consiglio di Stato e la fattura del 7 maggio 2020 emessa dall'UM sono annullate.

2. Non si prelevano né tasse né spese di giustizia.

3. Lo Stato del Cantone Ticino rifonderà a [redacted] complessivamente fr. 1'600.- a titolo di ripetibili per entrambe le sedi.

4. La domanda di assistenza giudiziaria e di gratuito patrocinio è priva di oggetto.

5. Contro la presente decisione è dato ricorso in materia di diritto pubblico al Tribunale federale a Losanna entro il termine di 30 giorni dalla sua notificazione (art. 82 segg. della legge sul Tribunale federale del 17 giugno 2005; LTF; RS 173.110).

6. Intimazione a: [redacted]
patr. da: avv. Lea Hungerbühler, 8002 Zurigo;
Dipartimento delle istituzioni, Sezione della popolazione, 6501 Bellinzona;
Consiglio di Stato, 6501 Bellinzona.

Per il Tribunale cantonale amministrativo
La presidente

TRIBUNALE CANTONALE AMMINISTRATIVO - CANTONE TICINO -

La cancelliera

Composition of Judges:
Matteo Cassina (Vice President), Matea Pessina, Fulvio Campello
Clerk: Reto Peterhans

Ruling on the appeal filed on August 15, 2024, Case No. 05 MV.2124

Notice to the Parties

Representation:
Attorney Lea Hungerbühler, 8002 Zurich

Appealing Against:
The decision of July 31, 2024 (No. MC.2024.16) by the Judge of Coercive Measures, which upheld the resolution of July 25, 2024, issued by the Department of Institutions, Section of Population, extending the administrative detention for the purpose of forced deportation.

Facts:

A.
On August 4, 2023, the appellant, a Moroccan citizen, submitted an asylum application in Switzerland. On January 22, 2024, the State Secretariat for Migration (SEM) dismissed the application due to the appellant's disappearance from the Federal Asylum Center where he was residing. The SEM tasked the Canton of Lucerne with regulating his stay and managing his deportation.

B.
The appellant was convicted on November 20, 2023, by the Criminal Court of the Canton of Ticino, and sentenced to 90 days of imprisonment (non-suspended), a fine of CHF 200, and expulsion from Switzerland for five years. This was for offenses committed between August 15 and September 14, 2023, including sexual harassment, repeated theft, minor property damage, and repeated trespassing.

He was later convicted on April 17, 2024, by the Public Prosecutor's Office of Grisons for attempted and completed theft and trespassing, receiving a suspended fine of CHF 2,700 (90 daily rates at CHF 30) and an additional non-suspended fine of CHF 600. On May 3, 2024, the Lucerne Public Prosecutor sentenced him to a non-suspended fine of CHF 500 (50 daily rates at CHF 10 each) for illegal entry and residence in violation of the Foreign Nationals and Integration Act.

C.
On May 6, 2024, following a period of disappearance, the appellant was located in Lucerne and transferred to Ticino. That same day, the Department of Institutions' Section of Population ordered his administrative detention for three months in preparation for forced deportation.

On May 7, 2024, a hearing was held, and on May 8, 2024, the Judge of Coercive Measures confirmed the detention, citing the risk of absconding and the appellant's previous failure to comply with authorities' instructions. The SEM also reinstated the appellant's previously dismissed asylum application on May 8, 2024, under Article 35a of the Asylum Act.

D.
On July 25, 2024, the Zurich Administrative Detention Center (ZAA) informed the Section of Population that the appellant had refused to be transferred to Ticino for a police hearing. The Section of Population extended the detention for an additional three months.

On July 30, 2024, the substitute Judge of Coercive Measures conducted a hearing at the detention center, with an interpreter present. The judge upheld the legality and proportionality of the detention extension, citing the existence of a valid expulsion order for five years, the high risk of absconding, repeated non-cooperation, and the appellant's explicit refusal to return to Morocco. The judge also concluded that less restrictive measures would be entirely ineffective in ensuring deportation.

E.
The appellant has now appealed this decision to the Cantonal Administrative Court, seeking immediate release. He primarily requests that the detention order be declared null, alternatively annulled, or that the case be remanded for a new decision.

The appellant claims a violation of his right to be heard, arguing that despite being represented by legal counsel since May 19, 2024, his lawyer was excluded from subsequent procedural stages, including the detention extension order of July 25, 2024, the July 30, 2024 hearing, and the decision issued the following day.

Additionally, the appellant asserts that access to his case file was only granted on August 8, 2024, following two formal requests. He also alleges a violation of the principle of proportionality, arguing that the detention extension was disproportionate given the ongoing asylum process, which he claims renders deportation unrealistic.

Considerations

The appellant's asylum request is still pending, which he argues renders deportation unfeasible and does not rule out the possibility of being granted refugee status. Should his release or deportation occur during the appeal process, he requests that the detention be declared null and void. He further requests legal aid and free legal representation.

F.
The Department opposes the acceptance of the appeal, presenting arguments that will be detailed if necessary. The substitute Judge of Coercive Measures, for his part, does not make specific observations but merely states that he was unaware the appellant had legal representation.

G.
In their replies, both parties largely reiterate their respective and opposing positions. The Section of Population emphasizes that on September 12, 2024, the SEM rejected the appellant's asylum application, denying him refugee status.

H.
On October 15, 2024, the Department issued another extension of the appellant's detention for an additional three months, deeming the criteria for maintaining the measure still met. This decision was based on his conduct, including a sanction received on October 7, 2024, for assaulting another detainee at the Zurich ZAA detention center and his refusal on October 15, 2024, to be transported to Ticino for a police hearing. This further extension is currently under review by the Judge of Coercive Measures.

Legal Grounds

1. Jurisdiction
The Cantonal Administrative Court's jurisdiction is established under Article 31 of the cantonal law implementing federal provisions concerning coercive measures related to foreign nationals, dated April 17, 1997 (Lamc; RL 143.200).

The appeal is timely (Art. 31 Lamc) and was filed by an individual clearly entitled to appeal (Art. 65 para. 1 of the Administrative Procedure Act of September 24, 2013, LPAmm; RL 165.100). Therefore, it is admissible and can be decided based on the relevant documents, including those from the Judge of Coercive Measures concerning the May 8, 2024 decision (MC.2024.11) and the Section of Population's records (Art. 25 para. 1 LPAmm).

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2. Right to Be Heard

2.1.
The appellant primarily claims a violation of his right to be heard. He states that despite appointing AsyLex as his representative on May 19, 2024, following his initial detention, and this appointment being communicated to the Section of Population during a request for access to records on July 26, 2024, the Department failed to inform his legal representative of the three-month detention extension issued on July 25, 2024. The order was sent only to the Judge of Coercive Measures and the Cantonal Police.

AsyLex was also not informed of the hearing held on July 30, 2024, and access to case records (allegedly incomplete) was granted only on August 8, 2024, after two follow-ups. The appellant argues that this denied him the opportunity to be assisted by his legal counsel, even though the Department was aware he had appointed one.

2.2.
The scope and limits of the right to be heard are primarily defined by cantonal procedural law. However, where this law proves insufficient, the minimum guarantees under Article 29 of the Swiss Federal Constitution (Cost.; RS 101) apply. This provision ensures that individuals have the right to express their views on all essential aspects of a procedure before a decision is made. It also guarantees the right to participate in evidence gathering, know its results, respond to it, and propose additional evidence (Federal Court Rulings DTF 120 II 379, 118 Ia 17).

This fundamental procedural right also includes the right to legal representation or assistance (Marco Borghi/Guido Corti, *Compendio di procedura amministrativa ticinese*, Lugano 1997, ad Art. 19 n. 4, and cited case law).

2.3.
Specifically regarding coercive measures, Article 81 para. 1 of the Foreign Nationals and Integration Act (LStrI) provides that detained foreign nationals have the right to be assisted by a representative of their choice residing in Switzerland. Article 9 Lamc reiterates this principle, allowing foreign nationals to avail themselves of legal assistance at all procedural stages. Representatives must be informed of hearings before the police or Judge of Coercive Measures to attend or advise the detainee. Failing to notify the representative violates the detainee's right to be heard (Federal Court Ruling DTF 139 I 206 consid. 3.1).

2.4.
In this case, the appellant's criticisms are partially valid. While it is true that he granted a power of attorney to AsyLex (specifically to Lea Hungerbühler, Cora Schmid, and Tanja Coskun-Ivanovic) on May 19, 2024, as documented in the power of attorney attached to the appeal (Doc. 2), the Section of Population was informed only after the request for access to records on May 24, 2024. This occurred after the Judge of Coercive Measures confirmed the initial detention on May 8, 2024.

The Department should have contacted the appellant's legal representatives before issuing the detention extension on July 25, 2024. Additionally, before the hearing on July 30, 2024, the Department, upon receiving notice of the hearing on July 26, 2024, should have communicated the existence of the representation mandate to the presiding Judge, who was unaware of it.

2.4. Right to Be Heard

Based on the facts presented, it must be concluded that while there was a violation of the appellant's right to be heard regarding the lack of notification and participation in the proceedings before the substitute Judge of Coercive Measures, as well as the delayed transmission of case records (granted only on August 8, 2024, after two follow-ups following the initial request on July 26), the appellant himself did not take steps to prevent these issues.

Additionally, it should be noted that while this violation is not negligible, it must be deemed remedied in this case. With the transmission of case files on August 8, 2024, the appellant was able to fully understand the rationale behind the decision of July 31, 2024, and adequately challenge it before the Cantonal Administrative Court, which reviews both facts and legal issues independently.

Furthermore, the lack of explicit reference to the applicable legal basis in the contested decision (which, as will be explained later, is Article 76 of the Foreign Nationals and Integration Act, with only a general reference to Articles 75-77 of the same Act) did not prevent the appellant from formulating his arguments or opposing the detention extension order.

2.5. Completeness of Case Records

The same conclusion applies to the appellant's claim that the records transmitted on August 8, 2024, were incomplete due to the absence of the minutes from the July 30, 2024 hearing. First, the missing minutes were not included in the records held by the Section of Population, meaning the Migration Office's granted access was not incomplete, as it transmitted all records in its possession.

Second, even without the hearing minutes, the appellant was able to adequately formulate his objections to the contested decision.

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3. Legal Basis for Administrative Detention

3.1. General Principles

Article 76 of the Foreign Nationals and Integration Act (LStrI) governs the detention of foreign nationals for the purpose of deportation. According to Article 76 para. 1 lit. b, in conjunction with Article 75 para. 1 lit. g LStrI, administrative detention may be imposed on a person who seriously endangers or poses a significant threat to the life or health of others and has been prosecuted or convicted for this reason.

Additionally, under Article 76 para. 1 lit. b LStrI, detention may be imposed if a first-instance removal or expulsion decision has been issued, or an expulsion decision under Article 66a or 66abis of the Swiss Criminal Code (CP) or Articles 49a or 49abis of the Swiss Military Penal Code (CPM). In such cases, detention is warranted to ensure enforcement if there is concrete evidence suggesting that the individual intends to evade deportation—particularly by failing to comply with the obligation to cooperate under Article 90 LStrI or Articles 8 para. 1 lit. a or para. 4 of the Asylum Act (LAsi)—or if their previous behavior indicates non-compliance with authorities' directives (Art. 76 para. 1 lit. b nos. 3 and 4 LStrI).

These provisions apply if the individual's behavior suggests a risk of absconding or disappearing into illegality (referred to as *Untertauchensgefahr*, Federal Court Ruling STF 2C_128/2009, March 30, 2009, consid. 3.1).

The necessary steps for enforcing removal or expulsion under the LStrI, or for carrying out expulsion under Articles 66a or 66abis CP or Articles 49a or 49abis CPM, must be initiated without delay (Art. 76 para. 4 LStrI).

3.2. Maximum Detention Periods

According to Article 79 para. 1 LStrI, preliminary detention, detention for deportation under Articles 75-77 LStrI, and precautionary detention under Article 78 LStrI may not exceed six months in total.

Article 79 para. 2 specifies that, with the consent of the cantonal judicial authority, the maximum detention period may be extended for a specified duration not exceeding 12 months—or, for minors aged 15 to 18, not exceeding six months—if the detainee does not cooperate with the competent authority (lit. a) or if there are delays in obtaining the necessary travel documents due to the actions of another state (lit. b).

When examining a detention order, as well as decisions regarding its extension or revocation, the judicial authority must also consider the detainee's family situation and the conditions of detention (Art. 80 para. 4 LStrI).

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4. Analysis of the Appellant’s Conduct

4.1.
As detailed earlier, on August 4, 2023, the appellant filed an asylum application in Switzerland. On January 22, 2024, the State Secretariat for Migration (SEM) dismissed the application because the appellant had disappeared from the Federal Asylum Center where he was residing.

On November 20, 2023, the Criminal Court found the appellant guilty of sexual harassment, repeated theft, minor property damage, and repeated trespassing. He was sentenced to 90 days of imprisonment, a fine of CHF 200, and expulsion from Switzerland for five years. This conviction, which has become final, was not the only criminal judgment against him.

On April 17, 2024, the Grisons Public Prosecutor sentenced him to a conditional fine of CHF 2,700 (90 daily rates at CHF 30) and an additional fine of CHF 600 for attempted and completed theft and trespassing. On May 3, 2024, the Lucerne Public Prosecutor imposed a fine of CHF 500 (50 daily rates at CHF 10, non-suspended) for illegal entry, preparation of illegal entry, and illegal stay under the Foreign Nationals and Integration Act (LStrI).

On May 6, 2024, after a period of disappearance, the appellant was transferred to Ticino, where the Department ordered administrative detention for three months. On May 8, 2024, the Judge of Coercive Measures confirmed this detention, finding evidence of the appellant’s intention to evade deportation (Art. 76 para. 1 lit. b no. 3 LStrI) and previous non-compliance with authorities’ instructions (Art. 76 para. 1 lit. b no. 4 LStrI).

4.2.
On July 25, 2024, the Zurich Administrative Detention Center (ZAA) informed the Section of Population that the appellant had refused to be transferred to Ticino for a hearing before the Cantonal Police. As a result, the Section of Population extended his administrative detention for an additional three months.

After a hearing on July 30, 2024, the substitute Judge of Coercive Measures confirmed the extension on July 31, 2024, deeming the measure lawful and appropriate. The judge highlighted the existence of a valid five-year expulsion order, a high risk of absconding, repeated non-cooperation, and the appellant's explicit refusal to return to Morocco. The judge further concluded that less restrictive measures would be entirely ineffective in ensuring deportation.

4.3. Justification of Continued Detention
These conclusions are well-founded.

First, as noted, the appellant was subject to a criminal expulsion order under Article 66a of the Swiss Criminal Code, a decision that has become final. Between November 20, 2023, and May 3, 2024, he was convicted on three occasions for various offenses committed between August 15, 2023, and May 2, 2024. Whether the detention can be upheld under Article 75 para. 1 lit. a, b, c, f, g, or h LStrI (Article 76 para. 1 lit. b no. 1 LStrI) can remain undecided, as the conditions under Article 76 para. 1 lit. b nos. 3 and 4 LStrI are met.

The appellant's behavior demonstrates concrete indications that he intends to evade deportation by failing to comply with his duty to cooperate (Art. 76 para. 1 lit. b no. 3 LStrI). His past conduct also indicates a disregard for authorities' instructions (Art. 76 para. 1 lit. b no. 4 LStrI).

As previously stated, on January 22, 2024, the SEM dismissed his asylum application after he absconded from the Federal Asylum Center. During this prolonged period of disappearance, which ended in early May 2024, the appellant committed additional crimes, as outlined in the May 3, 2024 charges. His conduct during this time indicates a significant risk of absconding and disappearing into illegality, particularly given his repeated declarations that he would not return to Morocco unless provided financial incentives.

4.4. Non-Compliance with Authorities
In addition to the risk of evading deportation, the appellant has demonstrated a pattern of non-compliance with authorities.

On May 29, 2024, during his first period of detention at the Zurich ZAA, he received a disciplinary sanction of two days in solitary confinement (suspended for one month). This measure was imposed after he participated in a protest on May 26, 2024, along with 24 other detainees, during which they refused to return to their cells. As a result, two floors of the detention facility were rendered inoperable from 5:00 p.m. to 10:00 p.m. The situation required intervention by a substantial police contingent, including negotiators. The protest was resolved peacefully only after assurances from law enforcement that the participants' demands would be forwarded to the relevant political authorities.

Further evidence of the appellant's non-compliance is his refusal on July 25, 2024, to be transported to Ticino for a police hearing, which prompted the Section of Population to issue the detention extension now under review.

4.4. Proportionality of the Detention Extension

In light of the above considerations, it is evident that the extension of detention complies with the principle of proportionality. It is necessary to achieve its intended purpose, given that in this case, less restrictive measures (e.g., assigning a place of residence) would be inadequate and ineffective due to the appellant's non-cooperative behavior thus far.

The appellant, who is subject to an expulsion order from Swiss territory, would likely attempt to evade deportation or make its execution significantly more difficult by becoming untraceable again.

Furthermore, the measure withstands scrutiny when considering the appellant's family and personal situation under Article 80 para. 4 LStrI. The appellant is single, unemployed, and without personal financial resources.

Finally, the duration of the extended detention respects the time limits set forth in Article 79 LStrI.

4.5. Ongoing Justification for Detention

For the sake of completeness, it must be noted that the reasons for extending detention under Article 76 para. 1 lit. b nos. 3 and 4 LStrI remain valid even in light of the appellant's behavior following the contested decision.

Records indicate that on October 7, 2024, Zurich authorities issued a disciplinary sanction of one day in solitary confinement, which was served on October 3, 2024. This sanction was imposed after the appellant committed acts of violence against another detainee on the same day.

The appellant's non-cooperative behavior also surfaced again on October 15, 2024, when he refused to board the transport arranged to take him to Ticino for a hearing before the Cantonal Police. Following this episode, the Section of Population issued another order extending detention for three months. This additional order is still pending review by the Judge of Coercive Measures.

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5. Feasibility of Deportation

5.1. Legal or Practical Obstacles to Deportation

At this stage, it must be determined whether the appellant's deportation is unfeasible due to legal or practical reasons under Article 80 para. 6 lit. a LStrI, as he claims. If this is the case, the detention would no longer be justified and would violate Article 5 para. 1 lit. f of the European Convention on Human Rights (ECHR).

The Federal Court has consistently ruled that the legal or material reasons referred to in this provision must be significant (*triftige Gründe*). Deportation is considered impossible when return is practically excluded, even if the individual's identity and nationality are known, and travel documents are obtainable (*STF 2C_672/2019*, August 22, 2019, consid. 3.1).

The feasibility of deportation depends on a forecast of whether the removal decision can be executed within a foreseeable and reasonable timeframe (*STF 2C_597/2020*, August 3, 2020, consid. 4.1). Detention becomes unlawful under Article 80 para. 6 lit. a LStrI, as well as the principle of proportionality, if there are compelling reasons to believe that deportation cannot occur. Detention must be revoked only if deportation is entirely unrealistic, highly improbable, or purely theoretical, but not when there is a serious, albeit slim, chance of execution (*DTF 130 II 56*, consid. 4.1.3).

5.2. Claims Regarding Asylum Procedures
In his appeal dated August 15, 2024 (and in his reply dated September 16, 2024), the appellant argued that because he had not yet received a decision on his asylum application, which was reactivated on May 18, 2024, deportation was not feasible, rendering his detention disproportionate.

However, on September 12, 2024 (prior to the submission of his reply), the SEM rejected the appellant's asylum request, denying him refugee status. Since a valid expulsion order is in place, the federal authority did not issue a removal order or address its execution under Article 32 para. 1 lit. d of the Asylum Ordinance 1 (OAsi 1). The SEM further specified that, under Article 89 para. 9 LStrI, no provisional admission would be granted.

The SEM justified its decision by deeming the reasons provided by the appellant for leaving Morocco as inconsistent and implausible. Therefore, no risk of serious harm or persecution was recognized.

5.3. Feasibility of Expulsion
The case records do not clarify whether the SEM's September 12, 2024 decision has become final or has been appealed to the Federal Administrative Court (TAF). Nonetheless, the issuance of this decision eliminates the argument under Article 80 para. 6 lit. a LStrI raised in the appeal.

Moreover, given the appellant's circumstances and behavior (as extensively described earlier), as well as the reasons outlined in the SEM's rejection of his asylum request, the likelihood of the TAF accepting any appeal appears non-existent. There is no indication that a decision on such an appeal would not be rendered promptly.

In this context, the appellant has only referenced the existence of the asylum procedure without providing any substantive argument in support of his application. Therefore, there is no basis for ending the detention, as the reasons for it remain valid, and the execution of expulsion is neither legally nor practically unfeasible under Article 80 para. 6 lit. a LStrI.

Furthermore, there is no evidence to suggest that deportation would violate the guarantees of Article 25 para. 1 of the Federal Constitution or Article 3 of the ECHR. On the contrary, the records show that the SEM has been actively working with the Moroccan representation in Switzerland to arrange the appellant's deportation.

Cantonal Administrative Court of Appeal
Case No. 52.2024.299
Lugano, November 5, 2024

5.3. It should finally be noted that the appellant has not yet been deported, given that, on October 15, 2024, the Section of Population ordered an additional three-month extension of administrative detention in preparation for forced removal. Considering the reasons outlined above, the extension challenged in this decision is justified and lawful. There is no reason to accept the appellant's request to declare the measure illegal.

6.1. Based on the foregoing, it must be concluded that the decision of the Judge for Coercive Measures deserves to be fully upheld, as it does not violate any legal provisions. The appeal is therefore dismissed.

6.2. Considering that the appeal was not devoid of merit (Article 3(3) of the Law on Legal Aid and Public Representation of March 15, 2011 [LAG; RL 178.300]) and that the appellant lacks the financial means to cover the procedural costs and attorney fees (Article 2 LAG), the request for legal aid is granted. Consequently, no court fees or procedural costs will be charged.

Regarding compensation for legal representation, Article 4 LAG states that attorneys operating under legal aid are entitled to fees and expenses for services reasonably necessary for the mandate, as outlined by the tariff set by the State Council. Unnecessary services or those unrelated to the main procedure are excluded. According to Article 4(1) of the Regulation on Legal Aid Tariffs of December 19, 2007 (Regulation; RL 178.310), attorney fees are calculated based on working hours, at CHF 180 per hour for attorneys and CHF 90 per hour for legal trainees. Article 7 of the Regulation allows the competent authority to deviate from these rates in cases where there is a manifest disproportion between the services provided and the fees claimed, the actual expenses incurred, or specific case circumstances.

In this case, the appellant's attorney initially submitted a fee note with the appeal and later filed a supplementary note for CHF 2,110.60. This amount corresponds to 7.5 hours at CHF 180 per hour for the attorney and 8.2 hours at CHF 90 per hour for the trainee, covering work performed after July 26, 2024, including filing the access request to the Population Section, plus CHF 22.60 in expenses.

While the hourly rates are correct under the law, discrepancies were noted in the hours listed for the attorney, which total 8.7 instead of 7.5. Additionally, the time claimed for certain actions, such as follow-up requests to the department, drafting, and reviewing the appeal and reply, appears excessive. For example, the time spent on a follow-up email to request file access on August 6, 2024, should be reduced to 0.2 hours for the trainee who sent the email.

Regarding the drafting and review of the appeal, given the relatively simple legal issue presented by the Judge for Coercive Measures' two-page decision, which confirmed the extension of detention, the attorneys should not have needed more than six hours (4.5 for the attorney and 1.5 for the trainee). For subsequent phases, including the reply, four additional hours (1.5 for the attorney and 2.5 for the trainee) suffice, rather than the claimed 7.8 hours.

Considering all work before and after August 8, 2024, a total of 11.2 hours (6.2 for the attorney and 5 for the trainee) is deemed reasonable. Based on this, the appellant is awarded CHF 1,566 in fees plus CHF 22.60 for expenses.

Decision:

1. The appeal is dismissed.
2. The request for legal aid and public representation is granted. Consequently, no fees or costs will be charged, and the appellant is awarded CHF 1,588.60 in legal expenses.

3. This decision may be appealed to the Federal Supreme Court in Lausanne within 30 days of notification (Articles 82 et seq. of the Federal Supreme Court Act of June 17, 2005 [LTF; RS 173.110]).

Cantonal Administrative Court of Appeal
For the Court
Vice-President Matteo Cassina

Notifications to:

- Attorney Lea Hungerbühler, 8002 Zurich
- Department of Institutions, Section of Population, 6501 Bellinzona
- Judge for Coercive Measures, District Court [Location]

Lugano, November 5, 2024

Incarto n.
52.2024.299

Lugano
5 novembre 2024

06 NOV 2024

In nome
della Repubblica e Cantone
Ticino

Il Tribunale cantonale amministrativo

composto dei giudici: Matteo Cassina, vicepresidente,
Matea Pessina, Fulvio Campello

cancelliere: Reto Peterhans

statuendo sul ricorso del 15 agosto 2024 di

patrocinato da: avv. Lea Hungerbühler, 8002 Zurigo,

contro

la decisione del 31 luglio 2024 (n. MC.2024.16) del Giudice delle misure coercitive, che conferma la risoluzione del 25 luglio 2024 del Dipartimento delle istituzioni, Sezione della popolazione in materia di proroga della carcerazione in vista del rinvio coatto dell'insorgente;

ritenuto, **in fatto**

A. Il 4 agosto 2023 il cittadino marocchino ha presentato una domanda di asilo in Svizzera, che il 22 gennaio 2024 la Segreteria di Stato della migrazione (SEM) ha stralciato in quanto l'interessato era scomparso dal Centro federale di asilo in cui alloggiava, incaricando il Canton Lucerna di regolare il soggiorno nonché di disporre ed eseguire l'allontanamento.

B. è stato oggetto di una condanna, pronunciata il 20 novembre 2023 dalla Pretura penale del Cantone Ticino, a una pena detentiva di 90 giorni (non sospesa condizionalmente), a una multa di fr. 200.- e all'espulsione dalla Svizzera per cinque anni, poiché ritenuto colpevole dei reati (commessi nel periodo compreso tra il 15 agosto 2023 e il 14 settembre successivo) di molestie sessuali, di furto semplice (reiterato), di danneggiamento (di poca entità) e di violazione di domicilio (reiterata). Egli ha ulteriormente interessato le Autorità giudiziarie penali in Svizzera, essendo stato condannato il 17 aprile 2024 dalla Procura pubblica dei Grigioni a una pena pecuniaria di 90 aliquote giornaliere da fr. 30.- cadauna (sospesa condizionalmente per un periodo di prova di tre anni) e a una multa di fr. 600.-, per i reati (perpetrati il 18 dicembre 2023) di violazione di domicilio e di furto semplice (tentato e consumato). Il 3 maggio 2024 invece la Staatsanwaltschaft di Lucerna gli ha inflitto una pena pecuniaria di 50 aliquote giornaliere da fr. 10.- cadauna (non sospesa), in quanto tra il 4 agosto 2023 e il 2 maggio 2024 si era reso colpevole di entrata illegale, di entrata illegale all'estero o relativi preparativi e di soggiorno illegale ai sensi della legge federale sugli stranieri e la loro integrazione del 16 dicembre 2005 (LStrI; RS 142.20).

C. a. Il 6 maggio 2024, quando si trovava a Lucerna dopo un periodo di irreperibilità, l'interessato è stato trasferito in Ticino e il medesimo giorno la Sezione della popolazione del Dipartimento delle istituzioni ne ha ordinato a la carcerazione amministrativa in vista del rinvio coatto per la durata di tre mesi.

b. Previa audizione svoltasi il 7 maggio 2024, il giorno successivo questa misura è stata confermata dal Giudice delle misure coercitive (n. MC.2024.11), il quale ha fatto proprie le motivazioni dell'Autorità dipartimentale, ovvero che nella fattispecie risultavano dati l'intenzione di sottrarsi al rinvio coatto e un comportamento precedente indicante che non si attiene alle disposizioni delle autorità. L'8 maggio 2024 la SEM ha ripristinato - conformemente all'art. 35a della legge sull'asilo del 26 giugno 1998 (LAsi; RS 142.31) - la domanda di asilo precedentemente stralciata.

D. a. Il 25 luglio 2024, informata dal Zentrum für ausländerrechtliche Administrativhaft (ZAA) di Zurigo (dove era incarcerato) che l'interessato aveva rifiutato il trasferimento in Ticino per un'audizione dinanzi alla Polizia cantonale, la Sezione della popolazione ha disposto la proroga della carcerazione amministrativa in vista del rinvio coatto per altri tre mesi.

b. Il 30 luglio 2024 il Giudice sostituto delle misure coercitive ha proceduto con l'audizione d presso le Strutture carcerarie, alla presenza di un interprete. Con decisione del giorno seguente ha confermato la legalità e l'adeguatezza della proroga della detenzione ordinata dal Dipartimento, considerando che continuassero a sussistere tutti i motivi che avevano portato all'incarcerazione. Ha in particolare tenuto conto dell'esistenza di una decisione di espulsione valida per cinque anni, di un elevato rischio di fuga o di latitanza, della ripetuta e mancata collaborazione nonché dell'intenzione espressa dall'interessato di non fare ritorno in Marocco; ha infine ritenuto che l'adozione di misure meno incisive sarebbe risultata del tutto inefficace in vista del rimpatrio.

E. Contro quest'ultima pronuncia si aggrava ora davanti al Tribunale cantonale amministrativo, chiedendo - oltre all'immediata scarcerazione - in via principale che sia dichiarata nulla, subordinatamente che sia annullata e ancora più sussidiariamente che gli atti siano rinviati al Giudice delle misure coercitive per una nuova decisione. Censura la violazione del proprio diritto di essere sentito in quanto, sebbene patrocinato sin dal 19 maggio 2024 e malgrado la richiesta di accesso agli atti formulata dal suo avvocato alla Sezione della popolazione il 26 luglio 2024, la rappresentante legale non è stata coinvolta nelle successive fasi della procedura, tra cui l'ordine della proroga della detenzione del 25 luglio 2024, l'audizione del 30 luglio 2024 e la sentenza del giorno seguente, qui impugnata. Lamenta inoltre che l'accesso al dossier è stato accordato dal Dipartimento solo in data 8 agosto 2024, dopo due solleciti. Censura altresì la violazione del principio della proporzionalità, poiché la proroga della carcerazione si avvererebbe inadeguata in ragione della do-

manda di asilo tuttora pendente, la quale renderebbe l'espulsione irrealizzabile e non potendosi escludere la concessione dello statuto di rifugiato. Qualora il rilascio o il rimpatrio avvenisse durante la procedura di ricorso, egli domanda che la detenzione sia dichiarata nulla e illegale. Postula infine la concessione dell'assistenza giudiziaria e del gratuito patrocinio.

F. All'accoglimento dell'impugnativa si oppone il Dipartimento, con argomentazioni di cui si dirà, se necessario, in seguito. Il Giudice sostituto delle misure coercitive non formula dal canto suo particolari osservazioni, ma si limita a precisare di non essere stato a conoscenza del fatto che fosse patrocinato.

G. In sede di replica e di duplica le parti si confermano sostanzialmente nelle loro rispettive e contrapposte argomentazioni. La Sezione della popolazione si richiama comunque al fatto che il 12 settembre 2024 la SEM ha respinto la domanda di asilo del ricorrente, negandogli lo statuto di rifugiato.

H. Il 15 ottobre 2024 l'Autorità dipartimentale ha disposto un'ulteriore proroga della carcerazione dell'insorgente per tre mesi, considerando ancora adempiuti i criteri per il mantenimento della misura, anche in ragione del fatto che il 7 ottobre 2024 egli è stato nuovamente sanzionato per avere commesso vie di fatto nei confronti di un altro co-detenuto presso lo ZZA di Zurigo nonché visto il rifiuto del 15 ottobre 2024 di farsi trasportare in Ticino per un'audizione dinanzi alla Polizia cantonale. Questo ulteriore ordine di proroga della carcerazione è attualmente al vaglio del Giudice delle misure coercitive.

Considerato, **in diritto**

1. La competenza del Tribunale cantonale amministrativo è data dall'art. 31 della legge cantonale di applicazione delle norme federali concernenti le misure coercitive in materia di diritto degli stranieri del 17 aprile 1997 (Lamc; RL 143.200). Il gravame,

tempestivo (art. 31 Lamc) e presentato da una persona senz'altro legittimata a ricorrere (art. 65 cpv. 1 della legge sulla procedura amministrativa del 24 settembre 2013 [LPAmm; RL 165.100]), è pertanto ricevibile in ordine e può essere deciso sulla base degli atti, integrati dal richiamo dal Giudice delle misure coercitive dell'incarto concernente la decisione dell'8 maggio 2024 (n. MC.2024.11) e di quello inerente al dossier della Sezione della popolazione (art. 25 cpv. 1 LPAmm).

2. 2.1. Il ricorrente lamenta innanzitutto la violazione del suo diritto di essere sentito per il fatto che, sebbene avesse incaricato AsyLex di rappresentarlo già il 19 maggio 2024 (a seguito della prima incarcerazione) e benché tale mandato fosse stato comunicato alla Sezione della popolazione in occasione della richiesta di accesso agli atti formulata il 26 luglio 2024, l'Autorità dipartimentale non ha informato la patrocinatrice in merito all'ordine di proroga della detenzione per ulteriori tre mesi, essendo quest'ultimo stato trasmesso unicamente al Giudice delle misure coercitive e alla Polizia cantonale. AsyLex non è quindi nemmeno stata informata dell'udienza svoltasi il 30 luglio 2024 e l'accesso agli atti di causa (a suo dire incompleti) le è stato concesso solamente l'8 agosto 2024, dopo due sollecit
sostiene che non gli è stata data la possibilità di farsi assistere dal suo legale, malgrado all'Autorità fosse noto che egli disponeva di una patrocinatrice di fiducia.

2.2. La natura e i limiti del diritto di essere sentito sono determinati, innanzitutto, dalla normativa procedurale cantonale. Se tuttavia questa risulta insufficiente, valgono le garanzie minime dedotte dall'art. 29 della Costituzione federale della Confederazione Svizzera del 18 aprile 1999 (Cost.; RS 101), norma che assicura all'interessato il diritto di esprimersi su tutti i punti essenziali di un procedimento prima che sia emanata una decisione e che gli garantisce anche il diritto di partecipare all'assunzione delle prove, di conoscere i risultati delle stesse, di determinarsi a riguardo e di avanzare offerte di prova (DTF 120 Ib 379, 118 Ia 17). Questo diritto processuale essenziale comprende pure, tra le varie pretese, anche quella di farsi rappresentare o assistere

(MARCO BORGHI/GUIDO CORTI, Compendio di procedura amministrativa ticinese, Lugano 1997, ad art. 19 n. 4 e giurisprudenza ivi citata).
Per quanto attiene più specificatamente al settore delle misure coercitive, l'art. 81 cpv. 1 LStrI prevede che lo straniero incarcerato ha diritto di essere assistito da un rappresentante di sua scelta residente in Svizzera. Principio questo che è ribadito anche dall'art. 9 Lamc, secondo cui la persona straniera può avvalersi in ogni stadio della procedura dell'assistenza di un patrocinatore. Il rappresentante deve essere avvisato della tenuta di un'udienza davanti alla Polizia o al Giudice delle misure coercitive, affinché possa parteciparvi al fianco del suo assistito o consigliarlo. Il fatto di non avvertirlo lede il diritto di essere sentito dello straniero incarcerato (DTF 139 I 206 consid. 3.1 con rinvii).

2.3. Nella fattispecie le critiche del ricorrente possono essere condivise solo in parte. Se da un lato è vero che
ha conferito il mandato ad AsyLex (e in particolare a Lea Hungerbühler, a Cora Schmid e a Tanja Coskun-Ivanovic) di patrocinarlo nelle procedure in materia di diritto di asilo, degli stranieri, penale e di assicurazioni sociali già il 19 maggio 2024 (cfr. la relativa procura, doc. 2 allegato al ricorso del 15 agosto 2024), dai documenti formanti l'incarto emerge che la Sezione della popolazione ne è stata informata in occasione della richiesta di accesso agli atti formulata il 24 maggio 2024, vale a dire dopo la conferma dell'incarcerazione pronunciata dal Giudice delle misure coercitive l'8 maggio 2024. Ne discende che l'Autorità dipartimentale avrebbe dovuto prendere contatto con i mandatari dell'interessato in vista dell'emanazione dell'ordine di proroga della carcerazione del 25 luglio 2024.
Quindi pure prima dell'udienza svoltasi il 30 luglio 2024 dinanzi al Giudice sostituto delle misure coercitive, il Dipartimento, ricevuta la fissazione dell'udienza del 26 luglio 2024, avrebbe dovuto comunicare l'esistenza del mandato di rappresentanza all'Autorità giudicante, che non ne era a conoscenza. Vi è però da considerare che - come evidenziato dalla Sezione della popolazione nelle sue prese di posizione - nel corso dell'audizione del 30 luglio 2024 non solo non ha informato il Giudice sostituto delle misure coercitive di essere patrocinato (ritenuto che - per quanto non parli la lingua in cui si è tenuta l'audizione - egli,

conscio di avere conferito un mandato di patrocinio, avrebbe avuto tutto l'interesse a potere contare sulla presenza e sul sostegno del mandatario), ma inoltre nulla ha eccepito in merito allo svolgimento dell'udienza stessa, rispondendo alle domande postegli. In seguito nemmeno si è premurato di inoltrare la sentenza del 31 luglio 2024 alla sua rappresentante, la quale ne è venuta a conoscenza in seguito alla trasmissione degli atti di causa da parte del Dipartimento, avvenuta l'8 agosto 2024.

2.4. Alla luce di quanto appena esposto bisogna dunque concludere che, per quanto vi sia stata una violazione del diritto di essere sentito dell'insorgente in relazione alla mancata informazione e partecipazione alla procedura dinanzi al Giudice sostituto delle misure coercitive nonché in merito alla tardiva (essendo avvenuta solo l'8 agosto 2024, dopo due solleciti, a fronte della prima richiesta formulata il 26 luglio precedente) trasmissione degli atti di causa da parte dell'Ufficio della migrazione, .

non ha fatto nulla per evitare che ciò accadesse. Vi è inoltre da considerare che tale violazione, per quanto di gravità non certo trascurabile, è da considerarsi sanata in questa sede. Con la trasmissione degli atti di causa dell'8 agosto 2024

è stato infatti in grado di comprendere le motivazioni della decisione del 31 luglio 2024 e di compiutamente contestarle dinanzi al Tribunale cantonale amministrativo, che rivede liberamente fatti e diritto. A questo proposito va altresì evidenziato che nemmeno il mancato esplicito riferimento alla base legale applicabile nella risoluzione impugnata (ovvero, come verrà esposto in seguito, l'art. 76 LStrI, figurandovi un più generico richiamo agli art. 75-77 LStrI) ha impedito al ricorrente di formulare le proprie censure e di opporsi al provvedimento di proroga della carcerazione in vista del rinvio coatto.

2.5. La medesima conclusione vale anche per quanto concerne la doglianza secondo la quale la trasmissione degli atti dell'8 agosto 2024 sarebbe incompleta, mancando il verbale dell'udienza del 30 luglio 2024. In primo luogo il verbale in questione non figura tra i documenti formanti l'incarto della Sezione della popolazione, ragione per cui è da escludere che l'accesso agli atti concesso dall'Ufficio della migrazione fosse effettivamente

lacunoso, avendo quest'ultimo trasmesso quanto in suo possesso. In secondo luogo occorre ritenere che anche senza l'atto in questione è stato in grado di formulare le proprie contestazioni in merito alla sentenza impugnata.

3. 3.1. L'art. 76 LStrI disciplina la carcerazione di uno straniero in vista del suo rinvio coatto. Giusta l'art. 76 cpv. 1 lett. b n. 1, combinato con l'art. 75 cpv. 1 lett. g LStrI, colui che minaccia in modo grave o espone a serio pericolo la vita o la salute altrui e per questa ragione è perseguito penalmente o è stato condannato, è passibile di carcerazione amministrativa. Inoltre giusta l'art. 76 cpv. 1 lett. b LStrI, se è stata notificata una decisione di prima istanza d'allontanamento o espulsione, o una decisione di prima istanza di espulsione secondo l'art. 66*a* o 66*a*^{bis} del codice penale svizzero del 21 dicembre 1937 (CP; RS 311.0) oppure l'art. 49*a* o 49*a*^{bis} del codice penale militare del 13 giugno 1927 (CPM; RS 321.0), l'autorità competente, allo scopo di garantire l'esecuzione, può incarcerare lo straniero se indizi concreti fanno temere che egli intenda sottrarsi al rinvio coatto in particolare perché non si attiene all'obbligo di collaborare secondo l'art. 90 LStrI e 8 cpv. 1 lett. a o cpv. 4 LAsi (n. 3) oppure se il suo comportamento precedente indica che egli non si attiene alle disposizioni delle autorità (n. 4). Tali disposizioni sono applicabili quando dal comportamento dell'interessato si possa ritenere che vi sia il rischio che egli si dia alla fuga e sparisca nella clandestinità (cosiddetta *Untertauchensgefahr*; STF 2C_128/2009 del 30 marzo 2009 consid. 3.1 con rinvii).
I passi necessari per l'esecuzione dell'allontanamento o dell'espulsione secondo la LStrI oppure per l'esecuzione dell'espulsione ai sensi dell'art. 66*a* o 66*a*^{bis} CP o dell'art. 49*a* o 49*a*^{bis} CPM sono intrapresi senza indugio (art. 76 cpv. 4 LStrI).

3.2. Ai sensi dell'art. 79 cpv. 1 LStrI la carcerazione preliminare, quella in vista di rinvio coatto secondo gli art. 75-77 LStrI e quella cautelativa giusta l'art. 78 LStrI non possono, assieme, durare più di sei mesi. Il cpv. 2 della medesima norma precisa che, con il consenso dell'autorità giudiziaria cantonale, la durata massima della carcerazione può essere prorogata di un periodo determinato non superiore a 12 mesi o, se si tratta di minori tra i 15 e i

18 anni, non superiore a sei mesi se l'interessato non coopera con l'autorità competente (lett. a); si verificano ritardi nella trasmissione dei documenti necessari alla partenza da parte di uno Stato che non è uno Stato Schengen (lett. b).
Nell'esaminare l'ordine di carcerazione, nonché la decisione di mantenimento o revoca di quest'ultima, l'autorità giudiziaria tiene parimenti conto della situazione familiare dell'interessato e delle circostanze in cui la carcerazione è eseguita (art. 80 cpv. 4 LStrI).

4. 4.1. Come accennato in narrativa, nel caso in disamina il 4 agosto 2023 il ricorrente ha depositato una domanda di asilo in Svizzera, che il 22 gennaio 2024 la SEM ha stralciato in quanto nel frattempo era scomparso dal Centro federale di asilo in cui alloggiava.
Il 20 novembre 2023 la Pretura penale lo ha riconosciuto colpevole dei reati di molestie sessuali, di furto semplice (reiterato), di danneggiamento (di poca entità) e di violazione di domicilio (reiterata), infliggendogli una pena detentiva di 90 giorni (da scontare), una multa di fr. 200.- e ordinando l'espulsione dalla Svizzera per cinque anni. Questa condanna, cresciuta in giudicato, non ha rappresentato l'unica decisione in materia penale pronunciata nei confronti di Mediante il decreto di accusa emanato il 17 aprile 2024 dalla Procura pubblica dei Grigioni gli è infatti stata inflitta una pena pecuniaria di 90 aliquote giornaliere da fr. 30.- cadauna (sospesa per un periodo di prova di tre anni) e una multa di fr. 600.-, per i reati di violazione di domicilio e di furto semplice (tentato e consumato). Il 3 maggio 2024 la Staatsanwaltschaft di Lucerna ha pronunciato una pena pecuniaria di 50 aliquote giornaliere da fr. 10.- cadauna (non sospesa), in quanto si era reso colpevole di entrata illegale, di entrata illegale all'estero o relativi preparativi e di soggiorno illegale giusta la LStrI.
Il 6 maggio 2024, allorquando si trovava a Lucerna dopo un periodo di irreperibilità, il ricorrente è stato trasferito in Ticino e il medesimo giorno la Sezione della popolazione ne ha ordinato la carcerazione amministrativa in vista del rinvio coatto per la durata di tre mesi. L'8 maggio 2024 il Giudice delle misure coerci-

tive ha confermato il provvedimento, condividendone le motivazioni, poiché risultavano dati l'intenzione di sottrarsi al rinvio coatto (art. 76 cpv. 1 lett. b n. 3 LStrI) e un comportamento precedente indicante che non si attiene alle disposizioni delle autorità (art. 76 cpv. 1 lett. b n. 4 LStrI).

4.2. Il 25 luglio 2024, venuta a conoscenza dal ZZA di Zurigo (in cui era incarcerato), che il ricorrente aveva rifiutato il trasferimento in Ticino per un'audizione dinanzi alla Polizia cantonale, la Sezione della popolazione ha disposto la proroga della detenzione amministrativa in vista del rinvio coatto per altri tre mesi. Provvedimento di cui, previa audizione dell'interessato svoltasi il 30 luglio 2024, con la decisione qui impugnata il Giudice sostituto delle misure coercitive ha confermato la legalità e l'adeguatezza, considerando che continuassero a sussistere tutti i motivi che avevano portato all'incarcerazione, segnatamente tenendo conto dell'esistenza di una decisione di espulsione valida per cinque anni, di un elevato rischio di fuga o di latitanza, della ripetuta e mancata collaborazione nonché dell'intenzione espressa dall'interessato di non fare ritorno in Marocco. Ha inoltre ritenuto che l'adozione di misure meno incisive sarebbe risultata del tutto inefficace in vista del rimpatrio.

4.3. Queste conclusioni meritano di essere condivise.
In primo luogo, come poc'anzi esposto, nella fattispecie nei confronti del ricorrente è stata pronunciata l'espulsione penale ai sensi dell'art. 66*a* CP, decisione che è cresciuta in giudicato.
Per quanto egli sia stato condannato penalmente in tre occasioni tra il 20 novembre 2023 e il 3 maggio 2024 per reati di diversa tipologia perpetrati tra il 15 agosto 2023 e il 2 maggio 2024 (cfr. consid. B e 4.1), il quesito di sapere se l'incarcerazione può essere mantenuta in quanto sono dati i motivi ai sensi dell'art. 75 cpv. 1 lett. a, b, c, f, g, h o i LStrI (art. 76 cpv. 1 lett. b n. 1 LStrI) può invece rimanere indeciso, essendo - per le ragioni che seguono - adempiuti i requisiti posti ai n. 3 e 4 della medesima norma.
La condotta di cui ha dato finora prova permette infatti di considerare che vi sono indizi concreti che fanno temere che egli intenda sottrarsi al rinvio coatto, non attenendosi all'ob-

bligo di collaborare (art. 76 cpv. 1 lett. b n. 3 LStrI); il suo comportamento precedente permette inoltre di ritenere che egli non si attiene alle disposizioni delle autorità (art. 76 cpv. 1 lett. b n. 4 LStrI).
Come già rilevato, il 22 gennaio 2024 la SEM ha stralciato la domanda di asilo dell'insorgente, poiché quest'ultimo si era reso irreperibile abbandonando il Centro federale di asilo in cui alloggiava. Durante questo (lungo) periodo di irreperibilità, terminato a inizio maggio 2024, ha dato prova di non essere in grado di rispettare l'ordinamento giuridico, avendo (dopo essere già stato condannato) perpetrato i reati per i quali è stato oggetto del decreto di accusa del 3 maggio 2024 descritto in precedenza (cfr. consid. B e 4.1). Dal suo comportamento è quindi ravvisabile un rischio concreto che egli si dia nuovamente alla fuga e alla clandestinità, visto il precedente e in ragione delle reiterate dichiarazioni con cui ha espresso l'intenzione di non fare rientro in Marocco (volontà ripetuta ancora in sede di udienza dinanzi al Giudice sostituto delle misure coercitive del 30 luglio 2024), se non a condizione di ricevere un incentivo finanziario.
Oltre al rischio di sottrarsi al rinvio coatto ha dato pure prova di non volere attenersi alle disposizioni delle autorità. Dagli atti emerge infatti che il 29 maggio 2024, durante il primo periodo di incarcerazione presso il ZZA di Zurigo, egli è stato oggetto di una decisione disciplinare di *confinamento in cella* per due giorni (sanzione sospesa per un periodo di prova di un mese) pronunciata dalle Autorità zurighesi (cfr. doc. B allegato alle osservazioni dipartimentali del 10 settembre 2024). Questa misura è stata adottata in quanto il 26 maggio 2024 il ricorrente aveva preso parte (unitamente a altri 24 co-detenuti) a una protesta durante la quale i partecipanti non si erano conformati all'ordine di rientrare nelle proprie celle e due piani del centro detentivo erano stati resi inagibili tra le 17:00 e le 22:00 a causa di questa manifestazione, che ha richiesto l'intervento di un cospicuo contingente di agenti di polizia (compresi i negoziatori). La situazione si era risolta, senza violenza, solo grazie alla promessa delle forze dell'ordine di sottoporre le richieste formulate dai manifestanti all'attenzione delle competenti Autorità politiche.
Un ulteriore indizio della mancata volontà dell'insorgente di attenersi alle disposizioni delle autorità è rappresentato dal fatto che il 25 luglio 2024 ha rifiutato di farsi trasportare in Ticino in vista di

un'audizione dinanzi alla Polizia cantonale, episodio a seguito del quale la Sezione della popolazione ha ordinato la proroga della detenzione qui in discussione.

4.4. Visto quanto appena considerato, occorre convenire con il Dipartimento e con il Giudice sostituto delle misure coercitive che la proroga della carcerazione risulta rispettosa del principio della proporzionalità. Essa si avvera infatti necessaria al fine del raggiungimento dello scopo prefissato, considerato che nella fattispecie misure meno incisive (quale ad esempio l'assegnazione di un luogo di soggiorno) non appaiono adeguate e risulterebbero inutili, visto l'atteggiamento non collaborativo finora tenuto da , il quale - colpito da una misura di espulsione dal territorio svizzero - cercherebbe verosimilmente di sottrarsi allo sfratto o tenterebbe perlomeno di renderne ancora più difficile l'attuazione, rendendosi ad esempio nuovamente irreperibile. La misura regge dunque pure a un'analisi dal profilo della situazione familiare e personale dello straniero giusta l'art. 80 cpv. 4 LStrI, essendo l'interessato celibe, senza attività lucrativa e privo di mezzi di sostentamento propri.
Infine, pure la durata per la quale la carcerazione è stata prorogata si avvera ossequiosa dei termini stabiliti all'art. 79 LStrI.

4.5. Per completezza deve inoltre essere considerato che i motivi alla base della proroga dell'carcerazione in vista del rinvio coatto ai sensi dell'art. art. 76 cpv. 1 lett. b n. 3 e 4 LStrI continuano a sussistere anche alla luce del comportamento tenuto da dopo la pronuncia della sentenza qui impugnata.
Dagli atti di causa emerge che con decisione disciplinare del 7 ottobre 2024 le Autorità zurighesi gli hanno (nuovamente) inflitto un giorno di *confinamento in cella* scontato il 3 ottobre 2024 a seguito dei fatti avvenuti il medesimo giorno, quando egli aveva commesso vie di fatto nei confronti di un altro detenuto.
L'atteggiamento non collaborativo dell'insorgente è emerso pure il 15 ottobre 2024, con il suo rifiuto di salire sul mezzo di trasporto organizzato al fine di condurlo in Ticino per un'audizione dinanzi alla Polizia cantonale. A seguito di questo episodio la Sezione della popolazione ha emanato l'ulteriore ordine di proroga per tre mesi della carcerazione in vista del rinvio coatto, sul

quale il Giudice delle misure coercitive non si è ancora pronunciato.

5. 5.1. A questo punto occorre esaminare se l'allontanamento del ricorrente risulti inattuabile per motivi giuridici o effettivi (art. 80 cpv. 6 lett. a LStrI), come da lui sostenuto. Se ciò dovesse essere il caso, la detenzione non si giustificherebbe e risulterebbe lesiva dell'art. 5 n. 1 lett. f della convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali del 4 novembre 1950 (CEDU; RS 0.101) (cfr: *pro multis*: DTF 130 II 56 consid. 4.1.1, 122 II 148 consid. 3).
Nella sua ricca giurisprudenza in materia il Tribunale federale ha precisato che le ragioni giuridiche o materiali a cui la predetta norma fa riferimento devono essere importanti (*triftige Gründe*), l'esecuzione del rinvio dovendo essere qualificata come impossibile allorquando il rimpatrio è praticamente escluso, anche nel caso in cui l'identità e la nazionalità dello straniero dovessero essere note e i suoi documenti di viaggio dovessero essere ottenibili (STF 2C_672/2019 del 22 agosto 2019 consid. 5.1 con riferimenti). Si tratta dunque di formulare un pronostico in merito alle possibilità di procedere alla messa in esecuzione della decisione di rinvio, alla luce delle concrete circostanze del caso. Determinante è sapere se verosimilmente si potrà procedere o meno all'allontanamento entro un lasso di tempo prevedibile e ragionevole (STF 2C_597/2020 del 3 agosto 2020 consid. 4.1). La carcerazione è lesiva dell'art. 80 cpv. 6 lett. a LStrI, come pure del principio della proporzionalità, allorquando sussistono fondati motivi per ritenere che ciò non è il caso. Sotto questo profilo, la detenzione deve essere revocata solo se la possibilità di procedere all'espulsione appare inesistente o altamente improbabile, nonché puramente teorica, ma non invece nel caso in cui dovesse esistere una seria probabilità, benché esile, di darvi seguito (DTF 130 II 56 consid. 4.1.3; STF 2C_597/2020 citata consid. 4.1).

5.2. Nel gravame del 15 agosto 2024 (e nella replica del 16 settembre 2024) sostiene che, non avendo ancora ricevuto una decisione in merito alla sua domanda di asilo (che è stata riattivata l'8 maggio 2024, cfr. consid. C.b) e non essendoci

indicazioni che essa possa essere prolata in un periodo di tempo ragionevole, l'espulsione non risulta essere effettivamente realizzabile, ciò che rende la detenzione sproporzionata.
Sennonché il 12 settembre 2024 (dunque già prima dell'inoltro della replica) la SEM ha respinto la richiesta di asilo del ricorrente, negandogli il riconoscimento della qualità di rifugiato. Dato che vige una decisione di espulsione cresciuta in giudicato, l'Autorità federale non ha pronunciato l'allontanamento e non si è espressa sulla sua esecuzione ai sensi dell'art. 32 cpv. 1 lett. d dell'ordinanza 1 sull'asilo dell'11 agosto 1999 (OAsi 1; RS 142.311), precisando inoltre che in virtù dell'art. 89 cpv. 9 LStrI non è ordinata nemmeno l'ammissione provvisoria. La SEM ha motivato il proprio rifiuto avendo considerato i motivi che hanno spinto a lasciare il Marocco come inconsistenti e insensati, ragione per cui non è stato riconosciuto un rischio di subire seri pregiudizi o persecuzioni.
Per quanto dagli atti non è possibile evincere se la decisione del 12 settembre 2024 sia passata in giudicato o sia stata impugnata dinanzi al Tribunale amministrativo federale (TAF), occorre nondimeno considerare che con la sua emanazione è venuto meno il motivo ai sensi dell'art. 80 cpv. 6 lett. a LStrI sollevato nel gravame. Deve peraltro essere rilevato che, in virtù della situazione e dei comportamenti del ricorrente (di cui si è ampiamente riferito in precedenza) e viste le ragioni contenute nel respingimento della domanda di asilo pronunciata dalla SEM, le possibilità di un accoglimento di un eventuale ricorso da parte del TAF appaiono financhè inesistenti e non vi sono dunque elementi per potere ritenere che una sentenza non sarà emanata in tempi brevi. In questa sede in merito alla procedura di asilo si limita ad appellarsi all'esistenza della medesima, senza però nulla argomentare a sostegno della propria domanda. Pertanto, risulta escluso che siano dati i presupposti per porre fine alla carcerazione, non essendone venuti a mancare i motivi e non rivelandosi l'esecuzione dell'espulsione inattuabile per ragioni giuridiche o di fatto ai sensi dell'art. 80 cpv. 6 lett. a LStrI, in assenza di indizi che il rimpatrio si avvererebbe lesivo delle garanzie sancite dagli art. 25 cpv. 1 Cost. e 3 CEDU. Al contrario emerge dagli atti come la SEM si sia celermente attivata presso la rappresentanza marocchina in Svizzera al fine di organizzare il rimpatrio dell'insorgente.

5.3. Deve infine essere rilevato che non risulta ancora essere stato espulso, dato che il 15 ottobre 2024 la Sezione della popolazione ha disposto la proroga per ulteriori tre mesi della sua carcerazione in vista del rinvio coatto. Ritenuto che per i motivi appena esposti la proroga oggetto di questa sentenza risulta fondata e legittima, non vi è motivo per accogliere la richiesta formulata nell'impugnativa di accertarne il carattere illecito.

6. 6.1. Stante tutto quanto precede si deve concludere che la decisione del Giudice delle misure coercitive merita di essere integralmente confermata, in quanto immune da violazioni del diritto. Il ricorso deve dunque essere respinto.

6.2. Ritenuto che il gravame non appariva sprovvisto di esito favorevole (art. 3 cpv. 3 della legge sull'assistenza giudiziaria e sul patrocinio d'ufficio del 15 marzo 2011 [LAG; RL 178.300]) e che l'insorgente non dispone dei mezzi finanziari sufficienti per assumersi gli oneri della procedura e le spese di patrocinio (art. 2 LAG), la sua domanda di assistenza giudiziaria va accolta. Ciò comporta che, malgrado l'esito, si prescinde dal prelievo di una tassa di giustizia e delle spese (art. 47 LPAmm).
Per quanto attiene all'indennità di patrocinio l'art. 4 LAG prevede che al patrocinatore sono riconosciuti l'onorario e le spese delle prestazioni derivanti da una ragionevole conduzione del mandato secondo la tariffa fissata dal Consiglio di Stato e che sono escluse, in particolare, le prestazioni inutili e quelle non connesse con la procedura principale. In sostanza fa quindi stato quanto oggettivamente necessario per la tutela degli interessi toccati dalla controversia. L'art. 4 cpv. 1 del regolamento sulla tariffa per i casi di patrocinio d'ufficio e di assistenza giudiziaria e per la fissazione delle ripetibili del 19 dicembre 2007 (di seguito: regolamento; RL 178.310) stabilisce quindi che l'onorario dell'avvocato che opera in regime di assistenza giudiziaria è calcolato secondo il tempo di lavoro sulla base della tariffa di fr. 180.- l'ora. L'onorario del praticante legale, soggiunge il cpv. 3 di questa norma, è calcolato sulla base della tariffa di fr. 90.- l'ora. L'art. 7 del regolamento concede all'autorità competente la facoltà di derogare alle predette disposizioni in caso di manifesta sproporzione tra le prestazioni eseguite e l'onorario dovuto in base alla

tariffa, tra le spese effettivamente sopportate e quelle da riconoscere sulla base della tariffa, o qualora le particolarità del caso lo giustifichino.
Nel caso di specie la patrocinatrice del ricorrente, dopo avere già prodotto una prima nota di onorario insieme al ricorso, con la replica ne ha presentata una seconda di fr. 2'110.60, corrispondente ad un dispendio di tempo di 7.5 ore a fr. 180.- l'una da parte dell'avvocato e di 8.2 ore a fr. 90.- l'una da parte di praticanti per le prestazioni a partire dal 26 luglio 2024 con la richiesta di accesso agli atti inoltrata alla Sezione della popolazione, oltre a fr. 22.60 di spese.
Ora, le tariffe orarie esposte appaiono corrette poiché conformi a quanto disposto dalla legge. Per contro bisogna rilevare che vi è un'incongruenza tra le ore indicate concernenti l'avvocato, che se sommate non corrispondono a 7.5, bensì a 8.7. Va altresì considerato che il dispendio di tempo esposto nelle due distinte per i solleciti all'indirizzo dell'Autorità dipartimentale in merito alla richiesta di accesso agli atti nonché per l'allestimento e la correzione dell'atto ricorsuale e della replica appare eccessivo.
In primo luogo non risulta congruo l'intervento sia dell'avvocato sia di uno stagista per la stesura dell'*ulteriore reminder di accesso al fascicolo* del 6 agosto 2024, che deve essere ridotto a un totale di 0.2 ore da parte della praticante che ha inviato l'e-mail di sollecito alla Sezione della popolazione (cfr. doc. 5 allegato al ricorso del 15 agosto 2024).
Per quanto concerne la stesura e la correzione del gravame si deve ritenere che, posti di fronte a una decisione del Giudice sostituto delle misure coercitive la cui motivazione giuridica constava di due pagine, con la quale veniva confermata la proroga della detenzione in vista del rinvio coatto dell'insorgente, i patrocinatori di quest'ultimo si sono trovati confrontati a una questione giuridica ben determinata, a loro peraltro già nota e priva di particolari complicazioni dal profilo legale, la quale - ai fini dell'allestimento del ricorso, compreso lo *studio dei file* dell'8 agosto 2024, a fronte delle 7.7 ore fatturate in totale (5.1 ore per l'avvocato e 2.6 ore per lo stagista) - non richiedeva più di un totale di 6 ore (4.5 per l'avvocato e 1.5 per lo stagista), sebbene non avessero potuto intervenire già dinanzi alla prima Autorità di giudizio. A ciò si possono aggiungere 4 ore (1.5 ore per l'avvocato e 2.5 ore per lo stagista) per la replica e per le altre fasi successive all'inoltro

del ricorso, a fronte delle 7.8 ore fatturate in totale (3.2 ore per l'avvocato e 4.6 ore per lo stagista), tenuto conto delle osservazioni dell'Ufficio della migrazione del 10 e del 20 settembre 2024 (con cui ha in sostanza difeso le ragioni poste alla base della sua decisione di proroga dell'incarcerazione) e della brevità della presa di posizione del Giudice sostituto delle misure coercitive del 2 settembre 2024. Complessivamente, prendendo in considerazione anche le prestazioni prestate prima dell'8 agosto 2024 (con la correzione di cui si è detto concernente il sollecito del 6 agosto 2024), occorre dunque riconoscere un dispendio orario di 11.2 ore (6.2 ore per l'avvocato e 5 ore per il praticante), commisurato al tempo che un avvocato solerte e speditivo avrebbe impiegato per giungere, senza inutili prolissità o ridondanze, allo stesso risultato. Sicché, a fronte di 6.2 ore, remunerate all'avvocato in base alla tariffa applicabile di fr. 180.- all'ora, e di 5 ore, remunerate al praticante in base alla tariffa di fr. 90.- all'ora, appare tutto sommato equo e ragionevole riconoscere all'insorgente un importo di fr. 1'566.-, oltre a fr. 22.60 di spese, a titolo di ripetibili per questa sede.

Per questi motivi,

decide:

1. Il ricorso è respinto.

2. La domanda di assistenza giudiziaria e di gratuito patrocinio è accolta. Di conseguenza non si prelevano né tasse né spese e al ricorrente è assegnata un'indennità di fr. 1'588.60 a titolo di ripetibili.

3. Contro la presente decisione è dato ricorso in materia di diritto pubblico al Tribunale federale a Losanna entro il termine di 30 giorni dalla sua notificazione (art. 82 segg. della legge sul Tribunale federale del 17 giugno 2005 [LTF; RS 173.110]).

4. Intimazione a:

patr. da: avv. Lea Hungerbühler, 8002 Zurigo;
Dipartimento delle istituzioni, Sezione della popolazione, 6501 Bellinzona;
Giudice delle misure coercitive c/o Pretura del distretto di Lugano, 6901 Lugano.

Per il Tribunale cantonale amministrativo
Il vicepresidente

TRIBUNALE CANTONALE AMMINISTRATIVO - CANTONE TICINO -

Il cancelliere