

Asylum-seekers with disabilities. The impact of the revised asylum procedure in Switzerland

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Abstract.

The article discusses the revision of the Swiss asylum law in light of the disenfranchisement of asylum seekers with disabilities. As in many other countries, asylum seekers with disabilities fall between two systems: the disability policies on the one hand and the asylum law on the other hand. Although framed by two international treaties, the revision of the Swiss asylum law exacerbates the invisibility of asylum-seekers with disabilities. It poses new challenges for asylum seekers with disabilities in terms of access to justice, credibility and allocation. Those challenges can only be addressed with an increased collaboration between both fields and the acknowledgement of the specific situation of refugees with disabilities.

Key-words.

Asylum seeker, people with disabilities, disenfranchisement, Swiss asylum law, CRPD (or: BehiG, AsylG)

Resumen.

El artículo analiza la revisión de la ley de asilo en Suiza al respecto de la exclusión electoral de solicitantes de asilo con discapacidades. Al igual que en muchos otros países, los solicitantes de asilo con discapacidades se encuentran entre dos sistemas: las políticas de discapacidad, por una parte y la ley de asilo por otra parte. Aunque enmarcada por dos acuerdos internacionales, la revisión de la ley Suiza de asilo agrava la invisibilidad de los solicitantes de asilo con discapacidades. Plantea nuevos desafíos para los solicitantes de asilo con discapacidades en términos de acceso a la justicia, credibilidad y distribución. Esos desafíos solo se pueden abordar con una mayor colaboración entre ambos campos y el reconocimiento de la situación específica de los refugiados con discapacidades.

Key-words.

Solicitantes de asilo, personas con discapacidades, exclusión electoral, ley de asilo en Suiza

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1. Introduction

Lost between two systems, asylum seekers with disabilities remain invisible in many countries. Although formally right bearers and protected by a minimum of two international treaties, they face increased challenges to safeguard their basic rights and assert their needs.

In Switzerland the situation is no different. “Disability is a topic in the asylum system, because it is not a topic”¹ explains a professional working in the health care sector in an interview during a qualitative study on asylum and disability in Switzerland (Horand, 2017: 71). Despite the national legislation regarding people with disabilities and the asylum law that exists, these two frameworks do not overlap. Neither the asylum law contains any straightforward reference to people with disabilities nor the other way around. The outcome are two separate fields, where service providers, organizations and state institutions do not collaborate. Refugees with disabilities are vulnerably placed at the intersection of these two systems and fall in the gap between.

By presenting the international legal framework that shapes the existing legislation in Switzerland, the paper points out the invisibility of asylum seekers with disabilities. It then focuses on the imminent revision of the Swiss asylum law. With new decrees, the government aims to achieve an increase in speed, a reduction of costs and simultaneously a fairer process. Against the background of the revised asylum law and the portrayed ignorance of the needs of refugees with disabilities, it remains a question, if and how the rights of asylum seekers with disabilities can be guaranteed.

By analysing the new decrees, the study highlights the direct impacts the restructuring has on refugees with disabilities. Out of many areas of concern, three are identified and profoundly elaborated on: access to justice, credibility and the placement in special centres as a measure of discipline.

The paper concludes by arguing that the revised law increases the complexity of the challenges faced by asylum seekers with disabilities and exacerbates their disenfranchisement.

2. The legal framework

2.1. Legal protection of refugees

In light of the vulnerability of the high number of refugees after the Second World War, the United Nations (UN) responded with an international treaty. The treaty is based on the Universal Human Rights Declaration, which recognizes the right of every person to seek asylum from persecution. The UN Convention Relating to the Status of Refugees was therefore signed in 1951 and entered into force three years later. With the additional protocol of 1967, the geographical and temporal limitations specific to the situation after the

¹ Translated by the author. Original in German: Behinderung ist im Asylwesen ein Thema, weil es kein Thema ist.

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Second World War were removed and the convention received universal coverage.

One of the guiding principles of the treaty is the “Non-Refoulement”. It is a norm of international customary law that implies that refugees should not be returned to a country where they face serious threats. The treaty further contains the rights of displaced people and the obligations that member states have in order to protect them.

According to the first article of the convention, a refugee is a person who:

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (UN, 1951).

Although the definition has been broadened to encompass persons who have been displaced but do not strictly fulfil all the criteria, the convention remains silent on disability as a reason for asylum. People with disabilities often face discrimination and harassment and are forced to flee their country. Since discrimination does not feature in the text as a reason for persecution and persecution itself is

not defined, many displaced persons with disabilities do not receive the status of refugees and remain unprotected (Horand, 2017: 20). According to Crock, an expert in the field of refugee law, asylum-seekers with disabilities suffer triple disadvantage: They have fled their country, live in fear of persecution and face social structures that hinder their full participation in society (Crock et al, 2013: 736).

Nevertheless, it is only in 2011 with the revision of the Resettlement Handbook that the UNHCR emphasizes the particular and individual attention that persons with special needs have to be granted during resettlement and asylum-procedures. Among those persons with special needs, people with disabilities are listed next to women, children and elderly people (UNHCR, 2011). In that same wave, the European Union issued a directive in 2013, urging member states to take into account the specific situation of vulnerable groups throughout their asylum policies (EU, 2013). It is important to stress that, compared to women and children, people with disabilities are never mentioned separately, but only as a part of that group of vulnerable persons (Straimer, 2011: 541).

As a member of the international community, Switzerland is requested to implement the international guidelines within its national legislation. According to the Swiss State Secretary for Migration, this is the case and the national asylum law is based on the international convention. Article 3, paragraph 1 of the Swiss asylum law defines a refugee as:

“persons who in their native country or in their country of last residence are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages for reasons of race, religion, nationality, membership of a particular social group or due to their political opinions” (Art. 3. Abs. 1. AsylG).²

Although the term “serious disadvantages” is specified in the next paragraph and includes a direct reference to particular reasons for women to seek asylum; disability is not mentioned separately. The segregation of the two fields on the international level is reproduced in the national asylum legislation.

2.2. Legislation for persons with disabilities

Switzerland ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2014 –as the 144th member state and six years after the entry into force of the convention in 2008. However, before the ratification the Swiss government already claimed that national legislation, such as the Act for Equal Opportunities for Persons with Disabilities (Behindertengleichstellungsgesetz, hereafter Be-

hiG) entails the quasi fulfilment of the standards mentioned in the international convention (Schweizerischer Bundesrat, 2012).

The initial state report, submitted to the Committee of the Rights of People with Disabilities two years after the ratification, argues similarly. It highlighted the national achievements and the alignment of the legislation in accordance with the principles of the CRPD (Schweizerischer Bundesrat, 2016).

The BehiG, which came into force in 2002, has been revised twice after the ratification of the convention. The implemented changes were minor and considered mainly further training opportunities of persons with disabilities and the barrier-free public transport. This confirmed the assumption of the state that national legislation is satisfactory to safeguard the rights of persons with disabilities.

Considering the shadow report produced by a number of disability organizations and submitted to the Committee on the Rights of Persons with Disabilities in 2017, this self-assessment of Switzerland carried out by persons without disabilities remains doubtful (Inclusion Handicap, 2015). Starting with the definition of disability itself, the BehiG needs adjustments to respond to the requirements of the convention, argues the report. The CRPD stipulates the definition of disability according to the social model, which highlights the impact of societal structures that hinder people with disabilities from full participation in the society. Using this model as a base of the international document meant a paradigm shift in disability policy in the opinion of the disability movement. Eventually, society was ready to break away from the medical model, that considered disability as an abnormality that needs to be treated. In Switzerland, nevertheless, the legislation undermines that achievement. Contrary to the principles set out in the CRPD, the BehiG defines a person with disabilities as:

² Translated by the author. Original in German: “Personen, die in ihrem Heimatstaat oder im Land, in dem sie zuletzt wohnten, wegen ihrer Rasse, Religion, Nationalität, Zugehörigkeit zu einer bestimmten sozialen Gruppe oder wegen ihrer politischen Anschauungen ernsthaften Nachteilen ausgesetzt sind oder begründete Furcht haben, solchen Nachteilen ausgesetzt zu werden“.

“a person who, due to a physical, mental or psychological impairment which is likely to be permanent, finds it difficult or is unable to carry out everyday tasks, cultivate social contacts, move around, obtain an education or training, or work” (Art. 2 Abs. 1. BehiG)³.

According to the shadow report, Switzerland is far from a coherent application of the principles of the convention. Practical examples reveal the continued discrimination that people with disabilities face. The report points out a range of areas, where the legislative needs to adjust the existing law in accordance to the CRPD. In particular with regards to access to justice, people with disabilities face increased levels of discrimination (Inclusion Handicap, 2015: 58).

Due to non-barrier-free buildings, the absence of appropriate procedures and the neglect of the needs of people with disabilities within those procedures, they face challenges to access equal justice. Furthermore, government agencies and officials generally lack the necessary knowledge to communicate with and understand persons with mental disabilities. This adds to the fact, that the credibility of claims of those people is often questioned (Inclusion Handicap, 2015: 60).

³ Translated by the author. Original in German: “Person, der es eine voraussichtlich dauernde körperliche, geistige oder psychische Beeinträchtigung erschwert oder verunmöglicht, alltägliche Verrichtungen vorzunehmen, soziale Kontakte zu pflegen, sich fortzubewegen, sich aus- und weiterzubilden oder eine Erwerbstätigkeit auszuüben”.

⁴ For more information on the restructuring, see: https://www.sem.admin.ch/sem/de/home/aktuell/gesetzgebung/aend_asylg_neustruktur.html

3. Invisibility of asylum-seekers with disabilities in Switzerland

Taking into consideration both legal frameworks, the asylum law as well as the law on equal opportunities for people with disabilities, the invisibility of asylum seekers with disabilities becomes obvious. The BehiG does not contain the term “refugee” in its text, nor does the asylum law refer to people with disabilities. As a result, and similar to the situation in many other countries in the world, refugees with disabilities are also disenfranchised in Switzerland.

In practice, this leads to two distinct fields where people working with asylum-seekers do not know about existing services for people with disabilities and vice versa. The qualitative study conducted by Horand on disability within the Swiss asylum system confirms that trend (Horand, 2017: 91).

She argues that the international and national provisions are too vague in terms of implementation and lead to varying interpretations. Furthermore, professionals working in the asylum process are often not sensitized and do not know about the necessary measures to provide barrier-free access. In particular, people with disabilities that are not directly recognisable face an increased burden due to the non-consideration of their impairment. The access to services that other people with apparent disabilities get more easily, often remains barred.

The absence of general institutional support or services for refugees with disabilities in Switzerland is further justified with the assumed small number of concerned persons. As no data on asylum seekers with disabilities is collected in Switzerland, this assumption is controversial by itself. It shows once more that asylum seekers with disabilities are not considered an integral part of the group of asylum-seekers (Horand, 2017: 92).

4. The restructuring of the asylum procedure

In a vote in 2016, the Swiss voting population agreed to the revision of the asylum law. It is meant to improve three areas of the existing framework: the procedure, the financing and the processing of data. With the provision regarding the procedure, the Swiss government aims at an increased speed of the process to enhance fairness and efficiency.

The first decision to grant asylum (or not) shall be made within 21 days in a federal reception and processing centre, where lawyers, interpreters and officials are brought together under one roof. After a maximal stay of 140 days in those centres, the responsibility to handle either the integration or the denial of asylum is transferred from the state to the

cantons. In March 2019, after a successful testing phase in one centre in Zurich, the revised procedure shall be implemented on a national level.⁴

5. Areas of concern for asylum-seekers with disabilities

By analysing the revised decree on the asylum procedure, three areas are of greater concern for refugees with disabilities.

5.1. Access to justice

First of all, access to justice is challenged. Despite the fact that every asylum-seeker is assigned a free legal representative, the UNHCR (2017) and Swiss civil society organizations (SFH, 2017) express concerns regarding the equality of that access.



Depending on the procedure or the centre in which asylum-seekers are accommodated, they may face obstacles to meet, communicate with or even find legal representatives. Since there are no national standardized qualifications or quality assurance mechanisms for the legal representations nor for consultations or service providers, regional as well as institutional variations are anticipated.

In particular in regard to the qualification of the legal representatives, the revised law does not provide any guiding principle. The national law refers to the cantonal decrees on legal representation, which only state the necessity of providing knowledge on the asylum process. There are no standardized qualifications mentioned regarding the social competence of the lawyer or obligatory trainings on addressing groups of persons with special needs. In addition to social competence, Horand highlights the importance of intercultural training. Based on her interviews and existing literature, she argues that disability is often defined differently among different cultures. Asylum-seekers might deny their own situation in order to not hamper the asylum-seeking process (Horand, 2017, 71).

Due to the increased rapidity of the process, the communication of meetings with officials, appearances in court or important deadlines are affected as well. The notices are set extremely short-term. Considering the difficulties that may arise in terms of mobility, access to information and access to supportive services, asylum-seekers with disabilities face increased obstacles (SFH, 2017: 4-8).

The reduced time span to decide on the status of refugees puts pressure on the legal representation. Since the deadline is extremely short-dated, an in-depth acquaintance with each case is impossible. In the particular cases of asylum-seekers with disabilities, where supportive infrastructure, such as sign language interpreters or additional conversations might be necessary, this pressure results in an insufficient representation (Caroni, et al., 2015: 41).

5.2. Credibility

This leads to an additional challenge that asylum-seekers with disabilities face: proving their credibility. On the one hand, and due to the prevalence of the medical model of disability within Swiss institutions, people with physical disabilities tend to receive a doctor's certificate confirming the medical aspect of their disability more easily. It is this certificate and the apparent disability that enhances their credibility. This is one aspect of doing disability, which leads to a reproduction of the medical model.⁵

It is used in the asylum-seeking process to guarantee access to service providers (Horand, 2017: 62). On the other hand, people with disabilities that are either not directly recognisable by laypersons or purposely hidden, face increased pressure to demonstrate their credibility during the hearings. Asylum-seekers need to justify the "well-founded fear of persecution", a requirement of the Refugee Convention that consists of a subjective experience and an objectively assessable element in order to be granted asylum.

The credibility of the person involved is particularly essential in order to assess the subjective element. Crock argues that, "at the most basic level, cognitive impairments can affect a person's ability to demonstrate fear or to articulate a claim of any kind" (Crock, 2013: 742). Hence, asylum-seekers with disabilities face an increased challenge.

⁵ For more information on doing disability check: BARNES, C., MERCER, G. (1997). Chapter 1: Breaking the Mould? An introduction to doing disability research. Doing Disability Research. Leeds. The Disability Press : 1-14.

5.3. Allocation in special centres

Apart the difficulties in accessing justice through an adequate legal representation, asylum seekers also face a threatening allocation in a special centre. Whereas in the previous decree, the transfer to a special centre was an option, it becomes an obligation for any asylum-seekers who

“endangers the public security and order or disturbs the orderly operation of the reception and process centre considerably through his or her behaviour” (Art. 16. Abs. 1 AslyV1).⁶

In the second paragraph, the decree elaborates on the reasons for allocation, but in an extremely vague manner. Examples that may be addressed with that disciplinary measure range from possessing weapons to refusing domestic work in the centres. The decree remains silent regarding the terms of the procedure and the regime of the special centres. In its report, the UNHCR urges Switzerland to be specific on those two aspects, in order to guarantee a human-rights based approach throughout the disciplinary action (UNHCR, 2017).

The arbitrariness of the current decree that regulates the allocation to a special centre is particularly threatening to asylum seekers with disabilities. Without individual consideration of each case and without a transparent, formal procedure, refugees with disabilities might be wrongly accused and end up in special centres for an undetermined number of days.

6. Conclusion

As the study has revealed, the separation between the asylum sector on the one hand and the disability field on the other hand is reproduced by distinct legal frameworks, both on the international and on the national level. The legal separation has a direct impact on the services offered, the professional's qualifications and finally the well-being of asylum-seekers with disabilities.

Contrary to the international movement, which shifted away from the medical model to a social conception of disability, Switzerland's legislation is based on obsolete considerations. Whereas the UNHCR and the European Union produce new directives to increase the protection of vulnerable groups, the Swiss government implements changes within the asylum procedure that enhance a disenfranchisement of refugees with disabilities.

Whether the invisibility of asylum-seeker with disabilities is the reason or the consequence of that ignorance-remains unanswered. What is certain is that the service providers from both fields need to increase their collaboration. Institutions and professionals as well as the legislation need to take the specific situation of refugees with disabilities into consideration. For other vulnerable groups such as women or children, mechanisms are already set in place to guarantee a better protection. Similarly, to that achievement, the current structures need to adjust in order guarantee people with disabilities an equal access to justice and a safe environment.

⁶ Translated by the author. Original in German: [...] eine Person, die sich in einem Empfangs- und Verfahrenszentrum befindet und die öffentliche Sicherheit und Ordnung gefährdet oder durch ihr Verhalten den ordentlichen Betrieb des Empfangs- und Verfahrenszentrums erheblich stört [...].

Bibliography

Articles and Studies:

- BARNES, C., MERCER, G. (1997). Chapter 1: Breaking the Mould? An introduction to doing disability research. *Doing Disability Research*. Leeds. The Disability Press : 1-14.
- CROCK, M., et al. (2013). Where disability and displacement intersect: asylum seekers and refugees with disabilities. *International Journal of Refugee Law*. Vol 24 (4): 735-764.
- HORAND, I. (2017). *Behinderung und Asyl: Wie wird Behinderung im schweizerischen Asylwesen thematisiert?* Master thesis submitted to the Université de Neuchatel, Faculté des Letters et Sciences Humaines.
- STRAIMER, C. (2011). Between protection and assistance: is there refuge for asylum seekers with disabilities in Europe? In: *Disability & Society*. Vol. 26 (5): 537-551.

Reports:

- INCLUSION HANDICAP. (2015). *Schattenbericht: Bericht der Zivilgesellschaft anlässlich des ersten Staatenberichtsverfahrens vor dem UN-Ausschuss für die Rechte von Menschen mit Behinderungen*. Available at: https://www.procap.ch/fileadmin/user_upload/customers/redesign_procap/Aktuell/News/NewsTexte_2017/170829_d_Uno-BRK_Schattenbericht_158_Seiten.pdf [accessed 18 February 2019].
- SCHWEIZERISCHER BUNDESRAT. (2016). *Erster Bericht der Schweizer Regierung über die Umsetzung des Übereinkommens über die Rechte der Menschen mit Behinderungen*. Submitted to the Committee on the Rights of Persons with Disabilities. Available at: https://www.humanrights.ch/cms/upload/pdf/160629_BehiK_Initialstaatenbericht.pdf [accessed 18 February 2019].

International Legislation:

- EUROPEAN UNION. Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU. Available at: <https://www.refworld.org/docid/51d29db54.html> [accessed 20 February 2019].
- UN GENERAL ASSEMBLY. *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. Available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 14 February 2019].
- UN GENERAL ASSEMBLY. *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106. Available at: <https://www.refworld.org/docid/45f973632.html> [accessed 18 February 2019].
- UN HIGH COMMISSIONER FOR REFUGEES (UNHCR). *UNHCR Resettlement Handbook*, 2011, July 2011. Available at: <https://www.refworld.org/docid/4ecb973c2.html> [accessed 20 February 2019].

Swiss Legislation:

ASYLGESETZ (AsylG) vom 26. Juni 1998, Stand am 1. Januar 2019, (SR 142.31). Available at: <https://www.admin.ch/opc/de/classified-compilation/19995092/201610010000/142.31.pdf> [accessed 18 February 2019].

ASYLVERORDNUNG 1 (AsylV1) über Verfahrensfragen vom 11. August 1999, Stand am 1. März 2017, (SR 142.311). Available at: <https://www.admin.ch/opc/de/classified-compilation/19994776/index.html> [accessed 18 February 2019].

BUNDESGESETZ ÜBER DIE BESEITIGUNG VON BENACHTEILIGUNGEN VON MENSCHEN MIT BEHINDERUNGEN (BehiG) vom 13. Dezember 2002 (Stand am 1. Januar 2017). Available at: <https://www.admin.ch/opc/de/classified-compilation/20002658/index.html> [accessed 18 February 2019].

Statements:

CARONI M., et al. (2015). Gutachten im Auftrag der Demokratischen Juristinnen und Juristen Schweiz (DJS/JDS) betreffend rechtliche Fragestellungen im Zusammenhang mit der Neustrukturierung im Asylbereich und der Beschleunigung im Asylverfahren. Available at: https://www.djs-jds.ch/images/2015-11_DJS_Gutachten_zur_Neustrukturierung_im_Asylbereich.pdf

SCHWEIZERISCHER BUNDESRAT. (2012). Botschaft zur Genehmigung des Übereinkommens vom 13. Dezember 2006 über die Rechte von Menschen mit Behinderungen. Available at: <https://www.admin.ch/opc/de/federal-gazette/2013/661.pdf> [accessed 18 February 2019].

SCHWEIZERISCHE FLÜCHTLINGSHILFE SFH. (2017). Neustrukturierung des Asylbereichs – Änderungen der Asylverordnung 1, Position der Schweizerischen Flüchtlingshilfe SFH. Available at: <https://www.fluechtlingshilfe.ch/assets/asylrecht/stellungnahmen/171130-sfh-stn-asylv1-de-final.pdf> [accessed 20 February 2019].

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. (2017). Neustrukturierung des Asylbereichs, UNHCR-Empfehlungen zur Unterbringung von Asylsuchenden in Bundesasylzentren. Available at: https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/08/CH_UNHCR-Empfehlungen-zur-Unterbringung-von-Asylsuchenden-in-Bundesasylzentren.pdf [accessed 20 February 2019].