



*Q&A: Trending Issues on Migration*

# The Swiss Asylum Procedure

## A Future Model for Europe?

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- Since 2014, Switzerland has been testing a new asylum procedure. The so-called test phase has largely been successful. The nationwide launch of the new Swiss asylum procedure is scheduled for 1 March 2019.
- The new set-up promises to streamline processes and accelerate asylum procedures. The procedure is based on the Dutch model, adapted to Switzerland's federal context. It comprises clearly defined steps. During the test phase more than half of asylum decisions were taken within 140 days in dedicated 'federal asylum centres' (Bundesasylzentren).
- A first comprehensive evaluation of the test phase was positive. The procedure is economical, faster, qualitatively better and more accepted by all participants. There is room for improvement in the areas of appeal time limits, process coordination, quality assurance and independent legal representation.
- As a lesson for other European countries, the Swiss model shows that asylum procedure reform can succeed only with the broad involvement of all concerned.
- Key to the efficiency of the procedure is that asylum seekers must be in a position to participate in the procedure in an informed manner, and assisted by comprehensive, independent and supportive advice.

## 1. Genesis and Substance: What is New About the Swiss Asylum Procedure?

The new procedure has its origins in the efforts to revise Switzerland's asylum law, which the Bundesrat (that is, the Swiss government) put before parliament in May 2010. A study commissioned by the Political Institutions Committee of the Council of States asserted that asylum procedure – from submitting an application to the final ruling on residence – takes an average of 1,400 days. This hinders both integration and repatriation. In response, the Political Institutions Committee of the Council of States tasked the Federal Justice and Police Department (FDJP – Eidgenössisches Justiz- und Polizeidepartement – EJPD) with developing proposals for a fundamental revision and acceleration of the Swiss asylum procedure. These proposals were based on a problem analysis on a national footing, and drew on the experiences of the Netherlands, Norway and the United Kingdom. The proposed options included short-term, feasible measures to accelerate asylum procedures and recommendations for a far-reaching revision of the Swiss asylum procedure.

As one of the so-called urgent measures of September 2012 the Asylum Act (Article 112b AsylG [Asylgesetz]) created the opportunity to test a new procedural model under the aegis of the national asylum authorities (State Secretariat for Migration [SEM], formerly the Federal Migration Office [BFM]). In relation to procedural sequences, division of processes and legal representation, the new procedure is based on the Dutch model, adapted to Switzerland's federal system.

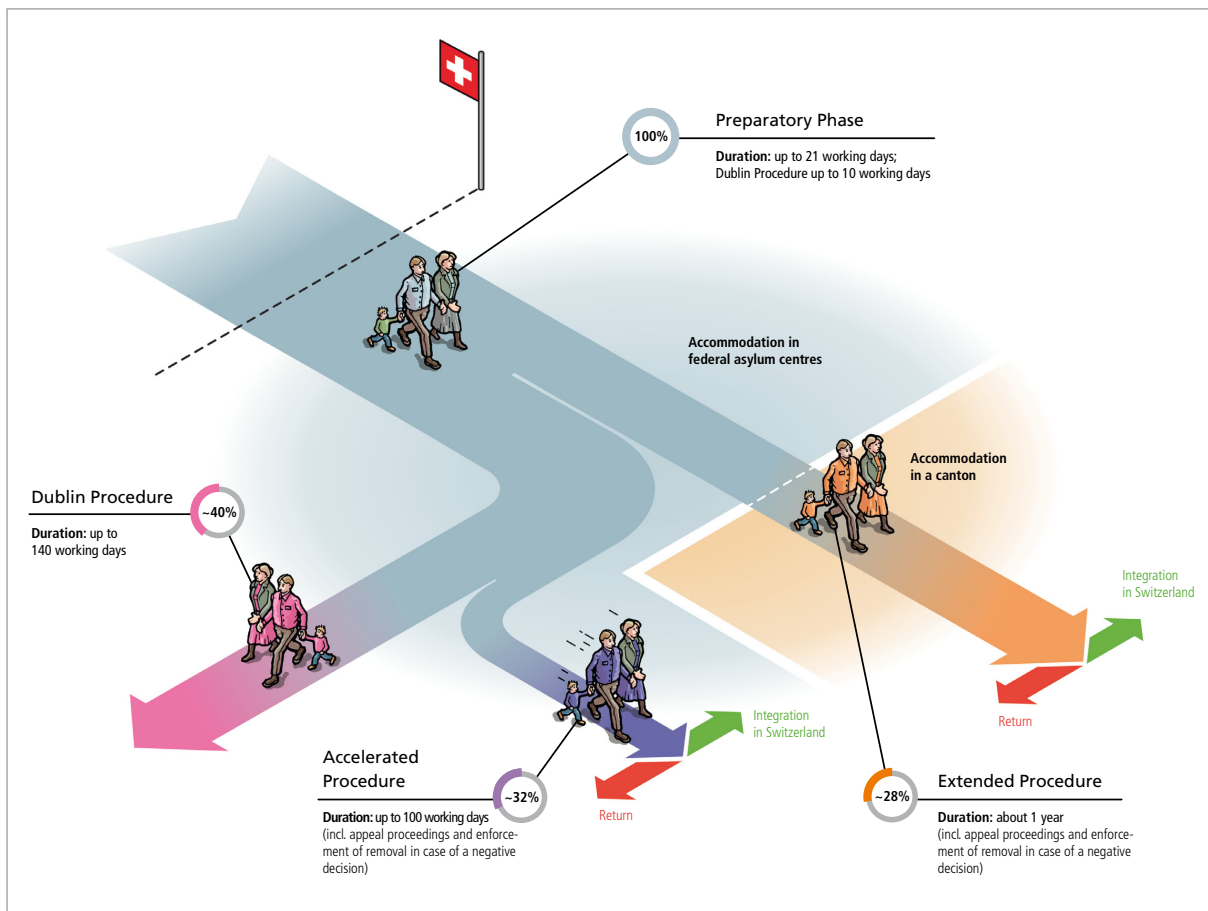
The city of Zürich was chosen as the pilot location and the test phase was run at a centre with around 300 accommodation places for around 1,500 procedures a year. At the same time, the federal government, cantons, cities and municipalities founded a working group that defined all the key points of reform within the framework of two so-called asylum conferences in January 2013 and March 2014. Without this mutual understanding between various levels of state actors, an agreement on a new procedure would have

been impossible. A new set of rules was established for the test phase that laid down the legal framework for the procedure in Zürich. It also served as a basis for the revision of the Asylum Act adopted in September 2015 and confirmed by a national referendum in June 2016.

The new procedure divides Switzerland into six asylum regions: *Western Switzerland, Tessin and Central Switzerland, Eastern Switzerland, Northwest Switzerland* and the cantons *Bern* and *Zürich*. Federal asylum centres were set up in each region, one of which has the "procedural function." Also, further federal asylum centres are envisaged with "waiting and departure function." This will bring federal accommodation capacity up to 5,000 places across the country.

In the centres with procedural functions, the process takes place with clearly defined steps and targets. Overall around 40% Dublin procedures and 60% "national" asylum procedures; in other words, procedures that are to be assessed substantively, are assumed. The aim is for 72% of all asylum procedures (Dublin procedures and 32% national procedures) to be concluded in federal asylum centres. These were the figures that were reached during the test phase at the Zurich pilot centre. Except that, because of the failure of many Dublin transfers and their inclusion in the national procedure, only around 50% of all cases were in fact concluded. The calculation is based on a protection rate of 60% (see *Picture 1*).

The remaining procedures take place in the so-called "extended procedure," during which asylum seekers are assigned to a canton. Residence – and thus also the majority of final asylum decisions – in the federal asylum centres is supposed to be limited to 140 days. (This represents a considerable change with regard to processes hitherto because residence in the former reception and procedural centres [Empfangs- und Verfahrenszentren or EVZ] run by the federal government was limited to 90 days and only a fraction of asylum applications were dealt with there – or some people's cases were merely heard.) The new procedure provides for the following steps:



Picture 1: Asylum Procedure starting in 2019 (courtesy of SEM)

1. On arrival and formal submission of an application, fingerprints are taken and the asylum seekers are given advice on the procedure (in practice, they are given information about it) by an independent “service provider” (often an NGO). This also ensures that the person in question is informed about available free legal representation. In the test phase, practically every asylum seeker availed themselves of this opportunity. Legal representation is also organised by the service provider, and the respective representative participates in all procedural steps before the SEM.
2. Application filing is followed by a preparatory phase. This lasts at most 21 days (a maximum of 10 days for Dublin procedures). This time is meant for procedural preparation and, if necessary, procurement of documents. In the preparatory phase, the SEM conducts an

initial (recorded) interview, which is retranslated back to the asylum seeker. The purpose of this is to gather detailed information about the applicant and, depending on what is discovered, it may also contain questions on Dublin matters or reasons for flight. This interview is not a hearing. At the latest after the first interview, the SEM decides whether or not a Dublin procedure will be initiated because the SEM considers another Dublin state (EU+4) to be responsible for examining the asylum application (“first triage”).

3. If a Dublin procedure is initiated, the SEM is supposed to submit a request for take-over to the country it considers responsible during the preparation phase. In accordance with the guidelines of the Dublin III Regulation, the latter is required to respond within two weeks and two months (depending on the circum-

stances). If the requested state assumes responsibility, the SEM is supposed to dismiss the relevant application within three days, upon which the person concerned is asked to travel to the responsible state where their asylum procedure will now be carried out. An appeal can be launched against this decision before the Federal Administrative Court. The period for transfer is generally six months. If the transfer cannot take place or cannot take place in due time, Switzerland becomes responsible and the regular asylum procedure has to be conducted.

4. If no Dublin procedure is initiated or fails, a hearing on the reasons for flight is held at the end of the preparation phase. After the hearing, a second triage takes place, at which a decision is made on whether the procedure can be concluded within 8–10 working days (“accelerated procedure”) or whether further clarifications are necessary, so that an accelerated procedure is not possible. In the latter case, the person concerned is assigned to a canton and an “extended procedure” is conducted, which only includes target provisions and no fixed procedural time limits for taking the decision. This procedure also occurs if the hearing cannot, for whatever reason, take place within the prescribed time period.

Another important aspect of the new procedure, which both accelerates the procedure and safeguards fairness and the rule of law, seeks to ensure that asylum seekers receive advice and legal representation free of charge. As a rule, NGOs perform this function. Legal representation supports the person concerned in all dealings with the SEM and also prepares the asylum seeker for the initial interview and asylum hearing. A special feature of the procedure is that if the SEM plans to reject an application in the national procedure, it does not inform the asylum seeker directly, but sends a “draft decision” to the asylum seeker’s legal representation, to which the asylum seeker can respond within 24 hours. In Zürich legal representatives have always exercised this right in order to pre-

vent a negative impact on the part of the SEM or the Court. Legal representatives are also tasked with explaining decisions to the asylum seeker and discussing with them the prospects of an appeal, which relieves the supervisory staff in reception centres of this task. In this context the legal representative is professionally obliged to give an assessment – as accurately as possible – of the chances of the appeal.

## 2. How Can the New Asylum Procedure Be Assessed?

The test phase was launched in Zürich on 6 January 2014. Over the first two years, it was subject to an external evaluation by the responsible FDJP. The evaluation concentrated on four key features: cost, efficiency, quality of the procedure and advisory/legal representation work. The findings of the evaluation were positive in all areas. The procedure is economical, faster, qualitatively better and more accepted by all participants. In particular, the evaluation of advisory activities and legal representation was able to establish that better informed asylum seekers contribute considerably to an enhanced efficiency of the procedure and that hearings run much more smoothly and purposefully if the asylum seeker has professional support. Discussing the draft decision with the asylum seeker and providing the opportunity to raise objections prior to the decision result in far fewer mistakes and a higher acceptance of the decisions on the part of the asylum seekers.

Despite the – foreseeable – conflicts between individual actors, to whom such close cooperation was a new experience, everyone evaluated the procedure positively. The constant involvement of all actors in the procedure resulted, essentially, in clarification of roles and not – as had been feared by some external observers – to “fraternisation”. Clarification of professional roles was achieved through regular exchanges between the authorities and NGOs. Along with positive evaluations, this was the reason Parliament decided in September 2015 to make the test phase decree, with certain amendments, the basis of the legislative revision in respect of the new procedure.

Looking at possible improvements, the role of legal representation comes into focus. In this context one major criticism was that the legal representative has the possibility – or obligation – to stop acting for the client if they see that an appeal has no prospect of success. Furthermore, an appeal is already included in the flat-rate payment that the federal government makes to the service provider. Accordingly, there was a fear that it was in the legal representative's interest not to file an appeal to save themselves some work, for which they would not be paid separately. Furthermore, at seven working days in the accelerated procedure (five working days in the Dublin procedure), the time limit for launching an appeal is regarded as very short. The asylum seeker has little time to find another legal representative if the first resigns. This deadline is also particularly challenging because, in Switzerland, there are no hearings before the court in asylum procedures and the seven calendar day (three calendar day in Dublin procedures) time limit for "amendment of the appeal" is tight. The court is also legally required to rule on the procedure within 20 days (five days in Dublin cases).

In order to avoid an inopportune withdrawal from the case, prohibited by the rules governing the client relationship, this means that such a withdrawal can take place only upon notification of the decision and not later, and the asylum seeker must be given a list of possible contact persons (other legal advisory services and lawyers) so that they can exercise their right to an effective remedy.

The biggest challenges for legal representation in this procedure, which is subject to such a tight timeline and compensated with a flat-rate payment, are the following:

- the proliferation of necessary translation work, given the limited availability of translators;
- the system's "robustness under pressure," in particular the questions of who bears the financial risk of the legal representative in the event of plummeting numbers of asylum applications and how rapidly the established structure is able to respond to rising numbers;
- quality assurance regarding advisory work and legal representation, from the necessary specific training, further training options, to quality assurance in a narrow sense in relation to the "products" of advisory work and legal representation; and
- the credibility of advisory staff and legal representatives as independent entities in the procedure because due to the setting (everything happens in one place) asylum seekers often perceive advisory staff and legal representatives as part of the immigration administration.

It can also be reasonably expected that consistency and quality, in relation to both decision-making and advisory and representation practice will pose a further challenge for all participants after the launch of the procedure in the six regions.

Notwithstanding these avenues for improvement, overall, results are positive. Success is also manifest in the broad acceptance among political actors and the general public, who approved the amended asylum law in a referendum held on 5 June 2016 by a majority of 66.78%.

In the meantime, preparations have been under way throughout Switzerland for the implementation phase. On 2 April 2018 a second test region started in francophone western Switzerland. In October 2018, mandates for advisory work and legal representation were issued in all asylum regions. Implementation throughout Switzerland will take place as of 1 March 2019.

### 3. What Lessons Can Be Drawn for a European Model?

The Swiss model teaches European countries that asylum procedure reform can only succeed with the broad involvement of all actors. The most important condition for reforming Swiss asylum procedure was a broad political and societal consensus, where the procedure was expedited considerably and qualitatively improved while safeguarding fairness and the rule of law. The procedure involves all levels of the administration and willing civil society actors. It establishes es-

sential parameters (acceleration, efficiency, fairness, rule of law) and is now also in a position to include new actors. Within the process conducted for the implementation of the new model, staff of the SEM is prepared for the reforms at all levels and involved in the transition process. Similar preparations are being made among NGO stakeholders and in the relevant cantons, cities and municipalities.

The Swiss model sets an example for successful implementation of asylum procedure reform in other European countries with its broad-based revision process. Exchange, participation and willingness to compromise on the part of all the state and non-state actors involved imbued the process with a high degree of credibility, and generated support for the new procedure.

From a substantive point of view, the focus on efficiency and fairness is key to success. In practice, it was apparent that the free advisory services and legal representation for asylum seekers contributes to the efficiency of the procedure and that more transparency is an essential condition to safeguard asylum seekers' cooperation in the procedure, as well as their acceptance of asylum decisions. When it came to implementation, the well-thought-out asylum procedure made it possible to overcome anxieties between the authorities and NGOs in the asylum sector. Perhaps the most important realisations on both sides were that the "other side" also acts professionally, and, although ideological battlefields do indeed exist, they did not play an eminent role for the practical work.

When it comes to the rule of law and credibility vis-à-vis asylum seekers, it is essential that independent advice and legal representation be available to all asylum seekers, regardless of the prospects of success. It became evident in the course of evaluation that asylum seekers pay very close attention to disparities in advisory services and the proximity of those helping them to the state authorities. Service providing entities must therefore constantly demonstrate the independence of advice and legal representation, as well as equal treatment of all asylum seekers regarding access to these services. These measures range from maintaining professional distance between the authorities and NGOs in front of asylum seekers, to taking measures to secure confidentiality. The perception that the procedure is transparent and fair is key to a fair and efficient process. If this is not the case, asylum seekers are unlikely to want to cooperate or to accept decisions made about them. This can lead, among other things, to an increase in the number of follow-up or special procedures or an increase in the number of people in exceptional situations, whose resolution and conclusion then requires action by the state and thus brings no overall efficiency gains.

Successful implementation of the procedure across Switzerland will depend decisively on the consistency and thus the credibility of the asylum procedure in the regions and the quality of advisory work and legal representation. A process of this kind requires courage, patience and the full participation of all the persons and organisations concerned.

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