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Practice Guide Provisional Stays

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Status S and Status F

Zurich, December 2022

This guide is intended to provide all interested parties with an overview of the permits allowing individuals to stay in Switzerland *provisionally*. The focus is on temporary protection (status S) and temporary admission (status F).

The protection status S was applied for the first time during the Russian war of aggression in Ukraine. Applications from persons who have fled Ukraine are therefore subject to a special procedure. In contrast, persons who have fled to Switzerland without any connection to Ukraine go through the regular asylum procedure. They are granted a right to stay in Switzerland if they fulfil the refugee status or if the enforcement of the ordered removal is postponed due to impermissibility, impossibility, or unreasonableness. In the second case, individuals are temporary admitted to Switzerland and are granted the status F. Both temporary protection and temporary admission are characterized by the fact that they have been developed as temporary, provisional rights of stay. They are therefore in many respects precarious legal statuses.

The purpose of this guide is to provide a closer look at the legal framework and the practice of the authorities regarding these two precarious categories of permits. To this end, we shed light on S and F statuses in four chapters each: Granting of status (I), associated status rights (II), the longer-term prospects for status change (III), and finally loss of status (IV). If affected persons are confronted with concrete problems and legal procedures at the cantonal migration authorities or at the State Secretariat for Migration (SEM) on the federal level, it is strongly recommended that they contact a legal advice centre or a person with legal expertise.[1] Generally speaking, the earlier in the procedure this happens, the better. This guide is intended to provide those affected as well as people supporting them with an initial overview. However, it cannot replace competent legal advice that is specific to the individual case.[2]

In principle, this guide does not serve to point out systemic grievances regarding the two statuses and to make political demands. However, Freiplatzaktion Zürich (FPA ZH) is engaged in many other contexts and formats against the state-produced insecurity that these precarious permits entail,[3] and for the perception and enforcement of the rights of asylum-seeking and migrated people.

Freiplatzaktion Zürich

A note on translation: the present text is a translation of the German original (https://freiplatzaktion.ch/Aktuell/leitfaden-voruebergehende-aufenthalte-status-s-und-status-f). We have – for the purpose of providing a comprehensive understanding – translated the original quotes as well. Where available, the legal texts have been taken from translations provided by the Swiss Federation on its official website (https://www.admin.ch/gov/de/stArt.html). However, this is not a professional translation. Errors and inaccuracies may occur due to the translation. If in doubt, please consult the German version.

The support of Swiss Solidarity (https://www.glueckskette.ch/) has made the preparation of the guide and its translation possible. Many thanks!

[1] The Swiss Refugee Agency SFH maintains a list of centers providing free legal aid in the cantons to which affected persons can turn: https://www.fluechtlingshilfe.ch/hilfe-fuer-schutzsuchende/rechtsschutz.
[2] The following information has been compiled to the best of our knowledge and belief. However, there is no claim to completeness and FPA ZH cannot assume any warranty for the information contained.
[3] Cf. Freiplatzaktion Zürich, «Prekäre Aufenthaltstitel - Staatlich produzierte Unsicherheit», Rundbrief 4/2022, p. 3 f.

Table of contents

A. Temporary Protection (Status S)

I. Granting of Status

This section provides an overview of how and under what circumstances the protection status S is granted in practice.

1. Origin and Background of the Protection Status S

The protection status S was introduced after the wars in former Yugoslavia. Since the total revision of the Asylum Act and its entry into force in 1999, it has been enshrined in Art. 4 and 66 ff. of the Asylum Act (AsylA).

The idea of the protection status S arose in the context of the 1990s. At that time, more and more persons applied for asylum who had not fled from personal and ideologically motivated persecution, but from general situations of violence and wars in their home countries. In these cases - which concerned, for example, individuals from the former Yugoslavia, Somalia or Sri Lanka - the authorities denied refugee status, but could not send the persons back to their countries of origin for humanitarian reasons. Therefore, temporary admission (so-called status F), introduced in the 1980s as a substitute measure for deportation, was being granted more and more often. The authorities, however, found this situation unsatisfactory, as is evident from the Federal Council's rather unambiguous dispatch of 1995:

> On the one hand, temporary admission is formally only a substitute measure for the impracticable execution of removal. However, this means that a time-consuming and costly individual asylum and removal procedure must be carried out in every case, even though it is already certain at the outset that, while asylum will not be granted, removal can also not be enforced. Especially in cases where the Federal Council explicitly decides to bring people from war or civil war zones to Switzerland for the purpose of granting temporary protection and to temporary admit them in groups, this legal concept leads to the absurd situation that the authorities first have to formally expel these persons from Switzerland in order to be able to temporary admit them at the same time with the same order. The question of a possible return of persons in need of protection must also be considered unsatisfactorily answered. The current solution offers no guarantee that temporary admission will not become permanent. There seems to be a consensus today that the granting of temporary protection should only lead to a temporary stay from the outset and that it must be ensured that those in need of protection are returned to their home country after the violent situation has ended. However, the current legal system lacks a comprehensive regulation of return assistance and any further measures that would be necessary for this. Difficulties have also arisen in practice regarding accommodation and the payment of welfare benefits for persons who remain in Switzerland for an indefinite period. [...]
>
> But the legal status of the persons concerned is also unsatisfactory today. In particular, the precarious legal status and the absence of entitlement to family reunification place persons in need of protection, who often live separated from their family in Switzerland for years while there are no signs of improvement in their home country, in a difficult personal situation.[4]
>
> [entire quote translated.]

Against this background, temporary protection was introduced in the total revision of the Asylum Act: to be able to accept large groups of refugees fleeing from general violence in their respective home countries in a relatively uncomplicated manner.

Despite this aim and the legal basis existing since 1999, temporary protection existed only on paper for more than two decades. It was never applied, although there was no short-

[4] Dispatch on the total revision of the Asylum Act and on the amendment of the Federal Act on the Residence and Settlement of Foreign Nationals of December 4, 1995, BBl 1996 II 1, p. 14.

age of groups of people fleeing violence and unacceptable living conditions in civil war regions. The protection status was not applied in the cases of people fleeing from civil war or situations of general violence in Sri Lanka, Somalia, Iraq, Afghanistan, or Syria.

It was not until the outbreak of the Ukraine conflict in February 2022 that the protection status S came back into the focus of politics and the public. On March 11, 2022 - in view of the large number of people fleeing to Western Europe to escape the war in Ukraine - the Federal Council applied protection status S for the first time.

The legal requirements for the activation of the protection status S are outlined in Art. 4 AsylA:

> Art. 4 Granting temporary protection
>
> Switzerland may grant temporary protection to persons in need of protection as long as they are exposed to a serious general danger, in particular during a war or civil war as well as in situations of general violence.

Thus, individuals considered to be in need of protection are persons fleeing - without necessarily being victims of targeted persecution - the consequences of war, civil war, situations of generalized violence, or systematic and serious violations of fundamental human rights.[5]

The decision on granting temporary protection to a specific group of refugees is made by the Federal Council. Art. 66 of the Asylum Act provides as follows:

> Art. 66 Policy decision of the Federal Council
>
> [1] The Federal Council shall decide whether and according to which criteria Switzerland will grant temporary protection to groups of persons in need of protection in accordance with Article 4.
>
> [2] Before doing so, it shall consult representatives of the cantons, the charitable organisations and if need be additional non-governmental organisations as well as the Office of the United Nations High Commissioner for Refugees.

The actual goal of activating the protection status S is to relieve the asylum system. The granting of the protection status takes place in a quick and – compared to other asylum and migration law procedures – relatively unbureaucratic way, without an individual extensive examination of a possible asylum application or refugee status of an individual.

The protection status S is not intended to lead to permanent residence but is described as «return-oriented». The focus is not «[…] the permanent residence in Switzerland of persons in need of protection (…), but the return to their home country or country of origin as soon as the possibility for this presents itself [entire quote translated.]».[6]

2. Why was the Protection Status not activated in other Situations?

The failure to activate the protection status S in other situations of violence and war, such as those in Somalia, Sri Lanka, Iraq, Afghanistan, or Syria, is likely politically motivated.

The authorities justified their reluctance, among other reasons, with security concerns in the absence of a case-by-case examination and with the «smaller» number of people from these other countries seeking protection in Switzerland. In doing so, they disregarded the fact that, if the protection status had been activated, more people might have sought - and found - protection in Switzerland. It is quite conceivable that this was precisely the aim of the authorities. In any case, the political climate, and a fundamental defensive atti-

[5] Judgment of the Federal Administrative Court (FAC) D-5779/2013 of 25 February 2015, E. 5.4.2.
[6] Dispatch Asylum Act 1996, p. 2.

tude toward immigration from third countries (i.e., countries outside the EU/EFTA region) to Switzerland have increasingly intensified since the 1990s.

Paradoxically, the Federal Council argued as an additional justification in the case of Syria that the application of the protection status S to refugees from Syria could result in considerable additional work for the asylum system in the long run, because the asylum procedure would have to be resumed upon request after five years.[7] One can only speculate about the reasons why this worry was not again brought up when granting protection to persons fleeing Ukraine. In any case, this position taken by the Federal Council with regards to Syria ignores the provision in Art. 74 Para. 2 of the Asylum Act, according to which persons in need of protection are granted a residence permit (B permit) after five years (limited in time until the lifting of the temporary protection status). Accordingly, it would have been rather unlikely that a large number of asylum proceedings would have had to be taken up again.

After all, the Federal Administrative Court held in a 2015 ruling that, at least with regards to the situation prevailing in Syria, the activation of protection status S would have been appropriate:

> In view of the material on Article 4 of the Asylum Act, it seems justified to assume that the legislative considerations underlying the introduction of this provision would in principle also be applicable to the conflict situation currently prevailing in Syria. Moreover, the application of this provision to asylum seekers of Syrian origin would be an appropriate response to the uncertain development of the situation in Syria. However, an application of Art. 4 AsylA does not lie within the competence of the Federal Administrative Court as an appeal authority in the field of asylum law, but the granting of such temporary protection would have to be ordered by the Federal Council (Art. 66 AsylA) or initiated by the SEM.[8]
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> [entire quote translated.]

The handling of temporary protection - and the lack of application of the status to other groups of people who had to flee situations of violence and war in their country of origin - shows how strongly the asylum sector in Switzerland is dependent on the political motivation of the decision-makers. Because the Federal Council has considerable room for decision-making in the application of the protection status S – in contrast, for example, to the decision on the protection of recognized refugees, which is framed more narrowly by rules of international law – this protection status is also particularly exposed to political moods (and mood swings).

3. The Protection Status S in the Case of Ukraine

By general decree of March 12, 2022, the Federal Council decided to grant temporary protection to persons who have fled Ukraine.[9] However, this grant of protection does not apply without restriction. Beneficiaries must meet certain criteria.

In the general decree, the Federal Council defined the beneficiary groups as follows:

a) Protection-seeking Ukrainian citizens and their family members (partners, minor children and other close relatives who were fully or partially supported at the time of flight) who were residing in Ukraine before February 24, 2022;

[7] Federal Council response to Isabelle Moret's interpellation of March 19, 2015, AB 15.3294, Asylum Act. Granting temporary protection specifically to people from Syria?
[8] FAC, Judgment D-5779/2013, 25 February 2015, E. 5.4.4.
[9] General Decree Granting Temporary Protection in Connection with the Situation in Ukraine, March 11, 2022, BBl 2022 586. Available at: https://www.fedlex.admin.ch/eli/fga/2022/586/de.

b) Protection seekers of other nationalities and stateless persons and their family members as defined in point a) who had international or national protection status in Ukraine before February 24, 2022;

c) Protection seekers of other nationalities and stateless persons as well as their family members as defined in letter a, who can prove with a valid short stay permit or residence permit that they have a valid right to stay in Ukraine and cannot return to their home countries safely and permanently.

Thus, the condition for granting protection is not Ukrainian citizenship, but rather the fact that a person was a resident of Ukraine *before* February 24, 2022.[10]

Regarding the respective groups of persons, it should be noted that there is no restriction for protection seekers who are in binational partnerships or family unions. If, for example, only one spouse has Ukrainian citizenship (lit. a) and the couple can prove that they resided in Ukraine before fleeing, both are entitled to protection status.[11] The Federal Administrative Court has already sent several cases back to the SEM because it did not clearly explain why and based on which provisions it denied temporary protection to binational couples or families.[12]

It should be noted, however, that family members of the persons listed in letters a to c above cannot claim protection status on their own. Thus, in the case of a Nigerian national whose Ukrainian wife was still in Ukraine and had accordingly herself not filed an application for temporary protection, the Federal Administrative Court held that this person did not fall into the category of persons under letter a) of the general ruling rendered above.[13]

In the case of individuals who do not have Ukrainian citizenship, it is also required that they either (I) had international or national protection status in Ukraine prior to their flight, or (II) were otherwise lawfully present in Ukraine and cannot return to their home country.[14]

Ukrainians who resided abroad and not in Ukraine before 24 February 2022 will not be granted temporary protection in Switzerland. For example, a Ukrainian woman who was living in Russia at the time of the outbreak of the war was not granted temporary protection. However, she was temporary admitted to Switzerland - due to the unreasonableness of removal to Russia.[15]

4. The Procedure: Application for Temporary Protection

The procedure for applying for and being granted temporary protection in the case of applicants and their family members in Switzerland and abroad is governed by Art. 68 to 73 of the Asylum Act.

An application for temporary protection can be made both at the border (especially at the border control at the airports Zurich-Kloten and Genève-Cointrin) and within the country.[16] No special form is required.

[10] FAC, Judgment D-2161/2022 of 25 May 2022, E. 7.3, in which the SEM did not fully clarify the appellants' place of residence.
[11] FAC, Judgment D-2161/2022 of 25 May 2022, E. 7.2.
[12] See for example: FAC, Judgments E-2140/2022 of 15 June 2022; D-2161/2022 of 25 May 2022; D-2283/2022 of 30 May 2022.
[13] FAC, Judgment E-2797/2022 of 14 September 2022, E. 6.2.
[14] Cf. for past practice in this regard below: I. 6.
[15] FAC, Judgment E-2812/2022 of 31 August 2022.
[16] Art. 69 Asylum Act.

A valid travel document is required for entry into Switzerland. Due to the visa waiver in force since 2017, persons from Ukraine can enter Switzerland without a visa and stay here for 90 days without a permit. If no travel document is available, other proof of Ukrainian citizenship or origin from Ukraine must be presented.[17]

A person seeking temporary protection must register at a Federal Asylum Centre («Bundesasylzentrum», BAZ) (between 9 am and 4 pm). It is also possible to register online at https://registerme.admin.ch/select-language. At the Federal Asylum Centre, fingerprints and personal data are recorded. In addition, the person will be assigned a legal representative. In the subsequent verification of personal data and (brief) initial interview, it is examined, among other things, whether the applicant is clearly a victim of individual and ideologically motivated persecution within the scope of Article 3 AsylA (i.e. whether the individual *obviously* fulfils the conditions to be recognized as a refugee).[18] If this is the case, the SEM conducts an asylum procedure. If it is not a case of obvious persecution relevant under the Asylum Act, it is examined whether the person belongs to the group of persons entitled to temporary protection.

If the applicant meets the requirements for the granting of status S (according to the general decree of the Federal Council), he or she will be granted temporary protection. The granting of temporary protection cannot be contested.[19]

However, so-called grounds for rejection may prevent the granting of temporary protection, even if the conditions for granting protection are met in an individual case. The grounds for rejection are regulated in Art. 73 AsylA as follows:

> Art. 73 Grounds for rejection
>
> Temporary protection shall not be granted if the person in need of protection:
>
> a. has committed an act falling within the terms of Article 53;
>
> b. has violated or is a serious threat to public security; or
>
> c. is subject to a legally enforceable expulsion order under Article 66a or 66a^{bis} SCC [Swiss Criminal Code] or Article 49a or 49a^{bis} [Military Criminal Code].

So far, there has been no case of application of this provision (as of the end of November 2022). However, it is very likely that the courts will be guided in their interpretation of the clause by the corresponding provisions on ineligibility for asylum and on the grounds for exclusion from temporary admission.[20]

If the person concerned does not meet the requirements (or if there is a reason for exclusion under Art. 73 AsylA), the SEM conducts an asylum and/or removal procedure in accordance with Art. 69 Para. 4 AsylA.[21]

Subsequent or multiple applications must be submitted to the SEM in writing and with a statement of reasons.[22] This concerns, among others, individuals who have already applied for asylum in Switzerland once.

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[17] E.g., Zurich Migration Office, https://www.zh.ch/de/migration-integration/ukrainehilfe.html#-689068951.
[18] Art. 69 Para. 2 AsylA.
[19] Art. 69 Para. 2 AsylA.
[20] They are thus likely to refer to Art. 53 AsylA (ineligibility for asylum) and to Art. 83 Para. 7 and Para. 9 of the Federal Act on Foreign Nationals and Integration (FNIA) (refusal of temporary admission), both of which deal with the refusal of protection status/right of residence to certain persons classified as dangerous or otherwise undesirable. Article 53 of the Asylum Act is explicitly referred to.
[21] cf. I. 5. below
[22] Art. 72 in connection with. Art. 111c AsylA.

If a person files not only an application for temporary protection but (also) an application for asylum and is granted temporary protection, the asylum procedure is suspended.[23]

The suspension of the asylum procedure may not be appealed. Persons in need of protection who have applied for recognition as a refugee may request that the procedure for recognition as a refugee be resumed at the earliest five years after the decision to suspend the application in accordance with Art. 69 Para. 3 AsylA. When this procedure is resumed, the temporary protection will be revoked.[24] If the SEM intends to refuse temporary protection, it must continue the procedure for recognition as a refugee or the removal procedure without delay.

The suspension of the asylum procedure and thus the postponement of the recognition of a person as a refugee for a whole five years is hardly compatible with the Refugee Convention, especially since the protection status S comes with much more limited rights compared to the status of a recognized refugee.

5. Refusal of Temporary Protection: Consequences and Possibilities for Action

If a person seeking protection is not granted protection status, a regular asylum and/or removal procedure is carried out. The following options are to be distinguished from each other:

a) If the person has already filed an asylum application or asserted grounds for asylum in the procedure for granting protection, an asylum procedure must be continued or carried out and – if this has not yet been done – a supplementary hearing on the grounds for asylum must be scheduled.[25] The SEM must thoroughly examine whether the person qualifies as a refugee:
   - If the SEM recognizes the refugee status, it grants the person asylum or (if there are grounds for excluding asylum) temporary admission.[26]
   - If the SEM denies refugee status, it rejects the asylum application and orders removal. However, if the execution of the removal proves to be impossible, unreasonable, or impermissible, the SEM grants temporary admission as a substitute measure for the execution of the removal.[27]

b) If the person has not filed an asylum application and has not claimed to be under threat of persecution qualifying for asylum or the refugee status during the procedure for the granting of protection,[28] the removal procedure follows directly. In the latter procedure, it is only examined whether there are obstacles to the execution of the removal from Switzerland.[29]

If a person has grounds for asylum (i.e. the above-mentioned fear of persecution on the basis of personal characteristics), it is advisable to expressly mention those grounds clearly and unambiguously already in the procedure for granting temporary protection

[23] Art. 69 Para. 3 AsylA.
[24] Art. 70 Asylum Act.
[25] Art. 29 Asylum Act. See for example: FAC, Judgments E-4460/2022 of 25 October 2022 E. 6.3.3; D-4440/2022 of 19 October 2022; D-2722/2022 of 10 August 2022; E-2877/2022 of 6 July 2022.
[26] Cf. on temporary admission as a refugee, B. I. 3.
[27] More on this below under section B.
[28] Cf. for example FAC, Judgment E-3828/2022 of 25 October 2022, E. 5.3: «The view of the complainant that an asylum procedure must be conducted automatically when an application for temporary protection is filed, i.e. even without an application for asylum having been filed, cannot be followed. It is clear from the materials that proceedings are to be continued as ordinary asylum proceedings if the application filed is to be regarded as an application for asylum pursuant to Art. 18 AsylA (cf. BBl 1996 II 81). [entire quote translated.]»
[29] If there are obstacles to enforcement, the SEM orders temporary admission, see B. I. 3.

(and as early as possible in the very first interview).[30] If this has not been done, however, it should still be possible to apply for asylum after temporary protection has been denied.[31]

So far, the refusal of temporary protection, the rejection of the asylum application and the order of removal have been issued by the SEM in one and the same decision. This decision is subject to appeal to the Federal Administrative Court. If the application for temporary protection (and the asylum application) is rejected, but the person is temporary admitted, the decision can still be appealed with regards to the granting of protection (and on the asylum point).[32] A challenge is only excluded if the person is granted temporary protection (and any asylum proceedings are suspended).

Decisions issued by the SEM must contain information on the right of appeal. Said information must also specify the time limit for lodging an appeal. According to the Federal Administrative Court, the 30-day appeal period pursuant to Art. 108 Para. 6 AsylA applies to appeals against the denial of temporary protection.[33] This also applies in cases where an asylum application is rejected, and removal and/or enforcement of removal are ordered in the very same decision.[34] As can be seen from the case law of the Federal Administrative Court, the information on the right of appeal provided by the SEM is regularly incorrect because it usually refers to the much shorter time limit in Art. 108 Para. 3 AsylA (5 working days) or Art. 108 Para. 1 AsylA (7 working days).[35]

Due to the complicated nature and the partly still unresolved procedural aspects of the appeal procedure, it is recommended to seek legal advice as soon as possible upon receipt of a negative ruling.

[30] Cf. FAC, Judgment D-4645/2022 of 1 November 2022, in which a Turkish national, according to the Federal Administrative Court, «[...] did not present any concrete indications of an asylum-related risk of persecution potentially threatening him in his home country [...] It can therefore not be concluded that he would have filed an application for asylum (Art. 18 AsylA) in addition to the application for temporary protection. Moreover, the complainant does not allege such either. There is therefore no reason for the court to call upon the SEM in this judgment to initiate such proceedings. [entire quote translated.]» Cf. there, E. 5.

[31] Cf. FAC, Judgment D-4645/2022 of 1. November 2022, E. 5.3: «At this point, however, it must be pointed out to the complainant that he is free to file an asylum application. [entire quote translated.]»

[32] Cf. e.g. FAC, Judgment E-2812/2022 of 31. August 2022.

[33] This is justified by the Federal Administrative Court with the «clearly ascertainable, historical will of the legislator [entire quote translated.]» cf. FAC, Judgment D-2161/2022 of 25 May 2022, E. 7.4. Said will of the legislator is summarized in the same decision as follows: «Regarding the analogous application of procedural regulations, the Federal Council stated in its dispatch of 4 December 1995 that the general rules of the asylum procedure should also apply to the granting of temporary protection (cf. dispatch, p. 82). At the time of the introduction of the rules on the granting of temporary protection in the Asylum Act, an appeal period of 30 days applied to all appeals in the field of asylum (cf. Art. 6 in conjunction with Art. 50 VwVG). Consequently, the historical legislator assumed that a 30-day appeal period applied to proceedings such as the present one. [entire quote translated.]»; cf. also FAC, Judgments D-4324/2022 of 27 October 2022 E. 7.1; D-2730/2022 of 4 August 2022, E-2140/2022 of 15 June 2022 E. 6.3, D-2283/2022 of 30 May 2022 E. 7.3.

[34] Cf. e.g. FAC, Judgment D-2850/2022 of 12 September 2022, E. 1.3.

[35] Cf. relatively clearly: FAC, Judgment D-4324/2022 of 27 October 2022, E. 7.1: «It is not apparent and is once again not substantiated by the SEM why the time limit for appeal - as stated in the contested order - should be five working days in application of Art. 108 Para. 3 AsylA. The Federal Administrative Court has repeatedly held that regarding the time limit for appeal in the case of orders refusing the granting of temporary protection, article 108 Para. 6 AsylA is to be applied mutatis mutandis. [entire quote translated.]»

Cost of Appeal Procedures

The risk of procedural costs must always be considered for all appeal options described in this guide. In principle, procedural costs are charged for appeal procedures.[36] As a rule, it is possible to apply for a waiver of the procedural costs. However, such a waiver is only granted on the condition that the person concerned is destitute (i.e. either receives social assistance or has an income that only just covers the cost of living) and that his or her case is judged to be promising («nicht aussichtslos») by the respective authorities in an initial assessment.

In addition, the state may pay for the compensation of legal representation, if the authorities or courts – in addition to the requirements regarding the waiver of procedural cost – also consider legal representation to be necessary.

Concerning the assessment of the cost risks, it is important to contact a person with legal expertise as soon as possible if you wish to appeal an order or decision.

6. Previous Practice on Temporary Protection in the Case of Ukraine

In recent months, the Federal Administrative Court has already settled several appeals against refusals to grant temporary protection (and subsequent expulsions), mainly involving cases of binational couples/families and persons from third countries with residence permits in Ukraine. The following groups of cases can be identified:

Persons from third countries who have a temporary or permanent residence permit in Ukraine (e.g. for studies) and have fled to Switzerland due to the war. In these cases, the decisive factor is whether the person could credibly demonstrate reasons why a return to his or her home country cannot take place in safety and permanently. In the few appeals that have so far been upheld by the Federal Administrative Court and returned to the SEM, the circumstances in the country of origin were insufficiently clarified by the SEM or the SEM's decisions were not sufficiently substantiated. As far as we know, the Federal Administrative Court has never directly ordered the granting of protection, but instead always opted to return the cases to the SEM.

- Example 1: A Sudanese national, who was in Ukraine to study, fled to Switzerland after the outbreak of war. He claimed that he could not return to Sudan because the security situation there had deteriorated since the military coup, the population – in particular in his home village – were threatened by famine, and he could not expect to be supported by his family. In the appeal proceedings against the negative decision of the SEM, the Federal Administrative Court held that the SEM did not investigate the ethnic, religious and linguistic affiliation of the complainant in Sudan, nor his last place of residence in his home country, nor the concrete living conditions of his family members residing in Sudan, nor any other aspects that might be relevant in connection with the feasibility of enforcing the removal order, and that the contested order did not mention a single word about the current situation in Sudan, although significant changes in the political and human rights situation were to be assumed. Accordingly, the proceedings were referred to the SEM for further clarification of the facts.[37]
- Example 2: In the case of Azerbaijani nationals who fled Ukraine with their children (both of whom have Ukrainian citizenship, cf. the case law concerning binational families below) after the outbreak of war and arrived in Switzerland after a short stay in Azerbaijan, the SEM had failed to clarify, according to the Federal Adminis-

[36] As a rule, a few hundred to a few thousand francs.
[37] FAC, Judgment D-3189/2022 of 10 August 2022.

trative Court, whether in Azerbaijan adequate medical treatment would be available to the parents (who were suffering from HIV) and what individual circumstances the family would find themselves in.[38]

Binational couples where the SEM assumed that a return to the country of origin of the non-Ukrainian spouse was possible. In these cases, the cases were mostly sent back by the Federal Administrative Court because the SEM had not clearly explained why the Ukrainian spouse's entitlement to protection should not apply in the respective case.[39]

In the case of Ukrainian children with non-Ukrainian parents, the Federal Administrative Court does not yet seem to have come to a clear conclusion as to whether they form part to the group of persons seeking protection under letter a) of the general ruling.

- Thus, in decision D-4049/2022 of 12 October 2022, the Court stated under E. 7.1. «In the present case, the Ukrainian citizen seeking protection is a minor, and the family members are his parents [with Uzbek citizenship]. This constellation is not covered by subparagraph (a) of the general ruling, since only partners and minor children of Ukrainian citizens are expressly mentioned as family members [...]. In addition, according to subparagraph (a) of the general ruling, other close relatives who were fully or partially supported at the time of the flight may be included in the protection. The complainants 1 and 2 are neither partners nor children of the complainant 3, nor were they supported by him (rather, the support took place in the opposite direction). Thus, the family does not fall under subparagraph (a) of the General Order of March 11, 2022, notwithstanding the Ukrainian nationality of complainant 3 [i.e., the child]. [entire quote translated.]»
- In contrast, the Federal Administrative Court ruled a few days later in D-3363/2022 of 21 October 2022 under E. 5.2: «The priority given by the SEM to the Azerbaijani nationality of the parents cannot change the fundamental entitlement of their joint children [with Ukrainian nationality] to be granted temporary protection. [entire quote translated.]»

Persons from third countries with a Ukrainian spouse who still lives in Ukraine. According to the Federal Administrative Court, these persons cannot invoke letter a) of the general ruling (see above), but have to provide reasons why they cannot return to their home country safely and permanently.

Persons who did not have a residence in Ukraine at the time of the outbreak of war, i.e. on February 24, 2022: In these cases, the refusal to grant protection has so far been confirmed by the Federal Administrative Court.

In addition, it is apparent from the rulings issued to date that the SEM has repeatedly failed to adequately examine grounds for asylum raised in the proceedings or has mixed up the procedures for the examination of protection with the examination of alleged grounds for asylum the examination of obstacles to the execution of deportation, and has given unclear reasons for its decisions in this regard. Thus, the Federal Administrative Court held in a decision concerning a Congolese national who studied in Ukraine and claimed that she could not return to the Congo due to the dangerous situation there:

> [The SEM violates its duty to provide a reasoning for its decision] by mixing elements of the procedure concerning temporary protection as well as the asylum procedure in the reasoning of the contested order, so that it can no longer be properly contested.

[38] FAC, Judgment D-3363/2022 of 21 October 2022, E. 7.2.
[39] See above under I.3. and for example FAC, Judgments E-2140/2022 of 15 June 2022; D-2161/2022 of 25 May 2022; D-2283/2022 of 30 May 2022.

> that the SEM, on the one hand, assumes that there are no indications that the complainant would not be able to return to the Congo permanently and safely if she were to return and, on the other hand, examines a potential threat due to her father's political activities with regard to refugee status (well-founded fear of persecution, targeted disadvantages),
>
> that this, however, is a procedure concerning the granting of temporary protection,
>
> that the lower court has to deal with the relationship between the procedure concerning the granting of temporary protection and the ordinary asylum procedure [...],
>
> that in particular the question arises whether the SEM does not have to continue the procedure pursuant to Art. 69 Para. 4 AsylA immediately as an ordinary asylum procedure if temporary protection is denied, whereby an additional hearing on the grounds for asylum pursuant to Art. 29 AsylA would have to be conducted,
>
> [...]
>
> that the facts regarding the potential danger to the complainant are not fully established in the present case,
>
> that the SEM only superficially inquired about or examined her claims of danger both during the brief interview on August 18, 2022 and in the contested order,
>
> that the question of her father's political function and activities, as well as her political vulnerability - also in view of her long absence from the country - should have been investigated [...].[40]
>
> [entire quote translated.]

As is evident from the case law on the denial of temporary protection, it is important to clarify and raise possible procedural errors on part of the SEM over the course of appeal proceedings. As explained above, the SEM sometimes establishes the facts incompletely, gives insufficient reasons for its decisions or makes serious formal errors (incorrect delivery of the decision, incorrect information on the right of appeal).

7. Accommodation During the Procedure

With regards to accommodation, reference can be made to the publicly available information provided by the federal government and the cantons.[41]

Upon arrival in Switzerland, persons applying for protection status who do not yet have a place to stay are initially accommodated in a Federal Asylum Centre («Bundesasylzentrum», BAZ). As a rule, the persons are assigned to a canton a short time later. Allocation is done on the basis of population-proportionality. After the allocation, the canton or a municipality is responsible for the accommodation and care of the allocated individuals (in the canton of Zurich, the municipalities of residence or third-party agencies commissioned by the municipalities are responsible for the accommodation of the refugees).

In addition to the accommodation in cantonal or communal shelters, the Swiss Refugee Agency SFH[42] coordinates the accommodation of refugees from Ukraine with private host families in cooperation with partner organizations. In the canton of Zurich, the cantonal

[40] Cf. FAC, Judgment D-5116/2022 of 18. November 2022; see also FAC, Judgment E-4460/2022 of 25. October 22, in which the FAC also found that the SEM should have conducted asylum proceedings after refusing to grant protection; cf. also FAC, Judgment D-4440/2022 of 19 October 2022 concerning a Russian national, where the SEM was also required to conduct asylum proceedings in the event of a refusal to grant protection (cf. also FAC, Judgment D-2722/2022 of 10.8.2022).

[41] For example: https://www.sem.admin.ch/dam/sem/de/data/asyl/faktenblatt-zusammenarbeit-bund-kantone.pdf.download.pdf/faktenblatt-zusammenarbeit-bund-kantone-d.pdf.

[42] Cf. https://www.fluechtlingshilfe.ch/aktiv-werden/fuer-ukrainische-gefluechtete/gastfamilien-fuer-ukrainische-gefluechtete. Last accessed on November 30, 2022.

social welfare office KSA has posted a questionnaire for interested host families. Whether private accommodation is possible depends on the municipality of residence.[43]

8. Evaluation and Extension of the Status S

With the decision of the Federal Council of November 9, 2022, the temporary protection for all beneficiaries was extended by one year until March 4, 2024, «[...] provided that the situation in Ukraine does not fundamentally change by then. [entire quote translated.]» In principle, the Federal Council must continue to decide on the extension every year in the future.

A group of experts is currently evaluating the protection status S. The group presented their interim report on 30 November 2022. The report draws an overall positive conclusion on the first-time application of protection status S. In the view of the evaluation group, however, there is potential for adjustments to the legal basis in certain areas. In addition, the group states that an alignment of the legal basis for protection status S with that for temporary admission would be desirable in principle. The evaluation group will examine these and other points in greater depth in preparation for its final report by June 2023. It will also formulate recommendations, taking into account the political room for manoeuvre.[44]

II. Status Rights

The purpose of this chapter is to provide an overview of the various rights of persons with protection status S.

In principle, the legal status of persons with protection status S - according to the law - is comparable to that of persons with temporary admission. However, there are marked differences, particularly regarding family reunification. Persons who have fled Ukraine and are granted protection status S also benefit from more favourable conditions regarding gainful employment and travel abroad.

The legal status of persons with S status is regulated in Art. 74 (regulation of presence) and 75 AsylA (regulation of gainful employment) and in various provisions at ordinance level.

1. Identification Documents

After protection has been granted, the decision of the SEM is sent to the persons or handed over at the BAZ. The S permit is issued to them by the cantonal migration office. According to Art. 45 Para. 1 of the Asylum Ordinance 1 (AsylV1), the permit is valid for a maximum of one year and can be extended. It is valid as an identity document vis-à-vis all cantonal and federal authorities but does not entitle the holder to cross the border.

In the canton of Zurich, persons granted protection receive a letter from the cantonal Migration Office concerning the initial issuance of the S identity card. They must then register at the district office of their place of residence and submit an application there for

[43] Questionnaire available at: https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.zh.ch%2Fcontent%2Fdam%2Fzhweb%2Fbilder-dokumente%2Fthemen%2Fmigration-integration%2Fukraine-hilfe%2Ffragebogen_privatunterbringung&wdOrigin=BROWSELINK. Last accessed November 30, 2022.

[44] Status S Evaluation Group, Interim Report, November 30, 2022, available at: https://www.newsd.admin.ch/newsd/message/attachments/74155.pdf. Last accessed November 30, 2022.

the issuance of the S identity card and make an appointment for the taking of biometric data. The letter from the Migration Office, the passport/identity card and a confirmation from the landlord must be taken to the appointment. As soon as the biometric data have been collected, the S ID card will be issued.

The S ID Card has a credit card format and looks like this:

2. Gainful Employment

In principle, persons in need of protection may not engage in gainful employment for the first three months after entry into Switzerland.[45] However, according to Art. 75 Para. 2 AsylA, the Federal Council has the power to decree more favourable conditions in this regard.[46]

The Federal Council has made use of this possibility in the case of refugees from Ukraine. On occasion of the activation of the protection status S in March 2022, the Federal Council decided to abolish the three-month waiting period for taking up gainful employment with regards to people from Ukraine.

Once S status has been granted, the person concerned can apply to the cantonal authorities for a work permit. The application must be made by the employer or, in the case of intended self-employment, by the person concerned him/herself. Self-employment can also take place outside the canton of residence (the work permit must be applied for by the employer at the place of work).[47] In the canton of Zurich, the Office of Economics and Labour (AWA) is responsible for the approval of gainful employment.[48]

Persons with S status also have access to the cantonal unemployment services («Regionale Arbeitsvermittlungszentren», RAV).

A termination of an employment relationship must be reported to the cantonal migration office as well.

3. Welfare Services

If persons with protection status S are dependent on welfare benefits from the state, they receive support in the form of asylum welfare. By law, the rates of asylum welfare must be lower than those of regular welfare.[49]

[45] Art. 75 Para. 1 AsylA.
[46] Also: Art. 53 VZAE.
[47] Cf. with numerous further information: https://www.sem.admin.ch/sem/de/home/sem/aktuell/ukraine-krieg.html.
[48] Detailed and further information on the procedure and process at: https://www.zh.ch/de/migration-integration/ukrainehilfe/erwerbstaetigkeit.html.
[49] Art. 82 Para. 3 AsylA and Art. 86 Para. 1 FNIA. «Regular welfare» refers to the welfare paid by the state to persons in need of welfare who hold residence permits, settlement permits or the Swiss citizenship.

In addition to covering rent and ancillary costs and the costs of compulsory health insurance as well as medical expenses, people receive an amount for basic needs, which can vary greatly from canton to canton and from municipality to municipality. In certain cantons and municipalities, less than Fr. 300 per person are paid for basic monthly needs. In other cantons, the amount is closer to that of regular welfare. [50]

In the canton of Zurich, the Social Conference (SOKO) has recommended that the municipalities pay people just under Fr. 700/month for basic needs. Again, however, some municipalities fall well short of this recommendation.[51] The SOKO has published a leaflet on support benefits, which contains more detailed information.[52]

Persons with protection status S who are dependent on welfare do not have a free choice of residence and must in principle remain in the municipality to which they have been assigned.

4. Family Reunion

Family reunification by persons with protection status S is structured similarly to family reunion of recognized refugees.[53]

Spouses, registered partners[54] and minor children of persons in need of protection are granted temporary protection if they have *applied* temporary protection *jointly and there* are no grounds for rejection under Art. 73 AsylA (Art. 71 Para. 1 lit. a AsylA) or if they were separated by events that led to the activation of temporary protection[55] and there are no special circumstances precluding this (Art. 71 Para. 1 lit. b AsylA). If the eligible individuals are staying abroad, they are granted entry.[56] The inclusion also applies to children born in Switzerland of persons in need of protection.[57]

The law does not provide for any further-reaching claims to family reunification in Switzerland, but the Federal Council may, in its general ruling on the granting of protection in specific circumstances, specify whether and under what conditions other close relatives may also be granted temporary protection. The Federal Council did so in the general ruling of March 11, 2022, in which it defined the circle of family members to be included in protec-

[50] Die Existenzsicherung vorläufig aufgenommener Personen in der Schweiz, lecture Migrationsrechtstage 2021 by Ruedi Illes, Amtsleiter Sozialhilfe im Kanton Basel-Stadt.
[51] See - with regard to welfare benefits for persons with F status who also only receive asylum welfare - the report of the organization «map-F» on asylum welfare benefits: Status F – Sackgasse oder Ausgangspunkt zur Integration?, report on integration opportunities and obstacles for temporary admitted persons in the canton of Zurich, May 2022.
[52] Available at: https://www.zh-sozialkonferenz.ch/wp-content/uploads/2022/05/SoKo-Information-Schutzbeduerftige-Status-S_-08.05.2022.pdf.
[53] In 2021, a political proposal to restrict this right to the level of temporary admission was rejected, cf. SDA-Report of 3 March 2021, available at: https://www.parlament.ch/de/services/news/Seiten/2021/20210303085539238194158159038_bsd055.aspx.
[54] Art. 79a AsylA.
[55] In a case of a Ukrainian who worked in the Czech Republic while his wife lived in Ukraine, the SEM assumed that the couple had not lived in a marital community before fleeing, which is why they had not been separated by the outbreak of war and the subsequent flight. According to the Federal Administrative Court, however, the SEM failed to clarify exactly how the couple had lived their married life across the border and whether there had not been an intact marital community. Accordingly, the proceedings were referred back to the SEM for further clarification of the facts. In doing so, the Federal Administrative Court also stated that in the event of a renewed refusal to grant protection, it would have to be examined whether the principle of family unity should be observed and whether it should be taken into account that the complainant has been living together with his wife in a marital union since his entry into Switzerland, see FAC, Judgment D-4324/2022 of 27. October 2022, E. 6.2. and 10.2.
[56] Art. 71 Para. 3 AsylA.
[57] Art. 71 Para. 2 AsylA.

tion as follows: «partners, minor children and other close relatives who were fully or partially supported at the time of the flight. [entire quote translated.]»[58] Thus, persons who have fled Ukraine can also apply for the reunification of other close relatives if they were already fully or partially supported by the person seeking protection at the time of their flight. It is difficult to understand why this definition does not include cases of so-called «reverse family reunification» (where children apply for reunification with their parents). Children who fall under the categories of persons in need of protection in the general decree can thus - at least according to the wording of the law - not join their parents (who would not fall under the categories per se).[59]

If family members cannot enter Switzerland themselves, a written application for family reunification must be submitted to the SEM. The family relationships and the circumstances of the separation must be explained and existing evidence (e.g. identity papers, civil status register extracts, birth certificates, photos, confirmation of residence, etc) must be submitted.

5. Travel Abroad

For persons who have fled Ukraine, travel abroad is possible without a permit.[60] They only need a valid travel document from their home country or country of origin that is recognized by Switzerland. However, if they stay in a third country for more than two months, it is assumed that they have moved their center of life to that country, whereupon the protection status expires.[61] Because the status expires by law, it is advisable to plan travel well and to allow sufficient «buffer time» especially for timely return (and in case of unexpected events and temporary travel hindrance). If the protection status expires, the SEM usually issues a declaratory ruling stating that the protection status has expired.[62] An appeal against the declaratory ruling can be lodged with the Federal Administrative Court.

For beneficiaries of the protection status S – just like for temporary admitted and asylum-seeking persons – a fundamental travel ban was decided by parliament in December 2021.[63] However, it is still unclear when this will come into force and whether there will be any changes to the freedom to travel in the case of holders of permits S from Ukraine.[64] It is advisable to always consult the current information on the website of the SEM (as well as the authorities of the destination country, if applicable).[65]

Travel to the home country: Persons with protection status S are in principle allowed to travel to Ukraine and to return to Switzerland thereafter. However, if they stay there for more than 15 days per quarter, the SEM may revoke their S protection status. This regulation does not apply to persons who can prove that they have made enquiries or prepara-

[58] Cf. General Ruling of 11 March 2022 (footnote 6).
[59] Cf. also the comments under I. 7. on the inconsistent rulings of the FAC in this regards, in particular in the Judgments D-4049/2022 of 12 October 2022 and D-3363/2022 of 21 October 2022. At most, corresponding family reunifications could (and would have to) also be granted with analogous application of other family reunification procedures under the FNIA, or a claim based on Art. 8 ECHR or the relevant provisions of the Convention on the Rights of the Child (at least if family reunification is not possible elsewhere or would be unreasonable or incompatible with the best interests of the child).
[60] Art. 7 Para. 1 and Art. 9 Para. 8 of the Verordnung über die Ausstellung von Reisedokumenten für ausländische Personen (RDV).
[61] Art. 79 lit. a AsylA. See also below.
[62] SEM, Handbuch Asyl und Rückkehr, Artikel E6 Die Beendigung des Asyls und die Aberkennung der Flüchtlingseigenschaft, 2.5.2, p. 17.
[63] Cf. the comments below on travel abroad in the case of temporary admission.
[64] Amendment to the FNIA of December 17, 2021, BBl 2021 2999, available at https://www.fedlex.admin.ch/eli/fga/2021/2999/de.
[65] As of today (December 1, 2022), the information is available at: https://www.sem.admin.ch/sem/de/home/sem/aktuell/ukraine-krieg.html. Section headed «Ein- und Ausreise».

tions for a definitive return to Ukraine. Likewise, the restriction does not apply if persons concerned can claim compelling reasons for a longer stay. For example, the visit of a seriously ill close family member.

6. Canton Allocation and Change of Canton

In principle, persons applying for temporary protection are assigned to a canton by the SEM on the day of registration according to a distribution key proportional to the population and are informed of this verbally. It is important to express (and provide reasons for) wishes for allocation to a specific canton already at the time of this allocation.[66] According to the SEM, however, such wishes are only taken into account within the framework of the distribution key. This concerns in particular the allocation with or to more distant relatives (i.e. outside the «extended nuclear family», see below) or to close friends.

A right for allocation to the same canton exists in only two cases:

- In the case of families: assignment to the same canton as members of the extended nuclear family (spouses, parents, minor children, adult children seeking protection without their own family, grandparents);
- For particularly vulnerable persons (e.g. unaccompanied minors, persons with disabilities, serious health problems or old age): Assignment to the same canton as close caregivers outside the nuclear family.

If family unity is at stake (i.e. family members see above), the allocation decision can be challenged by means of an appeal to the Federal Administrative Court.

Later - i.e. after the allocation - a written request for change of canton can be submitted to the SEM. The application must contain the canton of residence, the destination canton as well as the reason for the change of canton, must be signed by the persons concerned (or an authorized person) and must be sent by mail (registered mail or A-Post-Plus for tracking) to the SEM (Taskforce Kantonswechsel Ukraine, Quellenweg 6, 3003 Bern-Wabern).

If the application is submitted within 30 days of the allocation decision (i.e. before the decision becomes final), it will be treated as part of the «initial allocation», so in these cases it should still be possible to consider more distant relatives or close friends, if the allocation formula allows this.[67]

If the application is submitted later, the allocation decision has already become legally binding. Then an application can only be approved if

- A right to change the canton exists, i.e. reunification with the extended nuclear family is intended or if it is a case of special vulnerability (and the change of canton of the requesting person promises an improved care situation for the vulnerable person); or
- In cases of serious danger to the persons concerned or others;[68] or
- If both cantons concerned agree (in these cases, a particularly good justification of the request is important because the decision is at the discretion of the cantons).

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[66] A wealth of information on this topic can also be found at: https://www.sem.admin.ch/sem/de/home/sem/aktuell/ukraine-krieg.html.

[67] Cf. again: https://www.sem.admin.ch/sem/de/home/sem/aktuell/ukraine-krieg.html#862023165 under the heading «Kantonszuweisung» and the question «Wie soll jemand vorgehen, wenn er mit dem Zuweisungsentscheid nicht einverstanden ist?».

[68] Cf. Art. 22 Para. 2 AsylV 1 in conjunction with Art. 27 Para. 3 AsylA and Art. 21 Verordnung über den Vollzug der Weg- und Ausweisung sowie der Landesverweisung von ausländischen Personen (VVWAL).

Important: The move to the other canton may only take place once the permit has been issued by the SEM. It is therefore advisable to wait until the change of canton has been approved before looking for accommodation.

Experience with the change of canton of temporary admitted persons shows that the cantons have a very restrictive practice in approving changes of canton in cases where the persons concerned have no legal right to do so. There tends to be a defensive attitude. Often, employment in the target canton is not sufficient. Because the approval of a change of canton is at their discretion, the cantons do not have to justify their decisions according to the SEM.[69] If the canton to which the person wants to move does not respond within the set deadline, the SEM assumes rejection and the change of canton is refused. This can lead to frustrating constellations in which the change of canton is made impossible for years.

General observation: Shortly after the activation of the protection status S, the originally very liberal handling of the status was already restricted. At the beginning, persons were not allocated to cantons, but were allowed to freely choose where they wanted to be accommodated. However, this was soon abandoned in favor of the population-proportional allocation applied today.

III. Status Improvement

This section of the guide is intended to show the options that exist for persons with protection status S to improve their legal status. It primarily deals with the question of when and under what conditions temporary protection can be converted into a regular residence permit (B permit).

With regard to the change of status, the statuses S and F differ significantly. While the change to a regular residence permit from status S is automatic, people with status F must go through a hardship procedure in which the cantonal authorities check the fulfilment of various integration requirements. At the same time, the residence permit for people receiving it automatically through their original protection status S is limited to the period in which the individuals continue to need protection (i.e. the need for protection is acknowledged by the federal authorities).

There is no practical experience regarding the change of status in the case of protection status S - because the status had never been applied before the Ukraine war and the change from status S to a residence permit B only takes place after 5 years. The competent authorities will also break new ground in this respect. However, the legal provisions provide clear guidelines.

1. Important Legal Provisions

Art. 74 Para. 2 and 3 AsylA regulate the question of the change from status S to residence permit B and finally to settlement permit C. They read as follows:

[69] SEM, Handbuch Asyl und Rückkehr, Artikel F6 Die Gesuche um Kantonswechsel, 2.1.4.2., p. 6. However, this practice could conflict with the authorities' duty to state reasons and accordingly constitute a violation of an applicant's right to be heard.

Art. 74 Regulation of attendance

[1] [...]

[2] If the federal council has not yet revoked temporary protection within five years, the persons in need of protection shall receive from this canton a residence permit limited until the revocation of temporary protection.

[3] Ten years after the granting of temporary protection, the canton may grant persons in need of protection a permanent residence permit.

Because the granting of permits is governed by foreigners law (i.e. the granting of residence and settlement permits), it falls within the responsibility of the cantons. Accordingly, it is the cantons of residence of those in need of protection that grant residence and settlement permits.[70] It is therefore the cantonal migration offices who must implement the change of status if the conditions set out in the AsylA are met.

In the case of persons with protection status S, Art. 74 Para. 2 AsylA provides that the competent cantons shall grant a residence permit to persons in need of protection if the Federal Council has not yet lifted the temporary protection after five years. According to the wording, individuals with protection status S are thus granted a residence permit if the following conditions are met:

1 The Federal Council has granted temporary protection to a group of refugees by means of a general ruling based on Art. 66 AsylA. This general ruling is still in force.

2. five years have passed since the general order was issued.

The provision provides for an automatism: this means that the granting of the residence permit is not examined separately for each individual case, but is only dependent on the fulfilment of the above general requirements. The cantons are thus obliged to grant the residence permit if the requirements are met. According to the wording of the law, residence permits issued in this way would have to be limited in time until the temporary protection is lifted.[71]

Art. 74 Para. 3 AsylA sets out the conditions for granting settlement permits to the persons concerned. The prerequisite is that the temporary grant of protection for the group of persons concerned has not yet been revoked. In addition, at least ten years must have passed since the original general ruling. The granting of a settlement permit pursuant to Art. 74 Para. 3 AsylA is designed as an optional provision. This means that it is at the discretion of the cantons. In particular, the cantons can make the granting of a settlement permit after ten years subject to additional conditions. As things stand today, it can be assumed that the granting of a settlement permit ten years after the granting of temporary protection (and five years after the granting of a residence permit on the basis of Art. 74 Para. 2 AsylA) is likely to be linked to the fulfilment of the regular requirements for the granting of a settlement permit (analogous to Art. 34 Para. 2 FNIA).[72]

[70] The English terminology with regards to the C-permits is not uniform. They are called either *settlement permits* (cf. Art. 34 FNIA) or *permanent residence permits* (cf. Art. 74 AsylA). Both terms are used interchangeably in the present guide.

[71] However, the ordinance on the asylum procedure provides in Art. 46 AsylV1 (in contradiction to the wording of the law) that the residence permits - like residence permits of other third-country nationals - are renewed every year. According to Art. 46 Para. 1 sentence 2 AsylV1, however, this would likely be a formality, unless the temporary protection had been lifted in the respective year.

[72] The requirements for the regular issuance of a settlement permit according to Art. 34 FNIA are in particular (1) the duration of residence (which is likely to be considered fulfilled in the case of beneficiaries of temporary protection based on Art. 74 Para. 3 AsylA and its special regulation for persons with status S), (2) the absence of grounds for revocation such as welfare dependency, high debt or delinquency, and (3) the integration of the persons concerned. The latter is based on Art. 58a FNIA and the relevant provisions in Art. 77a to Art. 77f of the Ordinance on Admission, Residence and Employment (VZAE).

The rule in Art. 74 AsylA is more advantageous for the persons concerned than the general rule for third-country nationals (because the residence permit is granted automatically and because the five years with status S are counted towards the period of residence regarding the settlement permit). Because of its legal nature as *lex specialis*, Art. 74 AsylA takes precedence over the provisions for the ordinary issuance of residence and settlement permits in the FNIA.

The only way for beneficiaries of status S to obtain a regular residence permit before five years have elapsed is to apply for asylum and go through a corresponding procedure (see above on the granting of status).

2. The Procedure

The procedure for the change of status of persons with protection status F takes place in the respective canton of residence. Because Art. 74 Para. 2 AsylA provides for an automatism, the cantons are in principle required to grant the residence permits automatically - i.e. without an application by the persons concerned - as soon as the time since the issuance of the original general ruling by which the Federal Council ordered the granting of temporary protection reaches the threshold of five years. For individuals with protection status S, the provision of Art. 74 AsylA results in an entitlement to the granting of the residence permit. This also means that the persons concerned could challenge a possible non-granting up to the Federal Court.[73]

Since the granting of a permanent residence permit (C-Permit) under Art. 74 Para. 3 is optional (and not automatic), the persons concerned will probably have to apply for a permanent residence permit. If temporary protection has been revoked by a general ruling stating the end of the need for protection, those whose residence permit has nevertheless been extended (see below IV. 1.) will presumably also be able to apply for a settlement permit on the basis of Art. 34 FNIA. In principle, the period of stay with protection status S will also have to be counted towards the period of stay under Art. 34 Para. 1 letter a in this case.

3. The Relevant Practice

There is still no practice regarding the granting of residence and settlement permits to persons with status S because the time requirements of Art. 74 paras. 2 and 3 have never been met.

For refugees from Ukraine, the Federal Council has ordered temporary protection by general decree of March 11, 2022. The cantons will have to grant the individuals residing on their territory a regular residence permit on March 11, 2027 at the earliest - provided the Federal Council does not revoke the temporary protection. Despite the unclear wording in Art. 74 Para. 2 FNIA, it has to be assumed that the term of five years begins in each case with the granting of temporary protection to the individual.

Subsequently, the settlement permit can be applied for with the authorities of the canton of residence - again provided that the temporary protection has not been lifted in the meantime - at the earliest on March 11, 2032.

[73] Cf. Art. 83 Para. 1 lit. c of the Federal Supreme Court Act (BGG).

4. Important to Note

Because of the automatism in the law, there are no special aspects to consider with regard to the issuance of the residence permit for persons with protection status S.

With regard to the granting of a settlement permit, however, it is worthwhile to collect and keep evidence of integration efforts (German courses, social integration, participation in local club and societal life, etc.) at an early stage and throughout the entire stay. In practice, however, the cantons are likely to give particular weight to economic integration (namely permanent independence from social welfare), as is the case in the ordinary procedure for third country-nationals.

IV. Status Loss

In the case of loss of status, the question is under which conditions the temporary right of residence can be withdrawn again from people with status S. Because the change of status to a regular residence permit has already been discussed above, the present case only deals with the loss of the right of residence without replacement.

Again, there is no practical experience as of yet regarding the loss of temporary protection. Here, too, it can be assumed that the competent authorities are breaking new ground. However, the wheel has not been reinvented: the provisions are closely based on already existing regulations governing, for example, the loss of temporary admission or that of residence permits, both of which have been applied for years.

The termination of temporary protection is regulated in Art. 76 to 79 AsylA. It can essentially take place in three scenarios. The first scenario refers to the whole group in need of protection (termination by general ruling), the other two scenarios refer to individual reasons for revocation or expiry.

1. Cancellation for All Affected Parties by General Ruling

The revocation of protection status S for the entire protected group is based on Art. 76 AsylA. Said provision reads as follows:

> Art. 76 Withdrawal of temporary protection and removal
>
> [1] After consultation with representatives of the cantons, the charitable organisations and, if required, other non-governmental organisations, the Office of the United High Commissioner for Refugees as well as with international organisations, the Federal Council shall determine when the temporary protection for certain groups of persons in need of protection will be withdrawn; it shall make the decision in a general ruling.
>
> [2] SEM shall grant the persons affected by the decision in accordance with paragraph 1 the right to a hearing.
>
> [3] If as a result of the hearing, indications of persecution are revealed, an interview shall be held in accordance with Article 29.
>
> [4] If, having been granted the right to a hearing, the person concerned does not provide an opinion, SEM shall issue a removal order. For the enforcement of the removal order, Articles 10 paragraph 4 and 46–48 of this Act as well as Article 71 of the FNIA apply mutatis mutandis.
>
> [5] The provisions of Section 1a. of Chapter 8 apply mutatis mutandis to paragraphs 2–4.

No empirical values are yet available for such a repeal by general ruling. However, it can be seen from the provision that the Federal Council must consult various stakeholders be-

fore issuing such a general ruling. The general ruling must also be published in the Federal Gazette. [74]

It is important to note that if temporary protection is lifted, asylum applications that were suspended during the initial reception procedure must be revived.[75]

Then all persons concerned must be granted a written legal hearing individually.[76] If the legal hearing reveals indications of persecution (relevant under asylum law) in the country of origin, an asylum procedure must be carried out.[77] Otherwise, the SEM must issue a (appealable) removal order for each person concerned. Within the framework of the examination of the execution of the removal order, obstacles to the execution of the removal order must also be examined. In particular, family or personal reasons may prevent a removal.[78] The SEM is also obliged to carry out a proportionality test in each individual case. For example, it could prove disproportionate to expel a person who already has some degree of professional and social roots in Switzerland.

In the context of the removal procedure, affected persons are entitled to legal advice and support from the legal advice offices mandated in the cantons.[79] These advice centres are obliged to support the persons concerned in exercising their rights to be heard. Unfortunately, they are not legally obligated to also represent the person in any appeal proceedings.

An appeal against the specific removal order in the individual case must be addressed to the Federal Administrative Court.[80]

If the Federal Council revokes temporary protection later than five years after it has been granted by means of a general ruling, the residence permits granted[81] will in principle lapse again. In this case, too, the SEM would be responsible for removal on the basis of Art. 76 AsylA. However, it should be noted that after a stay of more than five years (and corresponding integration at the place of residence), the removal may regularly prove to be disproportionate. It is then increasingly likely that a considerable proportion of those affected could also invoke Art. 8 of the European Convention on Human Rights (ECHR). The right to private life enshrined therein presupposes, as a rule, a lack of integration or a burden on the state of residence (e.g. through a persistent burden on the social system or delinquency) for the revocation of a residence permit once a person has taken root in a certain place. Here, too, a balancing of interests must be carried out.

It would also be possible for the persons concerned to apply for a hardship permit (based on Art. 30 Para. 1 lit. b FNIA), the granting of which would also be linked to criteria such as economic and social integration as well as the reasonableness of returning to the home country.

[74] Art. 47 AsylV1.
[75] Compare above, I.4.
[76] Art. 76 Para. 2 AsylA in conjunction with. Art. 48 AsylV1.
[77] Article 76 Para. 3 of the Asylum Act. This also follows from the fact that the persons concerned were not subject to a proper asylum procedure when they were originally granted protection status.
[78] E.g. rights of the persons concerned from their family or private situation according to Art. 8 of the European Convention on Human Rights ECHR.
[79] Art. 76 Para. 5 AsylA with reference to Art. 102l AsylA.
[80] Art. 105 ff. AsylA.
[81] Art. 74 Para. 2 AsylA.

2. The Revocation of Temporary Protection in Individual Cases

Cancellation by revocation of temporary protection in the case of individuals is governed by Art. 78 AsylA, which reads as follows:

> Art. 78 Revocation
>
> [1] The SEM may revoke temporary protection if:
>
> a. it has been fraudulently obtained by providing false information or by concealing essential facts;
>
> b. the person in need of protection has violated or endangered Switzerland's internal or external security or is guilty of serious misconduct;
>
> c. since being granted temporary protection, the person in need of protection has resided repeatedly or for an extended period of time in their native country or country of origin;
>
> d. the person in need of protection has a legal right of residence in a third country where they may return.
>
> [2] Temporary protection shall not be revoked if the person in need of protection travels to their native country or country of origin with the consent of the competent authorities.
>
> [3] The revocation of temporary protection does not extend to the spouse and the children, unless it is shown they are not in need of protection.
>
> [4] If it is intended to revoke temporary protection, an interview shall normally be held in accordance with Articles 29. The provisions of section 1a. of Chapter 8 apply mutatis mutandis.

In contrast to revocation by general decree, such revocation can only be ordered individually and specifically for persons with protection status S who fulfil one of the reasons expressly listed in Art. 78 AsylA (paragraph 1, letters a to d). The SEM can order the revocation but does not have to («may-provision»). However, it can be assumed that the SEM – provided the requirements are met – will usually revoke the protection status.

The restriction in paragraph 3 is also important: the revocation does not automatically extend to the spouse and children as long as they continue to be in need of protection. In such a context, the SEM must take into account the constitutional rights of the persons concerned (i.e. in particular the right to family life and the proportionality if the family members continue to retain a protection status in Switzerland). Likewise, the question will arise whether the person concerned can derive a right of residence in an individual case based on the family reunification provision for persons with protection status S (Art. 71 AsylA).

In order for the revocation to become legally effective, the SEM must issue an order. As provided for in paragraph 4, there must - as a rule - also be an ordinary hearing of the persons concerned on possible grounds for asylum (based on Art. 29 AsylA). Only if such an interview has already taken place in the original procedure - i.e. before Switzerland granted protection - may the SEM dispense with it. In this case, however, it must grant the concerned individual the right to be heard. This is usually done in writing (Art. 52 AsylV1). In the letter by which the SEM grants the right to be heard to an individual, all essential reasons underlying the decision for revocation must be set out.

In this procedure, too, affected persons are entitled to legal advice and support from the legal advice offices mandated in the cantons. They can, in particular, be accompanied to the hearing.

In the event of revocation, the protection status only expires when the SEM's decision becomes final. This means that an appeal to the Federal Administrative Court generally has a suspensive effect (Art. 55 Para. 1 VwVG) and the right of residence continues to exist during the appeal proceedings.

It is important to note that according to the ordinance of the Federal Council, a stay in the home country of 15 days is already considered a longer stay in the sense of Art. 78 Para. 1

lit. c AsylA, and allows the SEM to revoke the protection status S of the person concerned (Art. 5l AsylV1). The restriction in paragraph 2 should also be noted: in cases where the SEM allows a journey to the home country or country of origin, temporary protection may not be revoked on the basis of this journey.

The Federal Administrative Court has so far only had to rule on the revocation of temporary protection in one case:

- Case E-4854/2022 concerned a Ukrainian national who already held a residence permit in Slovakia at the time temporary protection was granted. The SEM revoked the temporary protection on the basis of Art. 78 Paragraph 1 lit. a FNIA («fraudulent misrepresentation or concealment of material facts») because the Ukrainian national had concealed the Slovak residence title. Before issuing the order, the SEM gave the complainant the opportunity to comment in writing on the revocation (contrary to the wording of the law, it did not conduct an ordinary asylum hearing). In the proceedings, the court held that an inadvertent or unconscious false statement was not sufficient for revocation, but rather that knowing and wilful false statements were required. The court considered this to be the case in the present case: the person concerned had concealed the existence of the Slovak residence permit on a form available in Ukrainian. In addition - according to the court - the application of article 78 Para. 1 lit. a Asylum Act requires that the concealed fact would have led to the rejection of the application for temporary protection if it had been known during the proceedings at that time. The court also affirmed this: the complainant would not have fallen under the category of persons in need of protection pursuant to the Federal Council's general ruling from the outset due to his legal and secure residence in Slovakia. Moreover, because he had a right of residence in Slovakia, the court also considered the ground for revocation under article 78 Para. 1 lit. d AsylA to be fulfilled.[82]

3. The Expiry of Temporary Protection in Individual Cases

The expiration of temporary protection in the case of individuals is governed by Art. 78 AsylA. This reads as follows:

> Art. 79 Expiry
>
> Temporary protection expires if the person in need of protection:
>
> a. has transferred the focus of their living conditions abroad;
> b. has renounced temporary protection;
> c. has received a permanent residence permit in accordance with the FNIA; or
> d. is made subject to a legally enforceable expulsion order under Article 66a or 66a^{bis} SCC or Article 49a or 49a^{bis} MCC or a legally binding expulsion order under Article 68 FNIA.

In contrast to the revocation of temporary protection, no specific order by the SEM is required for the protection status to lapse. Instead, the right of residence automatically lapses by operation of law (with the occurrence of the respective condition in letters a to d). At most, the SEM will issue a corresponding declaratory ruling.

So far, there is no practice regarding the expiry of the S protection status. However, it can be assumed that Art. 79 lit. a and lit. d in particular are based on the practice regarding the expiry of temporary admission[83] and ordinary residence permits respectively.

[82] Cf. FAC, Judgment E-4854/2022 of 11 November 2022, E. 7.
[83] See Art. 61 and Art. 84 Para. 4 FNIA; for the practice in the case of temporary admissions, see B.IV.3 below.

B. Temporary Admission (Status F)

I. Granting of Status

This section is intended to provide an overview of how and under what circumstances persons are admitted to Switzerland on a temporary basis.

In contrast to protection status S, the path to provisional admission leads through a regular (comprehensive) asylum procedure.

1. Background of the Temporary Admission

The notion of temporary admission was first introduced in 1987.[84] It came into its current form in particular through the revision of the then Foreign Nationals Act in 1990 (today's FNIA). It was intended to enable the authorities «[...] to find appropriate solutions for foreign nationals with special problems, primarily of a humanitarian nature [...] [entire quote translated.]», i.e. in cases in which «[...] the foreign national who is obliged to leave cannot leave Switzerland for certain reasons, either temporary or presumably for a longer period of time. [entire quote translated.]»[85]

Temporary admission is not a residence title, but a «substitute measure» that is ordered if persons are obliged to leave the country by a removal decision, but the removal cannot be enforced because it is impossible, unreasonable or impermissible. Although it is closely related to the asylum procedure - and is usually decided on by the State Secretariat for Migration as part of an asylum procedure - temporary admission is not governed by the Asylum Act, but by Articles 83 to 88a of the Foreign Nationals and Integration Act (FNIA).

2. Procedure for Granting Temporary Admission

Temporary admission is usually examined as part of the regular asylum procedure. There, it forms part of the overall assessment by the State Secretariat for Migration, which clarifies not only the existence of asylum-relevant reasons relevant to the recognition of refugee status and the granting of asylum, but also the preconditions for temporary admission. In order to initiate the procedure, the persons concerned must submit an asylum application. They are then assigned to a Federal Asylum Center, where the asylum procedure continues.[86]

If, in this procedure, the SEM denies the grounds for asylum asserted by a person (i.e. the existence of individual and ideologically motivated persecution), it subsequently orders the person's removal from Switzerland. At the same time, however, it is obliged to investigate whether the person concerned is subject to so-called obstacles to removal, i.e. reasons why he or she cannot return to his or her country of origin. This involves the question of whether a person would be threatened with an emergency situation in the event of return,

[84] Dispatch on the Amendment of the Asylum Act, the Federal Act on the Residence and Settlement of Foreigners and the Federal Act on Measures to Improve the Federal Budget of 2 December 1985, BBl 1986 I 1, esp. p. 14 ff. and p. 22 ff.
[85] Dispatch on the Federal Decree on the Asylum Procedure (AVB) and on a Federal Act on the Creation of a Federal Office for Refugees of 25 April 1990, BBl 1990 II 573, p. 665.
[86] The website of the State Secretariat for Migration provides an overview of the procedures in the asylum process: https://www.sem.admin.ch/sem/de/home/asyl/asylverfahren.html.

in essence humanitarian reasons that speak against the execution of the removal. If such reasons exist, temporary admission is granted.

Because the SEM examines the existence of obstacles to the enforcement of removal within the framework of the asylum procedure, it decides at the same time and in one and the same decision on the (non-)granting of asylum and the question of whether the enforcement of removal is possible, permissible and reasonable from a humanitarian point of view. The assessment thus usually represents the second step in the decision on asylum, and only becomes relevant if the SEM does not grant asylum.

Under certain conditions, the cantonal migration office can apply to the SEM for temporary admission of an individual in the context of removal proceedings under foreigners law (Art. 83 Para. 6 FNIA). If the SEM has already made a (legally binding) decision on asylum and removal, cantonal authorities can only apply for temporary admission if it proves impossible to enforce the removal.[87]

3. Reasons for Granting Temporary Admission

The assessment focuses on three grounds for granting temporary admission: impossibility (Art. 83 Para. 2 FNIA), impermissibility (Art. 83 Para. 3 FNIA), and unreasonableness of the execution of the removal order (Art. 83 Para. 4 FNIA). If one of these grounds exists, temporary admission is usually granted.

The execution of a removal order is impossible if there are technical or legal obstacles that are beyond the control of the person concerned. For example, if the home authority refuses to issue travel documents, it can be assumed that departure is impossible. The impossibility must be expected to last at least one year, which is not the case, for example, if the airports are only temporary closed. The authorities do not acknowledge impossibility of removal if a voluntary departure is still possible.

This case is rather rare in practice. It is often difficult to prove the impossibility of returning to the country of origin, and the standard applied by the migration authorities is usually strict.

The execution of a removal order is impermissible if obligations under international law prevent the removal to the destination country.

This is in particular the case if the prohibition of non-refoulement applies. The prohibition of non-refoulement prohibits the removal of a person to a state in which he or she is threatened with torture or inhumane treatment. Non-refoulement is enshrined in Article 3 of the European Convention on Human Rights and in Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Switzerland has ratified both conventions and is obliged to observe them. The threat of violation of other fundamental human rights, such as the right to a fair trial (Art. 6 ECHR) or the right to family life (Art. 8 ECHR), can also lead to temporary admission as a result of the impermissibility of the execution of the removal order.[88]

Subjective post-flight grounds: If a person is in fear of persecution in the sense of the Refugee Convention only because of their departure from a country or because of their behaviour after departure (e.g. exile political activities, change to a religion after leaving the country of origin where said religion is persecuted), they are excluded from being

[87] Art. 17 of the Ordinance on the Execution of Removal and Expulsion as well as Expulsion from the Country of Foreign Persons (VVWAL).
[88] For example: FAC, judgment E-3331/2013 of 3 July 2014.

granted asylum,[89] because they are accused of having caused or contributed to the emergence of the persecution. If they are granted refugee status, they will be temporary admitted as a refugee (this «between-status» is often referred to as «F politisch» or «F Flüchtling» colloquially in German). Refugees who are found to be «ineligible for asylum» for other reasons - listed in Art. 53 AsylA - are also only granted temporary admission. Temporary admitted refugees have a better legal status than temporary admitted foreigners, because they are entitled to the rights guaranteed in the Refugee Convention.

Execution of deportation is unreasonable if a person cannot be removed to the destination country on humanitarian grounds, namely if he or she would have to return to a situation of war, civil war, general violence or a medical emergency (cf. Art. 83 Para. 4 FNIA).

In order to assess the reasonableness of the execution of the removal order, the general situation in the country of origin (and at the place of origin) is taken into account, with the possibility of a life in safety being the primary consideration. The more critical the situation for the population and the weaker the available state protection, the more likely it is that the return is judged unreasonable. In the case of a few ongoing situations of civil war and violence, namely the civil war in Syria since 2011 and the situation in Afghanistan since the Taliban took power in 2021, the SEM assumes that it is generally unreasonable to return to these countries (i.e. regardless of the individual circumstances). Accordingly, persons who have fled from these countries are usually granted temporary admission (if they are not recognized as refugees and granted asylum).[90]

However, purely socio-economic difficulties such as high unemployment, poor educational facilities, or lack of housing are usually insufficient for temporary admission. The Federal Council also determines a list of «safe home countries and countries of origin» to which the execution of removal is generally considered reasonable.[91] Based on the prevailing general situation in the home country or country of origin, the individual circumstances of the person concerned must be taken into account, such as, in particular, gender, age, state of health, level of education, family situation, social and ethnic origin, housing conditions or financial means and prospects for professional reintegration. Finally, any advanced integration in Switzerland may also play a role in assessing the reasonableness of enforcing the removal order. The basic idea is that humanitarian solutions can be found on an individual-case-basis this way.

In practice, however, unreasonableness is assumed only very restrictively. Particularly in the case of individual reasons, the SEM often finds that a removal is reasonable if, for example, relatives (even distant ones) still live in the home country who can support the person concerned with their reintegration. If the person has gained work experience in the home country or in Switzerland, this is often also cited as an argument against the unreasonableness of the removal. In the case of «particularly favourable individual circumstances», the SEM also assumes that the return is reasonable, even in countries where the situation is otherwise considered categorically unreasonable.[92]

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[89] Art. 54 AsylA in conjunction with. Art. 83 Para. 8 FNIA.

[90] On the website of the Federal Administrative Court, reference judgments on various countries can be found, which deal, among other things, with the reasonableness of the execution of deportation: https://www.bvger.ch/bvger/en/home/judgments/referenzurteile/asylum/afghanistan.html. On the temporary admission of Afghan persons, see https://www.republik.ch/2022/02/02/asylsuchende-aus-afghanistan-die-schweiz-aendert-ihre-praxis?utm_source=newsletter&utm_medium=email&utm_campFNIAn=republik%2Ftemplate-newsletter-taeglich-20220203-newsletterdonnerstag.

[91] The list includes mainly European countries: https://www.fedlex.admin.ch/eli/cc/1999/357/de#annex_2/lvl_u1.

[92] As an example, reference can be made to previous case law concerning the return to Afghanistan of people with ties to Kabul, cf. FAC, Judgment D-5800/2016; also the case law on Somalia, cf. FAC, Judgments E-

Medical hardship: Unreasonableness due to a person's health is only assumed in very rare cases, namely if the person concerned would be exposed to a concrete danger after their return because they could not receive absolutely necessary medical care. The prerequisite is a serious physical or psychological condition on the one hand and a non-existent or at least inadequate treatment and care situation in the home country or country of origin on the other. According to the FAC, it is sufficient to ensure that «vital basic care» is available to assume the reasonableness of the removal, even if on a lower level than Switzerland's care, as long as it is not «life-threatening».[93] In cases concerning health reasons, the SEM is required to carry out medical clarifications in the destination country (existence of sufficient and accessible treatment as well as sufficient care). In addition, the SEM should clarify the health condition of the person concerned on its own and/or request medical reports concerning ongoing medical treatment from medical facilities. The SEM's medical enquiries often prove to be insufficient, which is − at least in the new asylum procedure − often at least partly due to the short deadlines. Therefore, it is advisable when filing an appeal to always carefully check whether all necessary enquiries have been carried out by the SEM and whether necessary medical examinations have been waited for.

4. Refusal of Temporary Admission: Order and Right of Appeal

The decision on temporary admission is made within the framework of the SEM's decision which concludes the asylum procedure. An appeal against this decision can be lodged with the Federal Administrative Court. Both the decision on the granting of asylum («Asylpunkt») and the decision on temporary admission («Wegweisungspunkt») can be challenged in the same appeal.

The time limit for appeal is usually stated in the information on the rights to appeal of a decision. It is either seven working days or 30 calendar days, depending on whether the case of the person concerned has been decided in the accelerated or in the extended asylum procedure (cf. Art. 108 Para. 1 and 2 AsylA).

5. Duration of the Temporary Admission

Temporary admission exists only as long as enforcement obstacles persist.

If the authorities come to the conclusion that departure has become reasonable, possible or permissible, the temporary admission can be revoked. Before doing so, however, the persons concerned must be granted the right to be heard. The revocation must always be proportionate. The latter is often not the case, especially after years of residence in Switzerland and advanced integration in the locality.

The «temporary» nature of the temporary admission is ultimately more theory than practice. As a rule, temporary admissions often remain in place for many years. Revocations occur only very rarely.[94]

591/2018 on Somaliland, E-6310/2017 on Puntland, and D-5705/2010 on Mogadishu; and the case law on the return of Hazara people in Quetta, Pakistan, cf. FAC, Judgment E-4269/2013.

[93] Cf. FAC, Judgment 2D_14/2018 of 13 August 2018, E. 5.2.2.

[94] Compare with more detail: below, IV.

II. Status Rights

The purpose of this chapter is to provide an overview of the various rights of individuals who were granted temporary admission in Switzerland.

In principle, temporary admitted persons have the most precarious legal status of all statuses of stay (with the exception of status N for asylum seekers). In various respects, their rights are limited. In particular regarding family reunification and status enhancement, they are also significantly worse off than individuals with protection status S.

1. Identification Documents

Because temporary admission is designed as a substitute measure and not a regular legal title of residence, beneficiaries have so far been receiving a paper ID card limited to 12 months (i.e. no biometric ID card with data chip).[95] This paper is issued by the cantonal migration office at the place of residence after the SEM has issued the temporary admission decision. It currently has the following appearance:

In fact, there is a plan to convert all identity cards for foreigners to credit card format. However, at least in the canton of Zurich, this has not yet been implemented.[96]

The ID card only records the legal status of the person with temporary admission and does not entitle the holder to cross the border.[97] The residence address and the period of validity are entered. If the address changes, the ID card is retracted and updated.

The extension of the ID card must be applied for at the competent cantonal migration office two weeks before expiration.

[95] See Art. 41 Para. 2 FNIA, Art. 20 VVWAL.
[96] See also the legislative project underway at the SEM: https://www.sem.admin.ch/sem/de/home/sem/rechtsetzung/vzae-gebv-aug.html. In fact, the change should already have taken place (the original planning was to only issue ID cards in credit card format from July 2021). However, the Zurich Migration Office, for example, still refers to a «later date»: https://www.zh.ch/de/migration-integration/ausweise-bewilligungsarten/biometrische-auslaenderausweise.html#-978587920.
[97] Art. 20 Para. 2 VVWAL.

2. Gainful Employment

Individuals are entitled to work from the date of their temporary admission.

For the commencement and termination of employment, a simple notification by the employer to the competent cantonal authority, in Zurich the Office of Economic Affairs and Employment, is sufficient. It is free of charge and must be made before the start of employment. In the canton of Zurich, it can be made using an online form.[98]

3. Welfare Services

Regarding welfare benefits, a distinction is made between temporary admitted persons with refugee status and temporary admitted persons without refugee status.

Refugees with temporary admission have the same welfare entitlement as persons who have been granted asylum.[99] In contrast, foreigners with temporary admission (i.e. persons without refugee status) receive lower support in the form of asylum welfare (for the rates, see the corresponding section above on protection status S). Depending on the canton and municipality, the rates for basic needs can be as low as CHF 300 per month.[100]

4. Family Reunion

Family reunification of temporary admitted persons is governed by Art. 85 Para. 7 FNIA.[101] The provision reads as follows:

> Art. 85 Regulation of temporary admission
>
> [...]
>
> [7] Spouses and unmarried children under 18 years of temporarily admitted persons and temporarily admitted refugees may be reunited with the temporarily admitted persons or refugees at the earliest three years after the order for temporary admission and included in that order if:
>
> a. they live with the temporarily admitted persons or refugees;
>
> b. suitable housing is available
>
> c. the family does not depend on social assistance;
>
> d. they can communicate in the national language spoken at the place of residence; and
>
> e. the family member they are joining is not claiming annual supplementary benefits under the SBA262 or would not be entitled to receive such benefits because of family reunification.
>
> [...]

Thus, after the SEM orders the temporary admission of an individual, the respective beneficiary must first await the end of a three-year waiting period before they can apply for family reunification.

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[98] With further references available at https://www.zh.ch/de/wirtschaft-arbeit/erwerbstaetigkeit-auslaender/erwerbstaetige-im-asylbereich.html.

[99] Art. 86 Para. 1[bis] FNIA.

[100] The organization map-F is dedicated to monitoring temporary admission in the canton of Zurich and has collected relevant data in the past: https://map-f.ch/. See the aforementioned report of the map-F organization on the situation of individuals with temporary admission: Status F – Sackgasse oder Ausgangspunkt zur Integration?, report on integration opportunities and obstacles for temporary admitted persons in the canton of Zurich, May 2022.

[101] Soon Art. 85c FNIA.

However, this three-year waiting period for family reunification has been called into question by a recent ruling of the European Court of Human Rights (ECtHR). In a case against Denmark – where a similar rule applied – the Court found that a blanket waiting period of three years violated the right to respect for family life (Art. 8 ECHR).[102] In line with European Union rules on subsidiary protection, the Court considers a maximum two-year waiting period to be compatible with Art. 8 ECHR. Also, according to the ECtHR, a weighing of interests must be carried out in each case.

In its ruling F-2739/2022 of 25 November 2022, the Federal Administrative Court has now followed the case law of the ECtHR. In this decision, the FAC ruled that the SEM and the FAC must change their previous practice (i.e. the strict application of the three-year waiting period) in the future. The SEM must examine an individual case already shortly before the expiry of a two-year period since the order of temporary admission.[103] As part of this examination, the criteria determined by the ECtHR[104] must be considered, and it must be determined on a case-by-case basis whether respect for family life dictates a shorter period than the period stipulated by law.[105]

Already before the ECtHR issued its ruling, the FAC consistently ruled that the three-year waiting period must be examined on the basis of the specific circumstances of the individual case to determine whether it complies with international law.[106]

After expiration of the waiting period, the family reunification of spouses or minor children under twelve years of age can be applied for and approved during a period of five years. It is important to note that the application for children over twelve years of age must be submitted within one year. Moreover, these time limitations do not start anew when individuals with temporary admission are granted a regular residence permit.[107] If the application is submitted after these deadlines, it can only be granted for important reasons, and the authorities regularly apply a very strict standard to this.[108] Circumstances giving rise to such «important reasons» for a delayed application must be very well substantiated and documented.

Next, the other requirements set forth in Art. 85 Para. 7 FNIA must be met. In detail:

First, the individual with temporary admission seeking family reunification must live together with the family members in an apartment that meets their needs (lit. a and b) either presently or in the future (meaning that a sufficiently large apartment must be availa-

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[102] ECtHR, M.A. v. Denmark, No. 6697/18, Grand Chamber Judgment of 9 July 2021.

[103] At this point, the SEM cannot dispense with an actual examination of the application through a non-entry decision (meaning a refusal to look at the substantive grounds of an application).

[104] Thus, in particular, the extent to which the time limit impedes family life, the extent of the person's ties in the state where the individual has been granted subsidiary/temporary admission, whether there are insurmountable obstacles to family life in the country of origin, and whether elements affecting immigration control are involved. Great weight is also to be given to the interests of the child. Compare FAC, Judgment F-2739/2022 of 24 November 2022, E. 6.3.2 with reference to the corresponding excerpt of the ECtHR judgment.

[105] Compare FAC, Judgment F-2739/2022 of 24 November 2022. Also: the media release of the Federal Administrative Court of December 7, 2022: https://www.bvger.ch/dam/bvger/en/dokumente/2022/10/mm_f-2739-2022.pdf.download.pdf/MM_F-2739-2022_EN_WEB.pdf.

[106] Cf. the case law set out in E. 6.4 of: FAC, Judgment F-2739/2022 of 24 November 2022.

[107] SEM, Handbuch Asyl und Rückkehr, Artikel F7 Familiennachzug von vorläufig aufgenommenen Personen und vorläufig aufgenommenen Flüchtlingen (Familienvereinigung), p. 6; Peter Bolzli, in OFK-Migrationsrecht, Art. 84, N 20, takes the view that the case law in BGE 137 II 393, E. 3.3. – according to which the time limit for family reunification starts anew when a settlement permit is granted (i.e. at the time of the upgrade from the regular residence permit), provided that a request for reunification was already made in due time with the residence permit – must also be applied to the granting of a residence permit to a temporary admitted person.

[108] Art. 74 Para. 3 VZAE. There must be very valid reasons for the delayed claim, or the imminent threat of a real emergency situation (for example, death or disappearance of the (only) adult caregiver of minor children in the country of origin). The relevant provision in the VZAE explicitly mentions the threat to the welfare of children: Art. 75 VZAE.

ble for the family to live in). In practice, the apartment must have no more than one room less than the number of persons living in it. In the case of a family of four, the family apartment must therefore have at least three rooms. Likewise, usually the landlord's written consent for the persons to move into the apartment in question is required as well. According to the Federal Administrative Court, it is possible to deviate from the schematic rule concerning the minimum number of rooms in individual cases if the landlord has agreed that the family members can move in, if the best interests of any affected child are safeguarded and a trouble-free cohabitation seems possible.[109] Finally, the temporary admitted person cannot be expected to have suitable premises already at the time of the application. Rather, it must be generally possible for the family to find suitable accommodation if the application is approved.[110]

Second, the family must not be dependent on social welfare or supplementary benefits (or become dependent as a consequence of the family reunification, cf. lit. c and e).

- Regarding independence from social welfare: this is assumed in practice when the financial resources available to the family reaches the level on which, according to SKOS guidelines, there is no (longer) a claim to social assistance.[111] In addition to income, resources also include any alimony, social security benefits (such as child allowances and premium subsidies for private health insurance)[112] as well as investment income. A mere abstract danger of a temporary welfare dependency of the family is not sufficient to refuse family reunification. Rather, a *concrete* danger of *future* welfare dependency is required. The authorities are obliged to carry out a *future-oriented* consideration of the financial circumstances taking into account the prospective income of all family members (the authorities usually require a concrete job prospect).[113]
- Regarding the independence from supplementary benefits: this additional requirement was introduced in 2019 for all family reunification procedures of third-country nationals. So far, there is still a lack of case law on this with regards to family reunification in the case of individuals with temporary admission. By analogy, however, it can be deduced from the case law of the Federal Supreme Court (FSC) and cantonal administrative courts on the family reunification of individuals with a residence permit that, in any case, a somewhat less stringent standard is applied than with regards to the independence from social welfare.[114] Also, the Federal Supreme Court has so far left open whether the provision constitutes age- and disability-related discrimination and violates the corresponding constitutional and ECHR provisions. It has expressly left unanswered whether the application of the criterion of independence from supplementary benefits in individual family reunification

[109] cf. FAC, Judgment F-528/2022 of 25 June 2022.
[110] Cf. FAC, Judgment F-7288/2014 of 5 December 2016, E. 5.2.
[111] Cf. FAC, Judgment F-3192/2018 of 24 April 2020, E. 7.
[112] Cf. FAC, Judgment F-7288/2014 of 5 December 2016.
[113] Cf. with further references inter alia FAC, Judgment 2C_685/2010 of 30 May 2011, E. 2.3 (deals with family reunification pursuant to Art. 43 FNIA, the wording of which, however, coincides with that in Art. 85 Para. 7 FNIA).
[114] For example, in the case of the reunification of an adult person and a (minor) need for supplementary benefits, the Administrative Court of Zurich assumed relatively generously - and without the existence of an employment contract or special skills - that the person with whom the person residing in Switzerland sought reunification would be able to contribute to the family income with her income at least in the medium term. This decision was upheld by the Federal Supreme Court (after the SEM had filed a so-called authorities' complaint). Compare the ruling of the Administrative Court of Zurich, Judgment VB.2020.00399 of 18 February 2021 and the ruling of the Federal Supreme Court, Judgment 2C_309/2021 of 5 October 2021. The Federal Supreme Court reaffirmed this somewhat more lenient stance in its ruling 2C_795/2021 of 17 March 2022 (there E. 4.2.4).

cases could lead to discrimination against a person with a disability who receives a pension from the invalidity insurance (IV).[115]

Finally, spouses wanting to join their partner residing in Switzerland must be able to (minimally) communicate in the national language spoken at the place of residence (lit. d) or at least prove their intention to learning it. Required is proof of (oral) proficiency in the national language spoken at the place of residence at the minimum level A1 or enrolment in a corresponding language course.[116] Most major language certificates are recognized.[117] The requirement of a language certificate may be waived if language acquisition is not possible or only possible to a limited extent due to a disability, illness or other limitations.[118] If a person has difficulty learning German, it is advisable to obtain a medical certificate of this learning disability from a medical professional.

In the case of family reunification by refugees with temporary admission, the assessment is somewhat different: if the family members of temporary admitted refugees are abroad, family reunification is governed by the same provisions as for foreigners with temporary admission. This means that the three-year waiting period must also be awaited and that the requirements according to Art. 85 Para. 7 FNIA must be fulfilled. However, a somewhat more generous practice in the examination of the requirements is called for («The special situation of temporary admitted refugees must be taken into account when deciding on the granting of family reunification»).[119] For example, the status-specific circumstances of refugees are to be taken into account when assessing the dependency on social welfare pursuant to Art. 85 Para. 7 FNIA. If the person recognized as a refugee does everything within their power (standard of «reasonableness») to support themselves and their family and cover the cost of living as autonomously as possible, and if the individual has already gained at least a partial foothold on the labour market, this must be sufficient to permit family reunification in Switzerland. According to the FAC this is premised on several conditions: (I) the person recognized as a refugee is not able to create a situation allowing them to fulfil the requirement of Art. 85 Para. 7 lit. c FNIA within the time limits applicable to family reunification through no fault of his or her own and despite their utmost efforts, and (II) the shortfall remains at a reasonable level and can presumably be made up in the foreseeable future.[120] In practice, this means that a small shortfall in revenue must be tolerated by the authorities.

After the family members of temporary admitted refugees have been granted entry, an asylum procedure takes place first. Thereupon the family members are either granted independent refugee status (if they have made credible an original and not just derivative threat of persecution) and granted asylum or temporary admission, or they are included in the refugee status of the person resident in Switzerland and granted temporary admission as well.[121] If the family members are already in Switzerland, they can be included in the refugee status according to the case law of the Federal Administrative Court.[122] This means that the conditions according to Art. 51 Para. 1 AsylA must be fulfilled, i.e. there cannot be any special circumstances which would speak against the granting of refugee status to the

[115] Cf. FSC, Judgment 2C_795/2021 of 17 March 2022, E. 5; also: Judgment 2C_309/2021 of 5 October 2021, E. 7.
[116] Art. 74a VZAE.
[117] Compare for a list issued by the municipality of Zurich: https://www.stadt-zuerich.ch/prd/de/index/stadtentwicklung/integrationsfoerderung/deutschkurse/sprachnachweise.html.
[118] Art. 85 Para. 7ter in conjunction with. Art. 49a Para. 2 FNIA.
[119] Art. 74 Para. 5 VZAE, see also the ruling of the Federal Administrative Court: FAC, Judgment F-1822/2017 of 21 March 2019.
[120] See with further references: FAC, Judgment F-2043/2015 of 26 July 2017, E. 5.2. and FAC, Judgment F-2186/2015 of 6 December 2016, E. 5.2. A current example in FAC, Judgment F-528/2022 of 24 June 2022, E. 4.
[121] Art. 74 Para. 5 VZAE in conjunction with. Art. 37 and Art. 5 AsylV 1.
[122] FAC, Judgment D-2557/2013 of 26 November 2014, E. 5.5.

family members.[123] Children of refugees born in Switzerland are also recognized as refugees and granted temporary admission, provided again that no special circumstances preclude this (Art. 51 Para. 3 AsylA).

5. Travel Abroad

Beneficiaries of temporary admission can only travel abroad under very limited circumstances. Each traveling individual requires both a return visa and a valid travel document.

According to an amendment to the FNIA that will soon come into force (probably in 2023), individuals with temporary admission are in principle prohibited from traveling abroad (cf. Art. 59d and Art. 59e FNIA). Exceptions are only provided for the preparation of their independent and definitive return journey as well as for special personal reasons (such as death/serious illness of close relatives).[124]

6. Change of Canton

According to Art. 85 Para. 3 FNIA, individuals with temporary admission must submit an application for a change of canton to the SEM.

The latter makes the final decision after hearing the cantons concerned. The change of canton is only approved with the explicit consent of both cantons. If one canton does not exercise its right to be heard, the application is presumed to be rejected.

The only exception is in the case of a claim to family unity or the case of a serious threat to the temporary admitted person or other persons. The decision of the SEM can only be appealed to the Federal Administrative Court on the grounds that it violates the principle of family unity.[125]

An amendment to the law on the change of canton of temporary admitted persons has already been passed by parliament and will come into force in the near future. According to this amendment, temporary admitted foreigners will be allowed to change canton if this is required for the protection of a family unit, if there is a serious risk to the health of the temporary admitted person or other persons, or if the temporary admitted person is in permanent gainful employment in another canton or is completing basic vocational training («berufliche Grundausbildung»).[126] However, this only applies if the persons concerned do not receive social assistance either for themselves or for their family members, and if the employment relationship has existed for at least 12 months or if it is not reasonable to expect them to remain in their canton of residence due to the commute or working hours (Art. 85b Para. 3 E-FNIA).

There are also differences regarding the change of canton for temporary admitted refugees. According to the still valid case law of the Federal Administrative Court, temporary admitted refugees are treated in the same way as persons with a settlement permit.[127] In essence, individuals with a settlement permit are entitled to change cantons at their leisure as long as they do not fulfil any of the reasons for the revocation of a settlement permit

[123] Examples of such «special circumstances» are listed in the SEM's Handbuch Asyl und Rückkehr, Artikel F3 Familienasyl / asylrechtlicher Familiennachzug, Section 2.1.7. (p. 11 ff.).
[124] Amendment to the FNIA of 17 December 2021, BBl 2021 2999, available at https://www.fedlex.admin.ch/eli/fga/2021/2999/de.
[125] Art. 85 Para. 4 FNIA.
[126] Art. 85b E-FNIA. Cf. again amendment to the FNIA of 17 December 2021, BBl 2021 2999, available at https://www.fedlex.admin.ch/eli/fga/2021/2999/de.
[127] Cf. FAC 2012/2 (E-2324/2011 of February 6, 2012), E. 5.2.3.

(as set out in Art. 63 FNIA).[128] Accordingly, temporary admitted refugees are entitled to change canton under the same conditions.

However, with the above-mentioned amendment of the law allowing for an easier change of canton for temporary admitted foreigners, the legal position of temporary admitted refugees will be downgraded at the same time: their change of canton will then be governed by the provisions for persons with a residence permit.[129] This means that temporary admitted refugees will only be entitled to a change of canton if the person is gainfully employed and no grounds for revocation according to Art. 62 FNIA are fulfilled.

III. Status Improvement

This section of the guide is intended to show the options for temporary admitted persons with status F to improve their residence status. It primarily deals with the question of when and under what conditions the temporary admission can be converted into a regular residence permit.

With regard to the change of status, status S and status F differ significantly. While the change to a resident permit in the case of status S is automatic, individuals with status F must go through a hardship procedure in which the cantonal authorities check numerous integration requirements.

This hardship procedure primarily takes place in the cantons. The federal government - represented by the State Secretariat for Migration SEM - only has to confirm the granting of the hardship permit (approval requirement).

The authorities at both federal and cantonal level have developed a practice with regard to status F. Because the main part of the procedure takes place in the cantons, said practice is strongly influenced by the migration authorities and administrative courts of each respective canton. There are sometimes significant deviations in the practice of the cantons, especially when borderline cases are involved. Therefore, it is often advisable to contact a legally competent person or legal advice centre in the relevant canton to discuss the prospects.

Because the SEM must approve the granting of a residence permit in the hardship case procedure, there is also a nationwide practice within the framework of this approval procedure. Regularly, however, this approval procedure only works to the disadvantage of applicants, namely in constellations in which the SEM feels that an individual case approved by the cantonal authorities and submitted to the SEM for federal approval is judged too generously and accordingly refuses approval.

However, in practice the SEM hardly ever denies the cantons' applications when they are willing to grant a hardship permit to temporary admitted individuals: according to SEM sta-

[128] Art. 37 Para. 3 FNIA. This entitlement does not exist in certain circumstances, i.e. if the individual requestion the change of canton has been a long-term welfare recipient (welfare received must be substantial), has perpetrated serious delinquency or constitutes a serious threat to public security and order (Art. 37 FNIA refers to the reasons for the revocation of the settlement permit in Art. 63 FNIA).
[129] Art. 85b Para. 5 in conjunction with. Art. 37 Para. 2 E-FNIA. Cf. again: Amendment to the FNIA of 17 December 2021, BBl 2021 2999, available at https://www.fedlex.admin.ch/eli/fga/2021/2999/de.

tistics, in 2021 just 6 out of 4,376 applications were rejected, i.e. a vanishingly small proportion.[130]

1. Important Legal Provisions

Two provisions in the FNIA are important for the upgrade from temporary admission to a regular residence permit.

Art. 84 Para. 5 FNIA applies specifically to temporary admitted persons and provides as follows:

> [...] Applications for a residence permit made by temporarily admitted foreign nationals who have resided in Switzerland for more than five years are closely examined relating to integration, family circumstances and the reasonableness of return to the country of origin.

In practice, this provision is understood as a reference to Art. 30 Para. 1 lit. b FNIA, the general rule for the granting of hardship permits in deviation from the usual admission requirements set out in the FNIA. It is important to note that the granting of this hardship permit is a discretionary provision, and that there is no entitlement to receive one. The cantonal authorities can grant such a permit, but are not obliged to do so. The applicants have no legal claim to a regular residence permit.

As is evident form Art. 84 FNIA, hardship applications from persons with status F must be examined in depth if an application is submitted five or more years after the original grant of F status. Theoretically, an application can also be submitted earlier, in which case it is likely to be approved only in exceptional circumstances. In the procedure set off by the application, the migration office of the canton of residence examines whether the applicants meet the conditions for the granting of a hardship permit. These requirements have been specified by the Federal Council in Art. 31 VZAE, which contains a list of criteria to be considered by the migration offices when conducting their assessment of a case of hardship. The relevant criteria are the following:

- Integration (with reference to Art. 58a FNIA and its concretization in Art. 77a to Art. 77f VZAE)
- Family relations
- Financial circumstances
- Duration of presence in Switzerland
- Health status
- Possibility of reintegration in the country of origin

It should be noted that special consideration must be given to Art. 58a FNIA when assessing the integration criteria in hardship proceedings. Paragraph 2 of this provision on «integration» explicitly states that the situation of persons who, due to disability or illness or other grave circumstances, show deficits either regarding the required language skills or regarding participation in economic life or education.[131] Specifying this general provision, Art. 77f VZAE stipulates the following:

> Art. 77f Consideration of personal circumstances
>
> The competent authority shall take due account of the foreign national's personal circumstances when assessing the integration criteria in accordance with Article 58a Paragraph 1 letters c and d FNIA. A deviation from these integration criteria is possible if the foreign national cannot meet them or can only meet them under more difficult conditions due to:

[130] This follows from the figures published by the SEM itself: https://www.sem.admin.ch/sem/de/home/publiservice/statistik/auslaenderstatistik/haertefaelle.html. In 2020, there were 10 out of 1,366. In 2019, there were 8 out of 1,081.
[131] Art. 58a Para. 2 FNIA.

a. a physical, mental or psychological disability;

b. a serious or prolonged illness;

c. other grave personal circumstances, namely because of:

1. a pronounced learning, reading or writing disability,

2. being working poor,

3. the performance of care duties.

[entire quote translated.]

It should also be noted that the cantons require applicants to present an identity document in order to obtain a regular residence permit.[132] This leads to problems especially in constellations where individuals are afraid to contact the authorities of their country of origin, for example due to fear of persecution or retaliation against family members. It also happens that embassies of certain countries of origin refuse to issue identification documents or that it otherwise proves impossible to obtain valid identity documents. In such cases, the persons concerned must prove (or sufficiently demonstrate) that it is impossible for them to obtain the documents.[133]

2. The Procedure

To apply for a hardship permit, individuals with status F must contact the migration authorities in their canton of residence. Most migration offices list the criteria and required documents on their websites.

In the canton of Zurich, the following documents are required for the procedure:

- Application for a residence permit (can be very short, important are the enclosures)
- Original excerpt from the debt collection register (last three years)
- Confirmation from the social authorities of the municipality of residence detailing the (lack of) receipt of social welfare (last three years)
- Employment contract (copy)
- Pay slips for the last twelve months (copies)
- Apartment rental contract (copy)
- Health insurance policies of all persons living in the household (copies)
- Language certificate at least A1 from telc, Goethe, ÖSD, KDE, TestDaF or fide
- For children: school reports for the last three years and confirmation of attendance from school authorities

Depending on the respective canton of residence, documents can be submitted through various ways. To be on the safe side, it is advisable to send the documents by registered mail or A-Post-Plus so that they can be tracked. In the canton of Zurich, the documents can also be submitted either by mail, online, or on site at the migration office.[134]

It is worthwhile to submit all documents directly when submitting the application. Otherwise, missing documents will later be requested by the migration office, a process which can significantly extend the duration of the procedure.

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[132] Art. 13, Art. 89 and Art. 90 lit. c FNIA.

[133] It is conceivable, for example, to collect and document corresponding contacts with the authorities of the country of origin, e.g. with embassies or consulates. The Administrative Court of Zurich has also recently itself interviewed an applicant in order to investigate the reasons for the missing identity documents in more detail. Cf. Zurich Administrative Court, Judgment VB.2021.00289 of 17 February 2021, E. 2.4.

[134] Cf. the website of the canton of Zurich: https://www.zh.ch/de/migration-integration/asyl/aufenthalt-mit-asyl/umwandlung-f-in-b.html#.

If the migration office refuses to issue a residence permit, the applicants can submit an appeal. The appeal procedure varies from canton to canton. The procedure is governed by the respective cantonal procedural regulations.[135] Negative decisions by the migration authorities must contain information on the right of appeal, i.e. information on where to lodge the appeal and within what time limit. In any case, it is important to contact a legally qualified person as soon as possible after receiving a negative decision (or already after being granted the right to be heard regarding an imminent negative decision). This especially, as a new application will possibly only be considered after a change in the situation of the applicant in cases where an applicant made no use of their right to appeal in an earlier procedure (i.e. it might be rejected on formal grounds).

For appeal procedures before the cantonal appeal authorities, it is worthwhile to consult a legal advice center. The Swiss Refugee Agency (SFH) maintains a list of centres providing free legal advice in all cantons.[136]

In the Canton of Zurich, the Appeals Department («Rekursabteilung») of the Security Directorate («Sicherheitsdirektion») is responsible for appeals. Its decisions can be appealed to the Zurich Administrative Court. The appeal must be received there within 30 days.[137]

Because the granting of the hardship permit is at the discretion of the cantons, in principle no appeal to the Federal Supreme Court is possible.[138] However, the Federal Supreme Court has recently indicated that it would accept and consider an appeal against a decision concerning a hardship permit under certain conditions, in particular if the individuals concerned have been residing in Switzerland for a very long time and are well integrated.[139] Under certain circumstances, and especially if the cantonal practice seems very strict and disproportionate, it may therefore be worthwhile to file an appeal to the Federal Supreme Court. However, because of the demanding formal requirements, it is important to consult a legally qualified person for this procedure.

The cost risks must also be taken into account in any appeal procedure against a decision on a hardship applications.[140] In proceedings before the cantonal authorities and courts, such cost risks are governed by cantonal law.[141]

3. The Relevant Practice

Although the criteria for the granting of hardship permits are explicitly set out in the law, the cantons have considerable leeway in their application.

Because persons with status F very often stay in Switzerland permanently, the granting of a residence permit is in fact also in the interest of the cantons. Accordingly, many cantonal

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[135] In the canton of Zurich, the decision of the migration office can be appealed at the Rekursinstanz of the Sicherheitsdirektion. Their decision in turn can be appealed at the Zurich Administrative Court. The procedural way is regulated in the cantonal Verwaltungsrechtspflegegesetz (VRG ZH).

[136] See also the information on the Refugee Assistance website: https://www.fluechtlingshilfe.ch/hilfe-fuer-schutzsuchende/rechtsschutz.

[137] The time limit starts to run on the day following the receipt of the negative decision (important: if an item is not collected from the post office, the time limit starts to run on the seventh day following the unsuccessful delivery attempt). Regarding administrative court: https://www.zh.ch/de/politik-staat/streitigkeiten-vor-verwaltungsgericht/informationen-zum-gerichtsverfahren.html.

[138] For a right to appeal to the FSC in most matters concerning the FNIA, it is required that the applicant at least credibly asserts an entitlement to a permit (such an entitlement may stem from national law or from fundamental and human rights guaranteed in the Constitution and the European Convention on Human Rights).

[139] BGE 147 I 168, E. 1.2.4 - 1.2.7.

[140] See also the principles in the box above under A.I.5.

[141] In proceedings before the Federal Supreme Court, the Federal Supreme Court Act (BGG) governs the costs.

authorities are less reluctant to grant residence permits to temporary admitted individuals (at least compared to granting hardship permits to persons without any legal right of stay) as long as they can prove that they have a permanent job and meet the criterion of being independent of social welfare. However, major differences arise in the practice of the cantons.

As a rule, a hardship permit will be hard to obtain in cases where the financial situation is not secured, namely in the case of sick or disabled persons (without a right to a pension by the invalidity insurance), in constellations where the income is insufficient to cover all expenses (working poor, often single parents with children or larger families), or in the case of people still pursuing education and not earning a sufficient amount of money to cover their cost of living.

The cantonal authorities must always make an overall assessment in the hardship procedures. They may not demand that all criteria be met, nor may they stipulate a single criterion as an indispensable prerequisite.[142] However, in many cantons, the requirement of (permanent) welfare independence weighs far more heavily than the other criteria. Generally, it is required that the permanence of the independence from social welfare is evident from the documents submitted by the applicant(s), and the authorities also consider likely future developments in their assessment.[143]

Even if an applicant is dependent on social welfare, there remains a chance of obtaining a residence permit. In these cases, it is particularly important to show that the receipt of social welfare is not the applicants fault due to circumstances outside of their control, and that the applicants made and make all possible and reasonable efforts to detach themselves from social welfare in the medium or longer term. In such a context, it is essential to be able to prove the relevant circumstances in as much detail as possible.[144] Pensions by the invalidity insurance (IV) or the old-age and survivors insurance (AHV) count as income, as does income from unemployment insurance. If applicants receive supplementary benefits, the individual circumstances are decisive: if the receipt is the result of an AHV pension following early retirement and a pre-existing dependency on social welfare, the courts regularly deny sufficient economic integration.[145]

In cases of inability to work due to illness, the assessments of the IV authorities are often decisive. This can play a role if an applicant's inability to work is recognized, but if that individual is not entitled to an IV pension for other reasons (this case constellation can occur for example in the case of foreigners whose illness already emerged before their entry into Switzerland). Medical certificates are weighed differently on a case-by-case basis. In any case, a strict standard is applied to the proof of medical inability to work.

In the case of single parents, the authorities require that efforts have been made to take up gainful employment after the youngest child's has passed the age of 3. It is difficult to understand why the standard applied in this regard is significantly stricter than, for example, the age limits for a custodial parent to take up work again in the context of family law.

Finally, the situation of all applying family members must be taken into account as part of the overall assessment. At the same time, an application submitted by an individual or a

[142] In the canton of Zurich, the migration office long required independence from social welfare as an indispensable prerequisite for the granting of an F permit. Last year, the Zurich Administrative Court put an end to this practice and obliged the authorities to conduct a comprehensive overall assessment in each case.
[143] See in the canton of Zurich: pay slips for the last twelve months, employment contract for a permanent employment relationship, document from the social welfare authorities for the last three years.
[144] In particular, efforts on the job market (applications, etc.), information on care work performed in family constellations, documentation on education obtained, etc.
[145] FAC, Judgment F-654/2020 of 16 August 2021, esp. E. 6.2.

family may not be rejected (in its entirety) simply because one family member does not meet the requirements. The individual examination and the individual granting of a hardship permit to individual family members must always remain possible.[146]

If there are reasons explaining the failure to comply with one of the requirements in the sense of Art. 58a FNIA and its specification in Art. 77f VZAE,[147] it is important to actively point them out early in the procedure, and to provide as much evidence as possible (or at least to try to explain them credibly). In the case of illnesses or learning disabilities/illiteracy, medical certificates can serve this purpose; in the case of care duties, evidence of the extent of care outside the family might be useful (i.e. external childcare, for example). Also, if an individual for which the applicant has taken on duties of care requires special care (e.g. due to illness or disability), this should be brought up early in the hardship procedure and, if possible, underscored with evidence.

In the Canton of Zurich, the Zurich Administrative Court has repeatedly upheld appeals and granted hardship applications in recent years, namely in cases where the overall circumstances were in favour of granting a residence permit despite dependency on social welfare. Examples of cases are:

- A single mother with several children born in Switzerland who, despite a relatively high workload in the low-wage sector, was still dependent on social welfare to a small extent. Particular weight was given to the fact that the woman had already lived in Switzerland for over 19 years, that a return to her country of origin (Somalia) was hardly conceivable, and that she had made every effort within her possibilities to participate in economic life. The interests and the well-being of the three children who were born and socialized entirely in Switzerland, one of whom was about to enter secondary school, also played a role.[148]
- A Kenyan national and her Nigerian-born husband, who entered Switzerland in 2000 and 2001, respectively, and were granted temporary admission in 2010 and 2012, respectively. Of their four children born in Switzerland (between 2004 and 2018), the eldest daughter had already been naturalized. The applications of the couple and the two youngest children for a hardship permit were rejected by the migration office and the first appeal authority and the case was brought before the Zurich Administrative Court. In addition to the long stay, the family circumstances (especially of the four children born and raised in Switzerland) and the difficulties of reintegration in the country of origin, particular weight was given to the fact that the family was able to fully cover their living expenses from their gainful employment, even if that had only been the case since a relatively brief period of time.[149]
- An elderly woman (born 1966) from Somalia, who was in poor health, had already arrived in Switzerland in 1992 and had been temporary admitted in 1999. Against the background of long-standing (severe) substance addiction, the Court held that reintegration in the country of origin was inconceivable. Although the applicant had never been gainfully employed in the primary labour market (because of her severe addiction) and had received a large amount of social welfare over the years, the court concluded that the migration authorities had given too little weight to the many years of residence and the impossibility of reintegration in the country of origin, and «[...] had given too much weight to the indisputable lack of professional and economic integration, and in this context had given too little weight to the

[146] Compare a more recent judgment of the Zurich Administrative Court, which also refers to the practice of the federal authorities: Judgment VB.2020.00797 of 22 July 2021, E. 4.3.6.
[147] See also above, 1.
[148] Zurich Administrative Court, Judgment VB.2020.00797 of 22 July 2021, E. 5.
[149] Zurich Administrative Court, Judgment VB.2021.00820 of 19 May 2022, E. 5.3.4 and 5.9.

complainant's longstanding drug addiction and her poor state of health, which had been present for years [...] [entire quote translated.]».[150]

- A temporary admitted Syrian national who had entered Switzerland in 2014 and was temporary admitted in the same year. The decisive factor was that the applicant had been severely visually impaired since his birth, which according to the Social Security Institution (SVA ZH) resulted in an inability to work of 70% and more (100% according to current medical reports). Accordingly, the court concluded that his receipt of social welfare was not his fault and – because had participated in employment programs as far as possible – he had shown every intention to participate in economic life. Irrespective of his wife and children, the existence of a case of hardship was recognized.[151]

Because the SEM almost always approves the applications of the cantonal authorities, there is hardly any case law of the Federal Administrative Court concerning cases of hardship for temporary admitted persons.[152] In principle, however, it is likely that a similar standard would be applied.

4. Important to Note

It is important to know that five years of residence with a residence permit is a prerequisite for the granting of a settlement permit (Art. 34 FNIA; the settlement permit is in turn a prerequisite for naturalization, cf. Art. 9 of the Citizenship Act [BüG]). The change of status from F to B is therefore necessary in order to climb the «permit ladder».

Finally, it should be noted that only 50% of the period of residence with F status is taken into account for naturalization.[153]

[150] Zurich Administrative Court, Judgment VB.2021.00668 of 13 April 2022, E. 6, esp. 6.5.
[151] Zurich Administrative Court, Judgment VB.2021.00829 of 2 June 2022, E. 6.
[152] With the exception of the aforementioned judgment: FAC, Judgment F-654/2020 of 16 August 2021.
[153] Art. 9 Para. 1 lit. b BüG and Art. 33 Para. 1 lit. b BüG.

IV. Status Loss

The present chapter deals with the conditions under which their temporary right of stay (through the grant of temporary admission) can be withdrawn again from people with status F. Because the improvement of status to a regular residence permit has already been discussed above, the present chapter only deals with the loss of the right of stay without replacement.

In contrast to the termination of protection status S, there is already a longer official practice concerning the loss of temporary admission.

The termination of the temporary admission is – like the temporary admission in other respects – governed by the Aliens and Integration Act (FNIA). The grounds for termination are listed in Art. 84 FNIA:

> Art. 84 Termination of temporary admission
>
> [1] SEM periodically examines whether the requirements for temporary admission are still met.
>
> [2] SEM shall revoke temporary admission and order the enforcement of removal if the requirements no longer met.
>
> [3] At the request of the cantonal authorities, fedpol or the FIS, SEM may revoke temporary admission due to the unreasonableness or impossibility of enforcement (Art. 83 paras 2 and 4) and order the enforcement of removal if there are grounds in terms of Article 83 paragraph 7.
>
> [4] Temporary admission expires in the event of definitive departure, an unauthorised stay abroad of more than two months, or on the granting of a residence permit.
>
> [5] Appplications for a residence permit made by temporarily admitted foreign nationals who have resided in Switzerland for more than five years are closely examined relating to integration, family circumstances and the reasonableness of return to the country of origin.

Paragraph 5 of the provision deals with the improvement of status, which has already been discussed above.

Paragraphs 1 to 4 are important here, which regulate the periodic review (1), revocation (2 and 3) and expiration (4) of temporary admission.

1. The Revocation as a Result of Periodic Review

Paragraph 1 of Art. 84 FNIA provides that the SEM periodically checks whether the original grounds for the granting of temporary admission (according to Art. 83 FNIA, see above) are still met in the case of a temporary admitted individual. This is basically a case-by-case examination. Because temporary admission depends on factors in the home country (e.g. civil war-like conditions such as in Somalia, Afghanistan or Syria) in a large number of cases – especially when it is a question of the unreasonableness of removal, which is the case in most cases – the periodic review depends heavily on country practice.

> An example: in country A civil war-like conditions prevail. However, the Federal Council has not ruled that protection status S is granted to persons from said country. Instead, all applicants from the country in question are granted temporary admission to Switzerland on a case-by-case basis. After a few years, the practice changes. The SEM (and the Federal Administrative Court) now consider country A to be relatively safe again. In such a constellation, the SEM may begin reviewing the temporary admissions of people from that country of origin on the basis of Art. 84 AsylA. This is what happened in the case of Eritrea when, following a change in case law (and a request from parliament), the SEM reviewed the temporary admissions of

several thousand Eritrean refugees (who were assumed to have already fulfilled their military service obligation).[154]

However, in other constellations – especially concerning temporary admissions granted because of the impossibility or impermissibility of enforcing a removal order – it is difficult to assess from the outside how and how regularly the SEM reviews temporary admissions.[155] According to its own information, the SEM has conducted periodic reviews of 50,000 temporary admissions between 2003 and 2018.[156] However, in only a very small number of cases the periodic review is effectively followed by a lifting of the temporary admission. According to the SEM's own data, the conditions for lifting temporary admission were met in only 4% of the cases reviewed between 2003 and 2018.

If, during the periodic review of an individual case, the SEM comes to the conclusion that the conditions for granting temporary admission are no longer met (reference to Art. 83 FNIA, see above), it may revoke the temporary admission by means of an order.

Before the SEM decides, however, the individual concerned must have been granted the right to be heard. This means that the SEM must explain to the individual concerned the reasons why it plans to revoke their temporary admission. The person concerned must be given the opportunity to comment on this. As a rule, the SEM will send a letter to the person concerned for this purpose. Theoretically, the individuals concerned could also be summoned to an oral hearing. If one receives a letter from the SEM stating a plan to revoke one's temporary admission, it is strongly recommended to seek legal advice. The response to this letter can have a decisive impact on the outcome of the proceedings.

The Federal Administrative Court has also set certain limits to the revocation of temporary admission. In a leading decision from 2020, the court ruled that it is mandatory for the authorities to observe the principle of proportionality when revoking a temporary admission.[157] This means that they must weigh the interests at stake - i.e. the interest on part of the person concerned to remain in Switzerland and the interest on part of the public that the person concerned leaves Switzerland. The following factors can play a role here:

- the duration of presence (the longer the more significant)
- linguistic integration (language courses attended, skills in the language of the canton of residence)
- professional integration (also the pursuit of vocational training for example)
- social integration (club activities, social environment, etc.)
- the family situation (if there are family members in Switzerland)
- possible difficulties in returning to the country of origin
- the absence of criminal proceedings or other indications of a threat to public safety

In each individual case, the SEM must make an overall assessment taking all relevant factors into account. In particular, the revocation of temporary admission may not be based

[154] In the end, only very few temporary admission were effectively revoked. Of 3'400 temporary admissions of Eritrean individuals examined in 2018/2019, only 83 were revoked by the SEM. In addition, the Federal Administrative Court upheld some of the appeals filed against these first instance decisions. See: https://www.sem.admin.ch/sem/de/home/sem/medien/mm.msg-id-81690.html.

[155] However, it must be assumed that the SEM will generally follow up if it receives tips concerning individual persons.

[156] See: https://www.sem.admin.ch/sem/de/home/aktuell/news/2018/2018-09-03.html.

[157] Leading decision of the Federal Administrative Court: BVGE 2020 VI/9.

solely on the fact that the requirements (necessary for the original grant) are no longer met.[158]

Since its leading decision in 2020, the Federal Administrative Court was asked to assess the revocation of temporary admissions in a number of cases. Regarding the issue of proportionality, it recently ruled as follows, for example:

- Revocation disproportionate in the case of a young man from Ethiopia who had entered the country as a teenager and had spent formative years of his youth in Switzerland. The court weighed in his favour his good knowledge of German, his participation in a pre-apprenticeship with prospects of continuing vocational training as an apprentice, as well as his advanced social integration. These factors outweighed a (minimal) criminal record and the fact that the authorities had at one point not known the whereabouts of the young man for a period of three weeks during his stay.[159]
- Revocation proportionate in the case of a man from Libya who had entered Switzerland eight years earlier. He had been granted temporary admission six years earlier. In particular, his multiple criminal offenses (including violent confrontations, falsification of identity documents, carousing, theft, trespassing and assault) were considered to constitute a «lack of integration». Also weighed was the fact that he had been largely supported by public welfare during his stay. In addition, the court took into account that he had spent most of his life in his home country and had no family members in Switzerland.[160]
- Revocation disproportionate in the case of a young man from Angola who had entered Switzerland six and a half years before the judgment and had been granted temporary admission four years earlier. He, too, had spent several formative years as a youth in Switzerland after entering the country. The court considered that – although he had not been able to prove advanced integration during the period of residence (he had committed a criminal offense during his stay and had not yet completed any education) – he «[...] seems to be on the right track [to build] a sustainable independent and regulated life in Switzerland [...] [entire quote translated.]» after long initial difficulties. The Court concluded that there was a certain attachment to Switzerland. It held that a revocation of the temporary admission in the case of the young man would not only constitute a certain uprooting, but would also endanger the sustainability of his maturing process. The court described the case as a borderline case in which private interests only just outweighed public interests. It warned the appellant that the assessment of proportionality could end differently in the case of further delinquency or a loss of employment through his own fault.[161]

The case law of the Federal Administrative Court shows that the overall picture plays a decisive role in the proportionality of the revocation. In this context, it is important that the persons concerned document the factors that speak in their favour and expressly put them forward in the proceedings. Especially letters of reference and «less measurable» integration factors (such as activities in sports clubs or associations or the like) can be of great importance.

[158] For an overview, see: https://www.humanrights.ch/de/ipf/menschenrechte/migration-asyl/aufhebung-vorlaeufiger-aufnahmen-verhaeltnismaessigkeitsprinzip.
[159] FAC, Judgment D-3347/2021 of 27 July 2022.
[160] FAC, Judgment D-7157/2018 of 8 December 2021.
[161] FAC, Judgment D-3705/2020 of 25 November 2021.

2. The Revocation at the Request of Other Authorities

Outside the periodic review, the SEM may also revoke a temporary admission at the request of a cantonal authority, the Federal Office of Police (fedpol) or the Federal Intelligence Service (FIS) (Art. 84 Para. 3 FNIA). This mainly concerns cases in which the authorities are of the opinion that the person concerned can no longer be tolerated in Switzerland due to delinquency and/or a threat to public security. However, such revocation at the request of the authorities is only possible under three conditions.

First - at least according to the view expressed here - the application must be made by the authorities named in the law (i.e. cantonal authorities, fedpol or FIS). There are known cases in which the SEM has lifted a temporary admission on its own initiative and without a corresponding application by one of the authorities mentioned in the legal provision. However, this procedure is contrary to the express wording of the law.

Second, the original temporary admission must have been issued due to impossibility (Art. 83 Para. 2 FNIA) or unreasonableness (Art. 83 Para. 4 FNIA). It is not allowed to revoke a temporary admission originally ordered on the grounds of impermissibility (Art. 83 Para. 3 FNIA).[162] This is because such a removal would violate obligations under international law, particularly in cases in which the individuals concerned would be under threat of torture or inhumane treatment upon return to their country of origin.[163]

Third, one of the grounds under Art. 83 Para. 7 FNIA must be met. This means that at least one of the following three circumstances must apply to the subject:

1. They must have been sentenced to a long-term prison sentence in Switzerland or abroad, or a criminal measure as defined in Art. 59, 60, 61 or 64 of the Swiss Criminal Code.[164] There must be a legally binding criminal judgment. According to practice, a long-term sentence is any prison sentence of more than one year (irrespective of whether the sentence was imposed conditionally, unconditionally or partially). It is important to note that shorter custodial sentences may not be added together. The long-term sentence criterion is only met if a sentence resulting from one single judgment exceeds the duration of one year.[165]
2. The person must have seriously or repeatedly violated public security and order in Switzerland or abroad or pose a threat to this order or to the internal or external security of Switzerland. In practice, this applies above all to constellations in which a person is regarded as a danger to public safety (in detail: Art. 77a and 77b VZAE).[166] This was affirmed, for example, in the case of a man in the context of a radical Islamist attitude and ideological proximity to organizations such as the Islamic State.[167]
3. Only in cases in which a temporary admission was granted due to the impossibility of enforcing the removal: if the person concerned caused the impossibility himself/herself. This constellation will rarely play a role in practice, because the SEM

[162] Whether temporary admission was granted due to impossibility, unreasonableness or impermissibility is always stated on the original decision issued by the SEM, the one individuals receive at the end of their asylum procedure.
[163] In those cases, Art. 3 ECHR and Art. 3 of the UN Convention against Torture preclude repatriation to the country of origin.
[164] These are inpatient treatments ordered in the context of criminal proceedings for a severely mentally disturbed or addicted person instead of or in addition to a prison sentence.
[165] FAC, Judgment E-3536/2020 of 3 May 2022, E. 5.3.1.
[166] In detail: FAC, Judgment D-1984/2021 of 25 July 2022, E. 4.
[167] FAC, Judgment D-1984/2021 of 25 July 2022. The person concerned was investigated by the Office of the Attorney General of Switzerland in connection with the possession and consumption of violent images as well as propaganda material of the Islamic State (and sentenced by order of punishment).

is very unlikely to grant temporary admission in cases of self-caused impossibility of removal.

Only if the conditions set out above are met can a temporary admission be revoked even if a return to the home country would in fact still be unreasonable or impossible (i.e. if the grounds for the original granting have not ceased).

Again, a proportionality test must always be carried out, i.e. the private interests in staying and the public interests in the departure must be weighed against each other.[168] In the case of serious criminal offenses or threats to public safety and order, however, the proportionality assessment will only rarely favor the individual concerned, because the courts tend to give considerable weight to public interests in these cases.[169] In the past, however, the Federal Administrative Court has also strongly taken into account developments and progress on part of the offender in the period after the crime was committed (i.e. a good prognosis and improved/stable personal circumstances).[170]

3. The Expiration of Temporary Admission

There are some constellations in which a temporary admission expires. In such cases, the right of stay simply lapses even without an order by the SEM.

The expiry of temporary admission is governed by Art. 84 Para. 4 FNIA and - since 2016 - by Art. 83 Para. 9 FNIA.

An expiration takes place in the following constellations:

- The individual concerned has definitely left the country. According to the relevant ordinance, a departure is considered definite if the person concerned (I) files an asylum application in another state, (II) obtains a residence permit in another state, (III) returns to the home country or country of origin without a return visa or travel documents for foreign persons, (IV) exceeds the period of validity of such a visa or passport while staying abroad, or (V) deregisters and then leaves.[171]
- The individual concerned stayed abroad without authorization for more than two months.
- The individual concerned has received a residence permit. (see above for this)
- The individual concerned has been convicted of one of the so-called «catalogue offenses» in Art. 66a or Art. 66a^{bis} StGB and the competent criminal court has ordered expulsion. The judgment must have come into legal force. This provision is the result of the so-called deportation initiative («Ausschaffungsinitiative»). There are numerous offenses in the catalogue, ranging from unlawful receipt of social welfare benefits and serious narcotics violations to arson or murder. In principle, expulsion is threatened regardless of the severity of the offense committed, and even minor offenses are sufficient. Only the existence of a case of hardship can then hinder the expulsion order. The decisive factor here is the verdict of the criminal court: if it issues an expulsion order and if the judgment has come into legal

[168] Exemplary: FAC, Judgment E-3536/2020 of 3 May 2022. E. 5.3.2. and E. 7.2.
[169] Here, reference can again be made to FAC, Judgment D-1984/2021 of 25 July 2022, E. 7. In the opinion of the court, the public interests outweighed the interests of the appellant, a citizen of Kosovo, although he was born in Switzerland and had always lived here. The Court - in addition to the ideological attitude that was the cause of the revocation – weighed against him that he had not completed any education and had been largely dependent on social welfare benefits.
[170] For example: FAC, Judgment F-1061/2019 of 15 March 2021, E. 6.
[171] Art. 26a VVWAL.

force, the temporary admission expires by law.[172] This mechanism can give rise to the precarious situation in which the person concerned cannot return to their country of origin (because enforcement is still not possible or not permissible due to obligations under international law, for example if they are threatened with torture or inhumane treatment in the event of return), but at the same time their temporary admission has expired in Switzerland due to the legally binding expulsion.[173]

- The person concerned has been expelled with legal effect on the basis of Art. 68 FNIA. This expulsion is carried out by fedpol after prior consultation with the FIS. This concerns cases of danger to internal or external security.

When the temporary admission expires, the right of stay ceases immediately and by law. As a rule, the persons concerned receive a corresponding letter from the SEM (so-called «declaratory order»). Such a letter can also be requested. The SEM must prove that one of the conditions stipulated in the law is met.

An appeal against the expiry of a temporary admission can be lodged with the Federal Administrative Court (whereby it must be requested that the court determine that the temporary admission has not expired). However, this usually only makes sense in cases where actual doubts exist that the reason given by the SEM is – contrary to the SEM's assertion – not valid. In other cases – especially in the case of trips abroad over the time limit of two months or an unintended «definitive departure» – it may make sense to apply for a new temporary admission directly to the SEM via a multiple application procedure. However, these procedures are rather complicated. Individuals concerned should seek legal advice immediately after receiving a corresponding letter.

[172] FAC, Judgment E-4970/2021 of 16 February 2022, E. 6.2. and 6.3. Also FAC, Judgment D-1297/2022 of 27 April 2022, E. 5.

[173] Individuals concerned find themselves in a situation of legal limbo. This is, however, supported by the Federal Administrative Court: cf. the FAC, Judgment E-4970/2021 of 16 February 2022, esp. E. 6.4.