

Discrimination against undocumented unaccompanied minors in Switzerland : submission to the UN Committee on the elimination of racial discrimination

SUMMARIZED TRANSLATED VERSION



Summary of the report submitted (in French) on 20 May 2020 by the Law Clinic on vulnerable people of Geneva University's Law faculty, in view of Switzerland's examination at the Committee's 101st session, postponed to the 102nd session.

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About the authors

This submission is a summarized version of the report submitted to the Committee by the [Law Clinic](#) 2019-2020 of the Faculty of Law of the University of Geneva on Vulnerable Persons. The Law Clinic is an annual seminar offered to Master's law students of the University of Geneva and aims to inform a specific population about their rights by popularizing (e.g. through an information brochure) the academic research conducted by students in the form of legal opinions. Since the start of the 2018 academic year, the Law Clinic has been dealing with the rights of young unaccompanied migrants, a theme that will be taken up again for the year 2019-2020, and whose publication in the form of an information brochure is planned for autumn 2020. The law opinions for the academic year 2019-2020 covered the following topics: education, the family, criminal matters (including violence), everyday life and rights vis-à-vis the police. This report, which has been prepared on the basis of these legal opinions, will therefore address the issue of racial discrimination against unaccompanied minors in the light of the above-mentioned themes.

List of acronyms

- **ACCESS II** : Accueil de l'Enseignement Secondaire
- **CAP** : name of an emergency reception programme offered by Geneva-based association Païdos for unaccompanied minors
- **CC** : Code civil
- **CIP** : Commission des institutions politiques du Conseil national
- **CP** : Code pénal
- **CPP** : Code de procédure pénale
- **CRC**: Convention relative aux droits de l'enfant
- **Cst** : Constitution Suisse
- **Cst./GE** : Constitution du canton de Genève
- **DIP** : Département de l'Instruction Publique
- **ECHR**: European Convention on Human Rights
- **ECRI** : European Commission against Racism and Intolerance
- **ECtHR**: European Court of Human Rights
- **IGS** : Inspection Générale des Services – the body in charge of investigating the police
- **LAGH** : Loi fédérale sur l'analyse génétique humaine
- **LAsi** : Loi sur l'Asile
- **LDIP** : Loi fédérale sur le droit international privé
- **LEI** : Loi fédérale sur les étrangers et l'intégration
- **LIP** : Loi sur l'instruction publique du canton de Genève
- **LPD** : Loi fédérale sur la protection des données
- **LPOL/GE** : Loi sur la police du canton de Genève
- **OASA** : Ordonnance relative à l'admission, au séjour et à l'exercice d'une activité lucrative
- **OEC** : Ordonnance sur l'état civil
- **ROPol/GE** : Règlement sur l'organisation de la police du canton de Genève
- **SEM** : Secrétariat d'Etat aux Migrations
- **SPMi** : Service de Protection des Mineur-e-s – Geneva's body for the protection of minors
- **TF** : Tribunal Fédéral – Switzerland's supreme court

Introduction

In 2019, 441 unaccompanied underaged refugees (also called “RMNA”) were living in Switzerland¹ and an estimated 100 to 200 undocumented minors (also called “MNA”) were living in Geneva².

In view of certain criticisms³ concerning the distinction between RMNA/MNA, which would make a questionable distinction in the light of the Convention on the Rights of the Child (hereinafter “CRC”), this report will not repeat that distinction, apart from the above-mentioned figures, which simply provide an overview of the extent of the phenomenon. We shall therefore use only the expressions unaccompanied “minors” (where applicable) or “young persons” (if adults under 25 years of age). Indeed, it is important to include a reflection on unaccompanied young people in our report on unaccompanied minors, as many of the problems affecting the rights of unaccompanied persons continue, or even intensify, once they reach the age of majority. Moreover, due to the lack of identity documents and the often discriminatory practices of the authorities of the country such as those described in this report, it is often difficult, if not impossible, for unaccompanied minors to prove their minority in accordance with their human rights and to enjoy the rights conferred on all children. Thus, many unaccompanied minors who are considered or suspected to be adults also face the same problems affecting unaccompanied young people. However, as several international⁴ and regional⁵ human rights instruments have pointed out, unaccompanied minors are among the most vulnerable categories of the population and therefore need greater protection.

Among these specific needs and rights are those conferred by the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “the Convention”), as interpreted and elaborated upon by the work of the Committee on the Elimination of Racial Discrimination (hereinafter “the Committee”). Indeed, although art. 1 para. 2 of the Convention specifies that the Convention does not apply to distinctions made by States parties between nationals and non-nationals, the Committee’s General recommendation n°XXX highlights that “*groups other than migrants, refugees and asylum-seekers are also of concern, including undocumented non-citizens*”⁶. The Committee therefore laid out several responsibilities for States such as :

- “*Ensure that legislative guarantees against racial discrimination apply to non citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens*”⁷ ;
- “*Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health*”⁸ ;

¹ https://www.sem.admin.ch/sem/fr/home/publiservice/statistik/asylstatistik/statistik_uma.html

² Enfants et jeunes migrants-e-s non accompagnés-e-s à Genève, Actes des Assises et résolution, 3 et 4 mai 2019, p. 4.

³ See for instance: « *A notre sens, la catégorisation des jeunes comme RMNA ou MNA s’inscrit en contradiction avec le droit international, en particulier au premier principe général de la Convention internationale relative aux droits de l’enfant (CDE) sur la non-discrimination (art. 2)9. Cela concerne tant les aspects procéduraux – où leur caractéristique d’enfant est insuffisamment prise en compte – que les conditions d’existences – les conditions de prise en en charge demeurant inférieures à celles dont bénéficient les autres enfants privés de leur milieu familial* », Haute Ecole de Travail Social de Genève, Vers une prise en compte holistique et dynamique des besoins des enfants et des jeunes migrant-e-s à Genève, Analyse des requérant-e-s d’asile mineur-e-s non accompagnés-e-s (RMNA), p.22.

⁴ See for instance: General comment n° 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Committee on the rights of the child, preamble, para.4, 16, etc.

⁵ See for instance : ECtHR, *case Khan v. France*, application n°12267/16, 28 February 2019, para 74.

⁶ General recommendation XXX on discrimination against non-citizens, UN Committee on the elimination of racial discrimination, preamble, p. 1.

⁷ Idem, para. 7.

⁸ Idem, para. 29.

- *“Combat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants”⁹ ;*
- *“Introduce in criminal law the provision that committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for a more severe punishment” ;*
- *“Ensure that claims of racial discrimination brought by non-citizens are investigated thoroughly and that claims made against officials, notably those concerning discriminatory or racist behaviour, are subject to independent and effective scrutiny”¹⁰ ;*
- *“Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin”¹¹ ;*
- *“Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin”¹².*

Our report therefore first looked at a few specific problems identified during the drafting of legal opinions in the Law Clinic and then made a few recommendations in this regard. The present document will present a summary of the above, please refer to the original version in French for a complete version of the report.

⁹ Idem, para. 21.

¹⁰ Idem, paras. 22 et 23.

¹¹ Idem, para. 9.

¹² Idem, para. 12.

I. Discrimination with regard to the right to education (art. 5 let. e, ch. v of the Convention)

A. Legal framework

As per art. 19 and 62 of Switzerland's federal constitution (hereafter: Cst), cantons have an obligation to put in place a legal system aiming towards facilitating the enjoyment of basic education to all children and adolescents of compulsory school age.

Geneva legislation extends this obligation to a right to training education, and not only basic education, rendering it mandatory until the age of 18.

B. Current situation of undocumented minors and access to education

Despite the fact that all children, irrespective of their legal status, have the right to go to school under the terms of articles 19 Cst and 24 of the Geneva Constitution (hereafter: Cst/GE), and that this is even an obligation until they reach the age of majority in the canton of Geneva under the terms of article 194, paragraph 1 Cst/GE, unaccompanied young people (outside the asylum system) do not have access to the education system.

Although they meet the conditions (i.e. being between 4 and 18 years old, living in Geneva and staying in Switzerland for more than 3 months, regardless of their residence status¹³), they're systematically denied access to school, a denial that is not sustained by any legal basis or justification.

It therefore appears that the refusal to enroll these young persons is based on discriminatory motives, namely their social and cultural origins as well as their legal status.

Instead of school, some of these young people have to go to a day care centre programme provided by the association Païdos. However, this programme does not seem to meet the requirements laid down by the law in order to be considered as training, nor does it seem to meet the requirements to be considered as sufficient education¹⁴. Indeed, this program does not deliver any certification and does not allow access to any other training leading to certification at a later date.¹⁵ Several undocumented minors have been regularly attending it for months, some even for a year, while never getting the opportunity to be transferred into secondary I or II education system. As a matter of fact, the programme only proposes workshops led by educators and not actual classes provided by teachers¹⁶. In addition, the program offers only a few hours of workshops per day, i.e. 4 hours, which also includes drawing and cooking¹⁷. It cannot therefore be a program that meets the requirements of sufficient training and teaching. Moreover, this programme is not equivalent to the training courses in

¹³ Art. 19 et 62 al. 2 Cst. ; art. 24 al. 1 et 2, art. 194 al. 1 et art. 195 al. 1 Cst./GE ; art. 37 al. 1 et 3 LIP ; Arrêt du Tribunal fédéral 2P.101/2004 du 14 octobre 2004, consid. 3.1 ; Tribunal cantonal GE, du 19 juillet 2019, ATA 1162/2019 consid. 6 b) ; Tribunal cantonal GE, du 19 juillet 2019, ATA 1167/2019, consid. 6 b).

¹⁴ art. 37 al. 4 LIP/GE ; art. 2C al. 1 et 2 REST/GE ; TF, 2C_892/2018, 6 mai 2019, consid. 6.3 ; art. 19 Cst. ; ATF 141 I 9, JdT 2015 I 71, consid. 3.2 ; ATF 129 I 35, JdT 2004 I 711, consid. 7.3 ; art. 13 Pacte ONU I ; Observation générale n° 13 du CESR.

¹⁵ Information found on Païdos website : <https://www.paidos.org/nos-actions/cap/>, (as of 13.10.2019).

¹⁶ Information found on Païdos website: <https://www.paidos.org/nos-actions/cap/>, (as of 13.10.2019).

¹⁷ See : <https://www.paidos.org/nos-actions/cap/>, (as of 13.10.2019).

which other students are enrolled in the canton of Geneva, since at secondary level I and II, it is generally full-time training given by teachers¹⁸.

Subjecting unaccompanied minors to this programme, which is not a school, thus creates inequalities of treatment between them and the other children of the Canton of Geneva, since they have to go to a day care centre that does not meet the school's criteria, while the others benefit from sufficient education. Systematically subjecting unaccompanied minors to the Païdos programme instead of school could even be tantamount to segregation since this separation seems to be based on ethnic and social criteria and affects only one group, unaccompanied minors¹⁹.

C. Access to education of children living in Confederation centers

There is a difference in treatment with regard to access to education depending on the legal status of the child.

As per art. 24 para. 3 of the Asylum Law (« Loi sur l'Asile », hereafter LAsi), all asylum seekers are accommodated in a Confederation centre from the time they submit their asylum application. In the case of an accelerated procedure, the applicant remains until the granting of asylum or provisional admission, or until his or her departure if his or her asylum application has been rejected (letter a). In the case of a Dublin procedure, he or she remains until departure (letter b). Finally, in the case of an extended procedure, the applicant remains until he/she is assigned to another canton (letter c). An applicant's stay in a federal centre may not exceed 140 days²⁰; after this period, he/she is assigned to a canton. It should be noted that these centres are managed by the SEM²¹.

Since 1 October 2016, LAsi states that every canton holding a Confederation centre is responsible for organising basic education for all asylum-seekers in compulsory school age and that, if needed, such education is provided within the centre itself²². Thus, this provision allows access to basic education for all asylum seekers of compulsory school age. Compulsory schooling as a general rule extends throughout Switzerland from 4 to 15 years of age.

According to the Federal Council, basic education applies to children staying in federal centres directly upon arrival, since their stay in the centres can last up to 100 to 140 days. Thus, under article 80, paragraph 4 LAsi, children arriving in the centres enjoy the right to basic education. However, this provision applies only to basic education and not to upper secondary education, since it concerns only children aged between 4 and 15, leaving young people aged between 16 and 25 outside the system.

In addition, in the context of the education provided in federal centres, an important issue to be addressed is the level of education provided. In general, the education received by children in federal centres does not meet the standards of compulsory schools outside the centres²³. There are often long waiting times before starting school, and programs and schedules that are not adapted to the

¹⁸Prescriptions cantonales pour le secondaire I

:https://edu.ge.ch/co/sites/default/files/atoms/files/prescriptions_catonales_2019-2020_0.pdf ; Prescriptions scolaires du secondaire II : <https://edu.ge.ch/sefpo/plans-detude-par-domaines>

¹⁹ ECtHR, *case D.H. and others v. Czech Republic*, application n° 57325/00, 13 November 2007, para. 207 ; ECtHR, *case Sampanis and others v. Greece*, application n° 32526/05, 5 September 2008, para. 89 ; ECtHR, *case Oršuš and others v. Croatia*, application n° 15766/03, 16 March 2010, para. 157. Although Switzerland has not ratified Protocol No. 1 to the ECHR, the principles and its threshold of protection are similar to those of Art. 19.

²⁰ Art. 24 al. 4 LAsi.

²¹ Art. 24 al. 1 LAsi.

²² Art. 80 al. 4 LAsi.

²³ Conférence nationale « réfugié-e-s ; éducation, intégration et émancipation » du 7 septembre 2019, formation équivalente pour tou-te-s – NON à la discrimination des réfugié-e-s, p. 4.

children's age groups, such as reduced hours and incomplete courses²⁴. For example, at the Boudry Federal Centre, pupils receive only half the weekly teaching hours provided for in out-of-centre schools²⁵. Moreover, the education provided in the federal centres does not comply with the guarantee provided for in article 19 of the Constitution. Indeed, the courses provided do not conform to the definition of basic education developed by the TF. Education must be open to all children and it must also be appropriate and adapted to each child, preparing them for life in a modern world.²⁶

- **These practices thus create a difference in treatment between children accommodated in confederation centres and those who are placed outside the centres or in cantonal and communal centres that can go to regular school. This difference in treatment based on legal status cannot be justified.**

D. Access to education of children within the ACCESS II system

1. Brief presentation of the ACCESS II system

ACCESS II stands for “l'Accueil de l'Enseignement Secondaire », i.e. « Secondary education welcome programme”. Its aim is to welcome allophone students who have recently arrived in Geneva and to offer reinforcement courses in languages and other basic subjects in order to enable them to integrate a regular class of Secondary II afterwards, whether it be for vocational or general education²⁷. This service welcomes students aged 15 to 19. It offers classes at different levels, ranging from literacy to school or vocational integration classes²⁸. Since some of the unaccompanied young people in this age group do not always have the level necessary to enter a regular class directly, they may have to go through ACCESS II.

2. Discrimination against ACCESS II pupils

Pupils from ACCESS II must take and pass the same tests as pupils finishing the orientation cycle who have completed all or most of their schooling in Geneva²⁹. It should be pointed out that the courses given by ACCESS II are not and cannot be equivalent to courses in ordinary schools, since the emphasis is on learning French and bringing people up to speed, since they have not been able to access the Geneva education system before³⁰.

- **Students from ACCESS are therefore in a different situation, not benefiting from the same academic background, but are assessed in the same way by the same tests. Which poses an issue of similar treatment in different situations. This treatment cannot be justified.**

It should also be pointed out that subjecting pupils from ACCESS II, i.e. migrant pupils, to the same tests as pupils in regular classes without any accommodation whatsoever results in migrant pupils having access to a lower quality education than other pupils who are unable to achieve the same level

²⁴ *Idem.*

²⁵ *Idem.*

²⁶ Arrêt du Tribunal fédéral 2C_927/2018 du 29 octobre 2018, consid. 5.3.

²⁷ Art. 1 RSAES-II.

²⁸ Art. 3 à 6 RSAES-II.

²⁹ Rapport de la COUR DES COMPTEs, p. 54.

³⁰ The classes' curricula are available at: <https://edu.ge.ch/site/acces/> > Structures.

of autonomy later on, a situation that has already been highlighted by various international mechanisms³¹.

II. Discrimination with regard to access to social services (art. 5 let. e, ch. iv of the Convention)

A. Right to non-discrimination and children's rights : quick overview

Art. 20 para. 1 of the Convention on the Rights of the Child (hereinafter "CRC") states that every child deprived of his or her family environment is entitled to special protection and assistance from the State. And, as outlined in art. 2 para. 1 of the CRC³², the rights under the CRC apply to all children within the jurisdiction of a State, regardless of their nationality, origin, or other distinction (e.g. status).

Yet, this principle of non-discrimination "*may indeed call for [...] differentiation on the basis of different protection needs*"³³. Indeed, it should be recalled that unjustified assimilation between two distinct situations may also be akin to discrimination, as recalled, *in fine*, in Art. 1 para. 4 and Art. 2 para. 2 of the Convention.

The protection and special assistance granted by a State to a child will therefore be considered adequate if it meets the needs of the person concerned and takes account of his or her experience. To put it another way, the socio-educational framework must be thought out individually for each person. The TF has thus recognised that, for unaccompanied refugee minors, "*the care and social and educational supervision must, in general, be reinforced*"³⁴.

The TF also recognized that unaccompanied minors "*have a particular need for protection, because of their age and because they are in Switzerland without being accompanied by a person with parental authority and, for some of them, engaged in an asylum procedure. For the same reasons, they are also particularly vulnerable to human trafficking and other forms of exploitation (in particular sexual exploitation), organized crime and other illegal activities. In addition, they are often traumatized by their experience of flight*"³⁵.

In order to comply with the requirements of the Convention and of the CRC, the protection and social assistance provided by the State to unaccompanied minors should therefore be at least equal to that provided to children in less unfavourable situations. As the following parts of this report explain, however, this is not currently the case in Geneva.

B. Overview of the Geneva's youth care system

The majority of the homes for minors in Geneva are being provided by the [Official Youth Foundation](#) (FOJ), a foundation bound by a service contract with the State of Geneva. About ten hostels for adolescents have been set up, whose main purpose is to accommodate young people with family,

³¹ Universal Periodic review 2012 ; UNHCR report, N 41 ; UN Committee on the rights of the child, Concluding observations, 2015, p.15-16

³² UN Committee on the rights of the child, General comment n° 6, para. 12.

³³ UN Committee on the rights of the child, General comment n° 6, para. 18.

³⁴ Arrêt du Tribunal Fédéral 2C_494/2018 du 10 janvier 2019, consid. 3.5.1.

³⁵ Conférence des directrices et directeurs cantonaux des affaires sociales (CDAS), Recommandations relatives aux enfants et aux jeunes mineurs non accompagnés dans le domaine de l'asile, 2016, p. 6.

relational, personal and/or social difficulties³⁶. What all these hostels have in common is that they all take in between 7 and 11 adolescents with the above-mentioned problems. They are therefore small reception structures, to allow for more intimate and in-depth work by the educators. We do not have information about the precise number of educators working in each home, but they are always referred to as a team. We can therefore affirm that Geneva youth in trouble are always supervised by several adults, the practice being to have one educator for every two or three young people.

Moreover, the different homes have different goals regarding the duration of the commitment with the minor. Some hostels operate more in an emergency logic, therefore providing short-term shelter. This is the case, for example, of the Centre le Pont and la Calanque, which take in young people for an average of 46.5 days and 80 days respectively³⁷. Other hostels operate more in an accompaniment and development logic, therefore providing medium and long term reception. La Pommière, for example, offers an average stay of 586 days³⁸.

Thus, as regards the accommodation of Geneva minors, and unlike that of migrant minors, the provided hostels comply with the requirements of the CRC. They are small structures that allow for the socio-educational work of educators. In principle, there are enough of them to deal with all situations without being overwhelmed. Finally, each home has a certain logic of supervision, be it emergency, support or development, which means that, in principle, the young person is assigned to the place best suited to his/her needs.

C. Issues regarding unaccompanied minors care

As already stated in this report, unaccompanied minors have the right to enjoy care services adapted to their needs and, if necessary, reinforced in comparison with those provided to other less vulnerable minors. The care currently provided to minors in Geneva should therefore be the minimum threshold to be proposed to unaccompanied minors. They often require more care than other young people in order to avoid unjustified assimilation of different situations and thus violate the right of these minors to non-discrimination. Socio-educational supervision must take account of the experiences of unaccompanied minors, their current situation and the needs necessary for their development.

- **There is currently, and only since November 2019, only one shelter home for unaccompanied minors, which is the Seymnaz hostel³⁹. The latter can only accommodate 20 minors, and only males. This is obviously insufficient in view of current needs. Many minors therefore find themselves forced to sleep on the street⁴⁰, to stay in hotels offering disastrous conditions⁴¹, a situation that has deteriorated even more during the covid-19 pandemic.**

In fact, as denounced in an open letter⁴² sent to the Geneva Council of State (Conseil d'Etat) on 27 April 2020, by the Permanence MNA, a legal counselling centre dedicated to unaccompanied minors, "*not surprisingly, the precariousness of these minors has increased*" during the crisis, as they find

³⁶ <https://www.foj.ch> (12.12.2019).

³⁷ <https://www.foj.ch/foyers/centre-le-pont/> (12.12.2019) ; <https://www.foj.ch/foyers/la-calanque/> (12.12.2019).

³⁸ <https://www.foj.ch/foyers/la-pommiere/> (12.12.2019).

³⁹ <https://www.letemps.ch/suisse/geneve-visite-premier-foyer-migrants-mineurs>

⁴⁰ <https://www.letemps.ch/suisse/geneve-raslebol-mineurs-non-accompagnes> ;

<https://www.letemps.ch/suisse/lerrance-fin-mineurs-non-accompagnes>

⁴¹ <https://renverse.co/VIDEO-Hotel-Aida-logements-indignes-pour-des-mineur-e-s-2276> ;

<https://www.tdg.ch/lematindimanche/geneve-hotel-aida-seme-trouble/story/30606587>

⁴² Open letter to the Council of State of Geneva Canton and Republic on unaccompanied minors, sent on 27 April 2020 by the Permanence MNA and signed by 45 signatories.

themselves completely *"left on their own"*, and the rare accommodation still accessible *"remains precarious, many of these places only welcoming the minors at night, which leads them to be on the street during the day"*.

Other minors have been put in the Foyer de l'Etoile, a home originally intended for asylum-seeking minors, whose structure and resources had not been adapted either to the specific needs of unaccompanied minors or to the concerns that the cohabitation of these two populations with specific needs might pose. Such problems were notably highlighted following the demise, on 27 March 2019, of Ali Reza, a young Afghan refugee who committed suicide at the Foyer de l'Etoile⁴³. In an open position paper published on 23 August 2019, the staff of the Foyer de l'Etoile also denounced a certain number of dysfunctions such as the *"lack of means"* to implement an educational project for unaccompanied minors and the absence of an *"individual integration project"*; the imposition of a *"logic of uniform intervention"*; the *"return to the logic of emergency"* in the care of unaccompanied minors; the *"inhuman size of the home and the inadequate institutional vision conceived within a limited logic of collective accommodation"*⁴⁴.

III. Discrimination with regard to equality before the law (art. 5, 1^{er} para. of the Convention)

A. Discrimination with regard to family reunification

1. Legal framework pertaining to family reunification related DNA tests in Switzerland

Article 102, paragraph 1, of the Federal Law on Foreigners and Integration (hereinafter "LEI") allows authorities to collect certain biometric data for identification and age determination purposes. Pursuant to article 87, paragraph 1 (c), of the Ordinance on admission, residence and gainful employment of 24 October 2007 (hereinafter "OASA"), the competent authorities in matters of aliens' law and the right of asylum may rely on article 33 of the Swiss Federal Law on Human DNA Analysis (hereinafter referred to as "LAGH") for the collection of DNA profiles if there are well-founded doubts as to a person's parentage or identity and these doubts cannot be resolved in any other way.

Such an analysis cannot, however, be imposed by the authority; it can only be proposed and carried out *"with the written consent of the person concerned"* (Art. 33 para. 2 LAGH), or by virtue of an overriding public or private interest, or if it is provided for by law (Art. 5 para. 1 and Art. 33 para. 2 HGTA, Art. 28 para. 2 CC, cf. infra para. 2.8).

According to the SEM, the notion of **"well-founded doubts"** must be interpreted in relation to the specific case and the country in question⁴⁵. For instance, doubts may arise if the documents come from a country with an unreliable civil registration system, due to the risk of corruption⁴⁶. It may also refer to the absence or very poorly developed existence of such a system⁴⁷. However, although nothing prevents the authority from offering a DNA test in all doubtful cases, it is not possible to test all persons

⁴³ <https://asile.ch/2019/04/17/solidarite-tattes-foyer-de-letoile-les-amis-dali-liberent-leur-parole/> ; <https://cigue.ch/solidarite-avec-les-mineur-e-s-non-accompagne-e-s/>

⁴⁴ Prise de position des collaborateurs du Foyer de l'Etoile, 23 août 2019/ <https://asile.ch/2019/09/06/rmna-les-educateurs-du-foyer-de-letoile-interpellent-les-autorites-genevoises/>

⁴⁵ SEM, F3, p. 10.

⁴⁶ SEM, Profil d'ADN, p. 2.

⁴⁷ SEM, Profil d'ADN, p. 2.

coming from a country at risk - the DNA test cannot be offered systematically and compulsorily for a particular country⁴⁸.

Art. 33 para. 1 of LAGH provides that a DNA test can only be ordered if the doubts cannot be resolved in any other way.

In addition, Art. 33 para. 2 LAGH requires that the person concerned must **consent in writing** to the establishment of the test. According to Art. 5 para. 1 LAGH, which is based on the principle of Art. 119 para. 2 letter f Cst, every person subjected to a genetic analysis must give his or her free and informed consent. In order to be considered free, consent must not be tainted by deception and must not result from unlawful pressure. Furthermore, consent is considered to be informed if the person concerned gives it in full knowledge of the facts, "*after having received all relevant information*"⁴⁹. In addition to written consent, the laboratory carrying out the DNA analysis must be able to demonstrate that the person concerned has been informed of the importance and scope of the genetic test (principle of informed consent).

2. Discrimination in practice and in law with regard to DNA tests

Several observatories and legal counselling centers working on asylum and aliens law have confirmed that they are increasingly being made aware of situations in which the cantonal migration authorities systematically request DNA tests for family reunification⁵⁰. Such tests are allegedly requested from persons of Eritrean origin, as well as from fathers in general⁵¹.

A person who refuses to take a DNA test must bear the legal and procedural consequences of not being able to provide the proof requested from them. Therefore, though there is no legal obligation to, there actual is a factual constraint to consent to DNA testing, since in the event of refusal, the persons concerned risk being denied the existence of any family ties. For these reasons, the consent given by a person applying for family reunification cannot be considered free in these circumstances.

B. Discrimination with regard to the right to marriage (art. 5 let. d, ch. iv of the Convention)

1. Issues pertaining to the specific conditions imposed to foreigners and to the right to non-discrimination

In addition to Swiss usual legal conditions for marriage, when at least one of the fiancés is a foreigner, the registrar also examines whether the will to marry is indeed present in both fiancés, in accordance with Article 97a of the Civil Code (hereinafter: CC), which aims to prevent marriages concluded exclusively for the purpose of circumventing the rules on the law of foreigners. In such cases, known as fictitious marriages or marriages of convenience, the civil registrar may, since 1 January 2008, refuse to celebrate the marriage (Article 97a paragraph 1 CC).

A marriage is considered as fictitious when the spouses (or only one of them) have never had the will to form a true conjugal community. In the absence of direct evidence, the registrar must take into

⁴⁸ SEM, Profil d'ADN, p. 2.

⁴⁹ FF 2002 6877, LAGH.

⁵⁰ ODAE, DNA-Tests, p. 1.

⁵¹ ODAE, DNA-Tests, p. 2; Aargauerzeitung, Familiennachzug: Flüchtlinge müssen vermehrt zum DNA-Test, 23.7.17, <https://www.aargauerzeitung.ch/schweiz/familiennachzug-fluechtlinge-muessen-vermehrt-zum-dna-test-131548275> (consulté le 14.12.19).

account a number of indicators such as a significant age difference between the spouses, mutual ignorance, the impossibility of communicating with each other, the payment of a sum of money, the short period of courtship or cohabitation before the marriage or the fact that one of the spouses is threatened with expulsion from Switzerland⁵².

Nevertheless, the civil registrar may consider a refusal only in a situation where the abuse is manifest. He/she cannot simply rely on intuition or an impression, but must have well-founded doubts as to the fiancés' marital intentions. According to Art. 97a para. 2 CC, he/she must also hear the fiancés on this subject. It is, however, a matter of concern that registrars have the power to question future spouses and to obtain additional information from other authorities or third parties. In addition, there is no process for establishing whether or not a doubt is well-founded.

Since 1 January 2011, Article 98 para. 4 CC obliges fiancés who are not Swiss citizens to establish the legality of their stay in Switzerland during the preparatory procedure for marriage, in order to avoid marriages of convenience. Foreign nationals wishing to marry must enclose a document establishing the legality of their residence with their marriage application in order to be able to start the marriage preparation procedure (Art. 64 para. 2 OEC).

Since the introduction of Article 98 para. 4 CC in 2005, registrars must systematically check the status of the fiancés and no longer have wiggling room concerning a marriage application from a person who has not been able to establish the legality of his or her residence on Swiss territory. In such cases, they are obliged to refuse to celebrate the marriage⁵³. Moreover, they must inform the authorities competent on foreigners matters of the identity of the fiancés who have not been able to establish the legality of their residence in Switzerland. Civil registrars are therefore used here as auxiliaries to the foreigners' police authorities, a situation which is not without raising a considerable number of concerns.

Any person of foreign nationality who does not reside in Switzerland, but who wishes to marry there, has the right to apply for a visa which would allow him/her to stay in Switzerland for the duration of the preparatory procedure for the marriage. However, there is no right to obtain such a visa. Thus, a foreigner who is already residing in Switzerland illegally and who wishes to marry must first regularise his or her status.

- **The European Court of Human Rights (ECtHR) has ruled that such a restriction on a right enshrined in the ECHR exceeds the acceptable margin of appreciation. Based on the fact that it applies to all persons residing illegally without any distinction, the ECtHR held that it undermines the very substance of the right to marry and that it is therefore not at all justified.**

Article 98 (4) CC therefore introduces an additional formality to access to marriage for foreigners. It creates a definitive impediment to marriage in Switzerland on the basis of an irrefutable presumption of a fictitious marriage linked solely to the absence of a valid residence permit and aimed solely at a particular category of fiancé(e)s .

- **Article 98 (4) CC indeed establishes a presumption which is very difficult to rebut and which amounts to creating two categories of foreigners with regard to marriage. First of all, foreign nationals not subject to the visa requirement may reside legally in Switzerland for a period of up to three months without engaging in gainful employment (Art. 10 para. 1 LEI). These are mainly EU and EFTA nationals who do not require a visa. Residence is also legal as long**

⁵² Arrêt du Tribunal fédéral 128 II 145 du 3 avril 2002, cons. 3.1 ; arrêt du Tribunal fédéral 2C_1055/2015 du 16 juin 2016, consid. 2.2 ; FF 2002 3591, Étrangers ; arrêt du TF 5A_347/2013 du 22 août 2013, consid. 3.2.1.2.

⁵³ ATF 137 I 351 du 23 novembre 2011, consid. 3.7.

as the foreigner is in possession of the necessary visa, does not exceed the duration of the visa (normally 90 days, valid for the entire Schengen area) and does not engage in gainful employment.

2. Specific issues pertaining to unaccompanied youth

Unaccompanied young migrants therefore face several obstacles, related to both age determination and legal status issues, the latter leading to increased scrutiny on their real and serious willingness to marry.

Unaccompanied young people who have reached the age of majority and are asylum seekers or provisionally admitted are in possession of an N or F permit. Those who have been granted asylum are in possession of a B permit. These young persons can then all prove the legality of their stay and begin the necessary steps leading to marriage. However, they are likely to be subject to thorough checks by the authorities, based on the fact that they are more likely to be suspected of having chosen out of mere complacency. However, unaccompanied young people who have reached the age of majority but without identity papers will be prevented from residing in Switzerland illegally. They will be granted sufficient time to enable them to regularise their situation by the civil registry office and will be subjected to a thorough examination of their intentions in relation to marriage.

If the authorities fear that there may be abuse or that the foreigner would not be able to obtain a residence permit after the marriage due to circumstances or personal circumstances, they will not grant him or her such a temporary right of residence. The right to marry is unsustainably violated and has a discriminatory effect on foreigners, who are faced with a number of obstacles making access to marriage very difficult. This is all the more the case for young people without legal status who, if they wish to marry each other in Switzerland, will be unable to do so due to their lack of residence status, as it will often be impossible for them to regularise their situation. There is therefore a real infringement of the right to marry.

C. Discrimination with regard to medical expertises

Unaccompanied young migrants find themselves in Switzerland without any documents to prove their identity. In addition to the lack of identity papers, it is also difficult to determine their age solely on the basis of their physical appearance.

- **Unaccompanied minors are therefore often subjected to invasive tests such as bone tests or examinations of the intimate parts of the body, as they cannot prove their minority status.**

However, as the Swiss Paediatric Society (SSP) has pointed out with regard to age determination methods *"whether for bone age, physical or dental examination, these tools are too approximate and present wide standard deviations, they are based on reference tables which are often unsuitable because they do not take into account the ethnic or socio-economic origin of the young person, nor any possible endocrine pathologies which could influence the results [and] today, no scientific method makes it possible to establish precisely the age of a young person between 15 and 20 years of age in*

order to define with certainty whether he or she is an adult or a minor"⁵⁴. Indeed, these analyses can only provide an age range and are unable to determine the precise age. In addition to this unreliability, the medical tests also cause considerable harm to the dignity and physical and psychological integrity of these young people⁵⁵.

D. Discrimination with regard to the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (art. 5 let. b of the Convention) : the case of racial profiling

1. Overview of Switzerland's legal framework on identity checks

Although it can target "*any person*", an identity check cannot be carried out without a purpose. The grounds for an identity check, which are specific to the case at hand, play an equally important role in determining whether the check is in accordance with the law. For example, there must be "*the existence of a troubled situation*", or the person stopped must be close to the place where an offence was committed, or must resemble a wanted person, or must belong to a "*group of individuals for whom there is reason to believe, on the basis of even the slightest indication, that one or other of them would be in an illegal situation involving police intervention*"⁵⁶.

The notion of group affiliation must be understood in a strict and objective sense: it refers to a voluntary adherence to a determined and determinable group. For example, it therefore does not cover ethnic groups, real or perceived, as the European Court of Human Rights confirmed it in the *Timichev v. Russia* case, in which it was established that "*no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified*"⁵⁷. The same is true of skin colour, as the UN practice has made clear, stressing that it "*cannot be considered a reliable criterion by which to guess at a person's nationality*"⁵⁸.

Only if it is still not possible to establish the identity of the person being checked in the initial phase of the check (i.e. when the person cannot state his or her identity or produce documents and the police have not been able to obtain answers to their questions or obtain information after a basic search) and/or if that identity remains in doubt, the police are entitled to take the person to their premises for further identification measures⁵⁹. Identification measures include taking fingerprints and photographs⁶⁰, or searching persons or objects. In some cases, they also include DNA analysis. Finally,

⁵⁴ Société suisse de pédiatrie, Détermination de l'âge des jeunes migrants : position de la Société suisse de pédiatrie, PAEDIATRICA, Vol. 28 No. 2, 2017 [https://www.swiss-paediatrics.org/sites/default/files/3_2.pdf].

⁵⁵ UN Committee on the rights of the child, General comment générale n°24 (2019) on children's rights in the child justice system (CRC/C/GC/24) 18 September 2019, para. 33ss, 43 and 58ss.

⁵⁶ ATF 109 Ia 146, consid. 4b; TF 1P.585/2002/, consid. 3.5, translated by the authors.

⁵⁷ ECtHR, case *Timichev v. Russia*, applications n° 55762/00 et 55974/00, 13 March 2006, para. 58.

⁵⁸ UN Human Rights Committee, Views on communication 1493/2006 *Williams Lecraft v. Espagne*, 11 September 2006, CCPR/C/96/D/1493/2006.

⁵⁹ art. 47 al. 2 et 48 al.1 de la Loi sur la police du canton de Genève (LPol/GE) cum art. 12 al. 1 du Règlement sur l'organisation de la police du canton de Genève (ROPol/GE)

⁶⁰ art. 48 al.1 LPol/GE

this control should at no time be "vexatious or hassle-free, nor should it be based on a sense of gratuitous curiosity"⁶¹.

2. Lack of an interdiction of racial profiling in the federal legislation

As repeatedly highlighted by many international and regional human rights instruments⁶², the Committee itself, in its draft General Recommendation on Racial Profiling, recalls that " racial profiling violates the prohibition against discrimination"⁶³.

At the regional level, the European Commission against Racism and Intolerance (ECRI) has also made repeated calls for a legal definition and a formal prohibition of racial profiling, both to the member States of the Council of Europe in general⁶⁴ and to Switzerland in particular⁶⁵.

- **However, to this date, Switzerland still has neither a legal definition nor a formal prohibition of racial profiling.**

In a 2018 ruling⁶⁶, the TF even confirmed the conviction for failure to comply with police measures of a Swiss national who had refused to disclose his identity during a check that he considered discriminatory. In this case, Mohamed Wa Baile, a Swiss national who used the same route through Zurich station on a daily basis, stated that he had been subjected to repeated checks, sometimes by the same officers. On 5 February 2015, during an umpteenth check, he refused to disclose his identity, which led to successive convictions and various appeals by the victim. However, while the police officers in question underlined the "dark" skin colour of the individual in their report⁶⁷ and acknowledged that what sparked the identity check was the fact that he had simply avoided their gaze when passing through the station, the TF stated that such a check was not discriminatory, the reason invoked by the police officers (having avoided their gaze) having been deemed sufficient objective grounds to justify a check for potential violation of the LEI.

3. Racial profiling against unaccompanied minors

Such a legal vacuum on racial profiling has a considerable impact on unaccompanied minors, particularly males of North African origin⁶⁸, many of whom have reported being subjected to identity checks by the police up to several times a week.

⁶¹ ATF 109 Ia 146, consid. 4b; TF 1P.585/2002/, consid. 3.5, translated by authors.

⁶² See for instance : « *Racial profiling violates a number of key principles and rights under international human rights law. These include principles of equality and non-discrimination contained in article 2 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, articles 1, 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and article 2 of the Convention on the Rights of the Child* » (Report of the Secretary-General for the Programme of activities for the implementation of the International Decade for People of African Descent (A/73/354), para. 11) ; ECRI, recommandation de politique générale n°11, p. 8 ; ECtHR, *case Lingurar v. Romania*, application n° 48474/14, 16 April 2019, para. 76, etc.

⁶³ Draft General recommendation N°36 «Preventing and Combating Racial Profiling», para. 12. Disponible sur: <https://www.ohchr.org/EN/HRBodies/CERD/Pages/GC36.aspx> .

⁶⁴ ECRI, General policy recommendation n°11, p. 4.

⁶⁵ Rapport sur la Suisse, 2009 : « *L'ECRI exhorte les autorités suisses à prendre des mesures pour lutter contre le profilage racial par la police tel que défini ci-dessus, notamment en définissant et interdisant clairement ce profilage racial dans la loi, en lançant des recherches sur le profilage racial et en assurant un suivi des activités de police afin d'identifier des pratiques de profilage racial* » (para. 187).

⁶⁶ Arrêt du TF, 6B_1174/2017, 7 mars 2018.

⁶⁷https://www.humanrights.ch/cms/upload/pdf/161101_Polizeilicher_Rapport_Nichtbefolgen_polizeilicher_Anordnung.pdf, p. 1.

⁶⁸ Meeting between the Law Clinic and the Collectif Lutte des MNA, on 17 September 2019.

- **Moreover, according to the testimonies of some minors, in addition to being frequent, these checks are often accompanied by bullying and abuse, and in some cases, violence, and they almost systematically end at the police station, where their fingerprints are being taken, without it being possible to determine what the police and any other authorities do with these data.**

Moreover, even at the height of the covid-19 crisis, which, as explained previously⁶⁹, makes unaccompanied minors even more vulnerable by forcing many of them to take to the streets, and despite a decrease in convictions for offences against the legislation on foreigners, *"identity checks continue to be carried out systematically, frequently followed by arrests"*⁷⁰. As denounced in the open letter sent by the Permanence MNA to Geneva Council of State on 27 April 2020, **these checks are frequently accompanied by inappropriate statements, by the "seizure of the minors' money", or the "seizure of their mobile phones", even though these phones are their only means of contacting the Service for the Protection of Minors.**

E. Discrimination with regard to the right to equal treatment before the tribunals and all other organs administering justice; (art. 5 let. a of the Convention)

1. Insufficient or inefficient legal remedies for police abuses

Various legal remedies are available to a person who is discriminated against, humiliated, abused and/or ill-treated by the police. For example, at the administrative level, a person who feels aggrieved by an act of the police may refer the matter to the police mediation body, as provided for in Article 62(2)(a) of the LPol/GE. At the penal level, several options are possible. Art. 63 para. 1 LPol/GE states that **the General Service Inspection (IGS) is responsible for judiciary tasks (namely investigation) against members of the police, without it being really possible to determine, either in this law or anywhere else, how the IGS can be seized by a victim of such abuse. However, it should also be noted that, even if it is officially under the jurisdiction of the police commander, the IGS remains "administratively attached to the police commander" (art. 63 para. 2 LPol/GE), who is the chief of police (art. 4 para. 2 LPol/GE).**

- **In this regard, it seems particularly important to note the many criticisms levelled at Switzerland regarding shortcomings in the mechanisms for monitoring complaints lodged against police officers.**

In 2001, the Human Rights Committee stated that it was **"deeply concerned at reported instances of police brutality towards persons being apprehended and detainees, noting that such persons are frequently aliens. It is also concerned that many cantons do not have independent mechanisms for investigation of complaints regarding violence and other forms of misconduct by the police. The possibility of resort to court action cannot serve as a substitute for such mechanisms"**⁷¹. This concern was reiterated in 2009, when the Human Rights Committee demanded that Switzerland establish independent mechanisms in all cantons to deal with excessive use of force, ill-treatment or abuse of authority by the police, as well as the creation of a national database of complaints against the police⁷².

⁶⁹ Cf. p.11.

⁷⁰ Open letter to the Council of State of Geneva Canton and Republic on unaccompanied minors, sent on 27 April 2020 by the Permanence MNA and signed by 45 signatories.

⁷¹ UN Human Rights Committee, Concluding observations on Switzerland, 2001, ch. 11.

⁷² UN Human Rights Committee, Concluding observations on Switzerland, 2009, ch. 14.

The Committee against Torture also notes that in Switzerland many cases concerning the abusive use of coercion and racist behaviour by police officers are not brought to the attention of the authorities⁷³. It also notes the inadequacy of statistical data on cases of police violence, the many cases in which proceedings against police officers have been discontinued and the fact that the penalties actually applied were merely disciplinary⁷⁴. Cases of racial profiling and racist behaviour by police officers in Switzerland have been repeatedly mentioned as worrying by the Committee against Torture and the Committee on the Elimination of Racial Discrimination⁷⁵.

- It therefore seems indisputable that, in the light of the various recommendations made to Switzerland on the establishment of effective and independent legal mechanisms for monitoring violence and ill-treatment committed by police officers, recommendations which the country has still not taken into account or followed up with concrete measures, the existing system is largely inadequate. These shortcomings raise serious concerns regarding access to justice for victims of discrimination, humiliation and violence by State officials in Switzerland.

2. Discrimination with regard to judicial follow-up on discrimination cases

The Committee had already noted that, in practice, "*cases of discriminatory remarks or actions directed at people from certain regions or ethnicities are frequently dismissed on the grounds that they are not based on a particular nationality or ethnicity*"⁷⁶. Nevertheless, when such an offence is found to have been committed, it is prosecuted ex officio and is punishable by a custodial sentence of up to three years' imprisonment or a pecuniary penalty.

IV. Recommendations

In light of the above, we wish to address, and invite the Committee to address the following recommendations to Switzerland :

EDUCATION

- Ensure access to education for unaccompanied migrant minors and youth
- Ensure adequate education in accordance with cantonal criteria, as well as secondary education in the centres of the Confederation
- Ensure a more egalitarian admission procedure for the ordinary classes of secondary II (collège, apprenticeship, etc.)

SOCIAL SERVICES

- Adopt and implement clear regulations in line with the rights of the child in terms of care for unaccompanied minors

RIGHT TO MARRIAGE AND FAMILY REUNIFICATION

⁷³ UN Committee against torture, Concluding observations on the seventh periodic report of Switzerland, 7 September 2015, para. 10.

⁷⁴ *Idem*.

⁷⁵ *Idem*; Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of Switzerland, 13 March 2014 (CERD/C/CHE/CO/7-9).

⁷⁶ *Idem*, para. 7.

- Repeal discriminatory clauses in articles 97a and 98 para. 4 of the Civil Code which constitute a discriminatory violation of marriage
- Lift restrictions on the right to marry for non-EU/EFTA nationals
- Systematically grant temporary residence permit to foreigners wishing to marry in Switzerland, irrespective of their origin or legal status
- End systematic DNA tests in family reunification applications, especially for fathers from the African continent
- Broaden the concept of family beyond biological ties to allow family reunification of family members with legal and social ties

MEDICAL EXPERTISES

- Prohibit systematic and invasive medical expertises applied to unaccompanied minors

RIGHT TO SAFETY

- Enshrine the prohibition of racial profiling in federal legislation
- Set up a body dedicated to monitoring the police and receiving complaints lodged against the police, and which would have no administrative ties whatsoever with the police
- Ensure equal, effective and simplified access to justice for all victims of police abuse
- Create publicly available statistical data that records cases of police violence