

Working Group
“Migrant Women & Marital Violence”

Executive Summary

Information note concerning the protection of migrant women in precarious status from marital violence*

Implementation of the Convention on the Elimination of All Forms of Discrimination against Women in

Switzerland

Committee on the Elimination of Discrimination against Women

Pre-session Working Group – List of Issues Prior to Reporting in view of Switzerland’s 6th periodic report

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**This summary is based on the French original version.*

The Working Group on Migrant Women & Marital Violence is comprised of individuals acting in their personal capacity, as well as the following organisations which have contributed to its work since 2009: Centre de Contact Suisses-Immigrés (CCSI Genève), Centre Suisses-Immigrés Valais (CSI Valais), La Fraternité du Centre social protestant – Vaud (CSP VD), Camarada and Syndicat Interprofessionnel des travailleuses et travailleurs (SIT).

Introduction

Migrant women are particularly vulnerable to marital violence in Switzerland. Yet, the conditions for renewing the residence permit obtained through family reunification can only be granted in principle if husband and wife continue to live together. Should migrant women seek to put an end to acts of violence by leaving the household, they risk being expelled.

Article 50 of the Foreign Nationals Act (Loi sur les étrangers – LEtr, which entered into force in 2008 and was replaced as of 1 January 2019 by Loi sur les étrangers et l'intégration – LEI)¹, was expected to address this problem, as it provides for the right to renewal of the residence permit in case of separation following domestic violence. However, the extent of and conditions for its application are extremely limited. In fact, 11 years after its introduction, this provision has proven to be ineffective in protecting foreign women against marital violence. Importantly, it only applies to spouses of Swiss nationals or permanent residents (C permit holders).

CEDAW, CAT, CESC, HRCtee and CERD have issued recommendations that Switzerland amend Article 50 LEI in order to prevent foreign women from remaining in abusive relationships.

In 2016, the CEDAW Committee in its Concluding Observations (CEDAW/C/CHE/CO/4-5) expressed its concern at *“underreporting of domestic violence by many migrant women whose residence permits depend on their being married to their violent husbands, and that the significantly high threshold of “severity” and “systematic violence” prevails as the standard of proof before the courts”* (para 46b) and recommended that the State party *“review the legal framework concerning the burden and standard of proof in cases of domestic violence committed against migrant women”* (para. 47c).

In the meantime, **Switzerland has ratified the Istanbul Convention, with a reservation to Article 59, confirming the State’s restrictive approach** to the protection of migrant women victims of domestic violence, who often rely on the residence status of their violent husbands.

Although the Federal Tribunal’s jurisprudence has become more lenient, overturning many decisions by lower courts, **there is currently a proposal to remove the Foreign Nationals Act from the purview of the Federal Tribunal, further undermining the right of appeal for migrant women victims of domestic violence.**

In practice, the criterion of severity of marital violence for being authorised to remain in Switzerland is highly problematic, so is the burden and administration of proof of such violence.

Given the current legal framework and practice, legal and social professionals can only say to migrant women victims of marital violence that if they leave their husband, they are at serious risk of losing their residence permit and being expelled. As a result, many women are reluctant to seek protection from violence, to file a complaint or seek redress. Therefore the legal framework and its practical implications violate the fundamental human rights of foreign women in Switzerland. Such State failure to protect migrant women is a form of discrimination based on gender and on national and residence status, which constitutes a violation of the CEDAW Convention.

¹ This provision only applies to foreign women who have obtained a B permit (regular residence status) after marrying a Swiss national or a foreign national with a C permit (permanent residence status).

Legal criteria

When it was introduced, Article 50 LEI was applied as requiring that two cumulative criteria be met: proving one has experienced marital violence and that reintegration upon return to the country of origin is highly jeopardised. Despite some resistance, following the adoption by the Federal Parliament of a new law to combat forced marriage, the wording of Article 50 §2 LEI has changed as of 1st July 2013. It now clearly states that marital violence – or forced marriage – suffices in and of itself to allow for a victim to remain in Switzerland after separation. This change in the law confirms a 2009 decision by the Swiss Federal Tribunal². According to this jurisprudence, such violence could already suffice to allow for the victim to stay in Switzerland after leaving her violent husband. But for this purpose, **violence must reach a certain threshold of severity**³.

In addition, Article 50 LEI only applies to foreigners married to Swiss nationals or permanent residents (C-permit holders), thus leaving it to the discretion of authorities the cases of foreign spouses of temporary permit holders who face abuse in the domestic sphere.

Administration of proof of violence

Moreover, quite often the failure to lodge a criminal complaint against the author or the dismissal of such a complaint implies for the migration authorities that the severity threshold was not attained or proven. The State Secretariat for Migration (Secrétariat d'État aux migrations - SEM) often concludes so, despite the fact that specialised services supporting victims of domestic violence have attested that the person was victim of a direct attack against her physical and psychological integrity, and has therefore been recognised as a victim under the Law for the protection of victims of offences (LAVI). Such expert opinion continues to be underestimated by SEM⁴ although it is now acknowledged as one element to be taken into account under Article 77 of the administrative ordinance on application of the Foreign Nationals Act (OASA)⁵. Experts on domestic violence tend to agree however that the mere fact of seeking help or refuge is a sign that violence has become unbearable and that a real danger exists⁶.

Understanding of the issue of domestic violence is also lacking among some judges. In a recent decision, the Federal Administrative Tribunal deemed not credible the allegations of a migrant woman victim of violence because she had had higher education in her home country. Hence she

² Federal Tribunal, ATF 136 II 1, 4 November 2009: <http://relevancy.bger.ch/cgi-bin/JumpCGI?id=BGE-136-II-1&lang=fr>.

³ See the State Secretariat for Migration directives, 25 October 2013 (as revised at 1st June 2019), para. 6.15.3: <https://www.bfm.admin.ch/content/dam/data/bfm/rechtsgrundlagen/weisungen/auslaender/weisungen-aug-f.pdf> as well as the circular issued on 13 April 2013: <https://www.bfm.admin.ch/content/dam/data/bfm/rechtsgrundlagen/weisungen/auslaender/familie/20130413-rs-ehegewalt-f.pdf>.

⁴ See ODAE romand, Case 235 (« Victime de violences conjugales, elle doit partir ») available at https://odae-romand.ch/wp/wp-content/uploads/2012/01/Cas_235_Sonia.pdf and Case 273 (« L'« intensité » des violences conjugales étant jugée insuffisante, elle doit partir ») available at <http://odae-romand.ch/spip.php?article620>.

⁵ Art. 77 OASA provides under §6 that for the purpose of evaluating whether domestic violence justifies the renewal of the victim's residence permit under Article 50 of the Foreign Nationals Act (LEI), are considered as evidence: a. medical certificates; b. criminal complaints; c. police reports; d. decisions under civil law; e. criminal convictions. Since 1st January 2012, at § 6bis it is now expected that "the competent authorities take into account information provided by specialised services". Such information is therefore not per se considered as evidence of the same level as the above.

⁶ See a report commissioned by the Federal Office for Gender Equality, "Assessing the severity of domestic violence", June 2012, available at http://www.ebg.admin.ch/dokumentation/00012/00196/index.html?lang=fr&download=NHZLpZeq7t,lnp6lONTU042l2Z6ln1ae2lZn4Z2qZpnO2YUq2Z6qJCDdnt4fGym162epYbq2c_JjKbNoKSn6A--.

was supposedly not likely to remain in an abusive relationship if such was the case (Judgement C-2696/2014 dated 29 June 2015, § 5.4.6).

In another more recent case where a husband had been criminally convicted for violence inflicted on his wife after separation, both administrative and judicial authorities persisted in dismissing the allegation and evidence that she had also suffered violence during marriage, before being expelled from her home by her violent husband⁷.

Challenges in renewal of permits

Another obstacle exists with respect to migrant women whose permit has been renewed for one or two years after separation due to domestic violence. There is a strong pressure to ensure that they become financially independent shortly after, without due consideration to the lasting consequences of the violence they were subjected to, the isolation that often accompanies such situations, or the lack of pre-school day care for their children, all of which make their professional integration all the more difficult. **In some cases, a residence permit is no longer renewed due to the lack of financial independence despite evidence that the consequences of violence still hamper a woman's rehabilitation and ability to enter the job market⁸.**

Right of appeal to the Federal Tribunal

In November 2015, the federal government began a consultation for amending the Law on the Federal Tribunal (LTF)⁹. While some proposed amendments can be perceived as improvements, our Working group is concerned about the proposal to amend Article 83 LTF, which restricts the right of appeal under the Foreign Nationals Act / LEI to foreign nationals that have been living in Switzerland for at least 10 years or who hold a permanent residence permit (C permit), unless otherwise stated in a treaty, such as the free movement agreement with the European Union (Accord sur la libre circulation des personnes - ALCP). The draft bill amending LTF is currently before Parliament.

Istanbul Convention – reservation to Art. 59

Despite efforts to inform the Government, Parliament and other stakeholders on the consequences of the current State practice with respect to migrant women victims of marital violence, the tendency is to maintain the status quo or even pave the way to further undermining of victims' rights. One recent development attests to this. **The Swiss Government (Federal Council) recently ratified the Council of Europe's Istanbul Convention with a reservation to Art. 59 of the Convention, which aims to protect all migrant women victims of domestic violence whose residence permit depend on their husband's.** The reservation is sufficiently general so as to allow for even going as far as revoking or further restraining the conditions for applying Art. 50 LEI (*"Switzerland reserves the right (...) not to apply or to apply only in specific cases or conditions, the provisions laid down in Article 59"*).¹⁰

⁷ See ODAE romand, Case 341 (« *Renvoi d'une survivante de violences conjugales, son mari jugé plus crédible* ») available at <https://odae-romand.ch/fiche/renvoi-dune-survivante-de-violences-conjugales-son-mari-juge-plus-credible/>.

⁸ See ODAE romand, Case 220 (« *Fragilisée par les violences conjugales, elle est renvoyée après 11 années en Suisse* ») available at <http://odae-romand.ch/spip.php?article489>. Such decisions are based on Art. 51 and 62 LEI combined.

⁹ <https://www.bj.admin.ch/bj/fr/home/staat/gesetzgebung/bundesgerichtsgesetz.html>

¹⁰ See *Reservations and Declarations for Treaty No.210 - Council of Europe Convention on preventing and combating violence against women and domestic violence*, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=4ebx9lxl.

Recent measures to address the issue

In April 2018, the federal government issued a report on the implementation of Art. 50 LEI, titled: « Pratique suivie en matière de droit de séjour des victimes étrangères de violences conjugales ». The report recognises some of the challenges in the implementation of this provision. However, to date no follow-up measures seem to have been taken in order to ensure consistent and adequate implementation of the law across all Swiss cantons, such as systematic provision of data by each canton on the application of Art. 50 LEI and training of migration authorities on how to assess and deal with cases of domestic abuse.

Suggested issues to be raised

In view of this situation, the Working Group on Women Migrants & Marital Violence calls on the CEDAW Committee to ask Switzerland how it intends to address the following issues:

- **Does the State envisage withdrawing its reservation to Art. 59 of the Istanbul Convention, in order to avoid unequal treatment of migrant women victims of domestic violence based on the residence status of their husbands?**
- **Does the State intend to expand the application of Art. 50 LEI so that it applies to all migrants victims of domestic violence, and not only to those married to Swiss nationals or C-permit holders, while ensuring they can access the Federal Tribunal to claim their rights?**
- **When will country-wide statistics, disaggregated by Canton, concerning the implementation of Art. 50 LEI be available, as indicated by the federal government in its April 2018 report?**
- **Also, when will dedicated training be provided to migration authorities across cantons, as indicated in the federal government's April 2018 report?**
- **How does the State intend to ensure the long-term consequences of domestic violence are duly taken into account by migration authorities in the examination of requests for renewal of permits under Art. 50 al. 1 b) and al. 2 LEI, and thus avoid rejecting such requests on the sole basis of reliance on social assistance by survivors of violence ?**