



International Convention on the Elimination of All Forms of Racial Discrimination

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Committee on the Elimination of Racial Discrimination

Decision adopted by the Committee under article 14 of the Convention, concerning communication No. 79/2021^{*}, ^{**}

<i>Communication submitted by:</i>	S.H. (represented by counsel, Fazil Ahmet Tamer)
<i>Alleged victim:</i>	The petitioner
<i>State party:</i>	Switzerland
<i>Date of communication:</i>	31 August 2021 (initial submission)
<i>Date of adoption of decision:</i>	1 December 2023
<i>References:</i>	Decision taken pursuant to rule 91 of the Committee's rules of procedure, transmitted to the State party on 7 December 2021 (not issued in document form)
<i>Subject matter:</i>	Racial discrimination due to the refusal to allow a refugee to enter Switzerland
<i>Procedural issues:</i>	Admissibility; inadmissibility <i>ratione temporis</i> ; non-substantiation of claims
<i>Substantive issue:</i>	Discrimination on the grounds of national or ethnic origin
<i>Article of the Convention:</i>	2 (2)

1. The petitioner is S.H. He states that he is a Turkish national and a refugee in Cyprus, born in 1974. The petitioner claims that the State party has violated his rights under article 2 (2) of the Convention. Switzerland acceded to the Convention on 29 November 1994 and made the declaration provided for in article 14 on 19 June 2003. The petitioner is represented by counsel.

Facts as submitted by the petitioner

2.1 The petitioner usually travels through Switzerland as a tourist to visit his partner, who lives in Lörrach, Germany, not far from the border crossing at Basel. On 20 June 2020, he arrived in Switzerland by plane from Cyprus, intending to travel to Germany. However, when he arrived at Zurich airport, he was refused entry into Switzerland. The Swiss authorities based their decision on Ordinance No. 3 of 19 June 2020 on measures to combat the coronavirus disease (COVID-19) pandemic.¹ The petitioner states that, under this Ordinance, nationals of European Union member States, the member States of the European Free Trade

* Adopted by the Committee at its 111th session (20 November–8 December 2023).

** The following members of the Committee participated in the examination of the communication: Sheikha Abdulla Ali Al-Misnad, Michal Balcerzak, Chinsung Chung, Bakari Sidiki Diaby, Ibrahim Guissé, Yanduan Li, Mehrdad Payandeh, Verene Shepherd, Stamatia Stavrinaki, Mazalo Tebie, Faith Dikeledi Pansy Tlakula and Yeung Kam John Yeung Sik Yuen.

¹ Switzerland, Federal Council, Ordinance No. 3 on measures to combat the coronavirus (COVID-19) pandemic, 19 June 2020, available at <https://www.fedlex.admin.ch/eli/cc/2020/438/fr>.



Association and the United Kingdom of Great Britain and Northern Ireland, as well as their family members, have the right to freedom of movement, irrespective of their nationality. The Swiss authorities took the view that, although the petitioner was a refugee in Cyprus with a valid residence permit, he was not considered to be a person who enjoyed freedom of movement under the Ordinance of 19 June 2020.

2.2 The petitioner claims that the decision to prevent him from entering Switzerland was illegal and discriminatory, as all the rules governing freedom of movement were complied with in accordance with the relevant Swiss directives. The petitioner also states that, according to the State Secretariat for Migration, the decision to deny him entry into Switzerland was based on Directive No. 323.7-5040/3, which was issued by this body on 15 June 2020.² According to this Directive, the petitioner did not belong to the group of persons benefiting from the right to freedom of movement.³ The petitioner claims that the Directive establishes that the categories of persons “authorized to enter the territory, provided that they meet the ordinary conditions of entry” include

Nationals of European Union and/or European Free Trade Association member States and members of their families, irrespective of nationality, and third-country nationals if they are posted to Switzerland for a maximum of 90 days by a company established in the European Union and/or European Free Trade Association and have previously been admitted to the regular labour market of a member State of the European Union and/or European Free Trade Association for at least one year.⁴

2.3 On 22 June 2020, the petitioner filed an appeal with the State Secretariat for Migration against the refusal to allow him to enter Switzerland. The complaint was dismissed on 30 June 2020. The State Secretariat took the view that article 4 (1) of Ordinance No. 3 on measures to combat the COVID-19 pandemic allowed persons from high-risk countries or regions to enter Switzerland if they enjoyed freedom of movement.

2.4 On 3 July 2020, the petitioner filed an appeal against this decision⁵ with the Federal Administrative Court. On 8 July 2020,⁶ the Court dismissed the appeal, stating that the petitioner had no substantial interests or ties that would allow him to enter Switzerland since his final destination was Germany. The Court also noted that the petitioner had left Switzerland of his own free will before the end of the appeal proceedings.⁷ The Court further noted that the petitioner could not be considered to have an interest worthy of protection under article 48 (1) (c) of the Federal Act on Administrative Procedure. The Court also stated that, because of the COVID-19 pandemic, the petitioner should have expected to encounter restrictions on entry into Switzerland and should have travelled directly to Germany, since this was his final destination.

Complaint

3.1 The petitioner claims that his rights under article 2 of the Convention have been violated. He recalls that the State party lifted the travel bans and related measures for member States of the European Union and the European Free Trade Association on 15 June 2020. He points out that all the passengers travelling with him from Cyprus were allowed to enter

² Switzerland, State Secretariat for Migration, Directive on the implementation of Ordinance No. 2 on measures to combat the coronavirus disease (COVID-19 Ordinance No. 2) pandemic and on the procedure for entering and leaving Switzerland, 15 June 2020, available at https://www.vd.ch/uploads/tx_vdfilesdbsecr/Directive_SEM_Corona_%C3%A0_partir_15.06.2020_FR__2_.pdf.

³ The petitioner states that he was returned to Cyprus on 22 June 2020, before the issuance of the decision of the State Secretariat for Migration.

⁴ Switzerland, State Secretariat for Migration, Directive of 15 June 2020 (see footnote 2 above), arts. 1.5 and 1.5.2.

⁵ The petitioner requested that the decision of 30 June 2020 be declared null and void, that he be granted entry into Switzerland, that his travel expenses between Larnaca (Cyprus) and Zurich be reimbursed, and that he be paid 5,000 Swiss francs (SwF) as compensation for non-material damage.

⁶ It should be noted that, contrary to the petitioner’s claim, the documents in the file supporting his communication show that the decision of the Federal Administrative Court was handed down on 8 July 2020 and not on 8 July 2021.

⁷ The petitioner should have stayed in the transit zone of the airport.

Switzerland. As a result, he claims to have been subjected to discrimination because of his refugee status.

3.2 The petitioner considers the interpretation of the Federal Administrative Court to be unfounded, unlawful and inhumane. He points out that being a refugee does not mean that he poses more of a risk of spreading COVID-19. He also points out that refugees have the same biological and genetic characteristics as other human beings.

3.3 The petitioner notes that, under articles 5, 7 and 28 of the Convention relating to the Status of Refugees,⁸ refugees are recognized as having the same rights as citizens of the country of asylum when traveling abroad. He also notes that Switzerland has been part of the Schengen area⁹ since 12 December 2008. Since passengers from Cyprus were not a risk to public health, the petitioner believes he should have been admitted on the same basis as Cypriot nationals. The petitioner therefore considers that the State party's refusal to allow him to enter Swiss territory constitutes a violation of his rights under article 2 of the Convention.

State party's observations on admissibility

4.1 On 21 February 2022, the State party submitted its observations, arguing that the present communication should be declared inadmissible: (a) primarily, because the six-month time limit established in rule 91 (f) of the Committee's rules of procedure had not been met; and (b) as a supplementary matter, because the communication is incompatible, *ratione materiae*, with the Convention.

4.2 The State party points out that the Federal Administrative Court issued its decision on the petitioner's appeal on 8 July 2020. The petitioner's communication is dated 31 August 2021. It was therefore submitted to the Committee more than one year after all available domestic remedies had been exhausted. The State party recalls that the petitioner did not invoke any exceptional circumstances to justify this late submission. It therefore requests the Committee to declare the present communication inadmissible because it was not submitted within the six-month time limit provided for in rule 91 (f) of the Committee's rules of procedure.

4.3 The State party argues that the present communication should be rejected as it is incompatible *ratione materiae* with the Convention. It recalls the arguments set out in the decision of 8 July 2020 of the Federal Administrative Court, which specified the reasons why the appeal filed by the petitioner was inadmissible. In this regard, the Court ruled that the petitioner had no connection with Switzerland and that his sole aim was to travel through Switzerland in order to join his wife in Lörrach, Germany. The Court pointed out that, a few hours after being refused entry into Switzerland at Zurich airport, the petitioner took a plane to Cyprus without waiting for the outcome of the procedure provided for in article 65 (3) of the Foreign Nationals and Integration Act.¹⁰ As a result, the petitioner was unable to benefit from the provision allowing him to spend 15 days in the transit zone of the airport while awaiting a decision on his application. The Court also considered that, in the present case, the petitioner had not demonstrated that he fell into the category of persons with an interest worthy of protection under article 48 (1) (c) of the Federal Act on Administrative Procedure.

4.4 The State party argues that the petitioner failed to adequately explain why he did not go directly to Germany to visit his partner, thereby obviating the need to pass through another country. It also notes that the petitioner failed to explain why he had not previously sought

⁸ In principle, no checks are carried out on persons at the common borders between Schengen States (internal borders). Persons crossing the external borders of the Schengen area will be subject to standard checks. Standard entry conditions are applied for all member States of the Schengen area. A standard visa policy is applied for short stays.

⁹ Refugees who live in a member State of the Schengen area, the United Kingdom, Ireland or Romania and hold a travel document for refugees issued by that State are exempt from the visa requirement, allowing them to stay in Switzerland without a visa. See Switzerland, State Secretariat for Migration, annex CH-1, list 2: Requirements for travel documents and visas – Special provisions irrespective of nationality, point 2.4.2 (“Travel document for refugees issued by a member State of the European Union or by Norway, Iceland or Liechtenstein”).

¹⁰ Switzerland, Foreign Nationals and Integration Act (No. 142.20), 16 December 2005, art. 65 (3).

to determine whether entry for the purposes of transit was authorized in these particular circumstances. This is a pertinent question as the petitioner must have expected to be unable to enter many States, other than for exceptional reasons, owing to the worldwide travel restrictions imposed in connection with the COVID-19 pandemic. The State party also notes that, a few weeks later, the petitioner travelled directly to Germany.

4.5 The State party notes that the COVID-19 pandemic led to the imposition of travel and other restrictions throughout the world, and that these restrictions were imposed as the pandemic spread and were consistent with national and international law. In order to ensure that Switzerland remained able to cope with the pandemic, and in order to guarantee the conditions for the adequate provision of health care and medical products to the population, the Federal Council ordered extraordinary travel restrictions on 13 March 2020 within the framework of an ordinance on measures to combat the COVID-19 pandemic, which it subsequently extended. The State Party also recalls that, on 13 March 2020, the Federal Council lifted the special travel restrictions imposed under the decree on the COVID-19 pandemic, which situation was extended by the removal of all Schengen countries from the list of high-risk countries as of 15 June 2020. The State Party further clarifies that it was not until 20 July 2020 that Cyprus¹¹ was removed from the list of high-risk countries drawn up by the State Secretariat for Migration.

4.6 The State party affirms that the authorities were not unaware of the difficulties encountered by the petitioner on his trip. However, the ruling of the Federal Administrative Court of 8 July 2020 was a purely formal decision establishing whether the petitioner had an interest that was sufficient for his appeal to be processed. The State party points out that the requirement to have a current and practical interest requiring legal protection within the meaning of article 48 (1) (c) of the Federal Administrative Procedure Act applies to all categories of person, without distinction as to race, sex, language, nationality or religion. The claim of racial discrimination therefore lacked all substance from the outset.

4.7 The State party notes that the petitioner, as a stateless person¹² holding a Cypriot residency permit valid for refugees, cannot invoke the right to freedom of movement and that he is not in a situation of extreme need within the meaning of the COVID-19 pandemic regulations. Therefore, his objection was rejected. In addition, the State party mentions that, contrary to what was stated in the petitioner's communication, entry restrictions were lifted on 15 June 2020, not for member States of the European Union and the European Free Trade Association as such, but for persons benefiting from freedom of movement, i.e., nationals of member States of the European Union and the European Free Trade Association and their family members. Third-country nationals wishing to enter Switzerland from Cyprus – which, at the time, was still considered to be a high-risk risk country under COVID-19 pandemic regulations – were still subject to pandemic-related entry restrictions, even if they had a valid residency permit under a status afforded by the European Union or the European Free Trade Association. The difference in the treatment afforded to persons enjoying freedom of movement and nationals of third countries was based on objective grounds and public international law, and was clearly not based on racial considerations. The infringement of personal freedom was also justified by the pandemic, provided for by law and proportionate.

4.8 The State party maintains that it is clear from the above that the decision to deny the petitioner entry into Switzerland was not based on grounds of race, colour, descent or national or ethnic origin within the meaning of article 1 of the Convention. It follows that in the present case, no act of racial discrimination within the meaning of article 1 of the Convention has occurred and, consequently, and in the light of the Committee's practice, the present communication should be rejected as incompatible *ratione materiae* with the Convention.

¹¹ In its observations, the State Party points out that Switzerland is a “non-member of the European Union”. However, it should be noted that, at the time when the communication was submitted, Cyprus was already a member State of the European Union.

¹² The copy of the Cypriot residency permit submitted by the petitioner states that he is a Turkish national with recognized refugee status and the right to work.

Petitioner's comments on the State party's observations

5.1 On 2 July 2022, the petitioner submitted his comments on the State party's observations. He rejects the State party's claim that his communication is inadmissible.

5.2 With regard to the claim that it is inadmissible *ratione temporis* under rule 91 (f) of the Committee's rules of procedure, the petitioner maintains that the failure to comply with the six-month time limit for the submission of his communication is attributable to the State party. In this regard, he points out that the Swiss authorities prevented him from entering Switzerland in accordance with the regulations that they had established. The petitioner states that the Federal Administrative Court rejected his appeal against the decision of the State Secretariat for Migration, and also ordered him to pay SwF 250 in legal costs.

5.3 The petitioner considers the State party's attitude to be discriminatory and a threat to his freedom. In addition, the petitioner disputes the State party's claim that he is stateless and reaffirms that he is a Turkish citizen with refugee status in Cyprus. He contests the reasons set out to justify why different treatment is afforded to refugees in Cyprus and other persons enjoying freedom of movement within the European Union and European Free Trade Association. The petitioner reiterates that these two groups of people have the same biological characteristics and living conditions. He also contests the State party's supposedly objective arguments for refusing him entry into Switzerland while allowing citizens of another country to enter.

5.4 The petitioner claims that the fine handed down by the Federal Administrative Court has also had a dissuasive effect on him as a refugee facing financial difficulties in his host country. Furthermore, he believes that the directive of the State Secretariat for Migration on the implementation of Ordinance No. 2 on measures to combat the COVID-19 pandemic makes no sense in relation to the pandemic, biology or human rights. In his view, it is absolutely discriminatory and humiliating for refugees and so-called foreigners.

5.5 The petitioner claims that, on 22 June 2020, he contested the decision to refuse him entry into Switzerland taken by the State Secretariat for Migration, and that this body failed to rule on his application within 48 hours¹³ on the grounds that he had not attached the contested decision to his objection. The petitioner contests this reason for refusing him entry since the decision was taken by the Zurich office of the State Secretariat. In the petitioner's view, since the State Secretariat necessarily has a copy of its own decision, there was no point in asking him to attach a copy to his objection. The petitioner points out that the State Secretariat ruled on his application on 30 June 2020, without having waited to receive this document from him.

5.6 According to the petitioner, the fact that the State party required him to remain in the airport transit zone, which is a closed area affording no freedom of movement, for more than 18 days is unacceptable. The petitioner also points out that he did not return to Cyprus of his own free will. Rather, he was put on a plane without his passport. He also points out that his travel costs were borne by the Government of Switzerland.

5.7 The petitioner further argues that what matters in the present case is not whether he has links with Switzerland that might justify his trip to that country but the State party's discriminatory attitude towards him. Lastly, the petitioner claims to have been subjected to discrimination by the Swiss authorities because, although he poses no more danger to Swiss society than Cypriot citizens, he was prevented from entering the country. The action taken by the State party constitutes a violation of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, pursuant to article 14 (7) (a) of the Convention, whether domestic remedies have been exhausted.

¹³ The petitioner has not provided any further details concerning this 48-hour period.

6.2 The Committee notes that the petitioner has alleged a violation of article 2 of the Convention on the grounds that the Swiss authorities refused to let him enter Switzerland because of restrictions imposed to curb the COVID-19 pandemic. It also notes that, in the petitioner's view, he was treated differently from the other passengers, who were from Cyprus and were allowed to enter Switzerland without hindrance, because he is a refugee. The Committee further notes that the petitioner filed an appeal against the decision of the State Secretariat for Migration on 3 July 2020 and that the appeal was rejected by the Federal Administrative Court on 8 July 2020. The Committee notes that the State party does not contest the fact that, in the present case, domestic remedies have been exhausted in accordance with article 14 (7) (a) of the Convention.

6.3 However, the Committee notes the State party's claim that the present communication is inadmissible as it was not submitted within the time limit set out in rule 91 (f) of the Committee's rules of procedure. The Committee recalls that, according to this provision, communications must be submitted to it, except in the case of duly verified exceptional circumstances, within six months after all available domestic remedies have been exhausted.¹⁴

6.4 The Committee notes that, in the present case, the Federal Administrative Court adopted its final decision on the facts that are the subject of the present communication on 8 July 2020. It also notes that the petitioner submitted his communication on 31 August 2021, i.e., more than six months after the date on which all available domestic remedies had been exhausted. The Committee further notes the petitioner's argument that the delay in submitting his communication was caused by the fact that the State party had denied him access to its territory. It notes that, between 22 June and 3 July 2020, the petitioner engaged in proceedings before the Swiss authorities to contest the refusal to allow him entry, without his presence in Switzerland being necessary. The Committee considers that, in the present case, the argument based on the petitioner's absence from Switzerland cannot be accepted as an exceptional circumstance within the meaning of rule 91 (f) of the Committee's rules of procedure. Lastly, the Committee notes that the petitioner has provided no further justification for the late submission of his communication.¹⁵

6.5 In view of the above, the Committee notes the absence of duly verified exceptional circumstances that would have justified the failure to observe the six-month time limit set out in rule 91 (f) of the rules of procedure.

7. The Committee on the Elimination of Racial Discrimination therefore decides:
- (a) That the communication is inadmissible;
 - (b) That this decision shall be communicated to the State party and to the petitioner.

¹⁴ *F.A. v. Norway* (CERD/C/58/D/18/2000), para. 6.2.

¹⁵ *Ibid.*, para. 6.3.