



## International Convention on the Elimination of All Forms of Racial Discrimination

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### Committee on the Elimination of Racial Discrimination

#### Opinion adopted by the Committee under article 14 of the Convention, concerning communication No. 53/2013\*, \*\*

<i>Communication submitted by:</i>	Benon Pjetri (represented by counsel, Association Humanrights.ch)
<i>Alleged victim:</i>	The petitioner
<i>State party:</i>	Switzerland
<i>Date of communication:</i>	12 December 2012 (initial submission)
<i>Date of adoption of present opinion:</i>	5 December 2016
<i>Subject matters:</i>	Right to nationality without discrimination; effective protection and remedy against any act of racial discrimination; obligation of the State party to act against racial discrimination
<i>Substantive issues:</i>	Discrimination on the grounds of national or ethnic origin and disability
<i>Procedural issues:</i>	Inadmissibility <i>ratione materiae</i> ; substantiation of claims
<i>Articles of the Convention:</i>	2 (1) (a) and (c), 5 (a) and (d) (iii) and 6

1. The petitioner is Benon Pjetri, a national of Albania born in 1973 in Albania, who now lives in Switzerland. Mr. Pjetri claims to be a victim of a violation by Switzerland<sup>1</sup> of articles 2 (1) (a) and (c), 5 (a) and (d) (iii) and 6 of the Convention. He is represented by counsel, Association Humanrights.ch.

\* Adopted by the Committee at its ninety-first session (21 November-9 December 2016).

\*\* The following members of the Committee participated in the examination of the present communication: Nourredine Amir, Alexei Avtonomov, Marc Bossuyt, Anastasia Crickley, Fatimata-Binta Victoire Dah, Afiwa-Kindena Hohoueto, Anwar Kemal, Melhem Khalaf, Gun Kut, Nicolás Marugán, Gay McDougall and Pastor Elías Murillo Martínez.

<sup>1</sup> The Convention was ratified by Switzerland on 29 November 1994 by way of accession, and the declaration under article 14 was made on 19 June 2003.



**The facts as submitted by the petitioner**

2.1 In May 1991, the petitioner entered Switzerland together with his mother and two siblings. Since 28 September 1993, he has been living in the municipality of Oberriet in the Canton of St. Gallen. Following a medical treatment that he underwent as a baby in Albania, his spinal column was irreparably harmed. As a result, his motor functions are impaired and he uses a wheelchair as he is incapable of walking. Moreover, he cannot articulate clearly when speaking.

2.2 On 1 October 2002, the petitioner applied for naturalization in the municipality of Oberriet. On 4 October 2002, the naturalization commission (*commission de naturalisation*) informed him that the naturalization procedure was in the process of being reviewed and that his application had been put on hold. On 9 May 2003, the petitioner emphasized that his naturalization was of utmost importance to him. In 2003, the naturalization commission of Oberriet decided not to support his application and to postpone it for another year, as it considered that the petitioner and the members of his family who had also applied for naturalization were not sufficiently integrated in the local community. It concluded that his application would not have a good chance of success at the municipal assembly (*assemblée municipale*).<sup>2</sup> The petitioner interpreted this as a sign that the naturalization commission was doubting the willingness of the members of the municipal assembly to accept his integration by means of the naturalization procedure, rather than questioning his integration. On 13 July 2004, the petitioner again applied for naturalization and highlighted that he had worked with the Union workshop (*werkstatt*) for persons with disabilities in Altstätten from 1994 to 1998 and had attended several German language schools. To prove his integration, he presented a list with 300 signatures of inhabitants of the village confirming that he spoke the language and that he was very well integrated, despite his disability.<sup>3</sup> On 21 February 2005, the naturalization commission considered that he had met all the conditions for successful naturalization. The Federal Office for Migration issued the necessary federal naturalization authorization on 7 July 2005. On 31 March 2006, the naturalization commission of Oberriet submitted the petitioner's naturalization application to the municipal assembly indicating that he had successfully integrated into the community, that all references about his personality were positive and that there was no negative information which might call into question his eligibility for naturalization. However, on 31 March 2006, the municipal assembly rejected the application for naturalization without any discussion, with 192 votes against and 159 votes in favour of the application. The petitioner submits that he was well integrated into the social life of the village until he objected to the rejection of his application for naturalization. He states that he had to withdraw from social life, not because of a lack of willingness to integrate, but to protect himself from the hostilities that started against him.

2.3 On 15 November, 7 December and 18 December 2006, the petitioner requested the resumption of his naturalization procedure. The first request was denied by the naturalization commission, which explained that the petitioner did not meet the requirements of local integration. The petitioner considers this to be contradictory to the opinion issued by the same body on 21 February 2005. On 27 December 2006, the naturalization commission informed the petitioner that, "it is of no real help if your application for naturalization is submitted again merely one year after its initial rejection,

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<sup>2</sup> The petitioner indicated that the new naturalization procedure, in which decisions of the municipal assembly with regard to naturalization applications were made by open ballot, was still at an early stage and the outcome was uncertain, in particular as to whether the voters at the assembly would make an objective decision on the application.

<sup>3</sup> The petitioner stated that he had included six reference letters with the naturalization application, including letters from a former member of the government of the Canton of Ticino and a member of the Social Counselling Service of the organization Pro Infirmis.

which might be interpreted by the people of the municipality as ‘pushy’ behaviour”. However, the petitioner insisted and the naturalization commission presented the application to the municipal assembly, which rejected it on 30 March 2007, following a discussion during which supporting and opposing opinions were voiced.<sup>4</sup> The media reported extensively on this case after the municipal assembly.<sup>5</sup> On 13 April 2007, as amended on 2 May 2007, the petitioner appealed the ballot decision of the municipal assembly to the Department of Home Affairs of the Canton of St. Gallen. The Department found a violation of the constitutional prohibition of discrimination on the grounds of disability (art. 8 (2) of the Federal Constitution) and referred the matter back to the municipal assembly. The “court” stated that the lack of employment of the petitioner was the main reason for his rejection by the municipal assembly and that if employment was considered as a criterion for naturalization, disabled persons would hardly ever have a chance of being naturalized. As the Department found indirect discrimination against the petitioner, it quashed the refusal of the application for naturalization of 30 March 2007 with the instruction that the naturalization commission resubmit the petitioner’s application to the next municipal assembly. On 15 July 2008, the municipal assembly appealed this decision before the Administrative Court of St. Gallen. On 26 August 2008, the municipality retracted the appeal.

2.4 On 27 March 2009, the naturalization commission again submitted the petitioner’s application for naturalization to the municipal assembly.<sup>6</sup> On that same day, a member of the assembly made a negative remark about the petitioner’s country of origin, stating that Kosovo-Albanians left a bitter taste in the mouth, given the experience in Switzerland, and the petitioner’s application was rejected. On 3 and 24 April 2009, the petitioner appealed the ballot of the municipal assembly of 27 March 2009 before the St. Gallen Department of Home Affairs. The Department rejected the appeal on 11 December 2009. On 28 December 2009, the petitioner lodged an appeal with the Administrative Court of St. Gallen.<sup>7</sup>

2.5 In its decision of 31 May 2011, the Administrative Court dealt predominantly with the question as to whether the reason for the negative decision on the grounds of the petitioner’s lack of integration in the local community could stand before the law. It held

<sup>4</sup> The supporting voices underlined his efforts to integrate into the village life, his open character, cordiality and frankness; the opposing voices criticized that he had been living off the State since 1998 — although the mayor had clarified that he had never received social benefits — that he did not behave correctly towards other citizens, that he had worked at the Union for only 4 years and that if everyone was naturalized, there would be mosques everywhere (see the minutes of the municipal assembly of 30 March 2007, pp. 14-17).

<sup>5</sup> The media raised the issue of xenophobic tendencies during the naturalization process, as people of certain nationalities were being blamed for various bad things (see *St. Galler Tagblatt*, “Moderne Hexenjagd”, letter to the editor, 5 April 2007) and that people from the Balkans who were willing to be naturalized faced distrust (see *Rheintalische Volkszeitung*, “Abgelehnte Einbürgerungsanträge”, letter to the editor, 4 April 2007).

<sup>6</sup> Prior to the discussion of the petitioner’s application for naturalization, the mayor asked the assembly to consider that the petitioner did not have the same chances of integrating into the community as a healthy person and to “adapt their benchmark accordingly”. Some members of the assembly accused the petitioner of lying during the first naturalization procedure regarding his membership in the local gun club. Others expressed doubts about his friends and called for his application to be rejected on the grounds that he did not participate in a club for persons with disabilities nor worked at a relevant workshop. The calls to reject the petitioner’s application were “enthusiastically” applauded by several citizens present, as testified by a journalist who attended the municipal assembly (see *Neue Zürcher Zeitung*, Sunday, 29 March 2009). Regarding the reproaches that he did not work in a workshop for disabled people and was not active in a sports club for disabled people, the petitioner held that such institutions were more segregative than integrative in nature.

<sup>7</sup> In his appeal of 28 December 2009, the petitioner requested exoneration from legal costs owing to his disability and the fact that he was unemployed. That request was rejected.

that there was no legal entitlement to naturalization, even if the formal and material conditions for naturalization were fulfilled.

2.6 On 7 July 2011, the petitioner lodged a subsidiary constitutional appeal against the decision of the Administrative Court of St. Gallen with the Federal Supreme Court (*Tribunal federal suisse*). He requested that the decision of the Administrative Court be quashed and that his application for naturalization be accepted. He raised, inter alia, a violation of the constitutional prohibition of discrimination on grounds of his origin and disability.<sup>8</sup> In its decision of 12 June 2012, the Supreme Court rejected the appeal.

2.7 The petitioner submits that, with the decision of the Supreme Court, he has exhausted all effective and available domestic remedies. He adds that the communication was submitted within six months of the date of the last domestic remedy, as required under article 14 (5) of the Convention, and that no other international proceedings have been instituted in this matter.

### **The complaint**

3.1 The petitioner claims that the Supreme Court did not sufficiently examine the grounds on which the decision of the municipal assembly rejecting his application for naturalization was based, which constituted discrimination on the grounds of his origin, in violation of article 5 (d) (iii), in conjunction with article 2 (1) (a) and (c), of the Convention.

3.2 The petitioner argues that the Supreme Court did not sufficiently justify how it arrived at the conclusion that the ballot of the municipal assembly did not constitute discrimination on the grounds of his origin and it failed to take into account the clearly discriminatory remarks made during the municipal assembly or the articles in the media. The petitioner adds that, prior to, during and after the municipal assembly, he was subjected to considerable hostilities, racist remarks and acts of violence which lasted over several months.<sup>9</sup> He also claims that, given the ballot of the municipal assembly and the hostile atmosphere in Oberriet, it is possible that the rejection of his application for naturalization by the municipal assembly was based on other discriminatory motives. As the municipality of Oberriet did not succeed in proving the contrary, the Supreme Court should have established the existence of discrimination and the violation of procedural obligations with regard to evidence, taking due account of article 5 (a), in conjunction with article 2 (1) (a) and (c), of the Convention, and obliged the lower tribunals and the municipality of Oberriet to review the petitioner's situation again.

3.3 The petitioner claims that the Supreme Court did not adequately examine the existence of multiple discrimination on the grounds of his origin and disability, in violation of article 5 (d) (iii), in conjunction with article 2 (1) (a) and (c), of the Convention, as it failed to effectively review the actions of the public and the local authorities which constituted racial discrimination. He claims that his disability aggravated the racial and discriminatory decision of the municipal assembly and that this was not sufficiently taken into account by the Court. The petitioner also claims that during the assemblies, several voters accused him of applying for naturalization to abuse the social security system and suspected him of having used his disability to that end. In that regard, he submits that it was

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<sup>8</sup> The petitioner alleges hostile attitudes against him, demonstrated by, inter alia, letters to newspapers and the request that he join an institution for disabled persons in order to integrate. He claims that the burden of proof should be reversed and that it is up to the municipality to prove beyond reasonable doubt that its decision to reject his application for naturalization was not based on discriminatory grounds.

<sup>9</sup> There is no information on file to support the petitioner's claim that he suffered violence in the context of his application for naturalization.

never established by the courts, including the Supreme Court, whether and to what extent he suffered discrimination and it is not clear why the Supreme Court concluded that the ballot of the municipal assembly did not constitute multiple discrimination on the grounds of his origin and disability, despite the hostile atmosphere of the two municipal assemblies, as reflected in the minutes and the articles in the media.

3.4 The petitioner further claims that he was discriminated against on the grounds of his origin and disability, as the criteria to demonstrate the integration of applicants for naturalization, as applied by the municipality of Oberriet and the Supreme Court, were not adapted to his particular circumstances, including the hostility he faced in Oberriet, which amounted to a violation of article 5 (d) (iii), in conjunction with article 2 (a), of the Convention. He claims that he was subjected to massive and racist opposition by the population. Owing to his disability, he did not have a job, which would have provided him with some degree of independence and security, and he wished to distance himself from the emotional injuries he had sustained. Therefore, he could not be expected to integrate beyond his attempts to converse with people in the village, which he did on several occasions. He submits that the Supreme Court should have established that, under the hostile circumstances, the standards for integration applied by the lower tribunals were too onerous and that the standards were discriminatory given his disability and the hostility he faced, respectively.

3.5 In addition, the petitioner submits that, as neither the Supreme Court nor the lower tribunals had seriously dealt with the existence of double discrimination in his case, the national judicial proceedings proved to be de facto ineffective, in violation of article 6 of the Convention. In particular, he claims that the judicial remedies were ineffective as the Supreme Court ignored the possibility of discrimination on the grounds of his origin and on the grounds of his origin and disability. He submits that the Court did not allow for appropriate proof of discrimination, as discriminatory motives in the minds of voting citizens are difficult to prove beyond reasonable doubt. Therefore, the Court should have lowered the level of proof of discrimination and reversed the burden of proof and based its reasoning on indications and a higher degree of probability of discrimination against him.

3.6 Finally, the petitioner requested the State party to: (a) guarantee him a non-discriminatory and fair naturalization procedure; (b) provide him with compensation for the damages suffered; (c) cover the costs of the present proceedings; and (d) adapt its national legal system so that a victim of a violation of the Convention can submit a complaint to the Supreme Court.

#### **State party's observations on the admissibility and merits**

4.1 On 28 January 2014, the State party submitted its observations on the admissibility and merits of the communication. It outlined the naturalization procedure in Switzerland, which takes place at the communal and cantonal levels subject to the authorization of the Federal Office of Migration.<sup>10</sup> The State party considers the suitability criteria for naturalization to be legitimate, including the requirement for the applicant to integrate into Swiss lifestyle and customs and to have a certain knowledge of the country, its population and one of its languages.

4.2 The State party submits that the communication is inadmissible *ratione materiae* and that the Committee must first ascertain whether the prohibition of racial discrimination under article 1 of the Convention was violated before determining which substantive obligations under the Convention have been violated.<sup>11</sup> It refers to article 1 (2) of the Convention, which states that the Convention shall not apply to distinctions, exclusions,

<sup>10</sup> See Swiss Citizenship Act of 29 September 1952, art. 12.

<sup>11</sup> See communication No. 31/2003, *L.R. et al. v. Slovakia*, opinion adopted on 7 March 2005, para. 10.2.

restrictions or preferences made by a State party to the Convention between citizens and non-citizens, and to article 1 (3), which states that the Convention may not be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. As the petitioner's application was not refused on grounds relating to his race, colour, descent or national or ethnic origin, as stipulated in article 1 of the Convention, and as he has not suffered any act of racial discrimination, his communication should be deemed inadmissible *ratione materiae*, in compliance with the Committee's jurisprudence.

4.3 The State party also submits that its authorities may treat its nationals differently from non-citizens so long as such distinction does not pursue discriminatory objectives on the basis of race, colour, status or national or ethnic origin, nor has such effects.<sup>12</sup> It considers that the refusal of the petitioner's application for naturalization did not constitute racial discrimination in the context of article 1 of the Convention. During the municipal assembly of 27 March 2009, some voters put forward several reasons against accepting the petitioner's application for naturalization. The State party stated that the petitioner, unlike other applicants for naturalization, did not participate in the naturalization commission meeting prior to the municipal assembly, did not respond to the questions posed and lied about his membership in the municipal gun association. The municipal assembly also questioned his behaviour in public, the fact of having doubtful friends, his insistence on being naturalized, his lack of local integration and contact with local inhabitants and the fact that he was not a member of any association of persons with disabilities nor did he work in a sheltered workshop. Only one voter mentioned the petitioner's origins as a reason for refusing his application. However, the President of the municipal assembly urged the members not to base their votes on the petitioner's origins but rather on his personal characteristics.<sup>13</sup> The petitioner's application for naturalization was also examined by three tribunals: the Department of Home Affairs of the Canton of St. Gallen, on 11 December 2009; the Administrative Court of St. Gallen, on 31 May 2011; and the Federal Supreme Court on 12 June 2012. All three tribunals considered the issue of discrimination against the petitioner on the grounds of his origins and decided that the refusal of his application for naturalization on the grounds of his origins would have violated the prohibition of discrimination set out in article 8 of the Federal Constitution.<sup>14</sup>

4.4 All three tribunals found that the arguments of the members of the municipal assembly against the petitioner's application for naturalization did not relate to his origin, but rather to his lack of local integration. The State party submits that no elements in the case enabled it to conclude that the refusal of the petitioner's application for naturalization was based in its totality on his origin or disability and therefore discriminatory. The State party informed the Committee that the petitioner's sister and her child as well as the petitioner's mother were naturalized in the municipality of Oberriet in 2007 and 2012, respectively. It argues that these examples demonstrate that the naturalization of persons of Albanian origin is not systematically refused in that municipality.

4.5. With regard to the merits, the State party submits that the communication is not substantiated, in particular as regards the petitioner's claim of double discrimination on the

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<sup>12</sup> See communications No. 2/1989, *Diop v. France*, opinion adopted on 18 March 1991, para. 6.6; No. 39/2006, *D.F. v. Australia*, opinion adopted on 22 February 2008, para. 7; and No. 42/2008, *D.R. v. Australia*, opinion adopted on 14 August 2009, paras 7.1-7.4.

<sup>13</sup> See the record of the municipal assembly of 27 March 2009, p. 9.

<sup>14</sup> See the decisions of the Department of Home Affairs of the Canton of St. Gallen of 11 December 2009, p. 21, para. 5.3; the Administrative Tribunal of the Canton of St. Gallen of 31 May 2011, p. 30, para. 2.7.3; and the Federal Supreme Court of 12 June 2012, para. 3.4.

grounds of his origin and disability.<sup>15</sup> It reiterates that the communication is incompatible *ratione materiae* with the Convention as the refusal of the petitioner's application for naturalization was not motivated by racial discrimination. It also submits that, further to the Committee's jurisprudence,<sup>16</sup> the threshold of double discrimination on the grounds of origin and disability has not been met. The petitioner was not targeted by an act of racial discrimination on the grounds of his origin, therefore the Committee is not competent to consider the eventual discrimination on the grounds of disability. The State party further submits that, during the domestic proceedings, the petitioner made separate claims of discrimination on the grounds of origin and of disability, without alleging the eventual link between the two.<sup>17</sup> The Supreme Court<sup>18</sup> and the other two tribunals also carefully examined the claims of discrimination on the grounds of origin and disability and concluded that the petitioner had not been a victim of discrimination on either the grounds of origin or of disability. It was only in his communication to the Committee that the petitioner claimed inadequate examination of double discrimination on the part of the State authorities and contended that his application for naturalization was rejected because one voter suggested that he wanted to be naturalized to avail himself of disability-related social benefits, which, in his view, amounted to an act of discrimination.

4.6 The State party clarifies that the argument that the petitioner was applying for naturalization in order to avail himself of disability-related social benefits was not raised during the municipal assembly of 27 March 2009,<sup>19</sup> but the matter was raised during the municipal assembly that voted on his previous application. The State party recalls that the President of the assembly of 27 March 2009 reminded the voters that the applicant had a right to disability-related social benefits, regardless of his naturalization. The President added that the petitioner had not abused his right to social benefits. The State party submits that the petitioner's argument in this regard was not sufficient to substantiate alleged racial discrimination on the grounds of disability. As the petitioner's claims of discrimination on two separate grounds are not interconnected, they should be rejected as incompatible *ratione materiae* with the Convention. The State party considers that the Committee should only examine the claim of eventual discrimination against the petitioner on the grounds of his origin.

4.7 With regard to article 5 of the Convention, the State party submits that the Convention does not establish substantive rights, but stipulates States' obligation to prevent discrimination in the exercise of their functions, in the light of article 1 of the Convention.<sup>20</sup> The State party admits that the petitioner does not challenge the legislation, jurisprudence or practice with regard to naturalization, but rather the application and interpretation of the naturalization provisions in his case, which are in conformity with the Committee's jurisprudence.<sup>21</sup>

4.8 The State party claims that the petitioner did not substantiate his argument that his origin was an obstacle to obtaining Swiss nationality and refers to the Committee's

<sup>15</sup> See communication No. 37/2006, *A.W.R.A.P. v. Denmark*, opinion adopted on 8 August 2007, para. 6.3. The Committee considered the communication inadmissible *ratione materiae* under article 14 (1) of the Convention.

<sup>16</sup> No specific opinions or general recommendations were cited.

<sup>17</sup> See, for example, the appeals to the Administrative Court of 28 December 2009, p. 14; to the Department for Home Affairs of 3 April 2009, pp. 18-19; to the Supreme Court of 7 July 2011, pp. 16-17; and to the Department of Home Affairs of 13 April 2007.

<sup>18</sup> See the Supreme Court decision of 12 June 2012, pp. 12-14.

<sup>19</sup> See the record of the municipal assembly of 27 March 2009, p. 13.

<sup>20</sup> See *Diop v. France*, para. 6.4.

<sup>21</sup> See communication No. 38/2006, *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, opinion adopted on 22 February 2008, para. 7.7.

jurisprudence on the issue.<sup>22</sup> It also considers that the petitioner did not substantiate his claim that the Supreme Court did not adequately examine the alleged discrimination on the grounds of origin and that his allegations concern article 6 and not article 5. It submits that the Court did examine those allegations and, in its decision of 12 June 2012, it indicated that the single discriminatory statement made during the municipal assembly of 27 March 2009, which referred to the petitioner's origin (see para. 2.4 above) and which was intended to justify the refusal of the petitioner's application for naturalization, was discriminatory. However, according to the Court's jurisprudence, refusals of naturalization applications are considered substantiated only if they are predominantly justified by non-discriminatory criteria. The State party therefore reiterates that the individual elements that the petitioner considers discriminatory (see para. 4.4 above) are irrelevant. Having considered the case in its entirety, the Court concluded that the interventions made during the municipal assembly of 27 March 2009 should be understood as relating to the petitioner's lack of local integration and did not amount to discrimination. The same conclusion was reached by the Administrative Court<sup>23</sup> and the Department of Home Affairs<sup>24</sup> of the Canton of St. Gallen. The latter tribunals admitted that refusal of the petitioner's application for naturalization on the grounds of his origin would be discriminatory, but indicated that his application had been rejected for other non-discriminatory reasons, in particular his lack of local integration. The Administrative Court further highlighted the absence of any evidence that the majority of voters at the municipal assembly were influenced by discriminatory considerations regarding the petitioner's origin, as two years earlier, the same council had granted naturalization to the petitioner's sister and her daughter.

4.9 The State party submits that the petitioner initially alleged discrimination on the grounds of disability before the national authorities, claiming that the sole reason why his application for naturalization was refused was because he was disabled, used a wheelchair, and was unemployed. He stated that he suffered discrimination on the grounds of disability and was unable to work. It was only later that he invoked alleged discrimination on the grounds of his origin and referred to the statement made by one voter during the municipal assembly of 27 March 2009.<sup>25</sup>

4.10 The State party also refutes the petitioner's argument that the Supreme Court did not take into account the context in which his application for naturalization was refused, including the negative press articles published after the decision of the municipal assembly, and that he was the target of hostile remarks and acts of violence prior to, during and after the municipal assembly. It considers that the petitioner did not demonstrate how the press articles could have influenced the vote on his application for naturalization as the articles denounce the hypothesis of discrimination on the grounds of origin or disability and were published after the first refusal of his application for naturalization and prior to the municipal assembly of 27 March 2009. The voters at the assembly had therefore been sensitized to public opinion on the issue and they would have been careful not to base their decision on such discriminatory reasons. As regards the alleged hostile remarks and acts of violence, the State party does not find any evidence on file to substantiate such claims.

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<sup>22</sup> See *D.R. v. Australia*, para. 7.3.

<sup>23</sup> See the Court decision of 31 May 2011, p. 30, para. 2.7.3. The Court considered that the petitioner did not have contacts with local inhabitants; did not provide any references outside of his community; had terminated the professional activities he exercised for several years in the workshop for persons with disabilities at his own will; and has not exercised any professional activities since then, despite his good knowledge of German and IT skills. The Court also noted that the petitioner was not a member of any association and did not participate in any activities offered by the municipality.

<sup>24</sup> See the Department's decision of 11 December 2009, p. 22, para. 5.3.

<sup>25</sup> See the appeals to the Department of Home Affairs dated 3 April 2009, p. 8; to the Administrative Court of 28 December 2009, p. 14; and to the Supreme Court dated 7 July 2011, pp. 16-17.



4.11 The State party refutes as unsubstantiated the petitioner's claim that he suffered discrimination on the grounds of his origin and disability owing to the inadequacy of the criteria used to assess his integration into the local community. It maintains that the Swiss Citizenship Act stipulates only minimal conditions for naturalization and leaves a margin of appreciation to the cantons to set out other criteria. In the present case, the Administrative Court applied the law on citizenship of the Canton of St. Gallen of 5 December 1955, which does not contain criteria other than those set out in article 14 of the Swiss Citizenship Act. According to the Administrative Court's jurisprudence, it is legitimate to require that a person applying for naturalization be integrated into the local community and conform to Swiss customs. The Supreme Court also concluded that, despite the discriminatory intervention during the municipal assembly of 27 March 2009, the refusal of the petitioner's application for naturalization was based on objective grounds and was not discriminatory. The State party claims that the petitioner admitted that he had been well integrated into the community until his withdrawal from local life owing to the massive hostility he faced from the local population following the first refusal of his naturalization application.

4.12 The Supreme Court stated that the petitioner's decision to withdraw from communal life was understandable given the rejection he had experienced, but that he had opportunities to integrate, despite his disability. The Court held that, given his personal context, the requirements for integration, in his case, should not be set too high. However, as the petitioner refused to participate in public life and did not make any attempts to integrate into the local community, the Court's finding that the petitioner did not substantiate his claim that he was integrated was not in violation of the federal law. The criteria for local integration have been examined in other judgments. For example, in the case of the petitioner's mother, on 31 May 2011, the Administrative Court considered that the refusal of her application for naturalization was not adequately substantiated, insofar as she had to care for her disabled son and could not be blamed for insufficient integration. The Supreme Court also rejected<sup>26</sup> the appeal of the municipality of Oberriet against the findings in the case of the petitioner's mother, and stated that affiliation with associations and other organizations should not be the only decisive criterion for integration. Following the Supreme Court's decision, the petitioner's mother obtained naturalization in the municipality of Oberriet.

4.13 In the petitioner's case, the Supreme Court also assessed the considerations of the municipal assembly of 27 March 2009, according to which the petitioner could participate in an association or work in a sheltered workshop for persons with disabilities in the interest of his integration, and deemed that they were not discriminatory. The Court stressed that such considerations reflected the expectation that the petitioner could integrate despite his disability, without contesting the fact that he did not have the same possibilities to participate in public life or in local activities. The petitioner's sole presumption that his application was rejected owing to his having a disability and using a wheelchair is not sufficient to conclude that the refusal of his application for naturalization was discriminatory.

4.14 However, the State party indicates that, in its decision of 14 July 2008, the Department of Home Affairs allowed the petitioner's appeal against the alleged discrimination on the grounds of his disability. It referred to the refusal of his application for naturalization of 30 March 2007 on the basis of a perceived attempt to abuse the social benefits system as he had left remunerated work with *Werkstatt Union* in 1998 and had been unemployed since then. The Department concluded that the requirement to exercise a remunerated activity would prevent the naturalization of persons with disability in the

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<sup>26</sup> See the decision of the Supreme Court of 12 June 2012 (ATF 138/242).

majority of the cases and therefore found that the decision of the municipal assembly of 30 March 2007 was discriminatory (see para. 2.3 above). The State party, however, concludes that there are no serious grounds to believe that the petitioner has suffered racial or other discrimination.

4.15 With regard to the petitioner's claims of a violation of article 6 of the Convention, the State party refers to the Committee's jurisprudence, according to which article 6 provides protection to alleged victims only if their claims are arguable under the Convention.<sup>27</sup> It reiterates that the petitioner raised separate claims of discrimination on the grounds of origin and of disability before the national authorities, without establishing their link. The Supreme Court, the Department of Home Affairs and the Administrative Court examined the petitioner's allegation of discrimination on the grounds of his origin. The State party submits that its authorities guarantee effective judicial protection against all acts of racial discrimination which are adequately substantiated, in accordance with article 6 of the Convention.

4.16 As regards the petitioner's claims of a violation of article 2 of the Convention, the State party submits that this provision is very general and cannot be directly applied in a specific case. It considers that the tribunals did not violate the provisions of article 2 as they duly assessed the petitioner's allegations of discrimination and that the petitioner did not substantiate in what way article 2 was violated.

4.17 Therefore, the State party concludes that there has been no violation of the petitioner's rights under article 5 (a) and (d) (iii), in conjunction with articles 2 (1) (a) and (c) and 6, of the Convention.

#### **Petitioner's comments on the State party's observations on admissibility and the merits**

5.1 On 24 April 2016, the petitioner submitted his comments on the State party's observations on admissibility and the merits. He argues that, even if the Supreme Court and the other tribunals had absolved the municipal assembly of racial discrimination, it did not demonstrate that the petitioner's ethnic origin was not an essential element in the refusal of his application for naturalization. The discriminatory effects of the refusal on the grounds of ethnic origin were also perceived by the public, the media and non-governmental organizations.

5.2 The petitioner claims that the reference to the naturalization of his sister and her child cannot be taken as proof that the refusal of his application for naturalization was not racially motivated. He also submits that the naturalization of his mother took place in a different context as she has been married to a German citizen since July 2003 and they have a daughter who was born in August 2004. Both those elements were essential for her application for naturalization to be approved. Besides, although his sister was considered by the naturalization commission to be well integrated, her application was accepted only by a narrow majority of votes at the municipal assembly.<sup>28</sup> In contrast, his mother's application was rejected by a large majority of votes at the municipal assembly and was only granted by the Department of Home Affairs of the Canton of St. Gallen after the Administrative Court of St Gallen upheld her appeal against the negative decision. Since it was not the municipality of Oberriet that granted his mother's naturalization, the State party cannot conclude that her naturalization demonstrates that the municipal assembly was not racially motivated when examining and refusing his application.

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<sup>27</sup> See, for example, communication No. 29/2003, *Durmic v. Serbia and Montenegro*, decision adopted on 6 March 2006, para. 9.6.

<sup>28</sup> 227 votes in favour and 186 against.

5.3 The petitioner argues that each naturalization procedure has to be assessed on its own merits, in particular when it raises issues of multiple discrimination. Such discrimination is complex and may vary, depending, for example, on the gender of the person and the existence of a disability. The petitioner submits that his sister and his mother do not have any disability and both are women. He also recalls that, in March 2009, the municipal assembly of Oberriet considered six applications for naturalization. Three of them were refused: those by a family from Bosnia-Herzegovina, a person from Macedonia and the petitioner. The three approved naturalizations concerned an Austrian, an Italian and another person of unknown origin. The petitioner considers that these figures reveal that the fact that he is of South-Eastern European origin was critical to the rejection of his application for naturalization.<sup>29</sup>

5.4 The petitioner contests the State party's argument that disability cannot be claimed as a cause of multiple discrimination under the Convention. The petitioner refers to the practice of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights which consider disability as "other status". He argues that this practice is also followed by the Committee.<sup>30</sup> Recalling that the main object of his communication is the violation of the Convention on the grounds of his origin, he submits that his disability should be considered as an aggravating factor. In his view, it is obvious that his disability was used as a factor in refusing his naturalization application.

5.5 The petitioner also argues that the State party's argument that article 5 of the Convention has not been violated insofar as the refusal of his naturalization application was based on the fact that he was not sufficiently integrated does not reflect the reality of his case. On 21 February 2005, the naturalization commission of Oberriet considered that he met the conditions for naturalization. However, his application as submitted by the naturalization commission, was rejected without discussion, with 192 votes against and 159 in favour, at the municipal assembly of 31 March 2006. The naturalization commission considered that the petitioner had met the conditions defined by the Confederation and the Canton, as well as the additional requirements laid down by the municipality. Nonetheless, the municipal assembly rejected the petitioner's application three times, with the number of opposing votes increasing each time. The petitioner therefore considers that the municipal assembly is an insuperable obstacle for him and that the naturalization procedures before a municipal assembly are more likely to lead to discriminatory decisions than the administrative procedures before other local tribunals or elected naturalization commissions.<sup>31</sup>

5.6 In this regard, the petitioner refers to the Committee's concluding observations on Switzerland adopted on 12 March 2014, in which the Committee recommended that the State party ensure that any revision of the Swiss Citizenship Act did not have a disproportionate and discriminatory impact on certain groups and reiterated its previous

<sup>29</sup> The petitioner also refers to a recent study that examined the naturalization procedures in Swiss municipalities and showed that people from Turkey or the former Yugoslavia had fewer chances of obtaining naturalization than Italians or Germans for example (See Jens Hainmueller and Dominik Hangartner Dominik, "Who Gets a Swiss passport? A natural experiment in immigrant discrimination", *American Political Science Review*, vol. 107, No. 1 (February 2013), pp. 159-187).

<sup>30</sup> See the Committee's general recommendations No. 34 on racial discrimination against people of African descent, para. 23; No. 32 (2009) on the meaning and scope of special measures in the Convention, para. 7; No. 30 (2004) on discrimination against non-citizens, para. 8; and No. 29 (2002) on descent in the context of article 1 (1) of the Convention, paras. (k)-(l).

<sup>31</sup> The petitioner refers to Jens Hainmueller and Dominik Hangartner Dominik, "Who gets a Swiss passport? A natural experiment in immigrant discrimination", *American Political Science Review*, vol. 107, No. 1 (February 2013), pp. 159-187; and Marc Helbling, *Practising Citizenship and Heterogeneous Nationhood: Naturalisations in Swiss Municipalities* (Amsterdam, Amsterdam University Press (IMISCOE Series), 2008).

recommendation that the State party adopt uniform standards on integration for the naturalization process and take all effective and adequate measures to ensure that naturalization applications were not rejected on discriminatory grounds, including by establishing an independent and uniform appeals procedure in all cantons.<sup>32</sup>

5.7 The petitioner considers that multidimensional discrimination occurred in his case. As regards racial discrimination on the grounds of his origin, he refers to various hostile statements made during the municipal assemblies and states that the atmosphere in the assemblies was very inhospitable, most likely because of his ethnic origin. As regards discrimination on the grounds of disability, the petitioner maintains that the Supreme Court did not adequately take into account his disability when assessing the requirements relating to his integration. He claims that the proportionality of requirements for integration should not be investigated and assessed primarily against the background of the absence of gainful employment, but rather should be guided by the principle of the free evaluation of facts, in particular the various reasons for his limited integration.

5.8 As regards the alleged multidimensional racial discrimination, the petitioner refers to the statements made during both municipal assemblies, which suggested that the author's ethnic origin and his disability and his perseverance in obtaining naturalization were decisive elements in the refusal of his application. He considers that the complexity and probable interweaving of the various motives were not taken seriously by the Supreme Court. The petitioner contests the State party's argument relating to his withdrawal from public life, considering that his non-integration is actually linked to the xenophobic and racist attitudes that he faced, such as insults and even violence, as well as hostility and exclusion owing to disdain. He considers that when the Supreme Court accepted the argument of the municipality of Oberriet that the petitioner's withdrawal from public life was the result of his unwillingness to integrate, it failed to recognize the multidimensional discrimination that he had suffered and to adopt a multidimensional discriminating interpretation.

5.9 The petitioner considers that the legal system of the State party generally meets the requirements of article 6 of the Convention, but that the judicial proceedings did not provide him with effective protection against racial discrimination. He submits that the Supreme Court did not effectively examine whether there had been discrimination in his case.

5.10 The petitioner adds that the Supreme Court did not comment on or examine the general xenophobic and racist atmosphere in the Rhine Valley, such as the letters to the editor and media reports that had been published before and after the municipal assembly and which are cited in his communication. He considers that the Court had set the standard of its evaluation of evidence so high that discrimination could never be proven. He claims that, given the nature of the municipal assembly, a clear identification of the motives for the respective vote is usually not possible and that it is impossible to detect whether one single statement could be the decisive element for the majority of the voters or to assess the true motives of the voters and whether the motives do not disguise discrimination. The petitioner claims that, given the difficulty of demonstrating discrimination by means of full evidence, it is necessary to reduce the standard of proof to an arguable level, such as in Supreme Court decision No. 129/217 in relation to his previous application for naturalization, in which the Court accepted arguments in support of the alleged discrimination. He concludes that the Court did not sufficiently examine whether there was discrimination on the grounds of ethnic origin or disability, nor whether he had suffered multiple discrimination.

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<sup>32</sup> See CERD/C/CHE/CO/7-9, para. 13.

## 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 the communication is admissible.

6.2 The Committee notes the State party's argument that the communication should be considered inadmissible as the claims are incompatible with the provisions of the Convention, insofar as the refusal of the petitioner's application for naturalization was not based on racial discrimination, as defined in article 1 (1) of the Convention. The Committee also notes that, according to the State party, article 1 (2) of the Convention specifically excludes distinctions, exclusions, restrictions or preferences made by a State party between citizens and non-citizens from the application of the Convention and that the Convention may not be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. However, the Committee recalls its general recommendation No. 30 (2004) on discrimination against non-citizens and, in particular, the obligation to interpret article 1 (2) of the Convention in the light of article 5,<sup>33</sup> including by ensuring that non-citizens are not discriminated against with regard to access to citizenship or naturalization and by paying attention to possible barriers to naturalization that may exist for long-term or permanent residents (para. 13).<sup>34</sup> The Committee therefore considers that the communication is not prima facie incompatible with the provisions of the Convention.

6.3 The Committee further notes that the State party's objections to the petitioner's claims of multiple discrimination on the grounds of his origin and disability are closely related to the merits of the communication.

6.4 As the Committee finds no other obstacles to the admissibility of the present communication, it declares it admissible insofar as it raises issues under articles 5 (d) (iii), read in conjunction with articles 2 (1) (a) and (c) and 6, of the Convention, and proceeds with its consideration of the merits.

### *Consideration of the merits*

7.1 The Committee has considered the present communication in light of all the information and evidence submitted to it by the parties, as required under article 14 (7) (a) of the Convention.

7.2 The issues before the Committee are whether the decision not to approve the petitioner's application for naturalization by the municipal assembly of 27 March 2009 amounted to discrimination on the grounds of origin, in violation of article 5 (d) (iii), read in conjunction with article 2 (1) (a) and (c), of the Convention and whether the review by the tribunals amounted to a violation of article 6 of the Convention.

7.3 The Committee notes the petitioner's claim that the decision not to approve his naturalization application by the municipal assembly amounts to racial discrimination as it was based on his ethnic origin. In this context, the petitioner refers to a statement made by one member of the municipal assembly, which contained negative remarks about his national or ethnic origin. The Committee also notes the petitioner's claims that the discriminatory effects were perceived by the public, the media and non-governmental organizations and that the absence of racial discrimination in his case cannot be derived

<sup>33</sup> See general recommendation No. 30 (2004), para. 3.

<sup>34</sup> *Ibid.*, para. 13.

from the naturalization of his mother and sister. The Committee further notes the petitioner's allegation that the integration requirements for naturalization were not adapted to the fact that he has a disability or to the hostility he faced. In this regard, the Committee notes the State party's submission that the municipal assembly of 27 March 2009 had put forward several reasons against the petitioner's application, including false statements made in an earlier application, the fact that he was not a member of any association and did not work in a workshop for persons with disabilities, and concluded that he did not meet the criteria of local integration. It also notes that three review tribunals, including two courts, found that the municipal assembly had invoked arguments against the petitioner's naturalization that were not related to his origin and therefore did not constitute racial discrimination. The Committee further notes that the Supreme Court admitted that the petitioner's decision to withdraw from communal life was understandable given the rejection he had experienced from some of the residents of the municipality mainly owing to his being a person with a disability and using a wheelchair,<sup>35</sup> but that the petitioner had opportunities to integrate despite his disability and that the requirements were proportionate to his circumstances.

7.4 The Committee notes the petitioner's claim that the Supreme Court did not sufficiently consider that his disability aggravated the decision of the municipal assembly to refuse his application for naturalization on the grounds of his origin and therefore omitted to evaluate whether that could amount to double discrimination. The Committee further notes the petitioner's claim that it may have been possible that the discriminatory statement influenced the negative naturalization decision and that the Court should have reversed the burden of proof to the municipality of Oberriet to demonstrate beyond reasonable doubt that its refusal of his naturalization application was not motivated by racial discrimination or double discrimination. The Committee notes, in that regard, the State party's claims that the threshold of double discrimination on the grounds of origin and disability had not been met, that the petitioner had made separate claims of discrimination on the grounds of origin and disability before the national authorities and courts, without alleging any eventual link between the two and that no comments about the petitioner's disability were made during the municipal assembly of 27 March 2009.

7.5 The Committee recalls that it is not the Committee's role to review the interpretation of facts and national law made by national authorities, unless the decisions were manifestly arbitrary or otherwise amounted to a denial of justice.<sup>36</sup>

7.6 The Committee notes that the national authorities and courts based their decisions on the fact that the petitioner did not qualify for naturalization for reasons other than the alleged discrimination on account of his Albanian origin, in particular that he had not been integrated locally. In the present case, the Committee considers that the information provided by the parties does not demonstrate that the rejection of the petitioner's application for naturalization was based on discriminatory criteria linked to his national or ethnic origin. It therefore considers that, in the present case, discrimination on the grounds of national or ethnic origin has not been proven. As regards the petitioner's claims of discrimination on the grounds of disability, the Committee considers that, pursuant to article 1 of the Convention, it is not competent to consider the separate claim of discrimination on the grounds of disability.<sup>37</sup> The Committee therefore concludes that the facts submitted by the petitioner do not demonstrate a violation of article 5 (d) (iii) separately or in conjunction with article 2 (1) (a) and (c) of the Convention.

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<sup>35</sup> See the Supreme Court's decision of 12 June 2012, paras. 3.1, 3.4 and 4.4.

<sup>36</sup> See communication No. 40/2007, *Er. v. Denmark*, opinion adopted on 8 August 2007, para. 7.2.

<sup>37</sup> See *A.W.R.A.P. v. Denmark*, para. 6.3, in which the Committee considered that it would be competent to consider a claims of double discrimination, but that separate claims of discrimination on grounds other than those stipulated in article 1 of the Convention were inadmissible *ratione materiae*.

7.7 With regard to the petitioner's claim under article 6 of the Convention, the Committee notes that the national courts reviewed his claim of discrimination and after examining the minutes of the municipal assembly and other elements of evidence, they concluded that the decision to reject his application for naturalization was not based on discriminatory grounds. The Committee also notes that the Supreme Court examined both the petitioner's claims of discrimination on the grounds of national or ethnic origin and disability. It further notes that, although the petitioner disagrees with the reasoning in the Court's decisions, there is nothing in the information before the Committee to indicate that the Supreme Court's decision amounted to a violation of the Convention. Accordingly, the Committee cannot conclude that the petitioner's right to protection and a judicial remedy against racial discrimination, as guaranteed by article 6 of the Convention, has been violated.

8. In the circumstances, the Committee, acting under article 14 (7) (a) of the Convention, considers that the facts before it do not disclose a violation of any of the provisions of the Convention by the State party.

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