



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



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**Mr Didier BURKHALTER**  
Federal Councillor  
Head of the Federal Department of Foreign Affairs  
Bern  
Switzerland

Strasbourg, 12 March 2012

Dear Mr Burkhalter,

Further to my visit to Switzerland from 20 to 23 February 2012, I should like to take the opportunity to follow up on the constructive dialogue that I had with you and the other Swiss authorities.

The visit provided me with useful insights into Switzerland's federal political system and the enjoyment in this country of human rights and fundamental freedoms. As you know, my discussions in Bern and Zurich focused on certain issues relating to measures against discrimination, the protection of the human rights of immigrants, refugees and asylum seekers, the Swiss institutional framework concerning human rights protection, and the outstanding accession by Switzerland to some major European and international human rights treaties.

In the appendix to the present letter I have elaborated further on the above-mentioned issues with a view to deepening our dialogue. I should appreciate your authorities' comments and the provision of any further information they may kindly provide me with before 26 March 2012, when I intend to publish this letter.

Looking forward to continuing the constructive dialogue with you and your government, I remain,

Yours sincerely,

Thomas Hammarberg

## Appendix

### Anti-discrimination, the protection of the human rights of immigrants, refugees and asylum seekers and institutional framework concerning human rights

#### I. Measures to counter racism and intolerance

1. The Commissioner has observed that in spite of being an inherently pluralistic society, racism and intolerance appear to be on the rise in Switzerland. During his visit the Commissioner witnessed himself a disturbing xenophobic manifestation, widely reported in the press, consisting of aggressive, insulting slogans on the website of a local office belonging to a major political party, which targeted migrants coming from certain South East European countries. These slogans were finally removed from the website following the reaction of the Federal Commission against Racism and others.
2. The Commissioner fully recognises the importance and value of an open political debate on issues of public concern. However, freedom of expression, as enshrined notably in Article 10 of the European Convention on Human Rights, is not absolute and has to be exercised in a responsible manner. It can and at times must be restricted by the authorities in order to safeguard the human rights and fundamental freedoms of others, especially socially vulnerable persons targeted by acts of incitement and spread of hatred or intolerance.
3. National political leaderships bear a significant responsibility in this context, being bound to effectively safeguard the rule of law, human rights and pluralism in a democratic society. The Commissioner considers that it is of the utmost importance that the authorities at federal, cantonal and municipal level adopt a proactive, vigorous approach towards all manifestations of racism and intolerance, condemn them immediately and publicly, and adopt all possible measures in order to effectively safeguard the fundamental values of Swiss society and the European human rights standards to which Switzerland has subscribed.
4. The Swiss Criminal Code already bans such xenophobic activities. Article 261bis prohibits public incitement of hatred or discrimination against a person or group of persons because of their race, ethnic group or religion. Around 84 per cent of all cases judged in court on their merits result in convictions, whilst half of the cases presented are dismissed for not being relevant to racial discrimination, as this is defined in the Article. Notably, political discourse of xenophobic and racist nature is generally not interpreted as falling under Article 261bis and therefore not criminally sanctioned by the courts. For example, the public display of racist symbols or recruitment of members to racist groups is not criminally sanctioned. Furthermore, the existing provision in the Criminal Code is not coupled with corresponding ones in civil and administrative law and does not cover all fields of public life. All these factors lead to a degree of impunity when it comes to combating racist and xenophobic acts and call for the adoption of measures in order to amend and strengthen the law and practice in this field. To this end, the authorities may usefully draw upon [General Policy Recommendation N° 7](#) of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination (2002).
5. The Commissioner has also noted that there are complaints concerning police action or use of force affecting individuals who are visibly identifiable as non-Europeans. This problem has been recognised by the authorities and also the police itself and measures have been taken to prevent police misconduct, such as the amendments to the Federal Code of Criminal Procedure in 2010 which replaced the 26 cantonal codes and introduced standardised procedures. Nevertheless, reports received by the

Commissioner raised questions as to the promptness and impartiality of the existing police complaints system. The Commissioner recalls his [Opinion concerning independent and effective determination of complaints against the police](#) (CommDH 2009(4)), on which the authorities may draw, noting at the same time that certain cantons have set up independent police complaint mechanisms which may be considered to be examples of good practice.

6. During his visit the Commissioner also discussed the practice of 'popular initiatives', a civil right in the Federal Constitution, through which by a collection of 100 000 citizens' signatures an amendment to the Constitution can be proposed and put to vote. Certain popular initiatives, such as those concerning the ban of minarets and the automatic expulsion of migrants having committed a certain crime, raise serious issues of compatibility with human rights standards - notably those of the European Convention on Human Rights. The need for an effective political or judicial filtering system to safeguard human rights standards in this particular context has been acknowledged by the Federal Council and the Parliament. The Commissioner welcomes this intention to meet the obligation to make sure that constitutional provisions introduced through popular initiatives are reconcilable with the peremptory norms of international law as well as all other agreed upon European and international standards concerning human rights and fundamental freedoms.

## **II. Anti-discrimination law and policy concerning other vulnerable groups**

7. Switzerland has been pursuing a sectorial approach towards its anti-discrimination legislation, with commendable results in certain fields. By its nature though, such an approach leaves gaps in the system, which can best be overcome through the adoption of a comprehensive anti-discrimination law. The existing constitutional provision on equality before the law – albeit essential – may not be considered as a substitute, in practice, for a comprehensive anti-discrimination law. The realities on the ground call for a thorough analysis by the authorities of the gaps in the existing system with a view to bridging them.
8. Sexual orientation and gender identity are not expressly mentioned as grounds for possible discrimination under Article 8 of the Constitution. The needs and vulnerabilities of LGBT (lesbian, gay, bisexual and transgender) persons are not always well known and policies are not adapted accordingly. In particular, changes in law and practice need to be made in order to eliminate discrimination affecting transgender persons. Surgical sterilisation requirements, forced divorce, compulsory hormonal treatment prior to name changes as well as lack of access to qualified healthcare are among the remaining serious obstacles for the full enjoyment by these persons of their human rights. In this regard, the Commissioner welcomes the legal opinion issued by the Federal Office for Civil Status on 1 February 2012, which advises the cantonal authorities not to impose surgical sterilisation or force couples to divorce in order to formalise a sex change.
9. With regard to gender equality and combating violence against women, in the past two decades Switzerland has made significant progress. Nevertheless, to ensure the sustainability of the efforts undertaken so far it is important that the relevant institutions, at federal and cantonal level, are always sufficiently resourced, visible and respected. This will contribute to the elimination of the still existing gender-based discrimination, such as the major pay gap for equal work of women and men in the private sector and the vulnerability to poverty of female-headed single parent families.
10. Migrant women are often in a particularly vulnerable position. Proposed legislative amendments directly affecting migrant women should be carefully analysed before adoption and weighed with the aim of reducing to a minimum the potential adverse effects they may have on the human rights and fundamental freedoms of the women concerned.

11. Article 8 of the Federal Constitution provides for equality before the law and prohibits all forms of discrimination on the grounds of physical or mental disability. A specific equality law and a federal office exist in order to protect and enhance the human rights of persons with disabilities. However, the existing law and practice appear to fail to protect persons with disabilities from discrimination in the workplace and to oblige private service providers to adapt their services to the needs of persons with disabilities. These are major shortcomings which should be eliminated.
12. As regards persons with psycho-social disabilities, reports received by the Commissioner indicate that still today persons with mental health problems are interned in closed psychiatric institutions, in some cases without their full consent. Questions related to the legal capacity of mentally disabled persons and their right to live in the community need to be systematically examined and addressed by the authorities in accordance with European human rights standards.<sup>1</sup> The new law on custody which will enter into force next year constitutes a good starting point in this context.

### III. Protection of the human rights of immigrants, refugees and asylum seekers

13. Switzerland is an inherently pluralistic society and traditionally hosts immigrants from Europe as well as from outside Europe. A major condition for the successful integration of immigrants, as well as of refugees and other recipients of international protection in the host country is the effective enjoyment by them of the right to private and family life and unity. For decades, the principle of respect for migrants' family life was reflected in Switzerland's integration policies. It seems that this important principle might be undermined by restrictions introduced so far and the regular proposals aiming to further limit migrants' right to reunite with their families. The automatic expulsion of foreigners convicted of a certain crime, proposed by a popular initiative which was approved in 2010, may well raise serious challenges to migrants' right to private and family life and unity, as indicated notably by the European Court of Human Rights' judgments in the cases of [Emre v. Switzerland](#) (2008) and [Emre v. Switzerland \(n2\)](#) (2011).<sup>2</sup>
14. Of equal importance for migrants' integration is the possibility for those lawfully residing in the country for a long period of time to be naturalised. Naturalisation practices in Switzerland have raised the Commissioner's concern given that the application of the relevant legislation varies widely among cantons and municipalities, where decisions are taken. Reports by expert organisations indicate that divergent practices at cantonal or municipal level are occasionally characterised by arbitrariness leading to rejections of applicants who otherwise fulfil the criteria for acquiring the Swiss nationality. Under the Federal Tribunal's case law, decisions relating to naturalisation always have to be reasoned and subject to appeal. A strict abidance by this case law in practice can help minimise arbitrariness and discrimination. In this context, the Commissioner urges Switzerland to accede to the [1997 European Convention on Nationality](#), a Council of Europe treaty which contains a number of useful standards on naturalisation.
15. As regards asylum, in the past decade Swiss legislation underwent a major revision that introduced particularly restrictive provisions, such as those providing for the rejection of asylum applications if the applicant does not produce valid travel or identity documents within 48 hours of a request from the authorities. During his visit the Commissioner was informed about a forthcoming revision. He shares the authorities' position that the present, unduly lengthy asylum procedures may be shortened, but this must be done in full respect of European human rights standards. The foreseen abolition of the much criticised 'out of hand' asylum rejection system (*non-entrée en matière*), applied for

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<sup>1</sup> See, inter alia, the Commissioner's Issue Paper, "[Who gets to decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities](#)", CommDH(2012)2.

<sup>2</sup> These cases concern the expulsion of and entry ban imposed on the migrant applicant who had lived in Switzerland from the age of six, following the committal by him of certain offences. In both cases the Court found violations of Article 8 of the Convention.

- instance when the applicant does not produce an identity document within 48 hours, would be a step in the right direction. In the context of the upcoming revision, the Commissioner encourages the authorities to prioritise the establishment of a comprehensive system of legal aid for asylum seekers, in particular in the context of the accelerated asylum procedures. Effective access to justice is a prerequisite for fair asylum procedures and this goal may not really be attained without provision of legal aid to persons seeking international protection.
16. The Commissioner was informed that Switzerland continues to return certain asylum seekers to Greece by virtue of the 'Dublin Regulation'. On 16 August 2011, the Federal Administrative Tribunal delivered a decision according to which a transfer could be possible 'in the case of persons who are in possession of a residence permit in the broad sense, and upon return to Greece are not at risk of being put into detention or of refoulement'. In at least two subsequent judgments by the Federal Administrative Tribunal the above decision was interpreted as allowing the transfer from Switzerland of two appellants who had been in possession of a Greek asylum seeker card ('pink card'), had worked in Greece and knew the language. Their appeal was dismissed and their return to Greece, under the 'Dublin Regulation', was ordered.
  17. The Commissioner recalls the well-known judgment of the European Court of Human Rights in the case of [M.S.S. v. Belgium and Greece](#) (2011) and his own findings, reflected in this judgment, which made clear that the current international protection system in Greece is not functioning, thus making asylum seeking and protection in Greece impossible. The Commissioner urges the Swiss authorities to halt all returns of asylum seekers to Greece and the Federal Administrative Tribunal to render judgments fully in line with the case law of the European Court of Human Rights.
  18. As regards irregular migrants in the country, estimated to be at least 70 000, they are reported to face problems related to exploitation in employment, adequate housing, and access to healthcare. The Commissioner was informed that irregular migrant children are admitted to schools, including secondary and tertiary education, and recently were also provided with access to vocational training (*apprentissage*). This policy is to be commended. In the other hand, under new legislation which was passed in January 2011, a migrant has to prove that he or she is residing legally in Switzerland in order to be allowed to marry. This provision in practice may raise issues of incompatibility with Article 8 of the European Convention on Human Rights (right to respect for private and family life), especially in cases where the migrants concerned have de facto established their family life in the country for a long time.
  19. The Commissioner is aware that many irregular migrants are in fact well integrated in Swiss society. They speak the local language, are active in associations and often contribute to social insurances and pension funds. Nevertheless their chances for regularisation, even after a very long stay in Switzerland, appear to be minimal. The existing regularisation procedures vary widely in practice. As shown by statistics, some cantons do not make any use of this procedure. In addition, faced with a risk of deportation, irregularly residing migrants are discouraged from applying for regularisation. The Commissioner recalls the Council of Europe Parliamentary Assembly [Resolution 1568 \(2007\)](#) on regularisation programmes for irregular migrants, and invites Switzerland to take measures ensuring that all irregular migrants have access to the existing regularisation procedures, and are treated equally, irrespective of the place of their residence. The introduction of the possibility of a judicial review at cantonal level would enhance fairness and transparency in these procedures.

#### **IV. Enhancement of the Swiss institutional framework concerning human rights**

20. The need for a robust national institutional framework to ensure the effective protection of human rights and fundamental freedoms cannot be overstated.
21. The Ombudspersons operating in a few cantons and cities, such as Zurich, visited by the Commissioner, constitute examples of good practice. The Commissioner encourages the authorities of all cantons to promote the appointment of cantonal ombudspersons through their parliaments. To ensure an optimal functioning of the system, and considering the fact that competences differ at the various levels of the federal system, the work of cantonal ombudspersons could be usefully complemented by the appointment of a federal ombudsperson. The latter could also play an important role in terms of information exchange and co-ordination at all levels of the federal system. An oft-invoked argument against the appointment of ombudspersons and the establishment of other national human rights institutions is the reliance on a well-functioning national court system. In reality, these two different systems complement one another; effective ombudswork bodies tend also to reduce the burden on the courts.
22. The important work accomplished by the different federal commissions set up as advisory and public awareness raising bodies is to be commended. The specialised offices and services created within the Federal Department of Home Affairs to deal with gender equality, racism and persons with disabilities are equally important, although their competences need to be expanded. All these institutions need to be supported and adequately resourced. The recent creation of the Swiss Centre of Expertise in Human Rights is also a positive development. The Commissioner hopes that at the end of the evaluation period this centre will develop into an independent and efficient National Human Rights Institution, in compliance with UN Paris Principles and the Council of Europe Committee of Ministers [Recommendation N° R \(97\) 14](#) on the establishment of independent institutions for the promotion and protection of human rights.

#### **V. Outstanding accession to certain major European and international human rights treaties**

23. In 1976 Switzerland signed the European Social Charter, a major European treaty providing for social and economic rights, but to date it has not ratified it. Neither did it accede to its revised version of 1996. Another major international human rights treaty that Switzerland so far has not acceded to is the United Nations Convention on the Rights of Persons with Disabilities. For the latter the ratification process is pending. During his visit the Commissioner noted with satisfaction that accession by Switzerland to these two major human rights instruments no longer poses a major problem and would like to take this opportunity to encourage a swift finalisation of the on-going accession processes.
24. Lastly, as regards in particular measures against discrimination and for the protection of migrants, the Commissioner urges Switzerland to accede to Protocol N° 12 (2000) to the European Convention on Human Rights, containing the general prohibition of discrimination, and to Protocol N° 4 (1963) to the European Convention on Human Rights which, inter alia, prohibits collective expulsions of aliens.