



**International Convention on the Elimination of All Forms of Racial Discrimination  
Examination of the eighteenth to twentieth periodic report of the Republic of Austria (CERD/C/AUT/18-20)**

**Written information submitted by the Austrian Ombudsman Board**

The Austrian Ombudsman Board has been following up citizens' complaints about the public administration in Austria since 1977, thus making it one of the oldest ombudsman institutions in the world. The Austrian Constitution entrusts the AOB with investigating whether administrative authorities are acting in accordance with the laws and are complying with human rights standards. With respect to the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in Austria, the AOB would like to emphasize the subsequent points.

Further information is available in the Annual Reports of the AOB, which contain a special human rights and anti-discrimination section (<http://volksanwaltschaft.gv.at/berichte/berichte-bund>; summary in English: <http://volksanwaltschaft.gv.at/berichte/internationale-berichte>).

**Art 5 (f): The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks**

**Art 6: Legislative, judicial, administrative or other measures which give effect to the provisions of the Convention**

In implementation of art 5 and 6 of CERD, the prohibition of discrimination based on ethnic origin with regard to access to public places and public services was enacted in 1977 under administrative penal law (art III para 1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991 [Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991, EGVG]; previously art IX para 1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991; Federal Law Gazette [BGBl] No. 1977/232). This provision states: *“Anyone who discriminates against others*

*without justification, solely because of their race, the color of their skin, their national or ethnic origins, their religious beliefs or a disability, or hinders them from entering places or accessing services which are intended for general public use, commits an administrative offence and shall be punished by the Administrative District Authority by a fine not exceeding EUR 1090.”*

The AOB has concluded numerous times that **the implementation of this prohibition of ethnic discrimination is extremely inefficient and is to some degree a dead letter.**

#### First determination of a case of maladministration by the AOB

The first investigative proceeding by the AOB was initiated in 2006 as a result of a complaint by the NGO ZARA (Zivilcourage und Anti-Rassismus-Arbeit [Civil Courage and Anti-Racism Work]). Within only two weeks, the NGO found more than 100 discriminating job and housing advertisements in Austrian print and online media, such as *“Female sales clerk for shoe salon wanted. Austrian only.”* or *“Apartment for rent. Austrians only, please.”* and reported them to the competent District Offices of the Municipal Authority of the City of Vienna. As the NGO did not receive any information on the result of the proceeding because it does not have legal standing, it contacted the AOB. Thereupon, the AOB initiated ex-officio investigative proceedings to determine whether and in what form the District Offices of the Municipal Authority of the City of Vienna pursued suspected violations of this prohibition of discrimination under administrative penal law.

Within the scope of this investigation, all of the administrative proceedings pertaining to ethnic discrimination pursuant to art III para 1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991 conducted in the capital city of Vienna in the previous 1.5 years were examined. 112 files were examined in detail and compared with one another. This comprehensive investigation resulted in the finding that when applying the prohibition of discrimination, the actions of the authorities are completely inconsistent. **The authorities frequently considered violations of the prohibition of discrimination as petty offences and therefore did not adequately pursue and punish them.** In one case, for instance, persons with dark skin were refused service in a restaurant with the justification that *“no food and drinks are served to black people because there is a massive drug problem in the neighborhood”*. This justification was considered *“plausible and excusable”* by the authorities; the operator of the restaurant was not punished.

In the case of complaints regarding discriminating housing and job advertisements, some authorities took the point of view that *“in the absence of a concrete disadvantage experienced by a specific person”* such actions do not even represent prohibited discrimination. Other authorities apparently considered discriminating advertisements to be petty offences and refused to investigate

the advertisers' identity by calling the phone number indicated in the advert and to punish them, as *"the required effort is disproportionate to the degree and importance of the violation of public interests inherent in the administrative offence"*. Frequently other proceedings were dismissed due to the statute of limitations because the authorities had neglected to take the necessary steps within the statutory deadline.

Overall, the investigation showed that the authorities carried out investigations of very different intensity and made completely different decisions, despite the fact that the cases were substantially the same. The decisions extended from the imposition of varying fines to issuing a warning or refraining from imposing any penalties due to the fact that this is a minor offence, to the finding that this does not represent prohibited discrimination at all. **Of the 112 proceedings, 103 were dismissed without any kind of penalty.** Six proceedings were concluded with a legally effective, administrative decision imposing a sentence and one proceeding was concluded with a warning. Two proceedings were brought before the Independent Administrative Tribunal (UVS).

As the final result of its investigation, **the AOB therefore jointly determined** on 28 August 2007 **a case of maladministration as the inconsistent and inefficient application of art III para 1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991 did not fulfill Austria's national commitments and international commitments under Community law regarding the combating of discrimination** (Annual Report of the Austrian Ombudsman Board to the National Council and the Federal Council 2007, p. 49, <http://volksanwaltschaft.gv.at/berichte/internationale-berichte>). A recommendation was submitted to the Federal Government, which is competent for the enforcement of the relevant provision. The AOB called upon the Federal Government to ensure an effective enforcement of the prohibition of discrimination that is consistent Austria-wide and to avoid restrictive interpretations in the definition of the elements of the offence. In accordance with the recommendations of the European Commission against Racism and Intolerance (ECRI) published in its third report on Austria (CRI (2005) 1, dated 25 June 2004, 12.), the AOB recommended that the protection against ethnic and national discrimination be reinforced.

While the Republic of Austria and the City of Vienna enacted certain measures based on these recommendations, thus far, they have not resulted in an effective improvement of the protection against discrimination. Three years later, the AOB concluded again that the enforcement of the prohibition of discrimination due to ethnic origin pursuant to art III para1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991 continues to be inefficient.

Second determination of a case of maladministration by the AOB

The reason for this investigative proceeding was a complaint by the NGO “Helping Hands Graz/Anti-Racism Hotline” which is dedicated to alien law. The complaint stated two cases of Turkish men being denied access to Austrian discotheques. In the first case, a young Turkish man and his Austrian wife wanted to enter a discotheque. While other persons were allowed to enter the venue without difficulty, the doorman demanded to see the man’s ID only. When he showed his Turkish passport, however, he was not permitted to enter the discotheque with the words “*Anything could be written in there, I can’t read that*”. In the second case, several months later, a young man of Turkish origin was denied access to the same venue with no apparent reason; yet his brother, who was a regular customer, was permitted access.

The competent Municipal Authority of the City of Graz, where these events were reported, found in both cases that this did not qualify as substantiated discrimination, because other persons of foreign origin visited the discotheque.

However, this finding ignored the problem of a so-called “foreigner quota”, i.e. the practice that only a certain number of persons with migratory background is permitted into a venue. Many reports by affected parties (cf. ZARA, Racism Report 2010, p. 50) show that this practice is common in a number of venues.

Therefore, the AOB again determined that the enforcement of the prohibition of discrimination was inefficient and represented a case of maladministration by the authorities (Annual Report of the Austrian Ombudsman Board to the National Council and the Federal Council 20011, p. 33, <http://volksanwaltschaft.gv.at/berichte/internationale-berichte>). **The in part extremely restrictive rulings by the Independent Administrative Tribunals, which are competent in the second instance, were also criticized, as they frequently do not ascertain and penalize discriminating denials of access on the grounds that it cannot be proven that the venue operator acted with the specific intent to discriminate** (e.g. Independent Administrative Tribunal Upper Austria, 25.11.2003, VwSEn-230822/3/Wie/Ni; 3.8.2005, VwSen-300609/Wei/Da). In this context, even the remarks regarding the government draft of art III para 1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991 are already extremely problematic, as they consider the elements of this criminal offence as fulfilled only if the unequal treatment of a person occurs solely due to his/her ethnic origin (or due to another prohibited form of discrimination) and the motive of the action is to be found in the prohibited form of discrimination (438 Supplements to the Stenographic Minutes of the Austrian National Assembly (BlgNr) 14th legislative period (GP)).

**This interpretation of the prohibition of discrimination cannot fulfill the international requirements and the requirements under Community law with respect to the protection**

**against discrimination.** Whether or not a subjective intention to discriminate exists is irrelevant. The sole relevant criterion is the objective effect of the provision as to whether unjustified and unequal treatment due to ethnic origin occurred. Therefore, discrimination can exist even if the disadvantage (supposedly) only aims at providing protection against other dangers or threats.

Therefore it is not surprising that **despite the high number of incidents of discrimination, the persons affected very seldom contact the authorities and that the few proceedings are often dismissed without any penalties.** Studies show that EU-wide 82% of those who had experienced discrimination did not file complaints (European Union Agency for Fundamental Rights (FRA), Racial Equality Directive, 2011, p. 19).

This is emphasized by the figures regarding the enforcement of the prohibition of discrimination due to ethnic origin pursuant to art III para 1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991. Thus, according to the response by the competent Federal Minister of Economy, Family and Youth to a parliamentary inquiry (1893, 6248, 8124/AB, 24th legislative period), only two complaints were filed Austria-wide in 2010 on the grounds of ethnic discrimination in restaurants/bars/pubs and at events. One of those was dismissed, while the other proceeding was still pending. The situation was not better in the previous years: in 2007 and 2008 a total of 31 complaints were filed. Of these, ten proceedings were dismissed. Of the ten complaints filed in 2009, five proceedings were dismissed.

**The prohibition of discrimination under trade law is an actual dead letter.** Sec 87 para 1 clause 3 of the Austrian Industrial Code [Gewerbeordnung], which stipulates that in the event of serious violations against the prohibition of discrimination, the business license must be revoked, has as far as can be seen never (!) been applied.

It is apparent from the previous statements that the current enforcement of the prohibition of discrimination does not ensure efficient protection against discrimination. This also means, however, that **the obligation stipulated in art 6 of CERD to provide effective protection against ethnic discrimination is not fulfilled.** The European Commission against Racism and Intolerance (ECRI) also regularly criticizes that art III para 1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991 and sec 87 para 1 clause 3 of the Trade and Commercial Regulations are practically never applied and that improvements are urgently needed (Reports on Austria dated 16.6.2000, 7; 25.6.2004, 12; 2.3.2010, 20). Furthermore, the then Human Rights Commissioner of the Council of Europe called on the Republic of Austria to establish comprehensive political measures against racist and xenophobic behavior after his visit to Austria in May 2007 (Thomas Hammarberg, report dated 12 December 2007, CommDH(2007)26 margin no. 44 et seq.).

Denials of access based on ethnic discrimination, however, are by now also punishable under civil law pursuant to the Equal Treatment Act [Gleichbehandlungsgesetz]. This is without a doubt an improvement of the protection against discrimination. Yet the risk of litigation costs for a court proceeding deters many victims of discrimination from asserting their rights under the Equal Treatment Act before ordinary courts. Additionally, the decisions by the Equal Treatment Commission are not always expedient to guarantee effective protection against discrimination.

Therefore, every effort must be undertaken to improve protection against discrimination in administrative law as well and to take measures that ensure the effective application of already existing prohibitions against discrimination by the authorities.

Accordingly, the AOB affirmed its recommendation to the Federal Government to ensure that the prohibition of discrimination is enforced throughout the country uniformly and effectively and to ensure by way of concrete administrative instructions that all information regarding denials of access to restaurants/bars/pubs due to ethnic discrimination is followed up with all proper means. In accordance with the recommendations of the European Commission against Racism and Intolerance (ECRI), measures to build increased awareness and provide improved training for all staff involved in administrative penalty proceedings were recommended. Furthermore, information campaigns should raise awareness and provide information for the population on what represents prohibited discrimination and whom to contact if one has been affected by such discrimination. A legislative amendment to art III para1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991 was also suggested with the aim of giving victims of discrimination the legal standing of a participating party or at least the status of a formal party.

The Federal Government has not yet issued an official statement. However, the Constitutional Service of the Federal Chancellery has informed the AOB that an amendment to art III para1 clause 3 of the Introductory Act to the Administrative Procedure Acts 1991 is in process in order to guarantee that the handling of the protection against discrimination is facilitated.