

ZARA Comment to the CERD Draft General Recommendation No 36 on preventing and combating racial profiling

June 2019

ZARA – Zivilcourage und Anti-Rassismus-Arbeit (Civil Courage and Anti-Racism Work) is an Austrian anti-racism NGO founded in 1999. Its mission is to strengthen civil courage, combat all forms of racism and to promote the equal treatment of all human beings residing in Austria, regardless of their skin colour, language, appearance, religion, citizenship and/or origin. ZARA's Counselling Service provides information, support and legal advice to victims and witnesses of racism in Austria.

V. 18.

Under point V.18. the Committee on the Elimination of Racial Discrimination lists the different consequences of racial profiling. It is mentioned, that the sense of injustice, humiliation and the loss of trust in the police may result in reduced reporting of crimes. In this context it must be stated, that the situation is even worse. In fact, it is often not possible or expectable to achieve a satisfactory outcome through legal remedies when it comes to allegations of mistreatment against police officers - especially but not only in Austria. This is evident, if we look at two different studies:

In the framework of a recent study on the handling of allegations of mistreatment against law enforcement officers conducted by the Austrian Center for Law Enforcement Sciences (ALES) on behalf of the Ministry of Justice ("Studie über den Umgang mit Misshandlungsvorwürfen gegen Exekutivbeamte") published in November 2018, all cases of mistreatment allegations against police officers that fell within the jurisdiction of the public prosecutor's offices in Vienna and Salzburg from 2012 until 2015 were examined. In most of the cases, the persons affected complained against law enforcement officers using unnecessary and disproportionate physical violence. In more than fifty percent of these cases, physical injuries of the complainants were verified by medical reports, and more than 40 cases (both verified as well as non-verified) involved serious injuries. However, the majority of incidents involved minor injuries. In contrast, the majority of the accused police officers were not injured. According to the complainants, physical mistreatments were accompanied by explicit verbal assaults and racist offences in almost 100 cases.

Only in seven out of the 1,518 cases examined, the public prosecutor's office submitted criminal complaints to court; in all other cases, the investigations against the police officers were discontinued or not even initiated. The reasons for this were primarily the lack of verifiability of a punishable behaviour as well as the non-fulfilment of the offence of bodily harm, while in some cases, the exercise of physical violence as a legitimate coercion was considered appropriate. In the seven cases investigated further, there was not a single conviction according to media reports. Not even one single complaint – out of more than 1,500 resulted in a court decision finding the law enforcement officers involved guilty of criminal offence. In contrast, the prosecution investigated in approximately 150 cases of defamation against complainants.

In November 2018, the Fundamental Rights Agency of the European Union (FRA) published the study "Being Black in the EU." In the framework of this study, almost 6,000 people of African origin from twelve EU countries (Denmark, Germany, Finland, France, Ireland, Italy, Luxembourg, Malta, Austria, Portugal, Sweden and the United Kingdom) were interviewed. The results of this study show a quite impressive negative "top ranking" of Austria, for example with regard to perceived racist behaviour on the part of police officers, as well as a substantial lack of trust in the police compared to the other countries examined: On average (All countries of the study), one-quarter of all persons surveyed (24%) were stopped by the police in the five years before the study. Among these, 10% characterised the last stop as racial profiling. In the last twelve months, on average 11% were stopped, with only 5% characterising these incidents as racial profiling. In both cases, Austria is far worse: In the last five years before the study, two-thirds of all persons surveyed were stopped by the police, with more than one third (37%) characterising the most recent stop as ethnic profiling; and in the last twelve months, every second person surveyed was stopped, among which almost one third (33%) characterised the control as ethnic profiling – this is about six times more than the average.

Pursuant to the high number of cases that were characterised as ethnic profiling, respondents in Austria show by far the lowest level of trust in the police compared to the other countries surveyed: The average level of trust in the police on a scale from zero to ten is 6.3 – while Austria brings up the rear with a value of 3.6. Furthermore, the interviewees were asked if the police treated them respectfully during the stops. A majority (60%) of all respondents who were stopped by the police in the five years before the survey say that they were treated respectfully during the most recent stop. In Austria, the number is way lower: Only 29% say that the police treated them respectfully during the last stop. The above data show that we really have a problem in Austria: A vast majority of persons affected characterise police conduct as racially motivated and the police officers' actions as disrespectful, and the level of trust in the police as an institution is comparatively low. At the same time, the results of the ALES study show that complaints against police conduct rarely lead to a satisfactory outcome for the complainants. In 100% of the cases, the authorities came to the conclusion that the police officers' behaviour was correct – this is surprising and not credible at all. All this data indicates clearly why those affected regularly do not trust that police conduct is reviewed objectively and fair.

This negative awareness among the Austrian civilian population poses a huge problem as it initiates a vicious circle of lack of feedback to the police, lack of incentives to change within the police force and shrinking trust. Very few victims of ethnic profiling have the stamina and confidence to take actions against the police, as they have little to no trust in being taken seriously and safe. There are also legal structures that hinder victims to take the necessary measures against identity checks which are triggered by ethnic profiling (this topic will be mentioned more detailed under point VII. A.27).

The lacking chances of success, the fear of secondary victimisation by the police and the substantial effort of money, time and nerves needed for a complaints procedure are enormous obstacles on the way to a formal complaint against racist police conduct. This prevents honest accounts of misconduct from being actually reported back to the police as an institution. In 2018 ZARA received 82 reports of racist incidents involving police staff. Because of the mentioned reasons, ZARA could only file formal complaints in 8 of these cases. The outcomes of these complaints are in most cases not satisfactory for the victims.

VII. A. 27.

The recommended legislative measures under point VII.A. are very important and necessary, but – in the case of Austria – not enough.

Victims of misconduct by the police need the possibility to appeal against racial profiling without risk. If an affected person complains against an identity check (which was a result of racial profiling) in Austria, the person has to cover the cost of the proceeding in case the complaint is unsuccessful. This financial risk is a major deterrent for many people, so most cases of racial profiling do not make it to the court.

Another problem is that many people fear the reaction of the authorities, as officers frequently respond to complaints with a full range of revenge allegations and administrative fines or even threatening with criminal allegations like libel. The problem worsens when the general feeling and experience is that the public prosecutors or even courts (including administrative courts) play along with the police and do not support civilian complainants. Ordinary courts and the police of course have a day-to-day working relationship with each other and are mutually depending on a good atmosphere. Therefore, we can read in many court decisions against the complainants that the court trusted the statements of the police more than those of the complainants when assessing the evidence. While this approach is useful and acceptable when it comes to ordinary crime, it cannot be used in the same manner when those accused of misconduct are actually police officers. Even the investigation in these cases is entirely led or at least conducted by police officers – so the system is asked to control itself. Here we observe a clear need for an independent structure to investigate and make decisions in cases of police misconduct. Such a structure must be fully independent from the police including its investigation and indictment structures.

To encourage people who are targeted by ethnic profiling, the implementation of a transparent appeal-system is necessary:

- Complaints must be safe – free from secondary victimization and fear of retaliation or bullying
- The complaints structure must be independent from the police – formally and factually
- It must be clear that in the case of an appeal, the only authority who can decide is a judge
- There must be transparent consequences the police-members face for various types of misconduct
- Effective dissemination of information for those affected by racial profiling about their rights and remedies as well as the corresponding rights and duties of police officers

VII. B.

ZARA strongly supports the idea of training programmes for law enforcement with the additional comment that any such training should include parts that specifically and explicitly deal with racist bias and structural discrimination on the grounds of ethnicity and citizenship.