

# **Racial Profiling and the victims' perspective in Germany**

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Racial Profiling  
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## I. Introduction

Germany is a federal state with police forces at federal level and at each 'Länder' level. Their legal basis is distinct and contains the mandate for the Federal Police to monitor illegal immigration and residence in Germany. 'Länder' police forces within their respective legal framework hold responsibility concerning security matters.

Racial Profiling as a phenomenon is known since some three decades in Germany. However only since about 2010 the problem is named *racial profiling* and an increasing opposition to accept such practice is developing.

In the following introduction I would like to focus solely on issues related to racial profiling concerning the assumed illegal residence or immigration of individuals, which is the responsibility of the Federal Police. As the legal basis and problematic performance of 'Länder' police is a different matter this would go beyond the scope of the presentation. In principle those issues are comparable however until now nobody has legally challenged racial profiling at 'Länder' level.

The experience of the **Bureau for the Implementation of Equal Treatment (BUG)** so far is solely with the Federal Police. As you will see later on we are currently realizing a new development concerning the assessment of the legal framework of the Federal Police by administrative courts.

## II. Relevant legal framework

### I. Act for Federal Police

#### a) § 22 (1a) Federal Police Law

*To prevent and inhibit irregular entry into the territory of the Federal Republic, the Federal Police shall be entitled to temporarily stop every person, interrogate and ask the person to hand over identity documents or travel documents, moreover to have a closer look at carried items. The police measures can be carried out on trains, in the area covered by German railways and at airports with domestic and international transport if it can be assumed on grounds of "border police situation analysis" or "border police experiences" that at these lines and places are used for irregular entry.*

This article needs to be performed in conformity with Art. 3 of the German Basic Law.

#### b) 2. § 23 (1) Nr. 3 Federal Police Law

*§ 23 (1) Nr. 3 Federal Police Law enables the Federal Police to check a person's identity in a border area up to 30 km deep to prevent and inhibit irregular entry into the territory of the Federal Republic or to prevent offences referred to in § 12 (1) Nr. 1 – 4 Federal Police Law.*

The above mentioned legal basis to carry out stop-and-search measures indicate quite precise measures to be taken by the police officer when carrying out the check.

In the case of § 21 (1a) this is to (i) stop, (ii) interrogate and to (iii) request an identification document. § 23 however foresees the steps to (i) stop a person, (ii) ask for identification documents and to (iii) check those documents.

This article concerns EU boarder regulations and needs to be read within this legal framework.

The differentiation between both articles has shown to be of utmost relevance in litigating racial profiling cases. Police officers are rather negligent of the specificities of each respective article and do perform their checks therefore in an arbitrary fashion.

## **II. Constitution**

Article 3 - Equality before the law

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.

## **III. Administrative law**

The sole option at hand to tackle legitimate stop-and-search checks of the Federal Police is administrative law. It is only possible to enforce that Federal police refrains from undertaking such checks again. No compensation or damage can be claimed within administrative law. No sanctions are enforced.

## **IV. General Equal Treatment Act (AGG)**

The AGG unfortunately does not cover the remit of public institutions or administrative services of the state. This act therefore does not serve as legal basis to tackle racial profile as a form of racial discrimination.

## **V. CERD**

Germany has signed and ratified the UN Convention on the Elimination of Racial discrimination (CERD) which foresees that measures are available that racial discrimination caused by state actors can be tackled. Germany however does not have such provisions.

## **III. Measures taken by NGOS**

### **1. Strategic litigation**

BUG is providing assistance to victims of racial profiling. This assistance is accompanied by public relations work and advocacy work to end racial profiling by the Federal Police.

When this is achieved we still will need to tackle racial profiling performed by the 'Länder' police forces.

#### **a) Closed racial profiling cases**

In 2011 a young black German student was subject to a check by the Federal Police in a regional train between Kassel and Frankfurt. The plaintiff was the only person that was asked to present his ID. As this was not the first time that he had been the sole person in a train picked for such a check he refused to show his identification card. No reason was given for the inspection. At this point the plaintiff mentioned that this kind of demeanour reminded him of SS methods he was subsequently removed from the train and taken to the nearest police station. Subsequently he opened a court case with the support of a specialised lawyer and

BUG. Only in the second instance in late 2012 he achieved a settlement with the Federal Police because the judge made it clear that an identity check solely on the ground of skin colour contradicts the Equal Treatment clause of the German Basic law.

In a second case a person that is a lawyer himself filed a complaint at the administrative court in Cologne. He was checked in a local train in the suburbs of Dortmund. The officer in charge introduced the measure to be based on § 22 (1a) concerning illegal stay. However the police did not interrogate the person but immediately asked for an ID. This led the judge to rule that the check was illegitimate as the police did not use § 22 (1a) but § 23. As § 23 is only valid along the German board within a limit of 30 km and the place of control was far out of this area the case was won.

### **b) Currently pending court cases**

Currently there are at least four cases pending at administrative courts in Germany. They are in Munich, Stuttgart, Koblenz and Cologne. The person from Munich was checked in a train close to the boarder to The Czech Republic (§ 23). The person from Stuttgart was likewise checked on the basis of § 23 while sitting in a first class coach as he was travelling for his employer (an institution of the German State). The case in Koblenz concerns a German family of West-African origin undertaking a Sunday family trip with the two daughters in a local train. They had been the only people being checked on the basis of § 22 (1a). On 07.11.2014 a very astonishing judgement of the administrative court in Koblenz was published. It says that checks on the basis of § 22 (1a) cannot be performed on trains that do not start or end in places beyond the German territory or do not pass international airports or havens. Illegal immigration is therefore not possible on such trains. As the local train on which the family was travelling did not leave the German territory the check was performed on no legal basis and was therefore illegitimate.

The fourth case took place in the train station of Dortmund. A Black German was waiting for his partner. The Federal Police officers checked him on grounds of § 23 because he might have been a drug dealer, homeless, an extremist, an illegal or a thief.

All mentioned cases are supported by a lawyer and of BUG as third party intervener and support to the plaintiffs.

### **c) Measure taken by BUG to tackle racial profiling**

#### **i) Background material for the lawyer**

In order to provide a wide pool of information and legal references BUG has undertaken extensive research to provide material and argumentation to the lawyer. This will be used when cases are actively handled.

#### **ii) Using the Freedom of Information Act**

BUG has submitted a lengthy enquiry on the basis of the Freedom of Information Act concerning figures of checks performed by the Federal Police. According to its own data, the hit rate of checks referred to in § 22 (1a) Federal Police Law reaches a total of 1.5% in 2012 and a total of 1.3% in 2013. The hit rates of checks referred to in § 23 (1) Nr. 3 Federal Police Law are even lower: It amounted to 0.5% in 2012 and in to 0.85% in 2013. Thus the efficiency of such investigations is highly questionable.

#### **iii) Supporting sympathetic members of the Federal parliament**

A black MP is currently planning to hold a hearing on racial profiling in the near future. BUG is contributing to the development of the event from the victims' perspective.

iv) Supporting victims

Beyond the legal work BUG is carrying out together with the lawyer BUG is supporting victims of racial profiling. The legal system in Germany is highly technical and can intimidate victims that have shown the courage to litigate. Representatives of the Federal Police or judges are at times ignorant of feelings that have been caused by racial profiling. In such instances BUG keeps in touch with claimants, explains ongoing legal steps, 'translates' legal language, accompanies them to court hearings and offers the possibility to network with other litigating victims. This ensures that claimants stay on board and are ready to fight their struggle until a court decision to their favour can be reached.

v) Undertaking PR work

Around court hearings and the issuing of judgements BUG is undertaking press work. This has in the past 3 year lead to a high level of visibility of racial profiling practices and tremendously increase the sensitivity towards this recurrent problem.

## 2. Public activities by community NGOs

Beyond strategic litigation activities numerous community and support NGOs undertake activities concerning racial profiling. They increasingly criticise publicly or demonstrate against the practice of selective identity checks carried out by the Federal Police. The Initiative of Black People in Germany (*Initiative Schwarzer Menschen in Deutschland - ISD*) in cooperation with BUG has filed a petition to the German Federal Parliament in late 2012. The ISD is the community organisation of Black people in Germany which intensively works on racial profiling as its membership is one of the central target groups. The petition appealed against the Federal Police's methods. It was signed by over 13,000 people and ranked 13<sup>th</sup> out of 526 public petitions in year 2012.<sup>1</sup> The ISD is also undertaking flash mobs at central locations to draw the attention of the public to the existence of racial profiling. Numerous debates, events and conferences have been organised to analyse the problem with the aim to give a voice to persons concerned by racial profiling as well as steering decision-makers to work on the matter.

## 3. Networking of civil society groups

Over the past 3 years an informal network of concerned organisations is joining forces and exchanges information on how to tackle racial profiling. NGOs and organisations joining the network consists of community groups at local regional and federal level, students' groups, support NGOs, human rights groups, people from the scientific and legal community and lawyers and judges groups. The group is strategizing how to coordinate legal and advocacy work to with the aim to see racial profiling being reduced over time.

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<sup>1</sup> [https://epetitionen.bundestag.de/petitionen/2012/11/07/Petition\\_37656.nc.html](https://epetitionen.bundestag.de/petitionen/2012/11/07/Petition_37656.nc.html) (last accessed: 24.10.2014)

## IV. Outlook and recommendations

As racial profiling is not only a German but truly international phenomenon the United Nations Special Rapporteur on Contemporary Forms of Racial Discrimination is invited to consider presenting the following suggestions and recommendations to relevant UN fora in order to tackle racial profiling:

- a) To prevent and reduce racial profiling, an intervention on political level is necessary. Racial profiling is incompatible with applicable laws and standards. The problem of racial profiling will only be solved if there is a fundamental recognition of the problem and political **willingness to tackle** it.
- b) One option to tackle racial profiling through law would be to extend national Equality Laws (if not yet done so) to the public sector. A legal framework is required to litigate against racial profiling practises not only through administrative but also via **civil or penal law** that offers **sanctions and compensation** for the victim.
- c) **Independent reporting and complaints offices** to report racial profiling cases are required at every national level to encourage victims to report their experiences. The European Commission against Racism and Intolerance has already urged to create an independent police complaints body.<sup>2</sup> The Independent Police Complaints Commission in England (IPCC) could serve as a model.
- d) The requirement that each **police officer** is required to be **identifiable** either via a number or name on his/her uniform will assist victims of racial profiling to take action against racial profiling practices. It would increase the police's sense of responsibility and would assist in clarifying alleged cases.
- e) For each stop-and-search carried out a **standardised form** should be used to document the check and to serve as basis for data collection. This form should state the legal basis on which the person was stopped, the name/number of the officer carrying out the check, the ethnicity of the person checked - if s/he so wishes - as well as date and place of the check. Additional information on a complaints mechanism would also be helpful.
- f) Last but not least anti-racism **pre- and in-service training** for police staff should be offered across the board to prevent racial profiling from being performed.

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<sup>2</sup> ECRI Report on Germany (fifth monitoring cycle), published on 25th February 2014, p. 17.