3. Fundamental rights section

3.1. Fundamental constitutional requirements of the Federal Constitution

3.1.1. Revocation of a permit pursuant to the Aviation Act

Mr. N.N.'s airport identity card was revoked by the civil airport operator on the basis of a background check by the Federal Ministry of the Interior prescribed by law. He turned to the Ombudsman Board after his application for access to the files was rejected by the competent Federal Ministry as inadmissible.

According to the Aviation Act, the Federal Ministry of Transport, Innovation and Technology can inform the operators of civil airports if there are concerns regarding a person checked by the security authorities. In this case, the operator of the civil airport may not issue an airport identity card to the person concerned and must revoke an airport identity card already issued.

The Ombudsman Board has already stated in 2006 that this "information" by the Ministry must be considered an official notification. § 134 of the Aviation Act must therefore be interpreted in conformity with the Constitution so that the person affected by this measure must be granted legal standing and also has a right that this information is served.

The Republic of Austria was sentenced with legal effect in government liability proceedings instituted by the complainant. The appeal sought by the Republic of Austria, was not granted by a decision of the Supreme Court. The Supreme Court shared the legal opinion of the Ombudsman Board in the matter. The completely general assertion of a "protection of sources and findings" without a concrete legal codification does not release the Republic of Austria from its obligations of assertion and proof in government liability proceedings. The Supreme Court further notes: "It can and must not be in keeping with the law that a legal entity only pleads the necessity of secrecy in a completely abstract form. If it does so, however, it must bear the disadvantage of a rule of the burden of proof that turns out to its detriment."

Following the Ombudsman Board's actions, the State Secretary in the Federal Ministry of Transport, Innovation, and Technology established a working group that is to seek ways to find a solution that takes all interests affected into due consideration.

3.1.2. Reimbursement of costs for a ECJ preliminary ruling procedure

If a complainant is successful in a suit before the Austrian Administrative or Constitutional Court, he can only be reimbursed to a minor extent for the costs eventually incurred through proceedings for a preliminary ruling by the European Court of Justice.

According to the established practice of the Constitutional Court, the legally stipulated flat rate is also compensation for the costs of any interim proceedings such as proceedings for a preliminary ruling procedure before the European Court of Justice. The same applies to proceedings before the Administrative Court. The system of uniform flat rates chosen by the legislative authority that do not depend on the individual complaint entails that the complainant is not compensated for all costs actually incurred in every individual case.

Against the background of the legal practice of the courts of public law and of the European Court of Justice, there are no objections to the current legal situation under Constitutional and/or Community law. However, the costs of proceedings for a preliminary ruling procedure before the European Court of Justice are generally considerably higher than those of other interim proceedings for which the same flat rates are valid.

The Ombudsman Board therefore takes the view that a more realistic flat-rate calculation would be advisable to make access to justice easier for the population as a whole. However, the Federal Chancellery has informed the Ombudsman Board that no such change is planned at present.

3.1.3. Incorrect information about fees

As of 1 July 2008 the fee for applications in constitutional and administrative proceedings regulated in the Administrative Court Act was raised from € 180 to € 220. As the Ombudsman Board repeatedly observed in July and August 2008, numerous authorities – among them the Data Protection Commission – did not take note of this change in the law.

As a consequence incorrect information was provided in official documents on the rights of appeal, where it was still regularly stated that a fee of € 180 is payable if a complaint is filed with the Administrative Court or the Constitutional Court.

In view of this unsatisfactory situation, the Ombudsman Board suggested that this increase in the fee for applications should be pointed out to all authorities by a circular letter of the Constitutional Service of the Federal Chancellery to this effect. This suggestion was carried out very quickly.

3.1.4. Does the Provincial Government of Styria withhold subsidies for residential building projects?

A municipality in Styria had received a written commitment from the competent member of the Provincial Government for the granting of subsidies pursuant to the Styrian Housing Subsidy Act. However, the specialized department of the Provincial Government refused to pay any funds, pointing out that a part of the two building plots was situated in flooding danger zones. The Office of the Styrian Provincial Government referred to an internal provision in connection with the 339th Residential-Construction Table on 9 October 2002, that had neither been accessible to subsidy-seekers nor known to the municipality in this case.

The municipality concerned complained to the Ombudsman Board; in the investigative procedure the Styrian Provincial Government justified its refusal as follows: "During the 339th Residential-Construction Table on 9 October 2002, it was determined that properties in the yellow danger zone would no longer be subsidised on principle. The Residential-Construction Table, which is conducted by a department of the Styrian Government, is concerned with local land-use planning. In its framework there are discussions with subsidy-seekers about building projects with a strongly informative component. That means that, for example, notification is given within the framework of the institution that residential-building properties in yellow danger zones are not subsidised on principle. This was expressly pointed out."

In contrast, the OB stated that the provisions of the Styrian Housing Subsidy Act 1993 do not preclude the allocation of funds for building projects that lie in the danger area of floods. With the entry in the current zoning plan, approved by the Styrian Provincial Government, a decision has been made as to the status of the land as for building purposes.

It is a cause for concern for the Ombudsman Board if the execution now imputes to the Styrian HSA 1993 a purport that would allow it to genuinely assess the building-land status of the land to be covered with buildings and to exclude a project on dedicated building land from subsidies. Such a course of action is unconstitutional in several respects. It violates the border between legislation and execution, grants execution latitude within which incomprehensible decisions can be made that, moreover, must be accepted as unopposable by the subsidy-seeker.

3.2. Principle of equality

3.2.1. Vienna: Place of residence determines fees for graves

The Ombudsman Board is repeatedly concerned with differing assessments of fees for graves that are tied to the place of residence. This not only violates the principle of equality, but also EC law.

In 1990, Mr. N.N. paid the fee for the granting of a right to use a grave at the Stammersdorf cemetery in Vienna. For the first ten years he had to pay triple the fee for the right to use the family grave. The calculation base was a decision of the Vienna Municipal Council from 1985 that divides Vienna's metropolitan area into four zones. For decedents whose last place of residence did not lie within the residential zone belonging to the cemetery, three times the grave fee was charged. This was also the case for the father of the complainant. In the year 2000, Mr. N.N. extended the right to use, this time being charged a fee twice the amount.

In the year 2001, the cemetery regulations of the City of Vienna were changed. Since 1 January 2002, fees for the extension of non-zone grave rights are only assessed at once the amount. The complainant therefore does not have to pay an increased fee for the right to use his father's grave.

From the point of view of the Ombudsman Board, different fees for graves for local and non-local residents within the City of Vienna violate Art. 12 and 49 EC Treaty according to the legal practice of the European Court of Justice. The Municipal Council of the City of Vienna pointed out that new graves cannot be created, or only to a very restricted extent, in all Viennese Municipal cemeteries. The calculation of charges is intended to prevent certain cemeteries usually preferred by the population from being overfilled. Above all, the population living around the cemetery should have the opportunity to acquire the right to use graves for their relatives that are relatively close to the place where they live.

The Ombudsman Board cannot recognize a compelling reason of public interest within the meaning of the ECJ rulings on Art. 12 EC Treaty. Thus EU conformity concerning different grave fees depending on residence, all the more as merely economic objectives do not constitute such a reason. An argumentation that the burial of a citizen of the Municipality in a Municipal cemetery is ensured and that the cemetery does not reach its capacity limits for this reason because many outside decedents also find their final rest there cannot invalidate Community-law concerns from the point of view of the Ombudsman Board.

The inequality of treatment of grave fees of Austrians with a residence in Vienna compared with Austrians without one and the differentiation of the fees for citizens of the Municipality according to different tariff zones finds its boundary in the rule of equality in the Federal Constitutional Act. Each differentiation requires an objective justification and must not constitute a disproportionate disadvantage. This in particular appears problematical in the case of a tariff discrimination between citizens of the municipality who are buried in a zone cemetery of their district of residence and those citizens of the Municipality who are not.

In the fall of 2007, the head of the responsible Municipal Council Department stated that the differing grave fees for local and non-local residents were to be abolished, at least for the main cemeteries in Vienna. New tariffs for the burial facilities of the City of Vienna were subsequently prepared.

3.3. Freedom of property (Art 1, 1. AP ECHR)

3.3.1. Restitution of land for building by a municipality

During the expansion of land for building in the municipality of Sierndorf in the Province of Lower Austria, the land of the mother of N.N. was rededicated from grassland to building area-residential area. After a subdivision plan was prepared, 1 582 m^2 of building area were assigned to the public good of the municipality of Sierndorf. As the course of the road laid down in the subdivision plan was changed and some square meters of the land assigned free of charge were no longer required as a public good, the mother of N.N. requested the municipality to restitute the land free of charge. She was informed by telephone that while she would get the land back free of charge, she would have to pay for the costs of surveying and the subdivision plan.

The municipality of Sierndorf argued that N.N. was evidently interested in the return of these insignificant areas, but that he had never defined which areas he wanted to get back. Although the Lower Austrian building code in principle does provide for the return of building areas, this could not be carried out because of the small surface of the area and the increase in value caused by the rededication. According to the present legal situation, exemption from notarial charges is provided for, but the preparation of a subdivision plan by the surveyor is not free of charge.

For the Ombudsman Board, the procedure followed by the municipality is in conflict with the judicature of the Constitutional Court. Following the judicature of the highest Court, the assignment of a building area to the public good is an expropriation. Its maintenance is unconstitutional if the public purpose for whose realization a law provides for the possibility of expropriation was not

realized. The Lower Austrian building code must therefore in the OB's opinion be interpreted in line with constitutional requirements. The dedication as a public traffic area must be revoked if the area is no longer needed as a public good. According to the view of the OB the municipality of Sierndorf should therefore have transferred the property back to the mother of the complainant.

The municipality stated that while exemption from charges is provided for the notarial handling of the retransfer of ownership, this does not mean that the preparation of a subdivision plan is free of charge. The Ombudsman Board's position is clearly different: Pursuant to § 10 Para. 3 Lower Austrian building code, no plan is necessary if pieces of land from which no road area must be assigned are reunited.

The municipality's course of action with respect to the retransfer of ownership of the building areas not required was not in conformity with the law, so that the OB stated that there had been a case of maladministration. The municipality subsequently informed the Ombudsman Board that the areas not required would be retransferred back to the ownership of N.N.

3.4. Data protection

3.4.1. Sensitive health data must not be circulated

The Ombudsman Board received information according to which patients who use a specific taxi service for a medically necessary transport must hand over a medical travel and/or transport order to the driver. The taxi driver passes these on to his firm for financial settlement with the respective local health-insurance authority. In this way, the taxi driver as well as the persons in his enterprise handling the settlement with the local health insurance authority obtain knowledge of the diagnosis and/or the intended therapy as well as the medical grounds for the transport order.

Pursuant to the Austrian Data Protection Act, everyone has a claim to confidentiality of his or her personal data, provided there is a legitimate interest therein. It further states that with respect to the use of personal data, unless it occurs in the vital interest of the person concerned or with his or her consent, restrictions of the claim to confidentiality are only permissible to safeguard preponderant legitimate interests of another person. Further restrictions are provided for the use of data especially deserving of protection, among them the "safeguarding of important public interests". It is also expressly stipulated that even in the event of permissible restrictions the intrusion in each case must be in the mildest form leading to the objective.

Health data are sensitive data "deserving of special protection". These data are subject to a general prohibition of use that is only overruled by the exceptions exhaustively listed in § 9 of the Data Protection Act. § 14 of the Data Protection Act contains a detailed obligation to take measures to ensure data security.

In this investigation procedure, the OB achieved that it is being examined whether it is possible that the diagnostic data as the basis of a transport order do not reach the transport company. Instead the data should be passed on directly to the health-insurance authority rendering the benefits. The health-insurance authority can then consolidate these data with the transport account and thereby check whether the transport was allowable. A regulation to this effect entered into force on 1 January 2009. The OB hopes that this problem will no longer occur in the future.

3.4.2. Lacking legal basis for video surveillance

A street lamp owned by the municipality of Ternitz in Lower Austria was regularly damaged. N.N., who received a diversion offer from the public prosecution office because he was a suspect, complained to the Ombudsman Board. The municipality of Ternitz had demanded in a letter to the complainant that besides the costs for the maintenance of the "damage" he had caused he should also assume the costs for the renting of a video surveillance tool by the Ternitz police.

In the investigative proceeding the Ombudsman Board set out the legal bases for data applications in the "public domain" and requested the municipality of Ternitz for comments in connection with the necessary reporting to the data-protection commission. It also inquired why local authorities had asked local police to act as the invoice recipient (the video surveillance was installed by a private enterprise) and consequently charge the amount of the invoice to the municipality of Ternitz, who then asked the complainant to pay this amount.

In its comments, the urban municipality of Ternitz admitted that the report to the data-protection commission had been forgotten and that there is no legal basis for the request to the police. The municipality affirmed that it would act in conformity with the law in the future. The investigation procedure was concluded with the formal objection to the conduct of the urban municipality of Ternitz.

3.5. Prohibition of torture (Art. 3 ECHR)

3.5.1. Living conditions in the Stein prison

During the past year several complaints were directed to the Ombudsman Board concerning conditions in the Stein prison situated in Lower Austria in the city of Krems. Among other things, the Ombudsman Board ascertained that inmates of the Stein prison partially share a cell designed as a single cell with a second inmate. In some of these cells, the toilets are only separated from the rest of the room by a dividing wall and a curtain.

In November 2008, 72 inmates had to live with at least one further person in a cell which was originally designed for one single person and in which the toilet area is only separated from the rest of the cell by a wall and a curtain. 248 inmates were held in cells in which the toilet area is separated from the rest of the cell by a wall and a curtain. 95 inmates were held in cells in which the toilet area is separated from the rest of the cell by a wall and a door. 340 inmates were held in cells equipped with an own cabin.

The Federal Ministry of Justice stated that double occupancy of cells designed as single cells only occurred in one wing of the Stein prison. As the Stein prison is overcrowded and necessary renovation work is taking place at the same time, avoidance of double occupancy in cells designed as single cells is only possible once the refurbishment work is completed.

Pursuant to § 40 of the Austrian penal law, criminal prisoners are to be accommodated in rooms that are simply and functionally furnished. The Ombudsman Board does not know of a decision as to how toilets in the cells of Austrian prisons must be separated. In the Federal Republic of Germany, the 5th criminal division of the Berlin Superior Court of Justice, after stating that the guarantee of human dignity within the meaning of Art 1 Para. 1 of the Bonn Constitution is not intended to cater to exaggerated sensitivities but to offer protection against extreme impositions that attack the core of personhood, decided that the German Federal Constitutional Court and the Frankfurt Higher Regional Court have both affirmed such a serious invasion of human rights if prisoners are assigned a doubly occupied single cell with an "open toilet" (without adequate visual and olfactory screening). The conditions of confinement objected to by the complainant, namely the accommodation of several prisoners in a communal cell without a separated toilet area must be considered unconstitutional even if the necessary reservations are taken into account, as the existing curtain offered neither visual nor acoustic protection, so that when a prisoner uses the toilet, all prisoners are unacceptably deprived of any possibilities of retreat, suffer an invasion of their privacy, and are injured in their human dignity.

It is in this spirit that the Ombudsman Board believes that § 40 of the penal law must be read, so that the present accommodation constitutes a case of maladministration. Even if the OB by no means wishes to imply that prisoners were subjected to demeaning treatment, the judicature of the European Court of Human Rights must be pointed out, which starts out from minimum standards for prison conditions.

3.6. Right to respect for private and family life (Art. 8 ECHR)

3.6.1. Right to the correct spelling of the last name

During an investigation procedure the Ombudsman Board had to ascertain that last names are often incorrectly written by authorities, as the diacritics over the respective letter of the last name are lacking.

Art. 8 ECHR contains a constitutionally guaranteed right to respect for private and family life. In view of the relevant legal practice of the Constitutional Court as well as of the European Court of Human Rights, there can be no doubt that the right to respect for private life also includes a constitutionally guaranteed right to respect for one's own name. From the aspect of constitutional law one must therefore ask whether the range of protection of the right to respect for one's own name also includes the law that first and last names must be reproduced in correct characters by authorities.

The Ombudsman Board already indicated the important arguments in favor of this view in its 2006 annual report. Unfortunately, the competent authorities did not take suitable measures, such as the introduction of software and hardware for the Federal service that can correctly store and reproduce diacritics. For this reason, the Ombudsman Board ascertained a case of maladministration in December 2007. The Federal Government was advised to change the software and hardware used in the Federal service and to ensure the correct writing of the names of persons step by step.

In its reaction, the Federal Chancellery admitted such faults, but also announced a modification. The problem was repeatedly discussed in meetings of experts, some Federal Ministries already presented concrete implementation plans. It is not foreseeable at present when the Ombudsman Board's recommendation will be fully implemented.

3.6.2. Extradition of the wife of an Austrian citizen

The Indian citizen N.N. complained to the Ombudsman Board about the duration of her proceedings for the granting of a residence title for relatives. The complainant had first entered Austria with a visa that was valid for six months. She hoped that the proceedings for the granting of a residence title would be concluded during this time. The enquiries of the Vienna Federal Police Headquarters concerning a possible residence marriage dragged on for months. In the meantime, her first child with her Austrian husband was already born in Austria. The Vienna Federal Police Headquarters nevertheless initiated extradition proceedings.

The criteria that the Constitutional Court lays down for a further legal stay in Austria are, *inter al.*: duration of stay, actual existence of family life and its intensity, degree of integration (relationships with relatives and friends, education, participation in social life, employment), no criminal record.

Taking these criteria into consideration, the initiation of extradition proceedings appears arbitrary. Close family ties exist, as the husband of N.N. is an Austrian citizen and their child is thus also an Austrian citizen. She herself entered Austria legally and was entitled to hope that the residence-title proceedings would be concluded within the half-year validity of her visa. The criteria of no criminal record, adequately assured means of subsistence as well as a secured accommodation situation are also fulfilled according to the information at hand. The marriage took place at a time when the complainant resided in Austria legally. Only the circumstance that she remained – for understandable reasons – in Austria after the expiration of the visa can be an accusation against her from a legal point of view.

The Federal Ministry of the Interior notified the Ombudsman Board twice between September 2007 und April 2008 that there are no objections to the granting of a residence title from the point of view of the Police. In July 2008, the Vienna Federal Police Headquarters suddenly initiated extradition proceedings against the complainant. This decision violates the protection of private and family life guaranteed by the Austrian constitution. It seems extremely improbable that a Supreme Court would confirm the authority's extradition decision. As already mentioned, practically all the criteria speak for the complainant. Moreover, the Ombudsman Board considers it unacceptable that the complainant must now struggle through proceedings in all instances in order to avert extradition at the supreme courts in the end. No comprehensible reasons for the turn-around in the authority's' decision were given to the Ombudsman Board.

3.7. Antidiscrimination

3.7.1. Discrimination based on nationality or ethnicity

3.7.1.1. Families of foreign citizenship have problems receiving family allowances

Families of foreign citizenship living in Austria are particularly often affected by problems in receiving the family allowance. As an example, the family allowance is often limited to an unjustifiably short timeperiod. In other cases, foreign families sometimes have to wait for years before their claim to family allowance is established. Further problems concern the retroactive granting of a family allowance for so-called "late-born" children.

Already in October 2006, the Ombudsman Board noted that a shorter time limitation of the family allowance for families of non-Austrian origin constitutes a case of maladministration. Nevertheless problems continue to arise in practice. As an example, a family where the mother comes from Colombia was only granted the family allowance for the younger son for four years. For the elder son, it was granted – as usual – until the 18th year of life. In another case in which the father is not an Austrian citizen, the family allowance was only granted for 6 months and the mother left in doubt as to the reason why a further granting was refused. This posed a huge financial burden on the family as with the discontinuation of the family allowance the childcare benefits and the insurance protection would have been discontinued as well. In both cases the Ombudsman Board was successful and the family allowance was granted without a special time limitation. No explanation for the short time limitations was given to the Ombudsman Board.

The official procedure on the claim to family allowance poses another problem for many foreign families as the duration is sometimes extremely long. Foreign families sometimes wait two years and more for their claim to a family allowance to be granted which they were in some cases first refused. In the proceedings, the families are sometimes also asked to produce documents in a quantity and quality that is as such not necessary for the procedure.

These cases could quickly be settled after the intervention of the Ombudsman Board. As the Federal Ministry of Health, Family, and Youth admitted, an investigation of possible fake self-employment had been done, although it would not have been necessary, namely whenever the permanent residence and the center of vital interests as well as sufficient means of subsistence are established. The problems thus evidently resulted from ambiguities regarding the legal prerequisites of the course of family allowances, in particular in the case of families who have moved to Austria from the new EU member states.

A further problem concerns the family allowance for so-called "late-born children" of third-country women with a valid residence title. These families can only apply for a family allowance when the residence title for their child is issued. In some cases, this takes a considerable amount of time, which in itself constitutes a great financial burden for the family involved. An amendment has made sure that the family allowance and the childcare benefits must be granted retroactively from birth if there is a residence title. In one case, however, the authority unjustifiably demanded confirmations of the domestic embassy for the retroactive granting and/or did not meet its duty to explain how the application form must be completed correctly.

3.7.1.2. Discrimination and violation of EC law: Carinthian baby allowance

EC law prohibits the discrimination of EU citizens. According to the legal practice of the ECJ, a member state discriminates against the citizens of the other member states if it makes the payment of a birth and maternity allowance dependant on the fact that the recipient has already lived in its territory before. The Ombudsman Board has ascertained that the restriction of the Carinthian baby allowance to Austrian families with at least two years of residence in Carinthia constitutes a case of maladministration.

Ms. C. is an EU citizen of non-Austrian nationality and has been living in Carinthia for some time. She became a mother a short time ago. She was refused the Carinthian baby allowance, which constitutes a one-time financial benefit from the Province for the parents of newborn children. According to the directive then in force it was only provided for Austrians who had resided in Carinthia for at least two years. After calling on the Ombudsman Board, payment of the Carinthian baby allowance to Ms. C. was still refused. She did, however, receive the corresponding amount by a check with the title "support for the family". Officials stated that Ms. C. was not allowed to receive a baby allowance because of the directive of the Carinthian Provincial Government in force, but that she should be indemnified all the same.

The Ombudsman Board on 18 April 2009 unanimously held that the directive of the Carinthian Provincial Government and the procedure of the authority constitutes a violation of EC law and therefore a case of maladministration. The Ombudsman Board stated that the EU member states do not have complete liberty in designing their systems of social security, but are bound by the principle of equal treatment of Community law. This also applies to the granting of private-sector promotions and subsidies.

Art. 12 EC Treaty prohibits any discrimination of EU citizens for reasons of citizenship. Pursuant to Art. 3 Reg. (EEC) No. 1408/71, EU citizens who live and work in Austria and the members of their family must be treated the same as Austrian citizens with regard to social-security benefits. Art. 7 Para. 2 Reg. (EEC) 1612/68 further provides that employees who are citizens of a member state enjoy the same social and tax benefits in the territory of a member state as domestic employees do. The requirement of equal treatment also applies to families from the EEA as well as Switzerland.

According to the rulings of the ECJ, a member state discriminates against the citizens of the other member states if it makes the payment of birth and maternity benefits contingent upon the requirement that the recipient has lived in its territory before. Such a regulation constitutes a violation of Art. 7 Para. 2 of Reg. (EEC) No. 1612/68, of Art. 52 of the EC Treaty as well as of Reg. (EEC) No. 1408/71 (ECJ, Rs C-111/91, Commission vs. Luxemburg).

The Ombudsman Board therefore recommended to the Carinthian Provincial Government that it should quickly bring its subsidy directive into conformity with EC law. As a reaction to the investigation of the Ombudsman Board, the Carinthian baby allowance was extended to families from the EU and EEC area as well as from Switzerland. The Ombudsman Board's recommendation to delete the residence clause that demands at least two years of residence in Carinthia without replacement, as it constitutes an indirect discrimination, has not yet been followed by the Carinthian Provincial Government.

At present, besides this case, an *ex officio* examination in other *Bundesländer* (Burgenland, Upper Austria, Salzburg, and Vienna) that also make the payment of comparable family benefits from the Provincial budget contingent upon a minimum period of residence is also pending before the Ombudsman Board. As a result of the examination, one Province, the Burgenland, has already changed its law and repealed the condition for subsidy of a minimum one-year residence of the Province criticized by the Ombudsman Board.

3.7.1.3. Discriminatory treatment by police officers

A complainant felt that she had been discriminated by the conduct of police officers and their way of expressing themselves during an official action. The Cypriote citizen N.N. was on a one-week stay in Austria together with her two children and her husband, who is an Indian citizen.

Owing to her lacking knowledge of German, the complainant was not able to give a "verbatim account" of the insulting statements the police officers made. But as N.N. is professionally concerned with discrimination and racism as a university professor, the Ombudsman Board had no reason to doubt the credibility of her statement. She had felt discriminated "by the hostility" of the police officers during the official act that, for example, showed itself in "threats" by the officers to take the complainant and her family to the police station that lasted almost 10 minutes. The complainant gained the impression that the officers had above all treated her and her family in such an unfriendly manner because of her "southern appearance".

The regulation based on the Law on the Security Police stipulates that police officers in fulfilling their duties must refrain from everything that could cause the impression of discrimination because of skin color and/or national or ethnic origin. This could not be convincingly demonstrated by the comments of the Federal Ministry of the Interior. The Ombudsman Board therefore requested the Federal Ministry of the Interior to emphasize this topic in further training for the police forces.

According to a report of the EU Commission, Austria is the country with the worst assessment in the category "Directive not transposed at all" regarding the application of the relevant directive 2004/38/EC concerning the right of the citizens of the Union and their family members to move freely and reside in the territory of the member states. The Ombudsman Board will therefore continue to observe the development of laws in Austria regarding the implementation of the directive.

3.7.2. Discrimination based on religion or belief

3.7.2.1. Freedom of religion and autopsies

The basic right to freedom of religion also includes the freedom to exercise one's religion by observing religious customs. If the relatives of a decedent argue against an autopsy for religious reasons, it may only be performed if this is necessary in particular for reasons of health protection. In any case, the persons concerned must be comprehensively informed about a necessary autopsy.

The son of the complainant had a brain damage since birth and died at the age of nine months in the Vienna General Hospital. The parents are adherents of the Islamic faith and turned to the Ombudsman Board, as they felt their religious feelings had been injured by the procedure of the hospital regarding the autopsy of their son. Immediately after the death of their son, they had

emphatically pointed out to the hospital personnel that they did not want an autopsy for religious reasons. A doctor informed them the next day, that a postmortem examination had to be performed on the corpse in order to be able to ascertain the exact cause of death and expressly assured them that no full autopsy, but only a small incision in the abdominal wall would be performed. The corpse was released one day later than agreed upon, and without further explanations of the type and extent of the postmortem examination. During the ritual washing of the dead, the parents saw that the corpse of their son, despite an assurance to the contrary, had been subjected to a complete autopsy. It was only one week after burial that the parents learned that the entire brain had been removed during the autopsy, so that it was not the complete corpse of the child that had been buried. In addition to the tragic loss of her son, the complainant now had to deal with the circumstance that she had not buried her son according to her religious customs, which is why she felt that the hospital had deceived her with respect to the type and extent of the postmortem examination.

This tragic case affects the fundamental basic right to the freedom of religion. This basic right, anchored in Art. 14 of the 1867 constitution and Art. 9 of the European Convention on Human Rights, in particular includes the freedom to practice one's religion by observing religious customs. Restrictions are only permissible if provided for by law and necessary and reasonable in a democratic society to pursue a legitimate goal, e.g. the protection of the health of the population or the subject of the basic rights.

The legal regulations furthermore provide that the corpses of patients who died in public hospitals must be autopsied if the autopsy was directed by the medical police or a court, or is necessary to safeguard other public or scientific interests. This can be the case particularly because of diagnostic unclarity. If none of these cases apply and the decedent has not agreed to an autopsy while alive, an autopsy may only be performed with the consent of the closest relatives.

Any autopsy against the wishes of the relatives who see themselves unable to grant their consent for religious reasons is an intrusion in the freedom of religion. An autopsy against the wishes of the family is only permissible if the objective pursued by the autopsy, health protection in this case, is of greater importance than the intrusion in the freedom of religion. This is the case, for example, if the cause of death is not adequately explicable or if there are diagnostic unclarities. In this case, the autopsy contributes to the determination of the exact cause of death and to the gaining of important knowledge for similar diseases in the future. The comments of the Vienna

General Hospital indicated that the sudden cause of the baby's death could not be sufficiently explained by the findings available, which is why an autopsy was necessary.

This was also unobjectionable in the light of the freedom of religion. But the investigation procedure of the Ombudsman Board showed severe shortcomings concerning the information and communication about the autopsy. The complainants were incorrectly informed about the type and scope of the postmortem examination by the hospital. If the necessity of a more comprehensive autopsy only appeared later, the hospital would have had to so inform the parents voluntarily and immediately. This did not occur and therefore constitutes a violation of a fundamental patient's right and the duty of physicians to divulge information. In its comments, the General Hospital acknowledged that mistakes were made, admitted these in a meeting with the parents, and apologized. General improvements in this area were announced by the hospital management as a consequence of this tragic case.

3.7.3. Discrimination based on lacking communication infrastructure

3.7.3.1. Application procedure for a position as an intern

The possibility of communication via the Internet must not be made a condition of application in an application procedure. People without Internet access must also, as an example, have the possibility to apply for a position as an intern.

An applicant for an internship informed the Ombudsman Board that in the procedure carried out by the Lower Austrian Provincial Government, applications are only possible by Internet. The Ombudsman Board initiated an investigation procedure in this matter and considered it discriminating that the possibility of communication via the Internet and thus personal Internet access becomes a condition of application.

As a result of the investigation procedure the Lower Austrian Provincial Government will in the future point out in information material that application forms can also be requested in writing or by telephone and sent in by mail. It must be assured that persons with no personal Internet access also have the possibility of applying for an internship at all.