



Deutsches Institut
für Menschenrechte

German Institute for Human Rights

Communication

in accordance with Rule 9.2 of the Rules of the
Committee of Ministers regarding the supervision of the
execution of judgments and of the terms of friendly
settlements

Case of Basu v. Germany (Application no. 215/19)
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1 Introduction

The German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) is the independent human rights institution in Germany. The Institute is accredited according to the Paris Principles of the United Nations (A status). The Institute's tasks include public policy research, education, information and documentation on human rights, application-oriented research on issues related to human rights and cooperation with international organisations. It also monitors the application of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established monitoring mechanisms for these purposes. The Institute has also been tasked with independent national reporting on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) and of the Council of Europe Convention on Action against Trafficking in Human Beings and EU Directive 2011/36/EU. The Institute has therefore established the National Rapporteur Mechanism on Trafficking in Human Beings and the National Rapporteur Mechanism on Gender Based Violence.

This communication submitted in accordance with Rule 9.2 of the Rules of the Committee of Ministers aims to provide information regarding the general measures necessary for the implementation of the ECtHR judgment in the case *Basu v. Germany* (Application no. 215/19).

2 Case summary

The case concerns the identity check by the Federal Police of a German citizen of Indian origin and his daughter who were travelling on train from the Czech Republic back home shortly after they had passed the national border in July 2012. The European Court of Human Rights (ECtHR) found that the identity check interfered with the applicant's right to respect for his private life (Article 8 ECHR) as he could make an arguable claim that he was targeted because of his skin colour and, thus, on racial grounds. Accordingly, also Article 14 ECHR was applicable, requiring an effective investigation of the allegations. As the internal investigations of the Federal Police were lacking the required hierarchical and institutional independence and as the German courts declined to examine the merits of the applicant's complaint, no independent body took all reasonable measures. Hence, the Court found that German authorities failed to carry out an effective investigation so that there had been a procedural violation of Article 14 in conjunction with Article 8.

3 Executive summary

This communication responds to the Action Plan submitted by the Federal Government to the Committee of Ministers on 30 September 2024. The Federal Government considers that no general measures going beyond the publication and dissemination of the judgment are required for the execution of the judgment.

The German Institute for Human Rights (GIHR) is **recognising improvements resulting from recent case law**. The Institute is, however, concerned that **German courts are not well prepared to effectively examine allegations of racial profiling**;

Therefore, the Institute concludes that a resolution of the Committee of Ministers that would complete the supervision of the execution of the present case would not yet be justified. We suggest that **general measures to comply with the judgment in this**

case should include measures to increase the capacity of German courts to deal adequately with allegations of racial profiling.

With regard to the developments highlighted by the Federal Government in the light of the complexity of the issue of racial profiling the Institute **welcomes the establishment of the Federal Police Commissioner** (and similar independent police complaint mechanisms in several federal states). The Institute is, however, concerned that the **Federal Police Act (as well as state police acts) does still not prohibit racial profiling**, and instead **new legislative proposals aim to provide powers that would explicitly allow the targeting of persons on racial grounds** even if those do not show any suspicious behaviour.

Hence, the Institute recommends that **general measures should also include an amendment of the Federal Police Act (and state police acts) to explicitly ban racial profiling and provide training and clear instructions for police officers** that selecting racialised persons who do not show suspicious behaviour does also constitute racial profiling if justified by police intelligence. In addition, the Institute recommends an **amendment of the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*)** and **systematic research on racial profiling**.

4 General measures

Except from the publication and dissemination of the judgment, the Federal Government's Action plan does not provide for any other general measures. The Federal Government argues that there is no need for further measures due to the "isolated nature" of the violation and recent developments in national case law.

Accordingly, no fundamental reforms are required as "a breach of the Convention could have been avoided in the case at hand if the administrative courts had examined the merits of the applicant's claim and had taken the necessary evidence" (action plan, para. 10), so that an effective and independent investigation would have taken place.

The Federal Government argues that since 2015, when the case at hand was decided, various administrative courts (including the Administrative Court Dresden that had decided that case at hand in the first instance) had declared complaints against alleged racial profiling admissible, so that the admissibility of such legal actions "can be considered as the rule" (para. 17).

In addition, the Federal Government highlights other developments, which in sum are said to "contribute to preventing and effectively investigating incidents of alleged racial profiling in the future" (para. 22). First, it claims that positive developments in relevant case law are not limited to the question of admissibility but also concern how complaints alleging racial profiling are dealt with on the merits (para. 23).

Second, the Federal Government rejects criticism voiced by the European Commission against Racism and Intolerance on occasion of its visit to Germany in 2019 that Section 23 (1) No. 1 of the Federal Police Act does not provide a sufficient legal basis for identity checks in view of the broad discretion the provision grants police officers. Third, it highlights recent plans to amend the Federal Police Act. Fourth, it reports on the establishment of the Federal Police Commissioner (*Beauftragter für die Polizeien des Bundes*) as an independent police complaints mechanism (paras. 26-26b). Finally, it is pointed out that "the aim of avoiding discrimination and in particular racial profiling plays an important role in the vocational

training to become a police officer of the Federal Police as well as in the regular police trainings taking place during the career of a police officer at the Federal Police” (para. 27).

Effective examination of the merits of racial profiling claims as a rule?

The German Institute for Human Rights shares the Federal Government’s assessment that the procedural violation of the Convention could have been avoided by an examination of the merits by the administrative courts in the case at hand. However, **the Institute questions the Federal Government’s premise that admissibility decisions do per se warrant an effective examination of the merits.** Rather, the European Court of Human Rights had emphasised the “duty to take all reasonable measures to ascertain through an independent body whether or not a discriminatory attitude had played a role in the identity check”.¹

To assess if German courts have taken all reasonable measures to investigate claims of racial discrimination in the context of police checks the Institute has **systematically reviewed the case law (24 court decisions) relating to 13 individual complaints alleging racial profiling** that were lodged with German courts after the Administrative Court Dresden had declared Mr Basu’s complaint inadmissible in May 2015 (see annex).

It needs to be noted that the **court proceedings only show a small part of the picture.** In 2021/22, the internal complaints management of the Federal Police received around 100 complaints against checks based on Section 22 (1a) or Section 23 (1) no. 3 of the Federal Police Act, ~~not a single one of which was declared admissible.~~² The Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*), which can only act in an advisory capacity due to its lack of competence with regard to public authorities, recorded 175 requests for advice on racial profiling by the police or public order authorities from 2021 to 2023.³ In view of both the fact that the German police carry out millions of checks which are not based on individual suspicion each year⁴ and the growing evidence that racial profiling is widespread,⁵ we

¹ ECtHR: Basu v. Germany, Judgment, 18 October 2022, Application no. 215/19, para. 38.

² German Bundestag (2022): Problematik des Racial Profiling und anlasslose Kontrollen der Bundespolizei seit 2021. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Clara Büniger, Nicole Gohlke, Gökay Akbulut, weiterer Abgeordneter und der Fraktion DIE LINKE. Drucksache, 20/4961, p. 6. <https://dserver.bundestag.de/btd/20/049/2004961.pdf>.

³ Federal Anti-Discrimination Agency (2024): Diskriminierung in Deutschland: Erkenntnisse und Empfehlungen. Fünfter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages, p. 188. https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/BT_Bericht/gemeinsamer_bericht_fuenfter_lang_2024.pdf.

⁴ The Federal Police alone it is reported to carry out around two million checks based on Section 22 (1a) or Section 23 (1) no. 3 of the Federal Police Act each year. German Bundestag (2022): Problematik des Racial Profiling und anlasslose Kontrollen der Bundespolizei seit 2021. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Clara Büniger, Nicole Gohlke, Gökay Akbulut, weiterer Abgeordneter und der Fraktion DIE LINKE. Drucksache, 20/4961, p. 3. <https://dserver.bundestag.de/btd/20/049/2004961.pdf>.

⁵ A survey of around 5,800 persons of African descent found 57 per cent of the respondents reporting that they had experienced police checks without apparent reason at least once in their lifetime. Aikins, Muna A. et al. (2021): Afrozensus 2020. Perspektiven, Anti-Schwarze Rassismuserfahrungen und Engagement Schwarzer, afrikanischer und afrodiasporischer Menschen in Deutschland. Berlin. Each One Teach One; Citizens For Europe, pp. 120. <https://afrozensus.de/reports/2020/Afrozensus-2020.pdf>. A representative survey of around 15,000 persons found that respondents, who believe that they are seen as foreigners due to their appearance, report twice as much that they had been checked by the police in the recent year (8.3 percent) than respondents who think that they are not seen as foreigners (4.4 percent). Müller, Maximilian / Wittlif, Alex (2023): Racial Profiling bei Polizeikontrollen. Indizien aus dem SVR-Integrationsbarometer. Berlin. Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR-Policy Brief, 2023-3). https://www.svr-migration.de/wp-content/uploads/2023/11/SVR-Policy-Brief_Racial-Profiling-bei-Polizeikontrollen.pdf. In addition, recent findings of qualitative research commissioned by interior ministries demonstrate the risk of discrimination and the consolidation of racist stereotypes inherent in exercising stop and search powers at “crime hot spots”. See: Schiemann, Anja et al. (2024): MEGAVO-Studie: Projektbericht 2021-2024. Münster. Deutsche Hochschule der Polizei, pp. 39 and following <https://www.polizeistudie.de/wp->

assume that the overwhelming majority of those affected do not seek access to justice.⁶

The **review of the case law confirms the claim of the Federal Government that today the admissibility of complaints alleging racial profiling can be considered the rule**: Only one complaint (case 8 of the annex) was declared inadmissible by the Administrative Court Saarlouis in September 2017.⁷ The appeal against the decision was, however, declared admissible by the Higher Administrative Court of Saarland which recognised an arguable claim that the plaintiff was discriminated on racial grounds.⁸ It has to be noted though, that the Federal Administrative Court, to which the plaintiff appealed, found that the Higher Administrative Court had neglected its obligation under Section 86 of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) to effectively investigate the facts.⁹ The Federal Administrative Court referred the case back to the second instance which confirmed the previous finding that the complaint was unfounded.¹⁰

In total, **8 of the 13 complaints were finally decided to be well-founded and the identify checks were found unlawful**. One complaint filed by a Togolese citizen against four identity checks by the State Police of Hamburg (case 9 of the annex) led to mixed result as the checks were considered unlawful by the first instance court,¹¹ whereas the Higher Administrative Court of Hamburg, which had been appealed to by the state police regarding one of the four checks, ruled that this check was lawful.¹²

Though **allegations of racial profiling played a role for the decision on the admissibility of most complaints, merits of these allegations were not necessarily examined**. In the legal proceedings on 4 of the 13 complaints, the courts either stated that they do not consider such allegations relevant for their decisions¹³ or they did not even mention them in their reasonings.¹⁴ They rather limited their reasoning on whether the identity checks were in line with the Schengen Borders Code or met the requirements of national law, e.g., in terms of the availability of police intelligence to qualify the areas in which the identity checks took place as crime hot spots. Thus, despite the “special vigilance” required by authorities to address the egregious nature and perilous consequences of racial discrimination,¹⁵ the courts failed to take all reasonable measures to determine whether the checks were racial profiling. In not considering the allegations the administrative courts were in line with the general reluctance of German courts to identify racism which was recently shown

content/uploads/Abschlussbericht_MEGAVO.pdf; Jacobsen, Astrid / Bergmann, Jens (2024): Diskriminierungsrisiken in der Polizeiarbeit. Ergebnisse des Forschungsprojektes "Polizeipraxis zwischen staatlichem Auftrag und öffentlicher Kritik. Herausforderungen, Bewältigungsstrategien, Risikokonstellationen". Nienburg/Weser. Institut für Kriminalitäts- und Sicherheitsforschung der Polizeiakademie Niedersachsen, pp. 131 and following. <https://www.pa.polizei-nds.de/download/77055>.

⁶ The Afrozensus (see footnote 5, p. 255) also found that only around one third of the respondents trust the German justice system “mostly” or “fully”.

⁷ Saarlouis Administrative Court (Verwaltungsgericht Saarlouis) (2017): Judgment, 28 September 2017, 6 K 1184/16.

⁸ Higher Administrative Court of Saarland: Decision, 21 February 2019, 2 A 806/17.

⁹ Federal Administrative Court: Decision, 13 December 2019, 6 B 30.19, para. 24.

¹⁰ Higher Administrative Court of Saarland: Decision, 22 February 2022, 2 A 60/20.

¹¹ Administrative Court Hamburg: Judgment, 10 November 2020, 20 K 1515/17.

¹² Higher Administrative Court of Hamburg: Decision, 31 January 2022, 4 Bf 10/21.

¹³ Case 1: Higher Administrative Court of Baden-Württemberg: Judgment, 13 February 2018, 1 S 1469/17, para. 22 [Administrative Court Stuttgart: Judgment, 22 October 2015, 1 K 5060/13, para. 34]; Whereas in case 9 the Administrative Court Hamburg explicitly refrained from examining the allegations (Judgment, 10 November 2020, 20 K 1515/17, para. 47), the Higher Administrative Court of Hamburg considered the issue (Decision, 31 January 2022, 4 Bf 10/21, paras. 107 and following).

¹⁴ Case 5: District Court Rheda-Wiedenbrück: Decision, 28 December 2016, 1 AR 8/16; Case 6: Administrative Court Arnsberg: Judgment, 2 February 2017, 6 K 3996/15; Case 7: Administrative Court Dresden, 9 August 2017, 6 K 196/15; Case 9.

¹⁵ ECtHR: Basu v. Germany, Judgment, 18 October 2022, Application no. 215/19, para. 24.

by a study of the “National Racism Monitor” funded by the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth.¹⁶

Since 2022, however, the administrative courts have examined allegations of racial profiling in all reviewed cases, usually applying a test developed by the Higher Administrative Court of Rhineland-Palatinate in April 2016.¹⁷ Accordingly, the burden of proof that police checks were not discriminatory on racial grounds is shifted to the responding police authority if the court is, first, convinced that the checks were not random but targeted, and second, if the court finds the justification for the targeting unreasonable.

When applying this test, in **three of four decisions issued since 2022 the courts based their assessment to a significant extent on testimonies of police officers involved in the checks:**

For example, the Bavarian Administrative Court gives the following account of the examination of evidence by the Munich Administrative Court (judgement unpublished) in case 11 (see annex): *“In the case at hand, however, the court was unable to recognise any discrimination or unequal treatment that went beyond subjective impressions. No criteria in relation to skin colour within the meaning of the relevant case law were apparent. It was not refutable that not only the plaintiff and his son, but also four other – in this respect unknown – persons had been checked on the train. According to the defendant’s [Federal Police] statements at the hearing and the content of the statements made by the police officers interviewed, there was no inadmissible purposeful motivation in the plaintiff’s case, nor were any inadmissible essential aspects recognisable in an assumed bundle of motives.”*¹⁸

In case 12, the Frankfurt Administrative Court noted: *“The court forms its conviction regarding the actual course of events on 31 July 2018 essentially on the basis of the witnesses heard: POM, POM and PK [the three police officers carrying out the check].”*¹⁹ and further *“This does not contradict the subjective description of the event by the plaintiff, according to which he perceived the approach of the Federal Police officers as discriminatory. In police law, police measures are always reviewed from the perspective of an objective, prudent officer. The legality of the police measure must be examined solely on the basis of this standard, also with regard to the review of discretion in the light of Article 3 (3) sentence 1 of the Basic Law. From the perspective of an objective, prudent magistrate, the plaintiff’s behaviour on the station platform was to be assessed as conspicuous, regardless of whether the plaintiff perceived this as discriminatory. The witnesses credibly demonstrated to the court that the plaintiff’s conspicuous behaviour on the tracks of the regional train station alone was the decisive factor in approaching the plaintiff. The conspicuous behaviour of the plaintiff relevant here is not covered by any feature of Article 3 (3) sentence 1 of the Basic Law.”*²⁰

¹⁶ González Hauck, Sué / Paasch-Colberg, Sünje / Pöggel, Tanita Jill (2024): Zwischen Anerkennung und Abwehr. (De-)Thema-tisierungen von Rassismus in Medien, Recht und Beratung. Deutsches Zentrum für Integrations- und Migrationsforschung, pp. 55-71. https://www.rassismusmonitor.de/fileadmin/user_upload/NaDiRa/Publikationen/Medien_Recht_und_Beratung/NaDiRa_Fokusbericht_02_RZ_240708_web.pdf.

¹⁷ Higher Administrative Court of Rhineland Palatinate: Judgment, 21 April 2016, 7 A 11108/14.OVG, paras. 109 and following. <https://www.landesrecht.rlp.de/bsrp/document/NJRE001263821>.

¹⁸ Bavarian Higher Administrative Court: Decision, 23 August 2024, 10 ZB 22.2522, para. 7 (emphasis added).

¹⁹ Frankfurt Administrative Court: Judgment, 11 July 2023, 5 K 2545/19.F, para. 21 (emphasis added).

²⁰ Ibid., para.36 (emphasis added).

The Administrative Court Dresden comes to the following conclusion in case 13: *“It is not established to the court’s conviction that the skin colour of the plaintiff would have been at least partly responsible for the identity determination at issue. A fact is proven if the court obtains a degree of certainty about its truth that is useful for practical life, which silences doubts, but does not have to rule them out completely. The basis for the court’s conviction was not only the taking of evidence, but also the overall result of the proceedings (Section 108 (1) sentence 1 of the Code of Administrative Court Procedure), which includes the personal hearing of the plaintiff, the content of the administrative files consulted, and the written submissions exchanged between the parties, including their attachments. None of the police officers involved in the identity check confirmed the plaintiff’s claim that he had been checked because of the colour of his skin.”²¹*

In all three cases, the administrative courts have attributed much greater credibility to the testimony of police officers, making it very difficult for the plaintiffs to overcome even the first threshold of the above-mentioned test. That **police witnesses have a structural advantage in situations when testimony stands against testimony** is known from criminal investigations of alleged police violence and other areas of criminal law: They usually outnumber their counterpart, can optimise incident reports and study the files before court hearings which allows them to harmonise their testimonies, and they are often experienced with court hearings, whereas persons from marginalised communities are lacking the same kind of routine.²²

To summarise, the Institute recognises progress in recent case law on alleged racial profiling in terms of both the admissibility of claims and the standards for the burden of proof. Nonetheless, the Institute is concerned that the German courts are not well prepared to exercise the special vigilance as required by the European Court of Human Rights: **In 7 out of 13 cases, the courts either refrained from examining allegations of racial profiling or failed to thoroughly investigate the allegations,** relying instead on statements of the police.

Revision of the Federal Police Act as a contribution to prevent racial profiling?

On 22 December 2023, the Federal Government had tabled a bill to revise the Federal Police Act (*Bundespolizeigesetz*) from 1994.²³ Whereas the Federal Council (*Bundesrat*) issued an opinion on the proposal in February 2024, the legislative proceeding is pending in parliament. On 14 March 2024, the plenary of the German Bundestag (*Deutscher Bundestag*) held the first reading and forwarded the proposal to the committees where no opinion to inform the final plenary readings was issued since.

²¹ Administrative Court Dresden: Judgment, 14 February 2024, 6 K 1387/20, paras. 31-32 (emphasis added).

²² Abdul-Rahman, Laila; Espin Grau, Hannah; Klaus, Luise; Singelstein, Tobias (2023): Gewalt im Amt. Übermäßige polizeiliche Gewaltanwendung und ihre Aufarbeitung. Frankfurt am Main: Campus, pp. 350-354; Theune, Lukas (2020): Polizeibeamte als Berufszeugen in Strafverfahren. Baden-Baden: Nomos. Critical legal scholars and sociologists of law have argued that German courts are “white spaces” dominated by implicit and unconscious expectations of a certain kind of normativity that racialised people find difficult to fulfil. Thus, they call for structural change and “institutional anti-racism”. See: Bartel, Daniel / Liebscher, Doris / Remus, Juana (2017): Rassismus vor Gericht: weiße Norm und Schwarzes Wissen im deutschen Recht. In: Fereidooni, Karim / Meral El (Hg.): Rassismuskritik und Widerstandsformen. Wiesbaden: Springer VS, pp. 361–383; Cobbinah, Beatrice / Danielzik, Chandra-Milena (Hg.) (2023): Rassismus in der Strafverfolgung. Von der Notwendigkeit struktureller Veränderungen. Berlin: Deutsches Institut für Menschenrechte. https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Praxis_Rassismus_in_der_Strafverfolgung.pdf.

²³ Federal Council (2023): Entwurf eines Gesetzes zur Neustrukturierung des Bundespolizeigesetzes, Drucksache 672/23, 22 December 2023, <https://dserver.bundestag.de/brd/2023/0672-23.pdf>.

Among others, the power to stop and search persons in trains and at international airports for the purpose of preventing irregular migration provided for by the current Section 22 (1a) of the Federal Police Act shall be revised.²⁴ Accordingly, it is planned that the selection of persons for checks must not take place on the ground of characteristics such as “race” without an objective reason justified by the purpose of the measure. The explanatory chapter of the bill adds that a “constitutional objective reason” is required.²⁵ In addition, it is proposed that any person who was stopped may request a receipt that documents the police check and its justification. Federal Police officers would have to inform affected persons about their right to receive a receipt.

These proposed measures will, however, not effectively contribute to prevent racial profiling:

- (1) It would **still be possible to stop and search persons, based on racial profiles, even if their behaviour gives no reason for suspicion.** The background of the proposal to allow the selection of persons for checks on grounds of “race” or other protected characteristics in combination with an “objective reason justified by the purpose of the measure” is German case law: On 7 August 2018, the Higher Administrative Court of North Rhine Westphalia had decided that the selection of a person for a police check solely on the ground of “race” or other characteristics protected by Article 3 (3) of the Basic Law is prohibited under German constitutional law. Accordingly, it can only be justified in combination with other criteria (in a “bundle of motifs”) and if aimed at protecting concurrent legal assets of constitutional priority.²⁶ The court reasoned that situational intelligence (*Lagebilder*) indicating an increased delinquency of “specific target groups” would, thus, justify police checks based on racial profiles even when the targeted persons do not show any suspicious behaviour.²⁷ However, situational intelligence or police statistics seen as “objective reason” do not justify racial profiling as people with similar appearance cannot be divided into clearly separable groups to which certain characteristics such as delinquent behaviour can be ascribed.²⁸
- (2) The proposal to introduce **receipts for police checks** is a step forward that is informed by good practices in other countries such as the United Kingdom or Spain. Requirements to document a check through a receipt may make police officers think twice before selecting a person and could contribute to collect statistics about police checks. However, **as long as receipts are not mandatory none of these potential benefits will be met.**
- (3) More importantly, the proposed **revision would only affect police checks currently provided for by Section 22 (1a) of the Federal Police Act.** The power to check the identities of persons in border regions or at “crime hot spots” provided for by Section 23 (1) Nos. 3 and 4 of the Federal Police Act remains untouched by

²⁴ The revised power shall be regulated by Section 23 (2) of the amended Federal Police Act. See: Drucksache 672/23, p. 17.

²⁵ *Ibid.*, p. 113.

²⁶ Higher Administrative Court of North Rhine Westphalia: Judgment, 7 August 2018, 5 A 294/16, headnote 4 and paras. 54-70.

²⁷ *Ibid.*, paras. 68-70.

²⁸ Cremer, Hendrik (2020): Racial Profiling: Bund und Länder müssen polizeiliche Praxis überprüfen. Zum Verbot rassistischer Diskriminierung. Berlin. Deutsches Institut für Menschenrechte. https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Stellungnahme_Racial_Profiling_Bund_Laender_muessen_polizeil_Praxis_ueberpruefen.pdf, p. 5. See also: Ruch, Andreas (2022): Rechtlicher Schutz vor polizeilicher Diskriminierung aus rassistischen Gründen. In: Hunold, Daniela / Tobias Singelstein (eds.): Rassismus in der Polizei. Eine wissenschaftliche Bestandsaufnahme. Heidelberg: Springer VS, pp. 83–103. Sandhu, Aqilah (2023): Racial Profiling im Lichte der Rechtsprechung. Zugleich ein Beitrag zur Auslegung von Art. 3 Abs. 3 S. 1 GG im europäischen Grundrechtsraum. In: Zeitschrift für Lebensrecht 32 (3), pp. 271–302.

the proposed bill.²⁹ Thus, in such situations – including the case at hand – neither an objective reason nor a receipt documenting the identity check would be required.

- (4) Moreover, the proposals for an Act for the Improvement of Internal Security and the Asylum System³⁰ and for an Act for the Improvement of Combating Terrorism³¹ which were tabled in the wake of the terrorist attack in the city of Solingen, aim at significantly expanding stop and search powers of both the state police forces and the Federal Police. The bills, that were first read in the German Bundestag on 12 September 2024, would authorise new police powers to enforce bans on weapons and knives. The Weapons Act (*Waffengesetz*) shall be amended by a new Section 42c according to which competent authorities can stop, question and search persons and check their belongings to enforce bans of weapons and knives at public events, in public transport and at other areas designated by local authorities.³² In addition, a new Section 23 (1b) shall be introduced to the Federal Police Act, authorising the Federal Police to conduct stops and searches on the entire German railway network without individual suspicion.³³ Both proposed provisions follow the example of the above mentioned revision of the Federal Police Act so that checks must not take place on the ground of characteristics such as “race” without an objective reason justified by the purpose of the measure. The explanatory chapter of the bills state: “*Checks are generally possible without cause and on a random basis. However, an objective reason for directing the checks in individual cases may be specific situational intelligence.*”³⁴ Thus, again intelligence, indicating that certain groups are more likely to carry weapons or knives, should justify racial profiling even if those targeted do not show any suspicious behaviour.

Federal Police Commissioner as an effective watchdog against racial profiling?

On 14 March 2024, the German Bundestag elected Uli Grötsch, a former Bavarian police officer and Member of Parliament, as first Federal Police Commissioner (*Polizeibeauftragter des Bundes*).³⁵ His office was established by the Act on the Federal Police Commissioner at the German Bundestag that came into force on 29 February 2024.³⁶ The establishment of the Commissioner who oversees the Federal Police, the Federal Criminal Police Office (*Bundeskriminalamt*) and the Police of the German Bundestag (*Polizei des Deutschen Bundestags*) is a substantial progress to

²⁹ The current Section 23 of the Federal Police Act is proposed to be replaced by Section 26 of the revised Federal Police Act. See Federal Council (2023): Entwurf eines Gesetzes zur Neustrukturierung des Bundespolizeigesetzes, Drucksache 672/23, pp. 22 and 117.

³⁰ German Bundestag (2024): Entwurf eines Gesetzes zur Verbesserung der inneren Sicherheit und des Asylsystems. Drucksache 20/12805, 9 September 2024. <https://dserver.bundestag.de/btd/20/128/2012805.pdf>.

³¹ German Bundestag (2024): Entwurf eines Gesetzes zur Verbesserung der Terrorismusbekämpfung. Drucksache 20/12806, 9 September 2024. <https://dserver.bundestag.de/btd/20/128/2012806.pdf>.

³² See Article 5 No. 8 of the proposed Act for the Improvement of Internal Security and the Asylum System. Drucksache 20/12805, p. 14.

³³ See Article 2 No. 2 of the proposed Act for the Improvement of Combating Terrorism. Drucksache 20/12806, p. 10.

³⁴ „The checks are generally possible without cause and on a random basis. However, there may be an objective reason for controlling the checks in individual cases if there is specific intelligence about the situation.“ („*Die Kontrollen sind grundsätzlich anlasslos und stichprobenartig möglich. Ein sachlicher Grund für eine Steuerung der Kontrollen im Einzelfall können aber besondere Lageerkenntnisse sein.*“), Drucksache 20/12805, p. 36, and the same explanation in Drucksache 20/12806, p. 24.

³⁵ Parlament wählt Uli Grötsch zum Polizeibeauftragten des Bundes beim Bundestag, 14 March 2024. <https://www.bundestag.de/dokumente/textarchiv/2024/kw11-de-wahlen-991104>.

³⁶ Gesetz über die Polizeibeauftragte oder den Polizeibeauftragten des Bundes beim Deutschen Bundestag, 28 February 2024, https://www.recht.bund.de/eli/bund/BGBI_1/2024/72.

increase police accountability in Germany. Similar institutions exist in seven federal states.³⁷

The **Commissioner is tasked (1) with detecting and investigating structural problems in the ranks of the above mentioned police forces, and (2) with assessing and investigating individual cases of possible misconduct of police staff**, in particular alleged violations of fundamental rights, with discrimination highlighted.³⁸ For this purpose the Commissioner is processing complaints both from police officers and from persons who were affected by police action,³⁹ and he can initiate investigations *ex officio*.⁴⁰ However, **citizens who do not work at a federal police force may only lodge a complaint if they are directly affected and if their complaints indicate structural deficiencies**.⁴¹ Thus, in theory complaints alleging racial profiling could be dismissed as “individual cases”.

The current **mandate holder repeatedly expressed his commitment to combat racial profiling**.⁴² His first activity report, published in June 2024, documents several complaints alleging racial profiling by Federal Police officers that had not been conclusively dealt with by this time.⁴³ Thus, it remains to be seen how the Commissioner will deal with complaints alleging racial profiling.

In order to perform his tasks, the Commissioner is authorised to request information or statements from police staff and police authorities, obtain access to documents and computer files, hear complainants, persons affected by alleged police misconduct and experts, carry out inspections at police premises and attend the policing of large events such as football matches or public demonstrations.⁴⁴

In terms of the possible outcome of investigations, the Commissioner may support consensual conflict resolution between the parties at any time.⁴⁵ He can comment on statements which he had requested from police authorities during his investigations;⁴⁶ he shall issue (public) assessment reports on cases of “significant relevance”⁴⁷, and he must publish an annual activity report and respond to requests for reporting by the parliament’s committee on rules of procedure and parliamentary affairs.⁴⁸ In addition, the Commissioner may forward cases to public prosecutors or disciplinary authorities.⁴⁹ Thus, in sum, his **power to provide effective remedy for persons who allege racial profiling is limited** (a) to conflict resolution through, for example, the facilitation of a face-to-face exchange of the parties or of an apology by the police, (b) to issuing (public) assessment, including recommendations, (c) forwarding cases to

³⁷ Töpfer, Eric / John, Sonja / Aden, Hartmut (2023): Parlamentarische Polizeibeauftragte. Menschenrechtliche Empfehlungen für die Stellen in Bund und Ländern. Berlin: Deutsches Institut für Menschenrechte; Forschungsinstitut für öffentliche und private Sicherheit. https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analyse_Parlamentarische_Polizeibeauftragte.pdf.

³⁸ Section 1 of the Federal Police Commissioner Act.

³⁹ Section 2 (1) and 3 of the Federal Police Commissioner Act.

⁴⁰ Section 2 (3) of the Federal Police Commissioner Act.

⁴¹ Section 3 (2) of the Federal Police Commissioner Act.

⁴² See for instance the preface to his first activity report: German Bundestag (2024): Tätigkeitsbericht des Polizeibeauftragten über den Zeitraum vom 14. März 2024 bis zum 30. Juni 2024. Drucksache 20/11990, 26 June 2024. <https://dserver.bundestag.de/btd/20/119/2011990.pdf>, p.3: “I know that I must endeavour to gain the trust of those population groups in particular who have a rather distanced relationship with the police due to their own experiences of discrimination. That’s why I already state here in the foreword: in a diverse country where there is room for everyone, there must be no racial profiling.”

⁴³ *Ibid.*, p. 13.

⁴⁴ Section 4 of the Federal Police Commissioner Act.

⁴⁵ Section 4 (2) of the Federal Police Commissioner Act.

⁴⁶ Section 4 (4) of the Federal Police Commissioner Act.

⁴⁷ Section 5 of the Federal Police Commissioner Act.

⁴⁸ Section 19 of the Federal Police Commissioner Act.

⁴⁹ Section 6 (1) of the Federal Police Commissioner Act.

those in charge of disciplinary oversight which usually are superior police leaders lacking the hierarchical or institutional independence as required by the ECtHR.

5 Recommendations

For the reasons above, the Institute recommends the Committee of Ministers to continue the examination of the execution of the judgment in the case *Basu v. Germany* under the enhanced procedure.

The Institute respectfully recommends the Committee of Ministers to call on the German authorities to:

1. implement **measures to increase the capacity of German courts to deal adequately with allegations of racial profiling**, e.g., by translating and disseminating the recent ECtHR judgment in the case *Wa Baile v. Switzerland* to emphasise the requirement to examine not only the legality of interferences with the right to privacy but also racial discrimination, by developing trainings for judges on how to handle police witnesses to warrant the practical independence of their investigations, by developing trainings for (future) judges to improve and increase the understanding of racism and to critically reflect on possible individual bias, and by increasing diversity in the judiciary;
2. amend the Federal Police Act (and other police acts) to explicitly **prohibit racial profiling** and provide for **mandatory receipts for all police checks**;
3. develop a **reasonable suspicion standard**, which makes clear that police intelligence does not justify checks of racialised persons who show no suspicious behaviour, and provide **trainings and clear instructions for police officers** on how to implement this standard in practice;
4. amend the **General Act on Equal Treatment** (*Allgemeines Gleichbehandlungsgesetz*) to **expand its scope of application to public authorities** and to **allow the Federal Anti-Discrimination Agency and anti-discrimination organisations to legally represent and empower individuals** who allege racial profiling;
5. fund and support **research and data collection** on racial profiling.

6 Annex: relevant case law since 2015

No.	Parties	Legal Proceedings (cases marked with an asterisk are also mentioned in the Federal Government's action plan)	Final decision: court found unlawful?	Court examined allegations of racial profiling?	Court found police failed to prove that check was no racial profiling?
1	German citizen of Afghan origin vs. Federal Police Office Stuttgart	Administrative Court Stuttgart, Judgment, 22.10.2015 - 1 K 5060/13 ** https://www.landesrecht-bw.de/bsbw/document/NJRE001239586 Higher Administrative Court of Baden-Württemberg, Judgment, 13.02.2018 – 1 S 1469/17 https://www.landesrecht-bw.de/bsbw/document/NJRE001335989	Yes	No	No
2	German citizen of Nigerian-Austrian origin vs. Federal Police Office Sankt Augustin	Administrative Court Cologne, Judgment, 10.12.2015 - 20 K 7847/13 https://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2015/20_K_7847_13_Urteil_20151210.html Higher Administrative Court of North Rhine Westphalia, Judgment, 07.08.2018 - 5 A 294/16 ** https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2018/5_A_294_16_Urteil_20180807.html	Yes	Yes	Yes
3	German citizen of Indian origin vs. Federal Police Office Munich	Administrative Court Munich, Judgment, 27.07.2016 - M 7 K 14.1468 ** https://openjur.de/u/960613.html Bavarian Higher Administrative Court, Judgment, 08.04.2019 - 10 B 18.483 https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2019-N-7290?hl=true	Yes	Yes	No
4	Indian-German vs. Federal Police Office Pirna	Administrative Court Dresden, Judgment, 02.11.2016 - 6 K 3364/14 ** https://anwaltskanzlei-adam.de/2017/01/03/verwaltungsgericht-dresden--urteil-vom-02-11-2016-az-6-k-3364-14/	Yes	Yes	Yes
5	Person of colour vs. Federal Police Office Hannover	District Court Rheda-Wiedenbrück, Decision, 28.12.2016 - 1 AR 8/16 https://anwaltskanzlei-adam.de/2017/01/03/verwaltungsgericht-rheda-wiedenbrueck--beschluss-vom-28-12-2016-az-1-ar-8-16/	Yes	No	No
6	Person of colour vs. State Police Office Olpe/North Rhine Westphalia	Administrative Court Arnsberg, Judgment, 02.02.2017 - 6 K 3996/15 https://www.zvr-online.com/fileadmin/doc/VG_Arnsberg_-_Identit%C3%A4tsfeststellung_Racial_Profiling.pdf	Yes	No	No
7	Algerian student vs. Federal Police Office Pirna	Administrative Court Dresden, Judgment, 09.08.2017 - 6 K 196/15 https://anwaltskanzlei-adam.de/2017/09/22/verwaltungsgericht-dresden-urteil-vom-09-08-2017-az-6-k-196-15/	Yes	No	No
8	German citizen of Malian origin vs. Federal Police Office Koblenz	Administrative Court Saarlouis, Judgment, 28.09.2017 - 6 K 1184/16 Not published Higher Administrative Court of Saarland, Decision, 21.02.2019 - 2 A 806/17 ** https://recht.saarland.de/bssl/document/NJRE001379203 Federal Administrative Court, Decision, 13.12.2019 - 6 B 30.19 https://www.bverwg.de/de/131219B6B30.19.0 Higher Administrative Court of Saarland, Decision, 22.02.2022 - 2 A 60/20 ** https://recht.saarland.de/bssl/document/NJRE001494849 Federal Administrative Court, Decision, 26.09.2022 - 6 B 10.22 https://www.bverwg.de/de/260922B6B10.22.0	No	Yes	No
9	Togolese citizen vs. State Police Hamburg	Administrative Court Hamburg, Judgment, 10.11.2020 - 20 K 1515/17 ** https://www.landesrecht-hamburg.de/bsha/document/NJRE001446608 Higher Administrative Court of Hamburg, Decision, 31.01.2022 - 4 Bf 10/21 ** https://www.landesrecht-hamburg.de/bsha/document/NJRE001493851 Federal Administrative Court, Decision, 21.09.2022 - 6 B 11.22 https://www.bverwg.de/de/210922B6B11.22.0 Federal Administrative Court, Decision, 25.10.2022 - 6 B 32.22 https://www.bverwg.de/de/251022B6B32.22.0	Yes (in the 1 st instance) No (for one out of four police checks in the 2nd instance)	Yes	No
10	Guinean asylum seeker vs. Federal Police Office Pirna	Administrative Court Dresden, Judgment, 18.01.2022 - 6 K 438/19 ** https://www.raa-sachsen.de/media/1109/schriftliches_Urteil_des_Gerichts.pdf	Yes	Yes	Yes
11	Person of colour vs. Federal Police	Administrative Court Munich, Decision, 29.06.2022, M 23 K 19.6319 ** Not published Bavarian Higher Administrative Court, Decision, 23.08.2024, 10 ZB 22.2522 ** https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2024-N-22262?hl=true	No	Yes	No
12	Person of colour vs. Federal Police Office Koblenz	Administrative Court Frankfurt, Judgment, 11.07.2023, 5 K 2545/19.F ** https://www.rv.hessenrecht.hessen.de/bshe/document/LARE230005192	No	Yes	No
13	German citizen of colour vs. Federal Police Office Pirna	Administrative Court Dresden, Judgment, 14.02.2024, 6 K 1387/20 ** No hyperlink available as judgment is only published in commercial legal database JURIS	No	Yes	No

Most of the case law was identified by searching for “racial profiling” at the open source database www.dejure.org.

Additional case law was found by searching the commercial database www.juris.de. It is, however, unclear if the list is exhaustive as not all decisions of German courts are published.

Decisions marked with an asterisk are mentioned in the Federal Government’s action plan. Though mentioned in the action plan, we have not included the following decision: Higher Administrative Court of Lower Saxony, Judgment of 14.01.2020, 11 LB 464/18, <https://openjur.de/u/2207533.html>. It concerns an identity check in the context of protest policing but no allegations of racial profiling were at stake.

Imprint

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The Institute

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