

# REPUBLIC OF AUSTRIA

## FEDERAL MINISTRY OF JUSTICE

**Order of 6 November 2009 on allegations of ill-treatment against members of the security authorities and employees in the penitentiary system; securing an impartial handling of the procedure excluding any appearance of bias**

According to the orders of the **Federal Ministry of Justice (FMJ) of 15 September 1989, 880.014/12-II.3/1989** (JABI. N° 57/1989) and **30 September 1999, BMJ-L880.014/37-II.3/1999** (JABI. N° 31/1999) allegations of ill-treatment against members of the security authorities had to be investigated without delay by means of investigative proceedings at the court. With the order of the FMJ of **17 February 2008, BMJ-L590.000/0012-II 3/2008** (item A.6.) the procedure in ill-treatment cases against members of the security authorities has been adapted to the new legal situation after the Law Amending the Criminal Procedure Code (*Strafprozessreformgesetz*) entered into force.

Nonetheless, there were certain difficulties in practice concerning the cooperation between the offices of public prosecution and the criminal police when investigating and clarifying suspicions of ill-treatment against members of security authorities and security services or the penitentiary system (torture and other cruel, inhuman or degrading treatment). Criticism has also come from the public and it has been doubted that investigations in such cases are free from bias.

Due to these reasons the situation concerning the orders is to be thoroughly amended in order to avoid any appearance of a partial or biased handling of the investigations. Therefore, after the case gets known, any public evaluation of the suspicion and especially any justification of the action of the authorities is to be avoided with all reasonable effort.

#### **A. General Comments**

1. Austria has signed the **United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** and ratified it taking effect on 17 October 1987 (BGBl. N° 492/1987). Subject of this Convention are assaults of organs of the state and it obliges the signatory states to ensure effective prevention, clarification and prosecution.

The provisions of this Convention, to which the order refers, state as follows:

#### **Article 1**

1. For the purposes of this Convention, **torture** means any act by which **severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind**, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a **public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

## Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

## Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the **right to complain to and to have his case promptly and impartially examined by its competent authorities**. Steps shall be taken to ensure that the complainant and witnesses are **protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given**.

## Article 15

Each State Party shall ensure that **any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings**, except against a person accused of torture as evidence that the statement was made.

## Article 16

1. Each State Party shall undertake **to prevent** in any territory under its jurisdiction other **acts of cruel, inhuman or degrading treatment or punishment** which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

The Convention therefore guarantees in case of any claim of a cruel, inhuman or degrading treatment the right to prompt and impartial investigation of the case (articles 13 and 16.1). In cases of deliberate infliction of severe physical or mental pain or suffering moreover it prohibits to use the statement made as a result of this torture (article 15). This prohibition to use the evidence is regulated in Austria in the provision of article 166 para. 1 n° 1 of the Austrian Code of Criminal Procedure (*Strafprozessordnung - StPO*).

2. Another international instrument in this area is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (BGBl. 74/1989). For Austria, this Convention entered into force on 1 May 1989.

The key issue of this Convention is the establishment of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which examines the treatment of persons deprived of their personal freedom by visiting the member states in order to enforce the protection of these persons if necessary. After the last visit of this Committee in Austria from 15 February to 25 February 2009 there were no reports of ill-treatment in the detention facilities.

#### **B. Procedure in cases of allegations of ill-treatment against members of the security authorities:**

1. Already the principle of officiality (article 2 para. 1 StPO – *Grundsatz der Amtswegigkeit*) as such obliges the criminal police and the offices of public prosecution to investigate any suspicion of ill-treatment according to articles 1 and 16 of the UN-Convention that comes to their notice in an investigation proceeding ex officio. The obligation to be impartial (article 3 StPO) renders it indispensable that the investigations are conducted by organs that are not

considered to be prejudiced, with the exception of actions that cannot be delayed at any cost (article 47 para. 1 n° 1 StPO).

Sufficient indications for the initiation of investigative proceedings in this context can not only be the accusations made within the framework of an official act or in a written report of charges, but also in the form of visible injuries or medical reports in cases of an arrest (article 1 para. 2 StPO). These suspicions have to be reported to the office of public prosecution (by the competent police authorities in the Länder - the *Landeskriminalamt* – or in Vienna by the Office of Special Investigations - *Büro für Besondere Ermittlungen* - or by the Federal Office for Prevention of Corruption and Fight against Corruption – *Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung*) immediately, at the latest within 24 hours according to article 24 para. 2 n° 1 StPO. Prior to a report those action that must not be delayed in order to secure the evidence must be taken, when indicated (photo documentation of the injuries; securing of other traces, overview of what happened including description of the place and the time passed between the act and the accusation, investigation and identification of possible organs and uninvolved witnesses if possible, ect.). This report also has to list the investigative measures intended in the future, especially the order of the intended interrogations. The competent office of public prosecution has to be informed without delay (stand-by service) of urgent investigative measures that require an order of the public prosecutor (and/or a judicial admission).

2. After reporting (item B.1.) the criminal police generally have to go ahead with the investigations without having to wait for explicit orders of the office of public prosecution to continue the investigation. Only if the office of public prosecution gives contrary orders or states that it wants to conduct the investigation completely or partially itself (article 103 para. 2 StPO), such further investigations must not be undertaken. The same applies if the allegation of ill-treatment is raised directly at the office of public prosecution. The offices of

public prosecution have to entrust the security authorities named in B.1. with the investigations in order to prevent any appearance of bias.

Correspondent to the circumstances of each case, the order of the interrogations in general has to be organised in such way that any appearance of a favourable treatment of accused members of the authorities is avoided. In cases of public interest or a difficult evidence situation the offices of public prosecution should participate in the interrogations which are to be conducted as shortly as possible after the allegation is made. Prior to handing over a copy or a printout of the protocol of the interrogation there has to be an examination whether interests of the proceedings could be endangered by this (prevention of conspiracy; article 96 para. 5 StPO).

It is especially important to find possible uninvolved witnesses of the case (e.g. by evaluating the photo or video material that has been provided in the course of recording a demonstration; see also article 54 para. to 7 of the Security Police Act – *Sicherheitspolizeigesetz -SPG*).

If allegations are made by persons threatened by a deportation, an adversarial hearing or a reconstruction of the act in appropriate cases are to be applied for at the court as soon as possible (e.g. in cases of ill-treatment in a police station). The Ministry of Justice would like to point out the possibility of an adversarial hearing of the accused. Such an adversarial hearing would be especially useful in cases where a separation of the proceedings is to be expected and the possibility of refusing to give evidence as a witness according to article 157 para. 1 n°1 StPO is to be avoided. The Ministry of Justice recommends to treat those cases as priorities and to clarify the allegations as soon as possible.

3. If there are external signs for injuries or other special indications for an injury (statements of ill-treatments that can not have remained without

consequences), the office of public prosecution will have to order an expert opinion – in cases of detention at best after the first examination by the doctor of the detention facility – on the possible cause of a physical injury without delay (as soon as possible after the time of the injury).

4. The Ministry of Justice would like to point out the possibility of referring the case to a different office of public prosecution in accordance with article 28 StPO. Such a procedure will – as can be seen in the day-to-day business of the senior offices of public prosecution – have to be considered especially in those cases where there are allegations against higher or managing members of the criminal police in the jurisdiction of the office of public prosecution. An application according to article 101 para. 2 second sentence StPO can also be a useful measure (depending on the circumstance of the individual case) in order to avoid any appearance of bias in cases of allegations against higher or managing organs.

5. If in case the allegations are correct there will be a change of the evidence situation (section 166 StPO) it is generally recommended to wait with the decision to file formal charges in the pending proceedings against the person who raised the allegations until there is an – at least provisory – result of the examination of the allegations, except for cases in which this would mean an extension of the time the accused has to spend in detention. In such cases the allegations against the members of the security authorities would have to be examined as a separate preliminary question in the pending proceedings (during the main proceeding), independent of the investigative proceedings against the members of the security authorities.

6. If allegations which are not completely unfounded are raised for the first time during a main proceeding, in most cases it is recommendable to stop the main proceeding as soon as possible. In those cases the correspondent takings of

evidence (notwithstanding a necessary application according to article 263 StPO) will have to be conducted without delay in the pending proceedings in order to clarify the issue of the ill-treatment allegations and the prohibition of evidence resulting from this.

7. In order to respect the basic ideas of article 13 of the Convention (guarantee of an impartial proceeding, protection against intimidation) a person in pre-trial detention who has raised an allegation of ill-treatment against members of the security authorities that is not obviously unfounded is not to be brought into an office building of this security authority for interrogation, excursions or transfer (articles 97, 98 para. 1 of the Law on Penal Enforcement – *Strafvollzugsgesetz - StVG* - in connection with article 184 StPO).

8. The directors of the penal institutions are requested at the same time to act correspondingly in cases of allegations of ill-treatment against employees of the penitentiary system. In such cases in order to investigate the allegation within 24 hours a report (article 100 para. 2 n° 1 StPO) together with a statement of the director of the penal institution has to be transmitted to the competent office of public prosecution. The competent office of public prosecution either has to entrust the criminal police with investigations or conduct the investigations on its own (compare item B.2.).

### **C. Libel**

1. In order to ensure the rights of the accused to a prompt and impartial investigation of the raised ill-treatment allegations guaranteed in articles 13 and 16.1 of the UN-Convention, investigative proceedings (article 1 StPO) against the person affected because of wrong accusations should not be initiated at once, unless there are special reasons (prescription) for this. In general any appearance that the person claiming ill-treatment is intimidated because of these allegations or that steps are taken against him should be avoided. If the

allegation raised against a member of a security authority (or against an employee in the penitentiary system) could not be confirmed with the investigations, the Ministry of Justice is of the opinion that there is no need to initiate proceedings because of libel unless there are specific circumstances to indicate a sufficient suspicion also including the element of “knowingly” (article 5 para. 3 of the Austrian Code of Criminal Law – *Strafgesetzbuch - StGB*). In such a case the office of public prosecution should examine the prerequisites of initiating investigative proceedings only after the proceeding against the member of the security authority (or the employee in the penitentiary system) is terminated finally and absolutely, that means only after the results of the evidence collected in this proceeding are available. In order to avoid prescription, a time-limit should be set in the electronic case register of the offices of public prosecution.

2. When examining the sufficient suspicion against the person who raised the allegations, the following points should be taken into consideration:

a.) Allegations that are obviously completely unfounded and such allegations that are so implausible that the interference of an authority is not likely, do not even expose the accused to the danger of being prosecuted by the authorities. In such cases a prosecution according to article 297 StGB is not to be considered. The same applies to allegations that can immediately be rebutted by simple investigations without initiating investigative proceedings against the accused officer (e.g. by looking at the timetable of service).

b.) Committing the criminal act of article 297 StGB means that the actor raises a wrong suspicion against a specific person (or several specific persons). For this, in general naming characteristics indicating these persons is enough. If such a person, e.g. after raising general allegations of ill-treatment against officers conducting an interrogation is not identified in a direct confrontation with this

officer, the prerequisite of “danger of a prosecution by authorities” of article 297 StGB is missing.

c.) For allegations raised while exercising the rights of defence, a more generous approach can be applied. The exercise of one’s defence rights in criminal proceedings can not justify the wrong accusation of committing a criminal act but still a mere exuberance of words out of an allowed defence does not constitute libel (decision LSK 1978/252). Moreover, the situation of pressure of the accused, especially while in detention, has to be taken into consideration appropriately. Therefore, an immediate revocation of specific allegations of ill-treatment in general can lead to the conclusion that there is no deliberation or at least the reason for withdrawal of punishment of article 297 para. 2 StGB is to be applied.

d.) The principle of “in dubio pro reo” can have opposing effects in the two possible proceedings (against the officer and against the person raising the allegations). In several cases the proceedings against the officers accused of ill-treatment are dismissed without completely clearing them from the suspicion. If doubts in this sense remain, which at least make it possible that the allegations could be true despite the dismissal of the case, investigative proceedings against the person affected because of article 297 StGB are not to be initiated.

#### **D. Entering into force and abolitions**

This order enters into force on **1 January 2010**.

As of **31 December 2009** the following orders of the Federal Ministry of Justice are abolished:

1. Order of **15 September 1989, BMJ-L880.014/12-II.3/1989** (JABI. N° 57/1989) concerning the UN-Convention against torture; Prohibition of use as

evidence; Procedure for allegations of ill-treatment against members of security authorities;

2. Order of **30 September 1999, BMJ-L880.014/37-II.3/1999** (JABI. N° 31/1999) concerning the procedure for allegations of ill-treatment against members of the security authorities (amendment of the order of 15 September 1989, JABI. 57) and concerning the annual reports (order of 15 December 1995, JMZ 430.001/30-II.3/1995);

3. Order of **31 May 1991, BMJ-L880.014/16-II.3/1991** (JABI. N° 27/1991) concerning the UN-Convention against torture; European Convention for the prevention of torture; prosecution of persons raising the allegations because of libel;

4. Order of **21 December 2000, BMJ-L880.0014/48-II.3/2000** concerning the procedure in cases of allegations of ill-treatment against members of the security authorities or employees in the penitentiary system; order of the Federal Ministry of Interior concerning the duty to immediately transmit a statement of facts to the offices of public prosecution;

5. **Item A.6** of the order of **19 February 2008, BMJ-L590.000/0012-II 3/2008** (JABI. N° 15/2008) concerning specific questions and problems raised in practise since the reform of the Code of Criminal Procedure entered into force.

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The forms for the annual reports adapted to the new legal situation have already been transmitted with the order of the **FMJ of 16 April 2009, BMJ-L370.004/0001-II 3/2009**. The Ministry of Justice would like to point out that

these data are subject to special public attention and therefore are of special importance for compiling the annual security report of the federal government.

The Federal Ministry of Justice therefore requests the offices of public prosecution and the senior offices of public prosecution to report on the proceedings in their area of competence using the provided forms referring to the persons affected as well as provide information as to how many investigation proceedings were initiated ex officio without allegations of the person affected.

(BMJ-L880.014/0010-II 3/2009)

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