

Discrimination based on ethnic origin

My article is devoted to an examination of discrimination based on ethnic origin. I also deal with some cases in which the grounds for discrimination have been national origin, language or religion or nationality, all of which are closely associated with ethnic origin. I shall primarily describe decisions by the Ombudsman, but to some extent also the positions adopted by other authorities or in the legal literature.

One of the fundamental assumptions in a state governed under the rule of law is that of equality between people. Discrimination calls that concept into question. Therefore it poses a threat not only to the individual, but also to society. In that light, rejecting discrimination is a central challenge for our legal system.

In Finland, attitudes towards immigrants appear to have become increasingly divided. On average, they have gradually become more positive, but on the other hand, critical tones have increased and become sharper in addition to gaining more and more space in the civic discourse. Immigration policies have been tightened up in response to growing immigration in many countries. One contributory factor in this is the deteriorating economic situation. It can also happen that immigration is presented as a threat in the media. Thus, for example, a headline in the daily *Aamulehti* (12.11.2009) proclaimed that the Prime Minister “fears a rush of immigration à la Sweden into Finland”. All of this is conducive to increasing the discrimination that the authorities also in Finland would have to tackle.

Discrimination is not a rare phenomenon: in 2008, 21% of the Finns who responded to a questionnaire stated that they had experienced discrimination on the ground of ethnic origin. This was, along with ageism, the most common reported experience of discrimination. (Milla Aaltonen – Mikko Joronen – Susan Villa: *Syrjintä Suomessa* 2008, 2009, p. 25.)

The number of complaints to the Ombudsman in which discrimination is alleged is not great; a few dozen complaints of this kind are received each year. Even among them, only quite few include a claim that specifically ethnic discrimination has occurred.

One definition of discrimination is unacceptable unequal treatment of people on the basis of differences between them (Martin Scheinin: *Syrjinnän kieltö*, in *Perusoikeudet*, 1999, p. 239). There is a detailed definition in Section 6 of the Non-Discrimination Act. Discrimination can be direct or indirect, harassment or an instruction or order to discriminate. Thus the scope of discrimination as defined in the Act is fairly broad.

For the sake of perspicuity, the structure of the article largely follows the sequencing of sections in the Non-Discrimination Act, although only some of the official practices that are outlined date from the period since the entry into force of the Act. It can be done this way, because the definitions of discrimination that the Act contains are fairly general in character and did not mean anything ground-breaking in legal interpretations concerning discrimination. From the perspective of the Ombudsman's oversight of legality and implementation of fundamental rights, the Non-Discrimination Act did not substantially alter the operating environment (Petri Jääskeläinen: *Equality in oversight of legality*, Annual Report of the Parliamentary Ombudsman for 2004, p. 19).

Legislation and international conventions

Section 6 of the Constitution (Equality) is a key starting point. It states that everyone is equal before the law. No one may, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.

Section 17 of the Constitution (The right to one's own language and culture) also deserves mention, and especially its third paragraph, according to which the Sámi, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. According to the Government Bill introducing this provision (HE 309/1993 vp, p. 65), the "other groups" mentioned here are mainly national and ethnic minorities.

In addition to these provisions, other regulations pertaining to fundamental rights safeguard equality especially because they apply as a general rule to everyone within the jurisdiction of Finland irrespective of, for example, nationality. One of the objectives when the fundamental rights provisions of the Constitution were revised was to broaden the range of people whom the Constitution protects (HE 309/1993 vp, p. 21).

According to Section 6 (Prohibition of discrimination), “nobody may be discriminated against on the basis of age, ethnic or national origin, nationality, language, conviction, belief, opinion, health, disability, sexual orientation or other personal characteristics.”

Section 11 (Discrimination) of Chapter 11 of the Penal Code, in turn, makes discrimination a punishable offence. The prohibited grounds for discrimination listed in the Section include race, national or ethnic origin, skin colour, language and religion.

Legislation also contains several other provisions concerning equality and prohibiting discrimination. Examples include those in the Act on Equality between Women and Men, the Employment Contracts Act, the State Civil Servants Act, the Municipal Officials Act, the Conscription Act, several Acts regulating education, the Administrative Procedure Act, the Act on the Status and Rights of Social Welfare Clients as well as the Act on the Status and Rights of Patients.

Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms contains a general prohibition of discrimination; the prohibited grounds for discrimination listed include race, colour, language, religion, national origin, association with a national minority and birth. The UN Covenant on Civil and Political Rights contains an equivalent list, which is somewhat differently formulated. Another convention that especially deserves mention is the International Convention on the Elimination of All Forms of Racial Discrimination, which applies to distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.

Non-discrimination has been described as manifesting itself in Section 6 of the Constitution as four different aspects: requiring equal treatment, a consistent line of action, prohibiting unequal treatment and making positive special treatment possible. In my view, this illustrates the relationship between equality and the prohibition of discrimination. According to the same author, if the prohibition of discrimination were to be interpreted very broadly – i.e. if mainly the phrase “other reason that concerns his or her person” were to be interpreted broadly – the prohibition of discrimination would come close to a general principle of equality, which would in turn weaken its significance as a factor that raises the threshold to acceptability of prohibited unequal treatment. (Tarmo Miettinen: *Laki yhdenvertaisuuden takeena*, Juhlakirja Pentti Arajärvi, 2008, pp. 353–354.)

The concept of ethnic origin

According to the precursor documents of the constitutional provision that contains the prohibition of discrimination, the word “origin” in the provision means both national and ethnic origin and social background. Unlike in the international human rights conventions, there is no separate mention in the list of race and colour, because the original concept must be regarded as covering these as well. (HE 309/1993 vp, p. 44.) Although the concept “race” is still being used in discrimination law, there is no scientific foundation for it according to present-day conceptions (Scheinin 1999, p. 243). Already due to its history as a concept, “race” is more strongly linked to racism than ethnicity (Anna Rastas: *Rasismi*, in: *Suomalainen vieraskirja*, 2005, pp. 82–83).

The precursor documents of the Non-Discrimination Act do not provide any explication of the grounds for discrimination listed in Section 6, nor are they explicated in the Directives that are in the background to the Act. It has been speculated that this could lead to problems in application of the Act alone due to the openness to interpretation of the grounds for discrimination (Miettinen 2008, p. 360). There is no definition of ethnic or national origin on the level of an Act elsewhere, either, and the meaning of these concepts is not as well established in everyday parlance as, for example, those of “language” or “religion”. (Outi Lepola – Mikko Joronen – Milla Aaltonen: *Syrjintä etnisyyden, uskonnon, kielen tai kansalaisuuden perusteella*, in: *Syrjintä Suomessa* 2006, 2007, p. 109).

Social science research provides additional ingredients for more exact deliberation of the concept of ethnicity. When ethnicity is mentioned, the reference is usually to a system of differentiation based on culture. People both distinguish themselves from others and make a distinction between others using the means that culture provides. For a group to be defined as an ethnic group, it is additionally usually expected to have, in one way or another, a common origin. Ethnicity has come to replace, above all, the concept of “race”. (Laura Huttunen: *Etnisyys*, in: *Suomalainen vieraskirja*, 2005, pp. 117, 123.)

Thus ethnicity must be understood as always meaning a relationship between groups (Huttunen 2005, pp. 125, 128, 131). It is a relative phenomenon and one that changes over time. The foundation for the formation of an ethnic group is a subjective belief in affinity, belonging together, as well as a perception by outsiders that the group is a separate ethnic community (Lepola et al. 2007, pp. 109–111.) The concept of ethnicity must be regarded as being applicable just as much when examining majority groups as when looking at minority ones (Huttunen 2005, p. 119). Nationality and ethnicity are understood fairly largely as being similar concepts (Ibid, p. 132).

The concept of ethnicity is laden with tensions. One tension is between, on the one hand, approaches that underscore the significance that culture imparts and, on the other, those that attach most importance to social and political organisation. A second tension prevails between, on the one hand, approaches that accentuate the permanence of a relationship and, on the other, those that emphasise change. A third tension arises between ways of understanding that, on the one hand, emphasise ethnicity as the identity of individuals and, on the other, prefer to see it as a social organisation. (Huttunen 2005, p. 126.)

In Finnish research, the concept of ethnicity has generally been used as an aid in discussing immigrants and so-called traditional minorities (Huttunen 2005, p. 126). In one classification, for example, the groups recognised as ethnic and national groups in Finland have been immigrants and old national minorities (Sámi, Roma, Jews, Tatars and so-called Old Russians) (Timo Makkonen: *Syrjinnän vastainen käsikirja*, 2003, pp. 29, 128).

It has been pointed out in officially approved recommendations concerning interpretation of the International Convention on the Elimination of All Forms of Racial Discrimination that assessing whether a person can be regarded as being a member of some or other ethnic or racial group is not in the final analysis a matter that falls within the scope of official discretionary power; instead, assessment should be based primarily on a person's self-identification. However, recognition of a group as an ethnic or racial one must be founded on objective criteria. (Makkonen 2003, p. 53.)

It has been noted that the International Convention on the Elimination of All Forms of Racial Discrimination may extend also to religious and language groups: if a group has, in addition to a religion or a language, some other significant community activity or cultural ties, the group and its members can be given protection as an ethnic group (Makkonen 2003, p. 53). Religion is often a key part of an ethnic group's identity, for which reason demarcating the borderline between religion-based and ethnicity-based discrimination can be difficult in practice (Ibid., p. 75). Nationality must also be taken into consideration in this conjunction. It can be an ostensible ground: indeed, efforts to discriminate that are associated with race and national origin can be found in the background to distinctions that are made on the basis of nationality (Päivi Neuvonen: *Kansalaisuusperusteisen syrjinnän kielto EU-oikeudessa, Oikeustiede–Jurisprudentia XLI*, 2008, pp. 273–274).

The distinction between whether what is involved is an ethnic, national, racial, language or religious group is, therefore, open to interpretation. Problems of definition are not of significance in the respect that the lists of discrimination grounds that legislation contains cover all grounds of this kind. But in that respect the preciseness of interpretation of the concept "ethnic discrimination" has the significance that in legislation ethnic discrimination has a special status. The scope of application of the Non-Discrimination

Act to various situations is at its broadest when ethnic discrimination is involved. It is, however, true that the purpose of both the Non-Discrimination Directive now in the pipeline in the EU and the legislative drafting in progress in Finland is to bring consistency to the legal remedies available in various situations of discrimination.

In addition, the Ombudsman for Minorities and the National Discrimination Tribunal concentrate specifically on ethnic discrimination. The former is tasked with promoting the rights and equality of ethnic minorities and foreigners as well as good ethnic relations in Finland. The web site of the Ombudsman for Minorities defines the clientele and target group as consisting of immigrants, foreigners resident in Finland as well as Finland's national minorities such as the Roma and the Sámi. Ethnic discrimination is defined on the same web site as being unequal treatment of people based on the fact that they belong to a certain ethnic or national group. It can also involve placing a person in a different position on the basis of religion, skin colour or nationality.

The National Discrimination Tribunal deals solely with cases involving ethnic discrimination. I served as its first chairperson in 2004–05. In the early stages of its work, the limits of the Tribunal's powers were, naturally, pondered. Among borderline cases, for example, a complaint by a Swedish-speaking Finn was deemed to be within the scope of the powers. The case was probably influenced by the fact that he lived in an area where Swedish-speakers' share of the total population is small. On the basis of its content, however, his complaint (1470/66/2004) was rejected as manifestly unfounded. There was also discussion on a general level in the Tribunal about application of the Act in a situation where a person is a so-called majority Finn, but dresses in such a manner that it can be concluded he or she professes the Islamic faith. I am not aware of what kinds of discussions on the theme of power demarcation have been conducted in the Tribunal since then.

Thus a precisely demarcated definition of "ethnic" does not seem to exist from the legal or even the social science perspective. In the final analysis, it seems we must be content with practice determining what is to be deemed discrimination on the ground of ethnic origin: the limits of this will be set by, on the one hand, in what kinds of situations people take the view that they have been discriminated against on a ground of this kind and complain about the matter and, on the other, what solutions the authorities who deal with complaints arrive at (Lepola et al. 2007, p. 109).

For this reason, I shall not try to make a strict demarcation of the limits of the official practice that I present. In addition to the cases that are to be interpreted as clearly ethnic discrimination – or national that is largely equatable with it – I shall deal also with some cases in which the ground for discrimination is more language, religion or nationality. The practice that the

Ombudsman has followed in relation to some belonging to the latter category is dealt with in greater detail in, among other publications, the annual reports, which have a separate section devoted to language matters.

Direct discrimination

Section 6.2.1 of the Non-Discrimination Act defines direct discrimination as being the treatment of a person less favourably than the way another person is treated, has been treated or would be treated in a comparable situation.

Direct discrimination is not justifiable for even the acceptable reason mentioned in Section 6 of the Constitution. Indeed, the Eduskunta's Constitutional Law Committee considered the relationship between the Non-Discrimination Act and the Constitution problematic, because the existence of an acceptable reason in the meaning of the Constitution makes it permissible to treat someone differently with regard to the prohibition of both direct and indirect discrimination. In the view of the Committee, the wording of the Bill had to be altered to bring it better into line with the Constitution. (PeVL 10/2003 vp.) However, the Employment and Equality Committee did not consider a change of this kind to be necessary (TyVM 7/2003 vp). Since the reason it presented for this stance is not particularly clear, the relationship between the Constitution and the Non-Discrimination Act seems to have remained vague. At least the Deputy Chancellor of Justice has made the interpretation that the stricter requirements of the Non-Discrimination Act take precedence, whereby there is no need in connection with direct discrimination to ponder the acceptability of the discrimination ground (decisions 339/06 and 150/08 of the Deputy Chancellor of Justice).

The definition of direct discrimination is slightly explicated in the Government Bill introducing the Act (HE 44/2003 vp, p. 42): less favourable treatment means the kind of treatment that causes an individual harm, such as for example unreceived benefits, financial loss, reduced opportunities to choose or comparable detrimental effect compared with how someone else would be treated in a comparable situation. A comparison between actual situations is not necessarily required: the point of comparison could also be, for example, how people are generally treated. It is further stated that it is irrelevant whether someone is placed in a different position with discriminatory intent. What is decisive is that an action is, in an objective evaluation, to be regarded as discrimination. Thus what is involved is a different kind of assessment from what is made when discrimination is evaluated in the light of criminal law, when also the degree of imputability must be deliberated.

The provision prohibiting discrimination in the Constitution (like that in the Non-Discrimination Act) applies also to mere separate treatment (segregation), such as providing equal services separately to different groups of the population (HE 309/1993 vp, p. 44). An arrangement of this kind was the subject of a decision by the National Discrimination Tribunal (2732/66/2004) to prohibit the City of Helsinki and a comprehensive school from forming year classes on the basis of the language spoken by immigrant children. The Helsinki Administrative Court upheld the decision (02464/06/1205).

Otherwise, too, an action can be in and of itself discriminatory without an identified victim of discrimination. Accordingly, the National Discrimination Tribunal has prohibited the Municipality of Enontekiö from continuing to discriminate against the Sámi-speaking population in the arrangement of day care, health care, services for the aged and basic education (2008-367/Pe-2) and found that the City of Rovaniemi's day care arrangements discriminated against Sámi-speaking children on the ground of their ethnic background (2008-25/Pe-2).

Treatment of asylum-seekers and other immigrants

An article on the subject of ethnic discrimination could in principle include an examination, indeed even a broad one, of the Ombudsman's decisions in cases with a bearing on foreigners, i.e. mainly in matters within the scope of application of the Aliens Act and the Nationality Act. It can be assessed that any ethnic discrimination manifesting itself in these matters will largely occur on the level of the system, i.e. in policy on foreigners. If this policy were to be too strict, it could perhaps be said that foreigners as a group are a target of ethnic discrimination. An unduly restrictive policy on foreigners could also lower the threshold in individual cases to discriminating on the ground of ethnic origin.

Policy on foreigners and the legislation observed within it as well as practical actions are indeed indications of the public authorities' general attitude towards ethnic minorities. Thus it is appropriate that in the most recent report concerning Finland by ECRI, the European Commission against Racism and Intolerance (2006, pp. 16–18) there is an extensive presentation of recommendations concerning the practices followed in dealing with asylum applications and treatment of asylum-seekers.

It does not appear that a position has been adopted with respect to policy on foreigners as such in the decisions issued by the Ombudsman. By contrast, there have often been interventions with respect to long processing times for asylum and naturalisation applications (e.g. 362/03).

Some complaints that have been made about persons being refused entry to the country have been of such a nature that it is advisable to examine them in the context of ethnic discrimination. If, namely, refusal of entry is done in a way that clearly deviates in severity from ordinary official actions, I do not believe that we are far from discrimination.

In case no. 742/95 the Ombudsman found that the manner in which a refusal of entry had been enforced was excessive and contrary to the proportionality principle that is expressed in both the Aliens Act and the Police Act. In her assessment, the final outcome was unreasonable from the point of view of the family that had been expelled. Enforcement was carried out without warning on a Sunday morning, so that the family were not allowed enough time to arrange their affairs before leaving the country.

In one case, which also prompted a public debate, involving the expulsion of a family from the country (2564/03), the biggest problems manifested themselves in the action of medical staff. Medicines were used to tranquilise the members of the family being removed. A nurse and a doctor were given a caution – in the final instance by the Supreme Administrative Court – for their action. The nurse was deemed to have administered the medicines without the subjects' consent in a situation where none of the preconditions for this that the regulations require were at hand, and the doctor to have prescribed the medication without sufficient knowledge. It remained for the Deputy-Ombudsman to investigate the action of the police: he took the view that there was some degree of cause for concern in the circumstances in which the father of the family had been transported.

The case 1020/05 concerned the refusal of entry to a group of Georgians. It was alleged in the complaint, among other things, that the Finnish authorities had behaved degradingly towards the group and that their provision of information concerning the event had been inappropriate. However, no evidence that the group had been treated in an inhumane or degrading manner emerged. The Ombudsman did not find any error in the provision of information, either, but emphasised on a general level that information must be provided with sensitivity when the situation is one that may cause stigmatisation.

Some of the cases that the Ombudsman has had to investigate in recent times prompt the thought that recognising that, for example, asylum-seekers have equal fundamental rights still seems difficult to do. However, the starting point is clear: fundamental rights belong to everybody.

In spring 2009 the Ministry of the Interior asked the Ombudsman for a statement on the legal effect of the age determination that is included in ascertaining the identity of asylum-

seekers. In some police services, individual age determinations had been conducted as forensic science studies based on the consent of the person in question. The Ministry had quite correctly identified the problematic features of this action: it involved infringing personal integrity without a specific provision authorising it. In a statement by the Deputy-Ombudsman (1205/09), the consent construction was deemed inadequate and the view was taken that the action should be provided for in an Act. A Government Bill with this purpose has subsequently been introduced (HE 240/2009 vp). The statements that the Ombudsman made ten years ago on the subject of DNA testing were along the same lines; in addition, the view was expressed in one statement then (1548/99) that, in order to guarantee non-discriminatory treatment, testing should be subject to the same prerequisites for all nationalities and ethnic groups.

My evaluation of the difficulty of acknowledging that fundamental rights belong to all does not apply to the Ministry of the Interior, but primarily to the criticism that the statement provoked: indeed, it seemed that in comments by even some jurists the initial assumption was that any provision of false age information would remove the person from the sphere of protection of integrity. What was forgotten was, for example, a statement by the Constitutional Law Committee to the effect that committing an illegal act does not in itself exclude anyone from protection of fundamental rights (PeVL 28/2001 vp).

Another interesting case in recent years (3228/09) involved a complaint about restrictions on the movement of asylum-seekers in Kontiolahti. It had been reported in publicity that the instance maintaining a reception centre and the local village association had made an agreement under which residents of the reception centre were urged to stay away from the public football ground belonging to the municipality. According to a bulletin issued by the village committee, "if an asylum-seeker appears at the ground, a villager must turn him or her away". Since, however, the matter was already the focus of a criminal investigation by the police, the Deputy-Ombudsman did not take the complaint under investigation.

The police and racist crimes

Studies reveal that immigrants are the victims of violent crimes relatively more often than others in Finland. Of the large immigrant groups, in particular Somalis have often been the targets of racist violence. (Rikollisuustilanne/Crime Situation 2008, 2009, pp. 275–276.) There have been frequent demands for more effective investigation of racist crime, for example in the ECRI report on Finland (pp. 9–10, 25–26).

The progress of racist crimes through the criminal justice system was examined in one study. The sample comprised 57 notifications in 2004 of crimes that are classified as racist. Of these, 12 resulted in convictions in lower courts, with the aggravated penalty for which the Penal Code provides being imposed in only three cases. However, the explanation in several cases was that the identity of the person who had committed the offence had remained unknown. (Lepola et al. 2007, pp. 135–136.)

From time to time, suspicions have been voiced that the police do not investigate thoroughly enough whether racist motives are associated with a crime. However, investigating a matter from the very beginning would be important for, among other reasons, the fact that a racist motive is nowadays a reason for increasing the severity of sentence.

As I see it, racist motives for crimes have not been much in evidence in the Ombudsman's oversight of legality. However, the view was taken in one decision (1915/00) that in a case involving refusal of admission to a restaurant there would have been reason to hear the views of the staff more comprehensively than was done. Namely, it would have been important to find out whether the bouncer's action was based on an order by the management.

In a policy-review session in February 2009, the present Government undertook a commitment to increase the effectiveness of combating racism and investigating racist crimes (Valtioneuvoston selonteko Suomen ihmisoikeuspolitiikasta/Government report on Finnish human rights policy, VNS 7/2009 vp, p. 163). **More effective tackling of racist crimes is likewise called for in the internal security programme that the Government adopted in 2008.**

People with foreign backgrounds as a sore spot?

For example, a person with a foreign background who has been the focus of police action can feel that official measures are deliberately discriminatory. Even if the action in question has been in principle a random check, a suspicion may arise as to just how random it has really been. The suspicion is understandable, because research material indicates that ethnically different persons are selected for random checks more often than others (Mikko Puumalainen: Poissa silmistä, poissa mielestä, in: Kerjääminen eilen ja tänään, 2009, pp. 149–150). Then it is advisable to pay attention also to what official actions are seen to be. Indeed, that is what has been done in the Ombudsman's decisions.

The intensified checks on foreigners that the police arrange from time to time have tended to prompt criticism. In one case (2711/03), the complainant called into question the fact that

the police had demanded proof of identity on the basis of the subject person's appearance. The complainant was a Finnish citizen of foreign origin who had been ordered to get into a police car so that his identity could be established.

According to the decision, it is understandable that this kind of surveillance is easily experienced as a violation of the principle of non-discrimination. In order to dispel suspicions, it would be important to implement surveillance of foreigners in conjunction with, for example, traffic controls. The importance of giving adequate reasons for measures and behaving appropriately was also underscored. A comparable intensified police surveillance action that prompted public discussion was most recently conducted in spring 2008, when one of the parties that expressed criticism of it was the Ombudsman for Minorities.

In a similar situation (2188/96), the complainant criticised the action of a passport control official when he had been required to show his passport on a ferry trip to Sweden, although he is a Finnish citizen. He believed that this had happened because of his skin colour. According to the reply, it was no longer possible to establish what had really happened in the situation and what kind of conversation had taken place. The Ombudsman had to be content with issuing a reminder that no one may be selected for a spot check on the basis of skin colour alone, but it is additionally important to avoid any behaviour that might create the impression that an action contrary to the prohibition of discrimination has been taken. In case no. 1003/00, in turn, the Ombudsman took the view that a group of Roma arriving in Finland from Sweden had been selected for an immigration check randomly and not because of their ethnic background.

The Roma who have come to Finland from Romania to beg pose a challenge for the machinery of oversight. It has been found that they remain beyond the scope of the services provided by the labour administration, the social welfare authorities and those who take care of intoxicant abusers as well as administrative services in general, and therefore are not covered by the controls that are included in these services, either. However, child welfare measures have been possible. In monitoring of foreigners, in turn, their status as European Union citizens must be taken into consideration. They are also beyond the unofficial peer control of the established Roma community in Finland. (Puumalainen 2009, pp. 121–170.)

At time of writing, questions associated with accommodation of Roma beggars are being studied in the Office of the Parliamentary Ombudsman for possible further action. Likewise being examined are complaints concerning failure to provide basic subsistence for beggars who have come from Romania (3332/09) and their removal from the Asematunneli underground shopping arcade near the main train station in Helsinki (3272/09). Another com-

plaint (2722/09) being investigated is one in which its author claims that the Helsinki police have harassed Roma tourists on the basis of their ethnic origin in downtown Helsinki. The complainant referred in a newspaper article to an “intensified campaign” by the police and pointed out that comparable measures were not being employed against tourists from all EU countries.

Discrimination in prisons

In a prison, as in other closed institutions, ethnic discrimination can have even very harmful mental consequences for its target. The person who is discriminated against has very little chance of avoiding mistreatment. In a closed institution also the discriminatory behaviour of individuals can cause staff members to be held accountable for their failure to take sufficiently effective measures to combat this behaviour.

In 2003 the Deputy-Ombudsman took under investigation the fact that all of the Roma prisoners in Konnunsuo Prison had been accommodated in a closed wing. There were foreign inmates there at the same time. This was based on the prisoners’ own request and the reason was duress and violence on the part of other prisoners.

It emerged that also the Criminal Sanctions Agency as well as its precursor bodies had drawn attention to the matter. A report revealed that the prison staff had tried to intervene firmly in racist behaviour by other prisoners. The problem was that it generally happened without the staff noticing.

The Deputy-Ombudsman noted in his decision (713/03) that the opportunities available to Roma prisoners to participate fully in all of the prison’s activities had been narrowed because of their origin. However, he did not regard the authorities’ actions in the matter as having been incorrect; instead, he accepted that they had viewed the position of Roma prisoners seriously.

The position of Roma prisoners has been followed since then as well. In his response to one complaint (1279/07), the Deputy-Ombudsman stated that he paid special attention on his prison inspections to the position of Roma and foreign prisoners and those belonging to language minorities. There are individual complaints alleging inappropriate treatment of Roma prisoners each year, but reports indicate that the problems are due not so much to the attitudes of the prison authorities as to those harboured by other prisoners. On inspection visits, it is emphasised to prison staff that they have a responsibility to ensure the safety of Roma prisoners and those belonging to other minorities and prevent them from being subjected to

duress by other prisoners. In the perception of the Deputy-Ombudsman, some prisons have succeeded better than others in maintaining an atmosphere in which Roma prisoners are not the target of discrimination.

According to the ECRI report on Finland (p. 21), continuing problems manifest themselves in the position of Roma prisoners. Examples of this mentioned include – in addition to the segregation done to protect them from other prisoners – also “the unprofessional and sometimes discriminatory behaviour of prison personnel”. In the Government report on human rights policy that was drafted later (VNS 7/2009 vp, pp. 9–10), the situation was seen as being now better. In open institutions, it stated, the situation of Roma prisoners was generally good, whilst also in closed prisons they can usually be kept in normal accommodation sections and it was possible to assign them to normal functions of the prisons. It was stated that in a few prisons Roma were, at their own request, accommodated separately in a wing where prisoners lived apart, but also they could nevertheless participate in comprehensive school classes and other activities arranged for them. The report further mentioned the non-discrimination plan approved for the prison service in 2006; one of the matters emphasised in this is tackling racist phenomena.

A few years ago, the Deputy-Ombudsman investigated how the rights of foreign prisoners were implemented in prisons. According to the report, it was possible in several prisons to provide inmates, at least orally, with the information on their rights and obligations and conditions in the institution in the manner that the Imprisonment Act requires. The situation was weaker where written guidelines were concerned, but it too was improving. The view taken in the decision (2845/06) was that there was no need for further steps in the matter.

Discrimination in the Defence Forces

One of the Ombudsman’s special tasks is to monitor the treatment of conscripts and others performing military service as well as peacekeeping personnel. As a special question, one of the objectives on inspection visits has been to examine the treatment of conscripts with foreign backgrounds.

A considerable number of so-called expatriate Finns, about 50 a year, have served in the Guard Jaeger Regiment. It emerged on an inspection visit (1751/06) that some conscripts who had come from abroad had no command of Finnish at all. More training material in English would have been needed. A project to translate key parts of a manual for soldiers was then under way. Since a subsequent amendment of the Conscription Act, there will probably be fewer persons with dual nationality and resident abroad doing national service

in Finland, which will lead to a corresponding fall in the number of conscripts with no command of Finnish (or Swedish).

Attention has been paid to discrimination also within the Defence Forces. In a study titled Equality and Non-Discrimination in the Defence Forces, which was based on a questionnaire addressed to "social curators" (welfare officers) in 2005, nearly two-thirds of respondents regarded the attitude of other conscripts to their comrades of foreign origin as positive and half considered the attitude of regular personnel positive. Just over one in ten considered the attitude of other conscripts quite negative, whilst a few respondents saw the attitude of regular personnel as quite negative. Also these respondents underscored that only some of the other conscripts or regular personnel harboured negative attitudes.

One-third of respondents reported that there had been problems with the practical arrangement of service by conscripts with foreign backgrounds; these were associated with, for example, the practice of religion or language.

The great majority of respondents evaluated the treatment of conscripts with foreign backgrounds as being in the main appropriate. 22% were of the opinion that other conscripts had discriminated against some of their comrades with foreign backgrounds. Correspondingly, 17% were of the opinion that members of the regular personnel had practised discrimination. Most commonly, discrimination had taken the form of inappropriate language. In addition, there had been bullying by other conscripts. The study revealed that female personnel had been the target of discrimination clearly more often than men of foreign origin, and specifically on the part of other conscripts.

Since then, in 2007, an equality and non-discrimination plan has been drafted in the Defence Forces and the responsibility units there have been required to draft their own local plans. The general plan includes a reminder that as the immigrant population increases, also the Defence Forces will have more and more employees and conscripts with foreign backgrounds. Under the plan, there is a requirement to pay special attention to avoiding the use of expressions that members of special groups (such as ethnic ones) may find offensive to describe these groups. In addition, equality and non-discrimination are also dealt with in, for example, the general rules of service.

Last year, the Deputy-Ombudsman decided to investigate what kinds of possibilities are available to Muslims serving as conscripts to observe the special features of their religion, such as fasting during Ramadan, while they are in the forces. It was explained in the thorough report received (which also dealt with some other minority religions) that there are fairly de-

tailed guidelines on this matter and that, on the basis of experience, it had not caused problems in units of the forces. The Deputy-Ombudsman stated in his response (1976/09) that he considered the guidelines appropriate. Since the question had not been brought up on inspection visits or in complaints, there was no need for further action in the matter.

Discrimination in obtaining housing

The situation with regard to members of the Roma community obtaining housing has long been problematic. Among the matters brought to the attention of the Ombudsman for Minorities by Roma, the category that is clearly the biggest concerns housing. In recent decades, discrimination in access to housing has been the focus of sanctions by various authorities.

The issue in one case in which a decision was made in 1996 (2466/94) was obtaining a dwelling from the Municipality of Sievi. The Ombudsman took the view that it had been established in the case that the starting point in the presentation made by the mayor had been his preconception. According to this, the applicant family would bother their neighbours because the family belonged to the Roma. The Ombudsman issued a reprimand to the mayor, which means that the flawed action was considered fairly serious. In another case (2009/01), the Deputy-Ombudsman found that there was no evidence that Roma had been discriminated against in a municipality's allocation of rental dwellings, but that this possibility could not be ruled out, either.

Discrimination associated with Roma families' access to housing has been dealt with by other authorities as well. The National Discrimination Tribunal found that the Municipality of Himanka had acted in a discriminatory fashion towards Roma in its selection of tenants for rental dwellings (2236/66/2006) and imposed a conditional fine which would be payable if the municipality did not immediately comply with the prohibition of discrimination. In October 2009 a court of appeal ordered the municipality to pay compensation to a Roma family that had been discriminated against when it applied for a rental dwelling. The National Discrimination Tribunal has also issued a prohibition order to a private property company, i.e. a body outside the scope of the Ombudsman's oversight, and imposed a conditional fine that will be payable in the event of non-compliance (646/66/2007).

In 2007, the members of the Municipal Board in Kolari were fined for breach of their official duty after it was found that they had discriminated against a Roma woman in the allocation of a rental dwelling. The following year, the Rovaniemi Court of Appeal fined a property manager employed by the City of Oulu for having behaved in a discriminatory and offensive manner towards a Roma family.

A decision by the Supreme Administrative Court in December 2008 (1338/07) concerned a rejection of an application to buy site for a single-family house. The question at issue was whether the decision not to sell the site to the applicant had been based on his Roma background. In the opinion of the Court, the City Board had not demonstrated that it would have had an acceptable reason not to sell the site. Thus the City Board's decision was unlawful and had to be quashed.

A separate question in Roma housing matters is the use of unofficial contact persons for Roma affairs in the selection of tenants. The problem with peer control is, besides the possibility of discrimination against its own members, also the fact that members of the group do not avail themselves of the benefits or rights that society offers or seek the protection to which they would be entitled (Puumalainen 2009, pp. 151–152).

Some of the municipal officials responsible for selecting tenants had gotten in touch with contact persons for Roma affairs when a new Roma had wanted to move to the municipality. This contact had in some cases led to the new Roma together with family not being allowed to move to the municipality. In a set of guidelines in 2008, the Housing Finance and Development Centre of Finland (ARA) issued a reminder of the constitutional provision that guarantees the right to move freely within the country and choose one's place of residence. Permission to move, as also the so-called obligation to avoid (whereby Roma families that do not get on are supposed to keep away from each other) was stated to be contrary to the Constitution as a method. "Customs associated with Roma culture do not negate the fundamental rights that the Constitution and other housing-related laws guarantee citizens as individuals," it was stated in the guidelines.

The Finnish League for Human Rights also drew attention to this matter in one of its reports. Something that it found to be cause for concern is that many officials in housing offices break the law and violate principles of good administration in their cooperation with contact persons for Roma affairs. In a statement published in December 2007, the Ministry of Social Affairs and Health's Advisory Board for Roma Affairs expressed its concern at cases in which fundamental rights, such as freedom of expression and the right to move freely, have been restricted by invoking Roma culture. According to the statement, customs that are contrary to Finnish legislation can not be accepted by invoking Roma culture. Negative attention has also been paid to the practice in the Government report on human rights policy (VNS 7/2009 vp, p. 161): **according to this report, taking the views of other Roma into consideration in the allocation of a dwelling constitutes direct discrimination as an official action.**

The problem is still topical. There were reports in the news media in September 2009 that the Ombudsman for Minorities was still receiving communications concerning Roma in whose changes of addresses contact persons for Roma affairs had interfered. According to information received from the Office of the Ombudsman for Minorities, one municipality had, in spite of the ARA guidelines, used a contact person for Roma affairs in the case of an individual applicant for housing. There was also a newspaper report in autumn 2009 of a case in which a Roma group was suspected of having forced, at gunpoint, a Roma couple to leave the locality. In the understanding of the police, the couple had moved into the area without the permission of the other Roma there.

The permission-to-move practice was taken under investigation, as an own initiative matter (46/08), at the Office of the Parliamentary Ombudsman. However, taking into consideration the measures that ARA had implemented as well as the fact that numerous questions relating to housing for Roma had been and still were at the time under deliberation at the Office of the Ombudsman for Minorities, the matter was not deemed to necessitate further measures. The Deputy-Ombudsman also had discussions with representatives of the Finnish League for Human Rights.

Other situations of discrimination

The Ombudsman has also issued decisions in other cases that, at least when looked at broadly, can be seen to involve ethnic discrimination. In numerous cases, the issue has been that people were treated differently on the ground of nationality. The Ombudsman has found that an order requiring persons renting stalls in a flea market maintained by a city to be Finnish citizens was in conflict with the prohibition of discrimination that derives from international conventions (750/88). In another case, 1060/97, the Ombudsman drew attention to the unsuccessful way in which reasons had been presented for a decision imposing a precautionary measure. It could give the impression that citizenship of the People's Republic of China had given a district court reason to suspect that the respondents would avoid paying compensation. The Deputy-Ombudsman has emphasised the right of a foreign student to receive income support (1398/98).

Ignoring the rights of the entire Swedish-speaking segment of the population comes close to ethnic discrimination in its final outcome. In a case last year (361/09) that concerned an emergency bulletin being transmitted on television and radio in Finnish only, it was found that this action had not only been in breach of an express provision of the Language Act, but also contrary to the prohibition of discrimination on the ground of language.

As in the case of the contact persons for Roma affairs mentioned in the foregoing, it has sometimes been necessary in oversight of legality to ponder the legal significance of the special traditions of an ethnic or religious group. In 1999, a Deputy-Ombudsman took the view that circumcising small boys, who are not competent to give their consent, without a medical reason for doing this is very open to question from the legal standpoint (1664/97). That in spite of the fact – as was noted in the decision – the right to practise religion must be respected and different cultures and faiths accorded esteem.

The view adopted in a decision of the Supreme Court (2008:93) was that circumcising a boy was not the punishable offence of assault. "... the intervention in the boy's bodily integrity in the form of medically appropriate circumcision performed on religious grounds" was deemed to be a defensible measure from the perspective of the child's overall interest. In her statement on the Government report on human rights policy (1570/09), the Ombudsman found the manner in which freedom of religion and the child's bodily integrity were weighed against each other in the judgement to be problematic and expressed the view that clarification of the matter would require a specific stance on the part of the legislator.

Indirect discrimination

According to the Non-Discrimination Act (Section 6.2.2), indirect discrimination means that "an apparently neutral provision, criterion or practice puts a person at a particular disadvantage compared with other persons, unless said provision, criterion or practice has an acceptable aim and the means used are appropriate and necessary for achieving this aim". Indirect discrimination violates real equality and manifests itself in situations where special measures would be needed in order to achieve real equality (Scheinin 1999, p. 242).

A typical example of indirect discrimination is a recruitment situation in which the job applicant is required to have a complete command of an official language, even though this is not an essential requirement from the perspective of successfully performing the job in question (Makkonen 2003, p. 11, Annual Report of the Ombudsman for Minorities 2008, pp. 14–16).

A decision (2079/02) on a complaint that concerned the right of a Muslim woman to wear a hijab in a passport photograph contained deliberations that have a bearing on indirect discrimination. Among the questions that had to be evaluated was whether a police service had interpreted the regulations on the recognisability of a photograph in a way that led in practice to a violation of Muslim women's freedom of religious expression. According to the

decision, interpretation of the guidelines had gone unduly far. The Deputy-Ombudsman asked the Ministry of the Interior to explicate the guidelines in order to bring uniformity to practices.

In one of his decisions last year (103/07) the Deputy Chancellor of Justice found an action of the Finnish Communications Regulatory Authority not only to be contrary to the requirements of the service principle, the obligation to advise and good language usage, but also to constitute indirect discrimination. The matter was also deliberated from the perspective of a need for positive discrimination.

The matter at issue was a television notification form that someone without a command of Finnish had filled out incorrectly. The Agency should have concluded on the basis of the returned notification form that the complainant had perhaps not understood the form's importance. The Deputy Chancellor of Justice pointed out that: "Although the operational guidelines on conducting transactions may be adequate in and of themselves, applying them or other operational models in a routine fashion can indirectly discriminate against those who for some or other reason associated with their person are in greater need than others of advice or other official services in order to take care of their affairs. Then, treatment on a basis of non-discrimination may require additional measures by the authority on a case-by-case basis."

Discriminatory use of language

Something that is also deemed in the Non-Discrimination Act (Section 6.2.3) to constitute discrimination is harassment, which is defined as: "the deliberate or de facto infringement of the dignity and integrity of a person or group of people by the creation of an intimidating, hostile, degrading, humiliating or offensive environment". It is mentioned in the Government Bill (HE 44/2003 vp, p. 43) **that the prohibition of discrimination in the meaning of the provision applies only to a "relatively serious action"**. It is another matter that even a less serious action can meet, for example, the hallmarks of defamation or slander.

Especially when they are expressed by societal decision-makers, statements that create a xenophobic atmosphere are a cause for concern. The ECRI noted in its report on Finland (2006, p. 17): "- - asylum seekers have sometimes been presented in political discourse including at high level, in a manner that is not respectful of these persons' dignity and that places the debate around asylum seekers in the realm of preventing abuse of the procedure rather than protecting human rights".

The cases dealt with by the Ombudsman include a good few in which inappropriate and discriminatory language has been used in reference to ethnic groups.

Complaints about newspaper articles written by a police officer attracted public attention (1261/96, 1905/98). In the complainant's view, the article in a Helsinki free sheet had reinforced negative preconceptions of the Roma and thereby encouraged discrimination against this segment of the population. The other article, in turn, was disparaging of rape victims in the complainant's opinion.

The Ombudsman took the view, on the basis of aspects relating to the maintenance of the police column in question, that the police officer had drafted the articles as part of his official functions. In his evaluation, the articles had contained racist, xenophobia-promoting and vulgar statements about various minority groups and women. Therefore, in his view, the officer had been in breach of his official duty based on his behaviour-related obligations. However, he did not deem it necessary to initiate a prosecution; instead, he considered the reprimand he issued to be a sufficient sanction for the officer. In the same decision, he drew the attention of the policeman's superiors to their responsibility for countering the harm that the articles had caused.

The issue in a later case (1517/99) was a "police column" in a local paper published in Nivala. The article, written by a policeman, made reference to Roma and warned, in relation to crime prevention, against admitting them to people's homes.

The Ombudsman took the view that the article had branded the entire Roma community as criminal. Although the police did indeed have knowledge of actual crime cases involving specifically Roma, it was probably not necessary to limit the precautionary advice intended for citizens to apply to Roma only, he pointed out in the decision.

In this instance, the Ombudsman's sanction was milder than in the case of the Helsinki policeman: he did not deem the policeman to have breached his duty in his official capacity and was content to draw his attention, for future reference, to the fact that a police officer has a duty to contribute to preventing the spread of racist and xenophobic attitudes in society.

Also well-known is a decision by a Deputy-Ombudsman (1655/95) in which attention was drawn to the fact that a police service had used the word "neekeri" (traditionally the equivalent of "Negro") in one of its reports. The view expressed in the decision was that this was not appropriate official police terminology; the word was regarded as having acquired negatively tinged connotations in the Finnish language.

The complainant in the case reported that he had been verbally humiliated or degraded in a police car because of his birth. It was not possible on the basis of the report received to adopt a stance on this. This is generally the final outcome in word-against-word situations of this kind, where additional evidence of inappropriate language having been used can not be obtained.

In 2000 (case 429/00) the Ombudsman investigated, on his own initiative, a notice that the Helsinki police service had published through the Finnish News Agency. The word "neekeri" was used several times in reference to the person suspected of having perpetrated a crime and in the kinds of contexts in which it could not, in the Ombudsman's opinion, be justified merely as an expression of identifying features or with other of the objectives of the bulletin.

The Ombudsman drew attention to the way in which the once-neutral word (meaning "Negro") had changed in tone (to something closer to "Nigger"). He also pointed out that the matter could not necessarily be resolved on the basis of how the majority of police officers or even the majority of Finns understand it: the evaluations of persons and groups other than those belonging to the majority population must be taken into account. In the view of the Ombudsman, the choice of word in the bulletin was inappropriate.

In 2002 (893/99) a Deputy-Ombudsman criticised a military lawyer who had given a newspaper interview from which it could have been inferred that the use of the word "neekeri" was not considered offensive in the Defence Forces. The interview gave the impression that the military lawyer was disparaging a court case in which a corporal was charged with calling a jaeger (ranger) a "neekeri".

These policy lines correspond to the practice that courts have followed: in 1998 the Eastern Finland Court of Appeal imposed a fine on a class teacher, who had called a girl of Caribbean-Finnish background a "neekeri", for slander.

The stricter demands that have been made with respect to appropriate language usage in official contexts as concepts have evolved prompted debate around that time. Thus Representative Sulo Aittoniemi asked in a written question to the Government (1271/1997 vp): "By what name should a Negro, a Somali or a Roma, i.e. a Gypsy, be called in order to avoid being legally held to account, and when has that prohibition come into force, for example in the activities of the police?"

The Government pointed out that in accordance with established practice, people should primarily be called by their given names or surnames irrespective of what language, national,

cultural, religious or other group they belonged to. When, for example, it is necessary to mention a person's nationality, the name for the nationality that the person in question possesses should be used. "In order to preserve good ethnic relations, it is important not to refer to the person's ethnic or other background by using a designation of a kind that the person him- or herself finds stigmatising, degrading or otherwise detracts from their human dignity."

The current Ministry of the Interior guidelines concerning the police's external provision of information recommend avoiding mention of a crime suspect's ethnic origin. If describing identifying features is unavoidable in order to apprehend a criminal or recognise a dangerous person, the guidelines state that the ethnic origin can be mentioned. According to resolutions issued by the Council for Mass Media, the media should follow similar policies.

Although one would expect that uniformity would have come to the authorities' use of language after the above-mentioned decisions, which were made some time ago, certain excesses have not been avoided subsequently, either. Thus attention has been drawn to the language used by a district court prosecutor: among other things, he had described an accused as having lived in "some or other banana state". In the decision by a Deputy-Ombudsman (1938/06) the choice of words was not found to be racist, intentionally at least, but in any event unnecessarily colourful and thus inappropriate.

An incident that was in and of itself minor – a shop assistant withdrew a tray of free food samples out of reach of the complainant's child – led to a notification of a crime being made, because the complainant suspected that their foreign background was the reason. A police decision to discontinue the investigation did not prompt criticism by the Deputy-Ombudsman with regard to its final outcome, but the reasons given for the decision had not been appropriate. It was stated in these, inter alia, that: "A person from a strange culture may find it difficult to understand that free food samples are on offer in a local grocery store for the purpose of sales promotion - - -" It was further stated in the decision that "These samples are not intended as a food supply for those of little means."

In the view of the Deputy-Ombudsman, the reasons presented by the officer in charge of the investigation could create the impression of a disparaging attitude to the social or economic status of the complainant and his family. In the decision (3797/05), however, the view taken was that the officer in charge of the investigation had been trying to advise the complainant and there was no reason to suspect that he had a negative view of or attitude to persons from other cultures. It sufficed in the case to draw attention to the requirements of the Constitution with regard to official use of language.

A public wisecrack about Swedish-speaking Finns by the Director-General of the Finnish Tourist Board MEK was deemed unsuitable on the part of a public servant (1604/07). In one case (955/08), the complainant took the view – with reason – that a song in a songbook associated with degree conferral ceremonies in one of the faculties of the University of Helsinki was discriminatory towards Russian-speakers. However, it was pointed out in the decision that the conferral committee did not fall within the scope of the Ombudsman's power of oversight. In any event, the matter was redressed in that the Chancellor of the university expressed regret for what had happened and announced that he would be taking measures to ensure that nothing like it happened at future conferral ceremonies.

The criticism expressed in complaint no. 315/07 was that expressions degrading Russian women had been used in a Finnish Broadcasting Company (YLE) programme (TV 1). It is established practice that YLE's activities come under the Ombudsman's oversight insofar as the special public service tasks in the Broadcasting Act are concerned. One of these tasks is to support tolerance and multiculturalism. However, the Ombudsman took the view that it could not be concluded on the basis of an individual programme or a statement made in it that the company would generally have acted contrary to the obligation mentioned. The importance of freedom of expression in the matter was also referred to in the decision.

Another decision worthy of mention in this context is one issued by the National Discrimination Tribunal (2193/66/2007) concerning an entertainment programme dealing with Roma that YLE had broadcast. The Tribunal concluded that YLE's action had not been so serious that the company would have been guilty of harassment in the meaning of the Non-Discrimination Act.

Positive discrimination

The Government Bill introducing the non-discrimination provision in the Constitution (HE 309/1993 vp, p. 44) contains a statement to the effect that the provision does not prevent the positive special treatment necessary to safeguard genuine equality, i.e. measures to improve the status and circumstances of a particular group. However, the provision does forbid such preferential treatment if it would factually mean others being discriminated against.

Section 7 of the Non-Discrimination Act defines conduct that is not classified as discrimination. The Act does not prevent "specific measures aimed at the achievement of genuine equality in order to prevent or reduce the disadvantages caused by the types of discrimination referred to in Section 6.1." What is then involved is positive discrimination. However,

it must be appropriate to its purpose. It is stated in the Government Bill proposing the Act (HE 44/2003 vp, p. 46) that positive discrimination is permitted only if it is temporary, and it may not be disproportionate relative to the objective set for it. On the basis of a statement by the Constitutional Law Committee (10/2003 vp), however, the reference to positive special treatment being temporary was deleted from the sub-section. The Committee took the view that positive special treatment is in any event linked to shortcomings in the implementation of genuine non-discrimination.

On the basis of various legislative provisions and their precursor documents, case law and the legal literature, Miettinen (2008, pp. 368–369) has summarised the limits of positive special treatment as follows:

- 1) Positive special measures must always have an objectively and appropriately reasoned aim, which is acceptable also from the perspective of fundamental and human rights. Since positive special treatment means a deviation from equal treatment of people, resorting to it is an exceptional measure in character.
- 2) Positive special treatment can generally be aimed only at the groups of persons whose genuine equality is jeopardised due to the discrimination grounds mentioned in Section 6.1.
- 3) Positive special treatment is justified only with the proviso that it does not mean discrimination against other persons. The aim with it is to bring some or other group of persons into a position of equality, but not into a better position than others. That being the case, any excessive favouring of a group of persons in the meaning of the Non-Discrimination Act could mean discrimination against other groups.
- 4) The latter demand requires positive special treatment to remain within certain proportions. The means employed must meet the requirements of the proportionality principle: they must be essential, appropriate and correctly dimensioned. What is fundamentally at issue is the requirement of reasonableness.
- 5) The procedural preconditions further include a planned approach and case-by-case consideration.

Thus formulated, the criteria are quite strict. In my view, the positive special treatment approved of in the decisions by the Ombudsman that I outline in the following meet these requirements, although the limits of this special treatment have not been pondered quite so precisely in the decisions.

On what level can positive special treatment be decided on? According to an argument presented in the legal literature (Miettinen 2008, p. 355) guaranteeing genuine equality is

a priori a task for the legislator; however, when positive special treatment does not mean discriminating against others, an authority can probably take the initiative and practise it. The broader the circle of people the measure affects and the more significant the deviation from general equality between people is, however, the more obvious it is that justification for positive special treatment can only be founded on authorisation granted by the legislator.

A complaint (649/02) decided by a Deputy-Ombudsman on in 2004 concerned the fact that only Muslims could be interred in a municipal cemetery established by the City of Turku. The complainant would have wished to bury an urn of ashes there. The deceased in question had not wanted to be interred in a cemetery belonging to the church. In the complainant's view, the City of Turku was breaching the prohibition of discrimination.

It was pointed out in the decision that persons professing a faith other than Islam or of another conviction have appropriate opportunities to be buried elsewhere. Appropriate burial places can be assigned for them even if there is no municipal cemetery for them. Where persons of the Islamic faith were concerned, it was further noted in the decision, exceptional needs were involved. Thus the city had acceptable grounds for meeting the needs of one religious denomination and no violation of the principle of non-discrimination was involved.

Several complaints (for example 208/08) were made on the basis that in certain indoor swimming pools in some cities reserved periods limited in a variety of ways had been arranged: generally for immigrant women, but in some cases also for immigrant men or for women in general. According to press reports, in Helsinki at least, the background of persons arriving to swim at these times had not been checked in practice.

The Deputy-Ombudsman took the view that an acceptable intention was in the background to the arrangement of reserved periods: arranging them for immigrant women (and in one case immigrant men) was, for example, a response to special needs, namely ensuring that they were taught to swim and promoting their integration. The period reserved for them was not disproportionately long relative to the time during which the public in general could swim in halls in the cities in question, either. Nothing that would have called for intervention within the framework of oversight of legality had come to light. However, something to which attention was drawn on a general level in the decision was that positive special treatment for immigrant women or men is allowed only as long as it is necessary in order to redress shortcomings that have been demonstrated.

Also deserving of mention is decision no. 2957/09, which concerned a loan scheme that the finance company Finnvera made available for women entrepreneurs only. What was involved

in the case was, of course, interpretation of a provision concerning positive special treatment in the meaning of the Act on Equality between Women and Men rather than of the Non-Discrimination Act. It was noted in the decision that the purpose of the loan scheme was to promote and support entrepreneurial activity on the part of women in a situation where fewer women than men sought to become entrepreneurs. The objective was to achieve genuine equality. Likewise significant was the fact that the loans for women entrepreneurs were not the only loans offered by Finnvera, which also provided a range of alternatives that men could choose to apply for. No further measures were deemed necessary in the matter.

Earlier, in the context of indirect discrimination, I referred to a decision by the Deputy Chancellor of Justice in which he took the view that, for example, lack of a command of the Finnish language could presuppose a special obligation to advise. It is probably a matter of taste whether to regard an accentuated duty to advise as positive special treatment or merely a measure in accordance with the service principle that is required already in Section 21 of the Constitution (Protection under the law) and in greater detail in the Administrative Procedure Act and one that meets the demands of adequate provision of advice and good use of language.

In the last few years alone we can find numerous examples of the need to advise persons with no command of Finnish or to arrange interpretation. In decision no. 862/06 the Deputy-Ombudsman emphasised that an employment office should already at the initial interview try to explain to immigrants how the unemployment security system operates. In case no. 3275/06 an employment office had not arranged for an interpreter to be present at the meeting where an integration plan for the complainant was being drafted. It was pointed out in decision no. 81/06 that immediately summoning an interpreter would have had the effect of strengthening the impression that a border check was appropriate. The view adopted in case no. 1857/08 was that it would have been better for a policeman either to summon an interpreter or allow the interrogation to be carried out by a colleague with a better command of English.

A policy line sketched out in decision no. 686/2000 of the Supreme Administrative Court can probably also be counted as positive discrimination; according to it, the cost of procuring the skirts worn by Roma women is so high that it can not be counted as being completely included in the costs covered by the basic part of income support, in which purchases of clothing are usually included. The Court referred in this to the provision of the then Constitution Act stating that the Roma have the right to maintain and develop their own language and culture. An action of a social welfare authority in accordance with this was criticised by a complainant as contrary to non-discrimination in case no. 3611/08; the Ombudsman re-

ferred to the Supreme Administrative Court decision already mentioned and found no reason to criticise the authority.

Prohibition of counter-measures

Section 8 of the Non-Discrimination Act stipulates that “no one may be placed in an unfavourable position or treated in such a way that they suffer adverse consequences because of having complained or taken action to safeguard equality”.

Counter-measures of this kind can be taken within or outside an employment relationship. With the Ombudsman’s power of oversight in mind, employment relationships, such as a public service relationship, are a key consideration. Examples of retaliation by an employer that are mentioned in the Government Bill (HE 44/2003 vp, p. 47) are dismissal, withdrawal of tasks and responsibility, stricter monitoring of job performance and overlooking an employee when vacancies are being filled. After an employer’s reaction, the employee is in one way or another in a worse position than before claiming discrimination. The negative changes that the employee experiences in the work atmosphere are not regarded as counter-measures in the meaning of the Act.

In a case resolved last year, a public servant took the view in his first complaint (3469/07) that a written reprimand issued to him had been a counter-measure in the meaning of the Non-Discrimination Act. In his view, it had been issued because he had reported workplace bullying of which he was the target to the occupational safety and health district and the occupational safety and health manager. In his second complaint (4216/08) he alleged that he had subsequently become the target of retaliation by his employer. In his view, his first complaint to the Ombudsman was the main reason for his being treated differently from other public servants. In his interpretation, his work and actions were being monitored especially closely.

According to the Deputy-Ombudsman’s decision, application of the Non-Discrimination Act’s prohibition of counter-measures would presuppose that a notification of discrimination would relate specifically to a discrimination ground in the meaning of the Act. Thus if a person has made, for example, a complaint on another ground and has subsequently been subjected to counter-measures, what is involved does not constitute counter-measures of the kind that the Act prohibits. This is not said expressly in the Act, but I believe it can be inferred from the purpose and structure of the Act as well as reasonably clearly also from what is said in the Government Bill (HE 44/2003 vp, p. 46): “It would be provided for in the

Section that no one may be placed in an unfavourable position or treated in such a way that he or she would be the target of negative consequences on the ground that he or she has complained or taken measures to safeguard non-discrimination *in the meaning of this Act*."

The complainant did not in his complaints link the measures that he had considered inappropriate specifically to any of the prohibited grounds for discrimination in the meaning of Section 6 of the Non-Discrimination Act, but instead took the view that he had been discriminated against on the basis of the "other personal characteristics" mentioned in the Section. It is stated in the precursor documents of the Non-Discrimination Act (HE 44/2003 vp, p. 41) that the list of prohibited grounds for discrimination enshrined in Section 6 would correspond to the grounds listed in Section 6.2 of the Constitution. The "other personal characteristics" mentioned in the precursor documents of the Constitution are a person's social status, wealth, participation in the activities of an association, family ties, pregnancy, legitimacy, sexual orientation and place of residence (HE 309/1993 vp, p. 44). No grounds of this kind, either, were involved in the complainant's case. For that reason, the view was taken in the decision that where the complainant was concerned there had been no discrimination in the sense of the Non-Discrimination Act and therefore the prohibition of counter-measures had not been violated, either. One can also refer to the stance adopted in the legal literature (Miettinen 2008, p. 354), according to which, in order to preserve the resolutive force of the prohibition of discrimination and the recognition ability of the prohibited distinctions, "other personal characteristics" must be equated to the grounds for discrimination listed in the Act.

In the Deputy-Ombudsman's decision, however, possible counter-measures were examined in the light of another ground: the view was taken that it followed from Section 21 of the Constitution (Protection under the law) that an authority as an employer must not take work-supervision or other measures that are unfavourable to an official or employee merely because the official or employee has complained to, for example an occupational safety and health district, about an action on the part of his or her employer. In this case it was deemed to have remained open to interpretation whether issuing a written reprimand had been a consequence of making a notification of harassment. There was no evidence of any other counter-measure.

In one older case (1336/92), in turn, the matter examined as a breach of the prohibition of discrimination contained in the general clause of the State Civil Servants Act was discriminatory treatment caused by the complainant having sent a complaint to the Ombudsman. Thus there are different kinds of possibilities of critically evaluating counter-measures, even if they do not fit within the limits of the Non-Discrimination Act.

Burden of proof

A special feature of the Non-Discrimination Act is a partly reversed burden of proof. Section 17 of the Act states: "During the hearing of a case as referred to in this Act, when a person who considers himself to have been a victim of discrimination as referred to in Section 6 establishes before a court of law or other competent authority information from which it may be presumed that the prohibition of discrimination has been infringed, the defendant must demonstrate that the prohibition has not been infringed. This provision does not apply to criminal cases."

According to the Government Bill (HE 44/2003 vp, p. 54), the complainant would have to present concrete facts on the basis of which a court, the National Discrimination Tribunal or other competent body dealing with discrimination affairs could assume that what was involved was unlawful discrimination in the meaning of Section 6. When the presumption of discrimination has come into being, the burden of proof is transferred to the defendant. The defendant would have to try to rebut the evidence presented by the complainant or weaken it to the extent that it remains below the threshold of proof. Thus merely a claim or a suspicion that is not founded on presentation of facts would not transfer the burden of proof to the defendant.

A question that is interesting is whether also in oversight of legality the explanation given in a discrimination matter in the meaning of the Non-Discrimination Act should be evaluated in such a way that the above-mentioned reversal of the burden of proof should be taken into consideration. After all, also the Ombudsman is a "competent authority". Of course, it can be supposed that what "competent authority" means in the provision is mainly one of the authorities which, unlike the Ombudsman, make enforceable decisions.

In the practice followed in the Ombudsman's work, for reasons that include the proceedings being conducted in writing, no attempt is generally made to weigh, for example, the credibility of the different parties' divergent accounts in the balance. Nevertheless, some evidence-related principles have taken shape. One has been called the presumption of a public servant's reliability: it is assumed that a statement made by a public servant under his or her accountability for official actions is true, unless otherwise demonstrated (Lauri Lehtimaja: *Selvityspyyntö ja syytteenvaara*, Defensor Legis 9–10/1988, p. 517). If, in turn, a situation can be characterised as word-against-word, the view generally taken has been that the complainant's assertion remains unproved if it is not supported by any other report (e.g. 2100/06). On occasion, however, a decision by the Ombudsman has involved weighing differing accounts against each other to see which can be regarded as the more credible (viz. a decision concerning a cell death 1147/04).

All in all, it seems possible in principle that in the Ombudsman's decisions in cases concerning interpretation of the Non-Discrimination Act, the special burden-of-proof provision in the Act would be followed. In practice, it has not been necessary to weigh differing accounts against each other in this way. By contrast, the Deputy Chancellor of Justice has issued a decision in which a clear stance on this matter has been made. It (150/08) concerned a decision by the Municipal Board in Kokemäki to grant a summer work subsidy to employers in the municipality to help them put young locals to work. In the view of the Deputy Chancellor of Justice, "there were reasonable grounds to suspect that applicants other than those officially domiciled in Kokemäki would, as a result of the conditions subject to which the employment subsidy was granted, be treated in the application situation less favourably than applicants from Kokemäki. Thus, in my perception, the presumption of direct discrimination in the meaning of Section 17 of the Non-Discrimination Act has come into being. - - - The report furnished by the Municipal Board in Kokemäki does not contain facts that would rebut the above-presented evaluation that a presumption of discrimination has come into being."

There do not appear to be any reasons why the Ombudsman's interpretation of the burden of proof in a case concerning the Non-Discrimination Act should deviate from the premises adopted by the Chancellor of Justice and other authorities who oversee compliance with the Act. Thus my conclusion is that also the Ombudsman should observe the burden-of-proof provision of the Act. For the sake of consistency, a corresponding course should be followed when the Act on Equality between Women and Men is interpreted, because also it provides for an equivalent reversed burden of proof.

To conclude

The annual number of complaints to the Ombudsman in which ethnic discrimination is alleged is not large. This is to be expected, because there is a dedicated authority, the Ombudsman for Minorities, tasked with countering ethnic discrimination. In 2008, for example, her office had to deal with over 700 client cases (however, not all contacts relate to the situation of a single individual).

Alongside the number of discrimination experiences of the kind revealed in questionnaire-based surveys, the role of instances of discrimination that are reported to the Ombudsman for Minorities and other authorities is nevertheless small. A contributory factor here may well be people's ignorance of their rights, although the level of knowledge in Finland is higher than in the European Union in general. Here, 63% of interviewees said they knew their rights in situations where they became the objects of discrimination or harassment; the corre-

sponding figure for the EU as a whole was 33% (Eurobarometer: Discrimination in the EU in 2009). On the other hand, the survey focused on all kinds of discrimination and it can be asked how many of the survey sample in Finland had been possible targets of ethnic discrimination.

When the practice followed by the Ombudsman is examined over a longer timeline and account is taken also of situations that are close to ethnic discrimination, the number of cases is, however, reasonably significant. They provide a cross-section of many typical ethnic discrimination situations. The cases demonstrate that, although fairly much attention has been paid to ethnic discrimination in various ways, incorrect action on the part of authorities still occurs.

An assessment made on the basis of a study some time ago to the effect that promotion of non-discrimination has not yet established itself as a general active guiding principle in the actions of authorities is probably correct (Miettinen 2008, pp. 371–372). There is a need for greater sensitivity to be able to recognise a situation in which a matter must be considered from the perspective of ethnic equality and non-discrimination, and to possess the expertise to act lawfully in such a situation and in a way that promotes fundamental and human rights. The Parliamentary Ombudsman has a distinct and important role in developing the actions of authorities towards non-discrimination. 