



Moving towards better protection 2002

Senter mot etnisk
diskriminering





The Centre for Combating Ethnic Discrimination
equal treatment • equal opportunity • equal rights

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Moving towards better protection 2002

Contribution from The Centre for Combating Ethnic Discrimination regarding the nature and extent of ethnic discrimination in Norway.

Foreword

This report, *Moving Towards Better Protection 2002*, is an English language translation of *Underveis mot et bedre vern 2002*, the fourth in a series released by the Centre for Combating Ethnic Discrimination (SMED). SMED began four years ago as a temporary pilot project. Since that time, the government has decided to confer on SMED status as a permanent agency.

This is a natural opportunity for us to present our experiences from the past four years, and to present for the first time statistics based on our legal aid work which account for complete calendar years.

The newly proposed law against ethnic discrimination has been subjected to review and it is expected that the Storting (Norway's legislative assembly) will implement the law this coming Spring. This represents a milestone for SMED; the implementation of a legal framework covering all areas of public life, which can replace the unsatisfactory fragmented laws of today, has been one of our primary concerns. Following up our suggestions regarding the law and its proposed monitoring body will naturally be given top priority in the coming year.



Moving Towards Better Protection 2002 is divided into three sections:

- The first three chapters present our experiences from the past four years, and summarise important developments in our work against ethnic discrimination.
- Chapters four and five provide a more in-depth look at our experiences in two specific areas: health and social services and immigration law. Both of these areas have presented SMED with considerable challenges: health and social services because cases in this area often deal with indirect discrimination and require some experience in order to recognise the elements of discrimination; and immigration law because it is the area in which complaints have increased the most over the past year, while at the same time many of these cases are on the borderline of SMEDs jurisdiction.
- The last two chapters, six and seven, present those areas which can best be described as challenges for the future. Chapter six presents SMED's study mapping the percentage of minority representatives in county and municipal government, compared with the percentage of minorities in the general populations of the respective regions. Chapter seven explores the various arguments surrounding primary language instruction and Norwegian language instruction, outlining important ways to ensure that persons with minority backgrounds are not discriminated in educational settings.

During the four years that SMED has been operational it has become increasingly clear that the work against discrimination must be expanded to also include work which promotes ethnic equality and equal opportunity.

Guro Fjellanger

GURO FJELLANGER
SMED's Head of office, June 2003

What does SMED do?

SMED provides free legal aid, documents the nature and extent of discrimination, and makes policy recommendations.

- The Centre for Combating Ethnic Discrimination was founded in 1998 as a State agency.
- The Centre's employees provide free legal aid to individuals that meet ethnic discrimination because of their religious beliefs, skin colour, or national/ethnic origin.
- The Centre documents the nature and extent of discrimination in Norway.
- The Centre makes policy recommendations and works proactively.
- The Centre cooperates with other organizations and agencies in order to prevent discrimination.
- The Centre's jurisdiction is nation-wide.

Who works at SMED?



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Head of office



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Beate Gangås (Commissioner of Police)
Lamisi Gurah (Leader of Afrikan Youth in Norway)
Marvin Wiseth (CEO)
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Part I
**SMED's experiences from
the past four years**



Chapter 1

Meeting others as oneself



WHEN THE CENTRE for Combating Ethnic Discrimination (SMED) released its previous report *Underveis mot et bedre vern 2001*, the racially motivated murder of a young boy in a suburb of Oslo earlier that year had shocked the country and placed anti-racism and anti-discrimination at the forefront of the public agenda in Norway. Since then, the «War against terror» initiated in the aftermath of the attacks on the World Trade Center and Pentagon on September 11, 2001 has reversed the tide. Through media and the course of public debate it has been possible to discern the contours of growing anti-Islamic sentiment, stripping people of a certain cultural background and religion of their identity as individuals in favor of gross generalization. This tendency reached a climax when Norway was identified as a potential terrorist target by a leading Al-Qaeda spokesman. Just days after the threat was made public, a Norwegian of Pakistani origin who had contracted for a garage to be built next to his home received a letter from the entrepreneur that his firm had come to the decision that they would no longer take on Muslim customers. The letter went on to state that the entrepreneur assumed that the man was Muslim, based on his name, and that this policy would therefore also apply to him.

This spring there has been an increased focus on discrimination in the housing market. The Parliament accepted the government proposal of explicitly forbidding discrimination in housing, whether during sale, rental or subletting. At the same time, the media reported on a known busi-

nessman who had demanded compensation from a realtor that hadn't informed him that the apartment he had purchased in an affluent Oslo suburb was located near public housing often used to house immigrants. In reference to this story, the daily newspaper Dagbladet ran an editorial on May 30 this year, stating that

*«The case is a sad reminder of how casual acts of discrimination serve as the racism of our time. **Non-Norwegians are lumped together as a group, losing their individuality and thereby their ability to meet others as themselves**» (Our translation, emphasis added.)*

Generalization, and the subsequent loss of one's ability to meet others as oneself, is in many ways at the heart of discrimination.

The nature and extent of ethnic discrimination in Norway

For four years SMED has worked against discrimination based on ethnicity, religion, creed, language, skin color, nationality, and ethnic or national origin. An overview of this work is presented in the next chapter.

Simply put, discrimination can be defined as irrelevant negative differential treatment, or differential treatment which has a disproportionate impact on one particular group, when this result is not otherwise justified. On this basis, there is a clear distinction between illegal differential treatment and legal differential treatment. A requirement of particular religious affiliation, for example, might be legal when it pertains to employment in certain positions within a religious organization;

similarly, a minimum language proficiency requirement might be legal when it pertains to employment of a language teacher.

In order to further illustrate different kinds of discrimination it is helpful to distinguish between direct and indirect discrimination. This distinction is included in a newly proposed law against ethnic discrimination, as well as in a new amendment to the Norwegian labor law. Direct discrimination is often described as likes not being treated alike, while indirect discrimination is described as like treatment of individuals that are not alike. There are many examples of seemingly neutral practices which result in discriminatory treatment¹:

- Workplace uniform requirements. A seemingly neutral uniform policy entailing standardised headwear can be problematic for individuals who cover their head in a certain way as part of their religious observance, unless the requirements are flexible enough to allow for exceptions in these circumstances.
- Minimum height requirements for police recruits. People from South-East Asia, for example, are often shorter than ethnic Norwegians. Certain height requirements will disproportionately effect the ability of people with South-East Asian backgrounds to serve as police officers.
- Security clearance requirements. Rules pertaining to security clearance require residence for a certain number of years, and can,

without flexible enforcement, represent a barrier for certain individuals with regards to certain job tasks and employment opportunities.

- Requirements that parents and children converse in Norwegian during supervised visits entitled by law. This can represent a barrier to dialog between parents and children in those cases where a family normally does not communicate with each other in Norwegian.

Both direct and indirect discrimination can occur, despite lack of motive or wish to discriminate. The significant factor is the ultimate result. This is an important distinction between racism and discrimination. When we take as our starting point that discrimination deals with results, and have as our goal equality and equal opportunity, it is easier to both identify discrimination and reach a consensus as to which measures should be taken to combat it.

We all have different starting points

Certain figures underscore the importance of focusing on results when seeking to alleviate the problem of discrimination.

Unemployment

- Registered unemployment among immigrants increased from 7.9% in February 2002 to 9.8% in February 2003. For the total population, the unemployment rate rose from 3% to 3.9% over the same period.



- Immigrants from Africa top unemployment statistics, with 17.8% unemployed. This is four times higher than the general rate.
- The unemployment rates for immigrants from Asia and Eastern Europe are, respectively, 12.8% and 11.1%.

In addition to difficulties immigrants face in getting hired, statistics show that policies whereby the last to be hired is the first to be let go also greatly affect immigrant workers.

Political representation

- In 14 of 19 county councils there are no people with immigrant background serving as elected representatives
- There are 68% fewer people with immigrant backgrounds serving in county councils than could be expected based on the number of eligible immigrant voters.
- There are 57% fewer people with immigrant backgrounds serving in municipal councils than could be expected based on the number of eligible immigrant voters.
(SMED's own study)

In key areas of public life, such as the employment market or important arenas of political influence, people with immigrant backgrounds are underrepresented, despite the fact that there is no legitimate reason why this should be the case.

Minorities face a greater number of obstacles when attempting to partake in the benefits society has to offer. In our experience it is not enough to simply work to relieve the burden of discrimination as it arises

in individual incidents. It is also important to aim for the establishment of full equality and participation in all areas of public life.

This realization has played a vital role in the broadening of SMEDs perspective. In our mission statement from 1998 SMED is defined as:

*«... a pilot project which shall provide legal aid to individuals who have been subjected to discriminatory practices, and monitor and document the extent and nature of discrimination. Discrimination is here understood as **negative differential treatment on the basis of religious creed, race, skin color, or ethnic or national origin.**» (Unofficial translation, emphasis added.)*

SMED's suggested changes to the wording of the proposed law against ethnic discrimination in February 2003 call for expanding the scope of the anti-discrimination project:

*«The law's purpose is to guarantee **equal rights and opportunities to all, regardless of ethnicity, religion, creed, national origin, language, or skin color.** These aims shall be ensured through **legal protection for individuals against discrimination based on ethnicity, religion, creed, national origin, language, or skin color; as well as through a legally obliging government, employers and business representatives to work to achieve full ethnic equality.**» (Unofficial translation, emphasis added.)*



Moving towards better protection

Today the laws which forbid discrimination on the basis of ethnicity are fragmented and difficult to discern, providing little protection in large areas of public life, and few sanctions in those instances where protection is in place. Since SMED's establishment four years ago, the establishment of a general law against ethnic discrimination has therefore been a top priority.

Even in the first Moving towards better protection report in 1999 the need for better protection was touched upon:

«In addition to the lack of legal precedents, today's legal framework for combating discrimination is fragmented and incomplete. The legal guidelines are primarily governed by criminal law, which hinders the establishment of effective sanctions against discriminatory practices or situations.»

ECRI¹, in its latest set of recommendations to member states, highlights the importance of constitutional protections ensured through civil and administrative law, as well as through criminal law. Norway today is far from meeting ECRI's recommendations.

There is no reason to criminalise every undesirable action. Discrimination in its most direct and premeditated form is already covered by the anti-racism provisions of the penal code². Here strict rules of evidence are maintained in order to prevent the punishment of innocent parties. In order for an action to be found punishable by law the court must first establish, «without the shadow of a doubt,» a chain of events which implicate the accused party's guilt.

Guilt is determined on the grounds of criminal intent or gross negligence, given that the accused party has been determined to have been of sound mind. There is no doubt that there is a real need for criminal law which can address the most reprehensible and injurious forms of discrimination.

Besides blatantly criminal actions, however, there exists a whole set of actions and outcomes of actions which are also injurious to the individual, either economically or otherwise, and which, seen from both an individual and societal perspective, are undesirable, being both morally and ethically wrong. Civil law can, through the use of sanctions such as the awarding of damages, provide individuals with compensation for such actions, as well as serve to prevent their reoccurrence.

In such cases, criminal punishment is neither an effective nor proper tool, as the cause is for the most part unintentional negligence. It is extremely difficult to prove intent in a case of indirect discrimination. Often the nature of the injury incurred does not warrant a criminal punishment. By adopting and applying civil law we will have an adequate and effective tool for preventing ethnic discrimination, as well as an effective means of providing compensation for economic and non-economic damages sustained by discriminatory practices.

Law rooted in human rights and an active commitment to equality

SMED has submitted a thorough commentary on the newly proposed

1) «The European Commission against Racism and Intolerance».

2) Cf. § 135a, §349a and §390 as well as §232 and §292 of the penal code.

law against ethnic discrimination. Our comments spring from the desire for a general and consistent law which can serve as a practical tool for ensuring equality and equal opportunity. Some important points include:

- **The incorporation of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) into Norwegian law.** SMED supports the proposal of such an integration. This would send an important message that combating racism and promoting equality on the local level is a continuation of our international obligation to honour fundamental human rights, also in everyday situations.
- **Positive treatment** That the proposal allows for positive treatment is an important recognition that our society does not enjoy full representation of all its members in all its public arenas. Positive treatment is necessary to counteract this imbalance, and ensure true equality and equal opportunities for participation in society.
- **Shared burden of proof** Shared burden of proof means that a person who experiences discrimination is obligated to provide proof that discrimination has taken place. The person accused of discrimination is then obligated to provide proof that discrimination has not taken place. This places the burden of proof on the party which has the most compelling evidence.

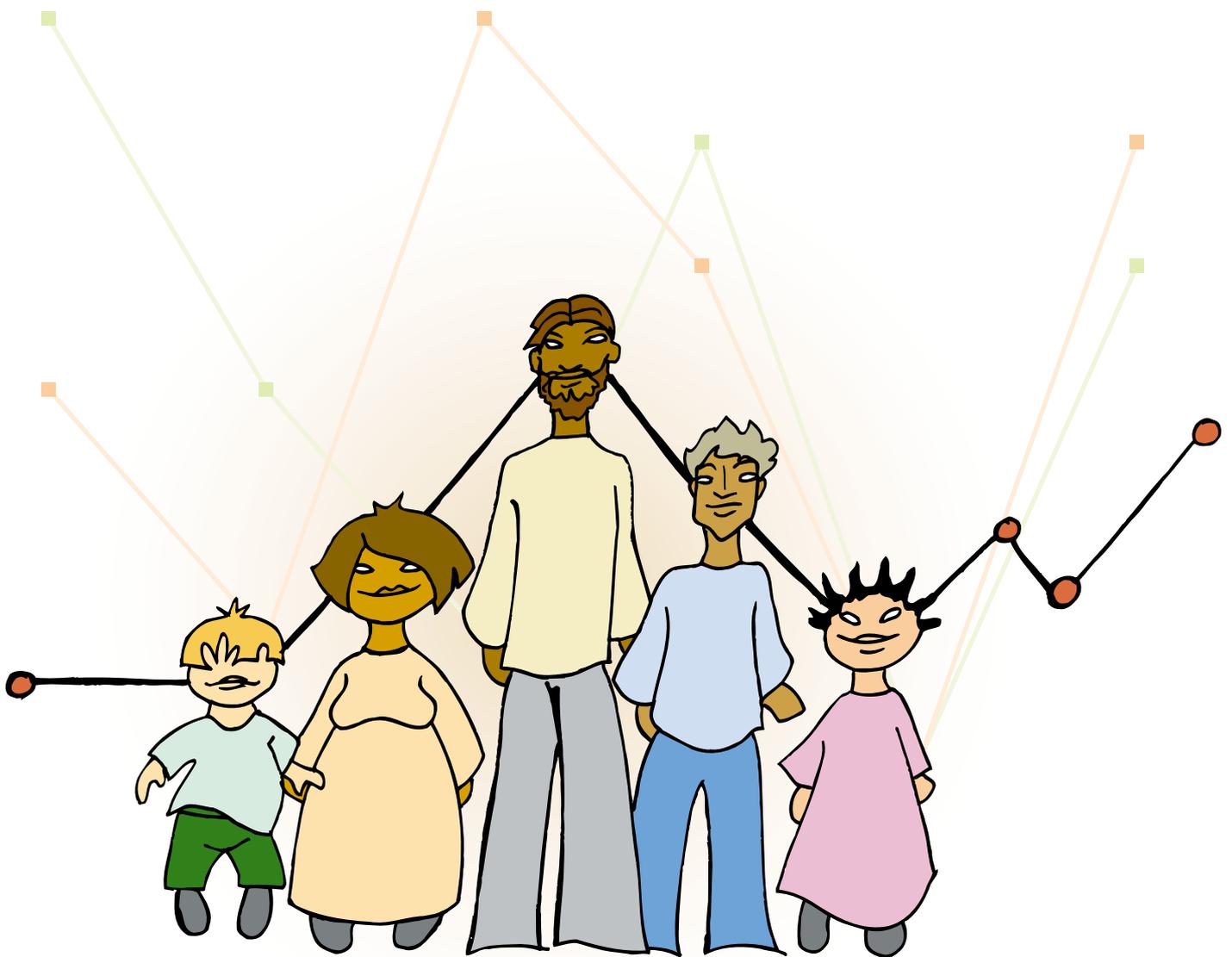
- **Positive Action** This represents an obligation on the part of government, employers and business representatives to work for ethnic equality. This represents a step forward from simply punishing isolated incidents of discrimination, requiring the development of active strategies for achieving ethnic equality.

Equality and equal opportunity

Earlier in this chapter we identified being deprived the ability to meet others as oneself as central to understanding the way in which discrimination affects individuals. The terms «similarity» and «equality» are often used to distinguish important aspects of this phenomenon. The typical Norwegian tendency to define sameness as a positive social trait collides roughly with the variety of individual and group difference represented in Norway's various minority communities today. That which on the surface seems to be indicative of sameness, and by extension equality, can in fact in the context of a diverse population lead to inequality, as we have seen in the examples of indirect discrimination given earlier in this chapter.

One's ethnic background, religion, creed or language do not in and of themselves steer one's interests and abilities in terms of career choice, where one wishes to live, or how one wishes to live. Once we come to this realization, work against discrimination becomes inseparable from work for equality, regardless of national origin, religion or creed, language or skin color.





Chapter 2

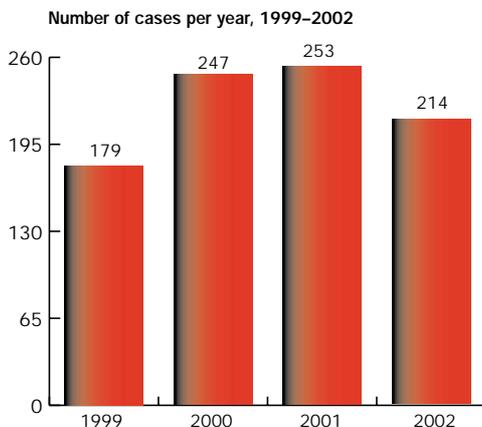
Who comes to our centre?

An overview of SMEDs users from 1999–2002

AS A LEGAL AID provider SMED has been compiling case information for the past four years. Although statistical data based on this casework has partially been made available in annual reports and other publications, it has not previously reflected full calendar years nor provided the opportunity to compare data from all the years SMED has been active. The following article seeks to provide a statistical overview of SMEDs cases according to the types of discrimination reported and the demographic makeup of our users; we wish to explore possible links between our users' backgrounds and the areas of enquiry (such as employment, housing etc). Towards the end of this article we will also use the data to sketch a profile of typical SMEDs users. Those readers wishing more data on specific kinds of discrimination are referred to our expanded annual report of 2002¹, as well as to our report *Moving Towards Better Protection 2001*.

the Centre had started to offer legal aid services from mid-February that year and that it took a while before word of the service got around. Variations over time can also be explained by varying media coverage of the Centre, as well as changes in our internal organisation. These factors might have played a role in 2002, as staff turnover and a subsequently more introverted profile during the autumn of that year resulted in a slightly lower media presence, possibly explaining a lower awareness of the Centre at the time and therefore also a lower number of new complaints. It should be noted, however, that the number of cases handled in any given year does not necessarily reflect the level of activity for that period of time. Some cases are extremely demanding and time-consuming, while others can be resolved easily or referred to other agencies.

Each year the Centre receives a small number of complaints which fall outside of our jurisdiction. When possible these are referred to other, more appropriate agencies. Until recently these complaints were registered by the Centre as cases and are therefore reflected in SMEDs statistics. The statistical data, however, makes clear that these cases were outside our jurisdiction and have been referred elsewhere. From autumn 2002 we have begun to undertake a preliminary evaluation before a complaint is officially registered as a case. This will most likely be noticeable in future statistics, as more complaints will be referred elsewhere without ever being officially registered.

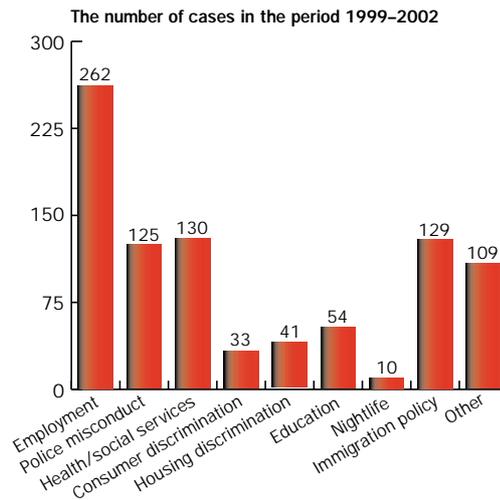


At the end of 2002 the Centre had handled a total of 893 cases, representing 223 cases per year on average. As the figure shows, the number of cases handled by the Centre has varied from year to year.

This fluctuation could be the result of a number of different factors. For example, the number of cases in 1999 was lower than that in subsequent years. This might be explained by the fact that

1) SMED makes both a short brochure that is distributed to our expanded network and a longer annual report every year.

Overview over case areas



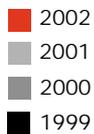
The diagram below shows the largest case areas divided into cases per year. Over the four year period there has been a marked increase in the proportion of cases dealing with discrimination in employment. The percentage of complaints regarding police misconduct decreased slightly only to increase again in 2002. The percentage of complaints about health and social services has decreased from 19% in 1999 to approximately 8% in 2002. Cases dealing with immigration policy decreased, only to increase in 2002.

The above graph shows that cases dealing with employment, police misconduct, health and social services, and immigration policy have been the most common over the past four years. It is also possible to compare the number of complaints reported in each case area from one year to another over the entire four year period.

Variation over time for the largest case areas

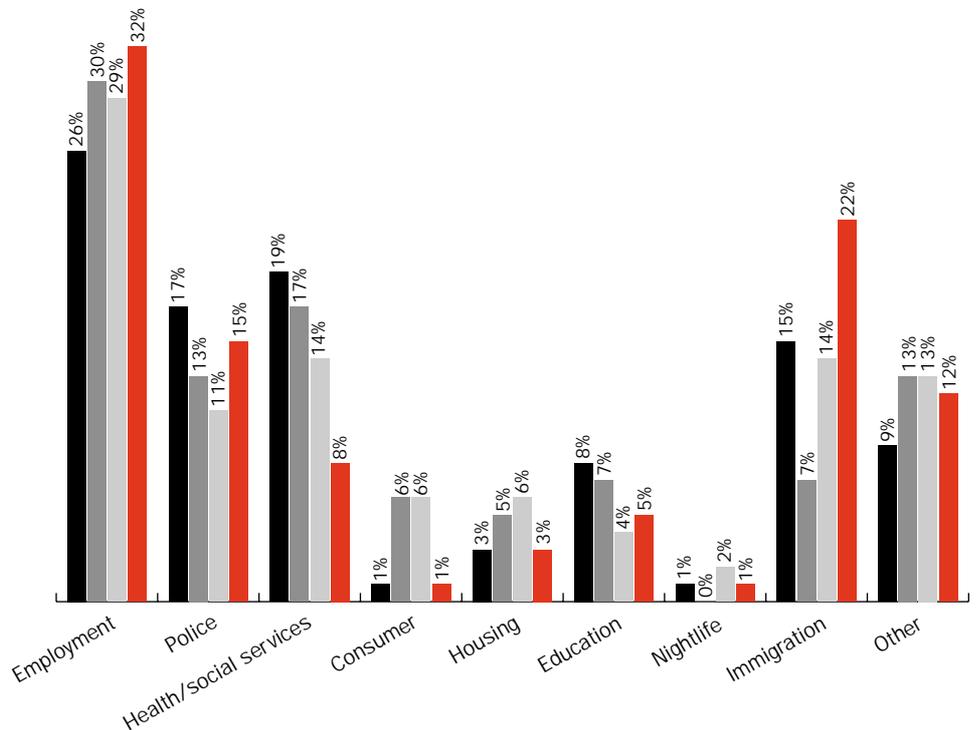
Let us look more closely at the kinds of cases represented in each of the largest case areas: employment, police misconduct, health and social services, and immigration policy.

Areas of enquiry (in percent) by year



Total 1999–2002

- Employment 29%
- Police 14%
- Health/social services 15%
- Consumer 4%
- Housing 5%
- Education 6%
- Nightlife 1%
- Immigration 14%
- Other 12%



Employment

Complaints of discrimination in employment have always represented the largest case area. The percentage of employment cases compared to all other case areas has increased during the past four years, from 26% in 1999 to 32% in 2002. The figure below shows that unlawful termination of employment, discriminatory hiring practices, and harassment were among the most frequent complaints of this kind².

Immigration policy

Complaints concerning immigration policy have steadily increased over the past four years. An exception to this trend can be seen in 2000 when SMED temporarily implemented a restrictive policy towards cases of this nature. The Centre’s experience with cases involving immigration policy is further detailed in chapter four of this report (Discrimination in immigration policy).

Police misconduct

The percentage of complaints alleging police misconduct has varied from year to year. The proportion of police misconduct cases compared to other areas has been as high as 17% in 1999 and as low as 11% in 2001. Police misconduct cases have covered a variety of different complaints.

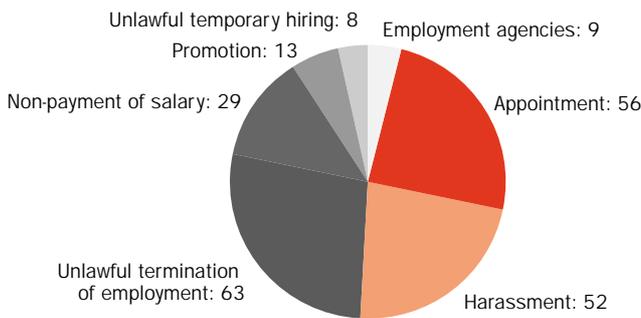
Health and Social services

Complaints concerning health and social services have led to a large number of cases, although there are large fluctuations in the number of cases from year to year. This is partially explained by changes in the Centre’s referral policy. The halving of cases dealing with health and social services from 2001 to 2002 can be explained by increased referral of cases to the ombudsman for health and social services.

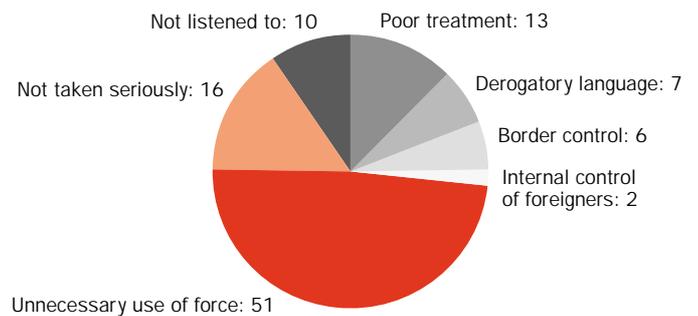


The figure below shows that unnecessary use of force was the most frequent allegation. Other common allegations are police failure to listen to the complainant or to take the complainant seriously, as well as generally poor treatment.

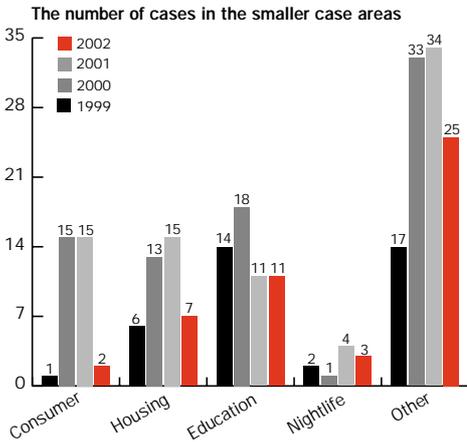
What complaints were received regarding working life?



What complaints were received regarding the police?



2) The figure includes most of, but not all areas of complaint.



The smaller case areas- can we see any changes over time?

The remaining – smaller – case areas can be grouped into five categories: general consumer discrimination, housing discrimination, discrimination in the educational system, nightlife discrimination, and «other».

Consumer discrimination

An example of consumer discrimination might be a bank refusing to accept a person as a customer because of the person’s ethnic background. The 33 registered cases of consumer discrimination involved complaints against banks, retail stores, and service providers, as well as a number of cases defined as «other».

Housing discrimination

The 41 registered cases of housing discrimination reflect complaints of discrimination during rental and sale of property, as well as harassment and property damage. Not all complainants were able to identify who they felt was responsible for the discrimination they experienced. When responsible parties were alleged, property owners were named 12 times, as were neighbours, while tenant councils were named 8 times.

Discrimination in the educational system

Complaints concerning discrimination in the educational system centered on allegations of harassment, religious discrimination, unfair treatment and disciplinary action, and unfair evaluation of relevant previous education. Other students, teachers, school administration and evaluatory committees were alleged to be responsible.

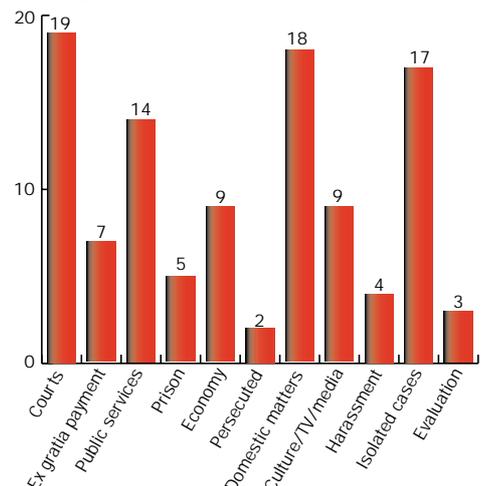
Nightlife discrimination

Over the past four years we have had ten cases of nightlife discrimination. Despite the relatively low number of registered complaints, these cases are significant in that they have resulted in changes in political, legal and police policy. The low number of cases, however, makes it difficult to generalise about the characteristics of cases of this nature.

«Other»

Cases grouped as «other» represent no small portion of SMEDs total case-load. Several of the subcategories shown in the figure below have played significant roles in SMEDs advisory work and documentation, especially cases involving complaints of discrimination in the legal system and concerning domestic matters. Cases concerning public services are described in our 2001 report and are often attributed to insufficient or lacking interpreter services. Some of the cases in the «other» category are extremely complicated and require discretion due to the involvement of individuals with serious personal and psychological problems.

Categories of cases within «other», 1999–2002



The demographic make-up of our users

With our user's permission we register data concerning our users' age, gender, ethnic background and number of years in Norway. Below we will compare this data from the past four years, and explore the implications our user make-up might have for our ability to document discrimination in Norway.

Gender

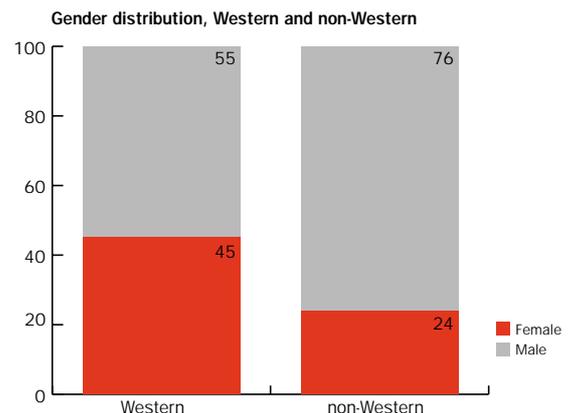
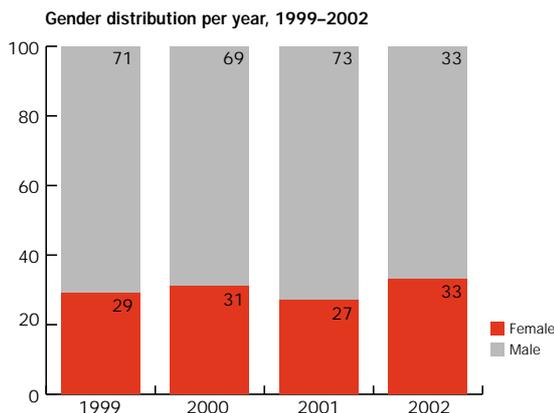
Complaints from women represented 30% of all complaints from 1999 to 2002. This figure should not, however, be interpreted to mean that women experience less ethnic discrimination than men. One possibility is that women are less likely to actively seek out legal aid services. There might also be other explanations for the lower number of complaints from women.

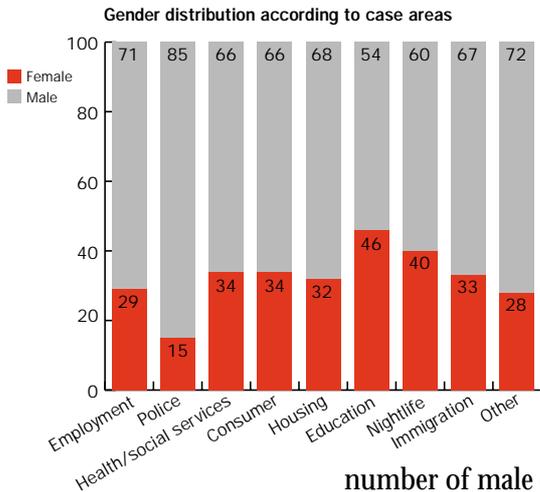
In the Centre's experience it is most often men who contact help when family members are in trouble, and it is often the male head-of-household who handles family legal matters. This pattern is especially common in housing and immigration cases, for example. Although

the Centre gives legal advice with the entire family's interests in mind, it is often a male family member who has initiated contact and with whom we communicate.

The diagram below shows no major variations over the past four years, with the percentage of complaints filed by women varying from just under to just over 30% of our total number of complaints.

Can our users' countries of origin somehow account for the stability of this lower percentage of complaints from women? The following diagram compares complaints by gender and Western/Non-Western background. (By «non-Western» background we mean persons whose country of origin is not within the EØS area, the USA, Canada, Australia or New Zealand. This definition is in line with Statistics Norway's definition of «non-Western».) Here we can see that Western women contact the Centre nearly as often as their male counterparts (47/53%). The difference between complaints from non-Western women and non-Western men, however, is much more significant: only one in four complaints from all non-Westerners come from women.





Looking at the total number of complaints from the past four years we can see different gender complaint patterns for Western and non-Western user groups. Although there is a slightly greater

number of male complainants among our Western users, the number is not dramatic. Whereas non-Western women represent only a fourth (24%) of the total number of non-Western users, Western women represent 45%, or nearly half, of our Western users. This indicates the need for an increased focus on reaching non-Western women and increasing their ability to make use of our services³.

Results from a survey of legal aid agencies presented in Juss Buss Retts-hjelp 2001⁴ revealed that very few immigrant women contact legal aid agencies for help. This despite the fact that the level of pressure experienced by the immigrant women taking part in the study was higher than that experienced by the general population. The study revealed that women in general have less of their legal aid needs met than do men, citing lack of understanding of the legal system as a possible explanation. The barrier for seeking out legal aid services is clearly higher for immigrant women than for immigrant men or women in general.

The previous figure shows that women have contacted the Centre with complaints fitting in under all of the Centre's case areas, and in most

areas there is little difference between the percentage of male or female complainants. It is interesting to note that women, when they do seek legal aid, seek aid for the same kinds of complaints that men do, suggesting that gender does not play a significant role in experience of ethnic discrimination. It should be noted that there is a slightly lower percentage of women with complaints concerning police misconduct, which does not seem surprising as women in general have less contact with the police than do men. Education is an area in which complaints by women are solidly represented.

Age

Our users span all age groups, although there is a markedly high concentration of users between the ages of 30 and 50.

While users between the ages of 30 and 50 have always been the largest group of users, there have been variations in the categories «under 30» and «over 50». In 1999 persons over 50 years of age represented the second largest group, about a quarter of all users – in 2001 this group had shrunk to approximately a tenth of the total number of users, increasing only slightly the year after. Users under thirty made up a larger proportion of our users in 2002 than they had in previous years. In 2001 users between 30 and 50 years of age represented a larger group than they had in previous years.

Does age have any significance in relation to the kinds of complaints users report? The diagram shows that users under thirty dominate in two (relatively small) case areas, namely education and nightlife discrimina-



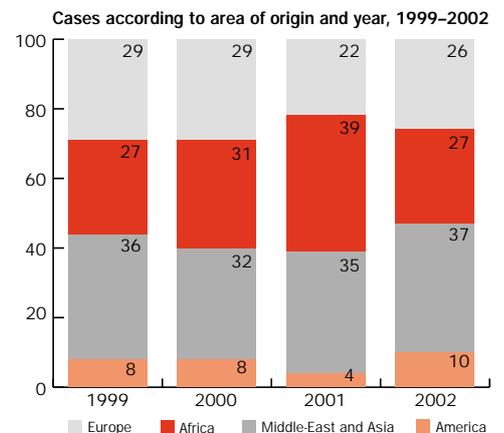
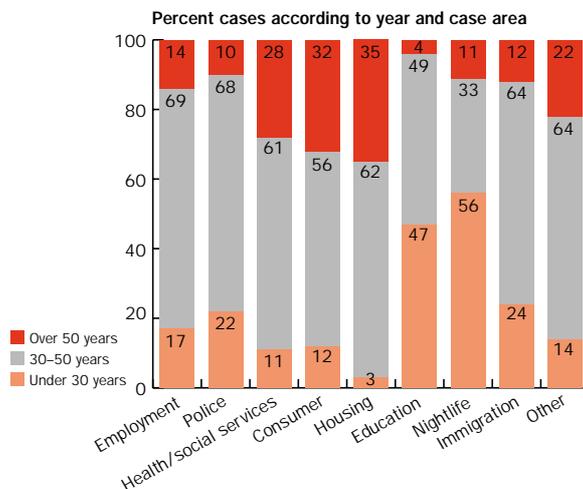
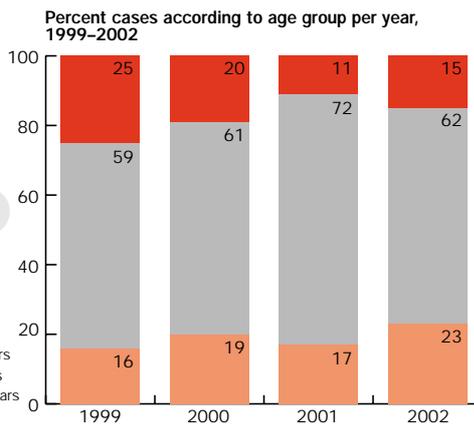
3) This category is not entirely unproblematic, as the definition of countries as «Western» and «non-Western» might give associations to a world divided into «white» and «black» areas, or neatly ordered, homogeneous cultural blocs. We make use of this designation here simply in order to gain an overview of significant differences we should be aware of, and leave the problematization of the normative usage of such designations for another time.)

4) JussBuss is a student based legal aid service. The survey was carried out by the Institute of legal sociology at the University of Oslo.

tion. Users over fifty appear to represent a larger portion of complainants in housing, consumer and health and social services cases. Users between thirty and fifty stand for more than 60% of nearly all cases and all case areas, with the exception of consumer complaints, education cases and cases dealing with nightlife discrimination. It is worth noting that these three areas are relatively small, based on the number of actual cases in each area.

Area of origin (ethnic background)
SMED has made a practice of registering our users' area of origin (ethnic background). We do this by asking individuals where they come from, when this information is not otherwise apparent from case documents. For the most part our data relies on our users' own self-identification. This focus on area of origin can at times be controversial, however- a young woman from Turkey, for example, might not find «Turkish» to be an appropriate designation for herself, wishing instead to be identified as «Kurdish».

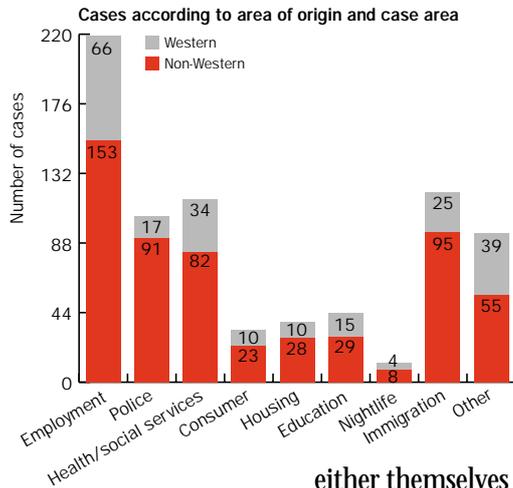
Many people have asked SMED whether we mostly help people from Asia or Africa, or whether people with «dark» skin are our most frequent users. During the course of the past four years we have been contacted by persons from all parts of the world in need of legal advice because of experiences of ethnic



In summary, persons between the ages of thirty and fifty represent the largest user group for SMEDs services. Age difference is seen to play a role in different kinds of complaints reported by our users.

discrimination. In SMEDs experience, ethnic discrimination is not a phenomenon which only affects non-Europeans or individuals with a non-Western background.

It should be pointed out that individuals from other European countri-



es represent the largest group of immigrants to Norway. According to the Statistics Norway there are 551,367 people with some kind of immigrant background in Norway (defined as those who are

either themselves born in another country or who have a parent who was born in another country). Of this group, 295,211 people – more than half – have their background in another European country. Less than ten percent of all immigrants – 46,623 people – have their background in an African country. Although SMED does not expect that the makeup of its users will necessarily reflect the makeup of Norway’s minority population in general, it is interesting to note that the percentage of people with African backgrounds reporting experiences of discrimination is higher than the proportion of people with African backgrounds in the general population.

What role then does area of origin play with regards to types of discrimination reported? The figure below does not offer a simple cut-and-dry answer.

Persons from non-Western countries represent the majority in all case areas. Of those users for whom we have been able to register area of origin (ethnic background) Western users represent approximately 28% of all registered complaints, while non-Western users represent 72%. Western users appear to have registered a

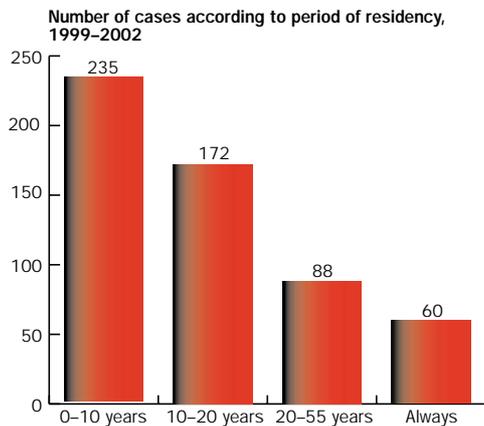
smaller proportion of complaints concerning police misconduct and immigration (which might be explained by the internal freedom of movement guaranteed European Economic Area citizens who are not Norwegian nationals), and a somewhat higher proportion of complaints which fall into the «other» category. We have seen that Western users also experience employment discrimination, housing discrimination, etc. Roughly speaking, it is not only those with «dark» skin colour that experience discrimination – it can be enough that one speaks Norwegian with a slight accent, despite having «white» skin and European or North American origins.

What significance does length of residence in Norway play?

We ask our users how long they have been in Norway. Our data (based on registration of length of residency in Norway for 555 out of 839 cases; data was not systematically collected in 1999) shows that of those that seek legal advice, the largest group are those that have been residing in the country for less than ten years. Use of our services diminishes as length of residence increases, and the smallest user group is made up of those that have lived here their entire lives.

Although these figures might indicate certain trends among those who actively seek out legal aid, they does not necessarily reflect the reality of experienced discrimination in Norway. A study of experienced discrimination in Denmark revealed that persons who had resided in Denmark for a longer amount of time had experienced more discrimination on the





basis of ethnicity than those with a shorter period of residency in the country. The study also revealed that only 4% of those participating had sought out the services of a legal aid agency as a result of their experiences.

al services appear to follow the same trends as employment cases. While those that have been in Norway for less than ten years have filed over 40% of the complaints in these areas, there are also a significant number of complaints registered by individuals who have resided in the country for longer periods of time.

Unsurprisingly, persons with less than ten years residency in Norway file the vast majority of complaints concerning immigration policy.

Persons who have always lived in Norway have contacted SMED with complaints in every case area. A significant portion of this group is made up of individuals belonging to one of Norway's several national minorities.

Does length of residency in Norway play a role in the kinds of complaints users report? The following diagram shows residency as it relates to five case areas: employment, police misconduct, immigration law, health and social services, and «other».

Persons with both shorter and longer periods of residency are represented among our employment cases. SMED is often asked whether those that suffer employment discrimination are primarily those with poor language skills. Our data shows that all groups experience discrimination

in employment—including those that have lived here for a long time or who have lived here their entire lives. While we have not tested each of these individuals' language abilities, it is safe to assume that employment discrimination is not

Results and user profile

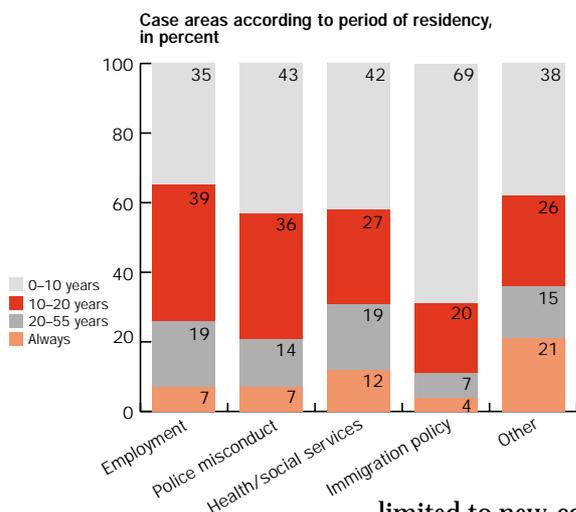
In this chapter we have sought to provide an overview of the kinds of people who contact SMED for help. Consistent with this perspective, we can now ask what can be said about SMEDs results from our users' point of view?

Our statistical data regarding our users, based on gender, age, ethnic origin, and length of residency in Norway, reflects tendencies among those who have actively sought out legal aid after having experienced ethnic discrimination. SMED receives complaints from those who believe that they have experienced discrimination. As a legal aid provider our responsibility is to help individuals to protect their personal interests. SMED is committed to following up cases dealing with discrimination and assisting in resolving them.

Many assume that our primary

limited to new-comers with under-developed language skills.

Cases involving police misconduct and discrimination in health and soci-



Results for the past four years:

Information given to user	552
Settlement	36
Apology	27
Reversal of finding	48
Legal representation of user (w/o result)	116
Policy change	14
Court victory	3
Court loss	2
Positive finding	14
Ex-gratia payment	1
Other	104



function is to aid individuals in bringing discrimination cases before the courts. A quick look at our results, however, reveals that going to trial- being awarded a settlement, reparations, etc.- is an outcome reserved for only a fraction of our cases. For the individual experiencing discrimination, the most important consideration is just finding a solution to the problem. In very few cases will a legal settlement be a necessary part of the solution.

Today’s laws offer very few explicit remedies against ethnic discrimination. For this reason we make use of all areas of applicable law when helping our users, not just those areas which explicitly deal with ethnic discrimination.

The legal aid provided by SMED has resulted in a number of different outcomes. One common result is that the user receives information relevant to their case. Minorities have as much need for legal information as the general population, and SMED fulfills this need. Sometimes we are only able to inform the user that there do not exist any legal protections for individuals in their position, despite the fact that they have experienced discrimination. In other instances we might be able to give the user information which will put them in the position to help themselves. Although providing legal information might not seem like a significant result, the outcome of many of our cases is limited to giving the user a better understanding of their rights. Within the context of today’s laws this is often the best we can do. Hopefully cases which cannot be resolved through existing legislation might nevertheless be used to document and ultimately remedy

existing procedural and systemic shortcomings.

Here is an overview of the kinds of outcomes we see most often:

- Cases where the user has been provided with legal information: 552 cases.
- Positive legal outcome: Settlement, apology, reversal of finding, policy change, court victory, positive finding, and award of damages.
- Negative legal outcome: Case lost in court, legal representation of user without direct results.
- Other: Examples might be improvement for the user gained through transfer to another office, academic leave of absence, or increased period of notice before termination of employment.

Cases which have been rejected

Only a small proportion of complaints have been rejected for not falling under SMED jurisdiction. These complaints represented for the most part legitimate grounds for legal aid, although SMED was not in the position to follow them up. When possible we have attempted to give information about other public or private legal aid agencies.

Although SMEDs jurisdiction encompasses all episodes in which individuals subjectively feel they have been discriminated on the basis of their ethnicity, we have still found it necessary to reject some cases. Over the past four years 37 cases have been rejected without providing legal information and 90 cases have been rejected after having provided legal information – 127 out of 893 cases rejec-

ted in all, representing 14.2% of our total caseload. Of these 127 cases the largest number of complaints (36 complaints or 28% of those cases falling outside of our jurisdiction) dealt with immigration policy. The other cases concerned complaints in the areas of health and social services, employment and «other», with a small number of complaints concerning allegations of police misconduct and housing.

In the 90 cases which were rejected after legal information had been provided the complainant was in most cases referred to another, more relevant agency.

Is the relative absence of certain kinds of users problematic?

SMED does not feel that much that can be done with regard to which age groups choose to contact with the Centre. Nor do we see it as problematic that many of our users are newly arrived immigrant minorities. This being said, we are pleased that we do have users from all parts of the world.

We do see it as problematic that we have a relatively low proportion of female users. In previous reports we have also pointed out that we have relatively few users living outside of the Eastern part of the country (Østlandet) and among the indigenous Sami people. We plan to actively follow up on these areas later in 2003.

Bringing discrimination cases to trial before the courts is an important, although minor, part of the work undertaken by the Centre.

SMEDs legal aid services can be divided into three main categories: cases which require an evaluation of the legal protections against a particular instance of discrimination, cases which entail legal representation (also with respect to dealings with government institutions), and cases which fall outside of our jurisdiction but can be referred to another agency.

SMEDs users file complaints based on their own subjective experiences of discrimination, and only a small portion of cases are rejected for being outside our jurisdiction. The high percentage of cases which have the sharing of legal information as their most significant outcome indicates that our users have a need for better information regarding their rights in Norwegian society.

CONCLUSION AND SUMMARY

What are the main trends of the past four years?

- There has been a consistently high number of complaints.
- There have been few dramatic variations from one year to the next.
- Employment, police misconduct, health and social services, and immigration policy have been the areas which consistently received the most complaints.

Who comes to us for help?

Predominantly male, non-Western residents of Oslo between the ages of thirty and fifty years of age. (The overrepresentation of users from the Oslo area is not problematised in this report, although it has been discussed in our year-end report and previous Moving Towards Better Protection reports.) Persons from all parts of the world are among our users, as are those with both longer and shorter periods of residence.





Chapter 3

Challenges posed by a legalistic approach to discrimination: **SMED's experience**

SMED'S PRIMARY FOCUS on legislation and the legal aspects of discrimination have also had a clear influence on SMED's general approach to discrimination. Over the course of the past four years SMED has been both commended and criticised for its work, and it can be worthwhile to look back on SMED's work with an eye to the limitations entailed by a legalistic approach.

The goal: Ethnic equality

The Centre for Combating Ethnic Discrimination (SMED) is responsible for providing free advice and legal aid to those who experience ethnic discrimination in Norwegian society. The recent proposition of a new Law against ethnic discrimination represents a significant development for discrimination law in Norway; as there has not previously existed any comprehensive legislation against discrimination, SMED's primary role as legal aid provider has been of extreme importance- both in order to chart and navigate the relevant passages of existing legislation, as well as to provide individuals the best possible legal protection within the existing legal framework. SMED has specialised itself in a field which has otherwise received little attention within the Norwegian context. As a result, SMED has achieved unique competence in the area of discrimination law, putting the Centre in the position to both critique and influence the further development of the field in Norway.

Sandra Fredman, Professor of Law at the University of Oxford, and Jon Rogstad, researcher at the Norwegian

Institute for Social Research, both point out the limitations of an exclusively legalistic approach to discrimination (Fredman 2003, Rogstad 2003). Guidelines ensuring that likes be treated alike and that different entities be treated differently can help to provide protection against the treatment legally defined as direct and indirect discrimination (Fredman 2003:5-6). There remain, however, a number of political and social aspects of discrimination which fall outside a formal, legalistic approach. These will continue to represent barriers to the realisation of true ethnic equality, no matter how thorough the legal framework might appear.

In her quest for ethnic equality, Fredman calls for a more sophisticated understanding of what equality might entail. She calls for moving beyond a simply «neutral» approach which is content with ignoring all considerations based on ethnic difference. Fredman points to the need for developing strategies which account for the real differences which come to bear in an ethnically diverse society. In this vein she calls for an increased focus on «disadvantage,» as well as an acceptance and appreciation of those differences relating to ethnic identity. Fredman also argues for the need for true democratic participation, pointing out that participation should not be limited to the polling place, but extended to include the workplace, healthcare services and educational system (2003:7-8).

Fredman's analysis highlights the tension between individual and group interests, and seeks to reconcile the conflicts which arise between these in different contexts.



The need for a variety of approaches

Jon Rogstad (2003) points out that the struggle against discrimination is in fact a struggle against a complex and interrelated matrix made up of various phenomena. As a result, different actors in different contexts will in their approach to discrimination identify diverging goals and various means to reach these goals. Rogstad sketches three different perspectives, or spheres of interest: the political, the social, and the legal, each with its own unique approach and set of ambitions.

A social perspective places the experience of discrimination at the centre of its analysis. From this point of view it would be interesting to establish how often or how many episodes of discrimination an individual has been subjected to, and in which settings. An example of this approach can be seen in a report produced by external researchers evaluating SMED's work (Gotaas 2003). The report presents a survey of interviews with some of SMED's users. This survey forms the basis of a qualitative study focusing on subject experiences of discrimination, and linking individual complaints to SMED with the individuals' broader life experiences and their experience of discrimination in their daily lives.

From a political point of view it is important to isolate the causes of discrimination and highlight the means to counteract or eradicate them (it should be noted that these means also include influence outside the formal corridors of power). This perspective sees the discriminator as its main focus. Finding suitable tools against discrimination requires

knowledge of why people discriminate, what their motives are, and what they ultimately wish to accomplish. In his own research Rogstad has looked at employers' motivations to discriminate in the context of market competition (Rogstad 2001).

From a legal perspective the objective chain of events is key; and the goal is to determine whether or not a particular episode represents a departure from the law. Actions are analysed within the immediate context within which they took place (the nature of the charge determines which facts are «relevant» and which are «irrelevant»).

Limits of the legal sphere

In order to provide effective legal aid it is important to establish a concrete episode (or episodes) involving an identifiable second party. *Retts Hjelp 2001*, published by Juss Buss, elaborates:

Legally irrelevant aspects will be set aside by the legal advisor; legal aid will usually only address a small portion of a larger, complicated situation. The legal system is not concerned with painting a broad picture, but concentrates instead on problems defined within the narrow confines of the law (Graver, et. al. 2002: 213, unofficial translation).

Legal aid focuses on the individual, and has as its ultimate goal the defence of the individual in its meeting with society. Although the individual's subjective experience forms the basis of our casework, however, whether or not discrimination has actually taken place according to the law is ultimately up to the Centre, and not our users, to determine.



Although SMED often encounters individuals in need of legal assistance due to discriminatory hiring practices, instances of this kind of discrimination are usually experienced by most individuals as one in a long series of injustices.

A man contacted the Centre after starting to experience personal problems as a result of not being able to get a job in Norway. Over the past two years he had applied to 600 different positions, although he was only asked to interview for five of these- without result. The man in question is a Norwegian citizen with a degree from a Norwegian university, speaks fluent Norwegian and has 10 years previous work experience in Norway. Among other things potential employers have confronted him about his assumed ties to the political regime in his country of origin, in addition to insinuating that he was a spy.»

This particular case illustrates that the largest problem might not be individual lack of cultural integration, but rather the attitudes that minorities meet when seeking employment. A legal approach attempts to build on subjective experiences of specific, isolated episodes and is unable to address experiences of systemic discrimination in their entirety. For this reason SMED is committed to active documentation as well as lobbying- in the social and political spheres it is possible to use other tools than in the purely legal arena, including the use of examples gleaned through legal work.

Finding individual solutions vs. Establishing broad principles

Some cases expose the tension between individual interests and broader societal- or minority- interests. As a legal aid provider, SMED has a responsibility to help our users achieve the best possible solutions to their own personal problems. This can present a dilemma for SMED, especially when principally important cases must be discontinued in order to fulfill our user's wishes.

A man applied for a position and was told during the interview that «we have thought long and hard, discussed it amongst ourselves, and come to the conclusion that there would be too many difficulties as a result of the differences between our religions». The man was not offered the position in question and subsequently contacted SMED. The case was brought to court where the judge suggested a settlement. The man decided to accept, rather than subject his family to long, drawn out legal proceedings.

As advisor and legal representative, SMED naturally advises its users to choose those solutions which best serve their individual interests. Paradoxically, this can at times lead to solutions which are good for the individual, yet stand in the way of establishing legal precedence or achieving a principle finding by a regulatory agency. What is best for the individual is not necessarily best for the minority population in the long run.



Other challenges posed by a legal approach

SMED has had several cases dealing with challenges to the legal right of religious minorities to take leave from work in order to observe religious holidays, provided they have informed their employers in advance. Respect for difference and individuals' special needs also includes acceptance of, and respect for, differences stemming from religion and language. In line with this, Fredman points to the negation of culture, religion and language as one of three primary axes along which structural racism operates (the others being polarisation leading to denigratory stereotyping, hatred, and violence; and the institutionalised cycle of disadvantage) (2003:4).

The limitations of a purely legalistic approach is clearly seen in the fact that it is not always desirable, or relevant, for SMED to explore the underlying mechanisms which tend to lead to the assimilation (one-sided, often forced compliance) rather than integration (a reciprocal, participatory process taking place between minorities and the majority population). This is particularly the case in relation to language and observance of religion.

The legal right to observe religious holidays is, as far as jurisprudence and popular opinion is concerned, relatively uncontroversial, although other areas might trigger stronger reactions. SMED frequently receives questions concerning the right to prayer in the workplace during breaks in the workday- for many, this is seen as much more problematic. While there is often acceptance for religious

variation which occurs «in private,» religious observance in the public sphere is often seen as a departure from accepted social and behavioral norms- even when it takes place on one's own time during official lunch breaks. These attitudes ultimately result in individuals being forced to conform to the majority's social, cultural, and religious norms at any given time in order to be able to make a claim on equal treatment.

SMED was contacted to assist in a dispute in which buss drivers had received written notice from their employer informing them that it was forbidden to speak any language other than Norwegian at the workplace, including in recreation areas during lunch breaks. The employer explained to SMED that this policy was meant as an aid to integration. The drivers' union eventually became involved and the conflict was ultimately resolved through the application of the Working Environment Act [Arbeidsmiljøloven], which denies employers the right to influence employees use of leisure time.

SMED was in this case forced to make use of labour law in order to establish that the employer could not make demands on the employees during their free time (un-paid lunch breaks). The demands of legal relevance required that SMED establish which rights the employees enjoyed under existing laws, and not address the broader questions raised by the employer's claim concerning forced language as a means to integration as opposed to the employee's right to decide for themselves which language to speak. As Fredman points out, it is not enough to promise the individual



formal equality with the ability to participate in the daily life of a society. The ability to influence the content of daily life, and how it is to be carried out, should be the measure of democratic participation.

Immigration Law: Legally sanctioned negative differential treatment

The next chapter details some of the difficulties surrounding complaints concerning immigration law. As an undersigner of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) Norway is committed to ensuring anyone within its jurisdiction effective protection through the courts and other State institutions. Differential treatment between citizens and non-citizens, however, is not covered by this convention, and is therefore exempt from existing national and international law. In other words, Norway has an immigration policy, operationalised through the rules of citizenship, which can be used to limit the scope of the State's jurisdiction and subsequent legal obligations (for a more thorough discussion see the next chapter).

Administration of this differential treatment need not necessarily account for the actual human reality which forms the basis of the cases in question:

A man wished to see his family before a major, potentially life-threatening surgical procedure. He had already asked once before that the surgery be postponed, in the hopes that his family's application for family reunification

would be processed in time for the new date set for the operation. After several months the date began to draw near and the man's family had yet to receive a response from the authorities. SMED was contacted and petitioned the UDI (Directorate of Immigration) on several occasions, arguing that the special circumstances of the case warranted a speedy resolution. In response SMED eventually received a form-letter stating that the matter had been sent on to the police for further processing. SMED received this form-letter the day after the man underwent his surgery.

The psychological burden experienced by the man resulting from the uncertainty of whether or not he would see his family again before he died was significant. The authorities' handling of the matter, however, did not seem to account for the individual, human elements in the case.

Sometimes situations arise in which human lives are placed in direct danger by the administration of immigration policy itself:

An HIV infected woman entered the country on a Schengen visa, only to discover that her condition was far more serious than her family had originally hoped. She was admitted to the hospital and after treatment in Norway she is healthier than she has been in years. If she continues treatment she will be able to lead a relatively normal life. If she discontinues treatment, however, her chief physician has made clear that she will not survive more than a year. Because it is not possible for the woman to receive proper treatment in her country of origin, she has applied for a residency permit on humanitarian grounds. The application was rejected



on the grounds that according to policy it should have been submitted in the woman's country of origin. The UDI has stated explicitly that it has not assessed the circumstances or virtues of the case. The Centre has submitted a complaint on the woman's behalf. The case is unresolved.

Cases such as this draw into question the State's right to disavow itself from a broader, human responsibility.

When one neutral practice leads to another discriminatory practice

Administration

The administration of immigration policy can unintentionally lead to hostility towards minorities and foster prime conditions for discriminatory treatment.

A man with a foreign nationality contacted SMED. His residency permit was based on a work permit issued for a position he had applied for over the internet. Upon starting work at the new job the man experienced poor working conditions in addition to being given unreasonable work assignments. The man was deeply effected by conditions at work and eventually lost his job. The police informed him that he would have to leave the country if he was unable to find another job which could serve as the basis for new work and residency permits.

The rules which require immigrants to leave the country upon the termination of a specific employment contract gives employers the ability to force foreign workers to accept

adverse differential treatment, in the form of lower wages or substandard working conditions, or both.

In another case, a foreign national contacted SMED for assistance in a work related conflict. Her employer had threatened her that if she were to contact the Centre for help he would make sure she would never be able to work in Norway again.

The State's differential treatment of citizens contra non-citizens highlights these groups' different status in society, opening for further discrimination along these lines. A legal perspective will focus exclusively on the employer's individual actions, ignoring the broader structural context which makes this kind of discrimination possible. The goal of legal aid is to ensure that the legal system serves the interests of the individual not to criticise the merits of immigration legislation.

Media

Institutional and cognitive structures exert mutual influence on one another. Through the media, administrative language becomes imbued with a new and originally unintended moral significance, re-applied in service of a new set of priorities. Filtered through the media's lens, the administration of immigration policy seems to offer the general population official confirmation as to which groups are to be considered «unwelcome,» «ungrounded,» or «illegal».

SMED has previously discussed the power of the headlines (2001:46), and it is undeniable that the media shapes the understanding of its audience. We can see the contours of a general reporting trend where citizenship and resident status



are lent a disproportionate level of significance in criminal cases involving minorities.

«Two Poles charged in brutal rape case»(Aftenposten 10.6.03:3)
 «Because he killed two people, the 26 year-old Ethiopian can be granted residency in Norway» (VG 3.6.03:6)
 «Threatening asylum-seeker must move» (Nettavisen 14.5.03)
 «The Somali that killed his wife and two small children [...] might get off» (Dagbladet 7.5.03:11)

These headlines are constructed in order to achieve a sense of shock and indignation, while irrelevant or less relevant facts (the alleged perpetrator's citizenship or residency status) is paid unnecessary attention. Reference to the perpetrator's citizenship implies that this detail somehow has broader significance for the events in question, bringing into question the intentions of other individuals from the same country or with the same ethnic background, no matter how law-abiding these might be.

Undue focus on citizenship status has led to increased polarisation between minorities and the general population. In an article listing murders so far this year, Aftenposten lists Norwegian victims according to age and gender («[...]29 year-old killed in Roa, [...] woman, 43, killed with a blunt object [...]»), while paying extra attention to citizenship and resident status when referring to minority victims:

«[...] 32 year-old Somali found killed, [...] 38 year-old Russian woman killed, [...] asylum seeker killed, [...]» (Aftenposten 28.5.03: 2)

The focus on citizenship or resident status in this context strips the victims of their basic humanity, underscoring that they are foreigners, even in death.

Media linkage of crime and minority status has had some unsurprising consequences in the wake of the news that Norway could also be targeted for terrorism. A turban wearing taxi driver reported that customers refused to ride in his cab, and at least one business has refused to provide services to Muslims or people assumed to be Muslims. Although there might be a clear correlation between media coverage, increased polarisation and xenophobia, there is little that can be done from a legal point of view. Concrete, discriminatory actions can be handled according to the law, while the general public must be encouraged to develop a critical eye towards the media.



Summary

In this chapter we have discussed some of the limits placed by a legalistic approach on the ability to handle discrimination as a multi-faceted phenomenon. In addition to providing legal aid, SMED also works in relation to the social and political spheres.

We have:

- developed internet-based learning materials
- created interactive web pages with information for the media
- undertaken a study of political representation (see chapter 6)
- arranged seminars and conferences for a broad audience
- reviewed legislation drawn up by the Storting, as well as county and municipal government
- developed materials suited for a diverse public

NOU 2002:12 calls for the increased ability to handle structural discrimination. In the passage below, the Holgersen committee, responsible for the proposal of the new Law against ethnic discrimination, comments on the fact that it is not enough to simply focus on individual episodes.

Structural discrimination can result in both direct and indirect, concretely discriminating actions against individuals or groups. Although it might be difficult to provide evidence of such concrete actions, there might nevertheless exist institutionalised forms of discrimination, whereby groups of people in some settings do not enjoy the same rights and opportunities as others, and where there has not necessarily existed an explicit intention to discriminate. Persons belonging to such groups will not necessarily demand reparations or be in the position to benefit from policy changes or other forms of concrete action. Structural discrimination is nevertheless a factor and plays a role in these groups' position and range of opportunities in society (NOU 2002: 12:35, unofficial translation).

The Holgersen committee considers structural discrimination to be a main focus of their report and argues that the proposed legislation will contribute to counteracting structural discrimination. Professor Fredman warns against systemic exclusion and suggests increased recognition of minority difference and human worth. Jon Rogstad suggests that we recognise and develop different perspectives and methods within the legal, social, and political spheres. All three argue for an expansion of our awareness beyond isolated episodes and individual experience of discrimination. In doing so, it is hoped that we can prevent discrimination and promote ethnic equality, while we continue to protect the rights of individuals facing discrimination in their everyday lives.

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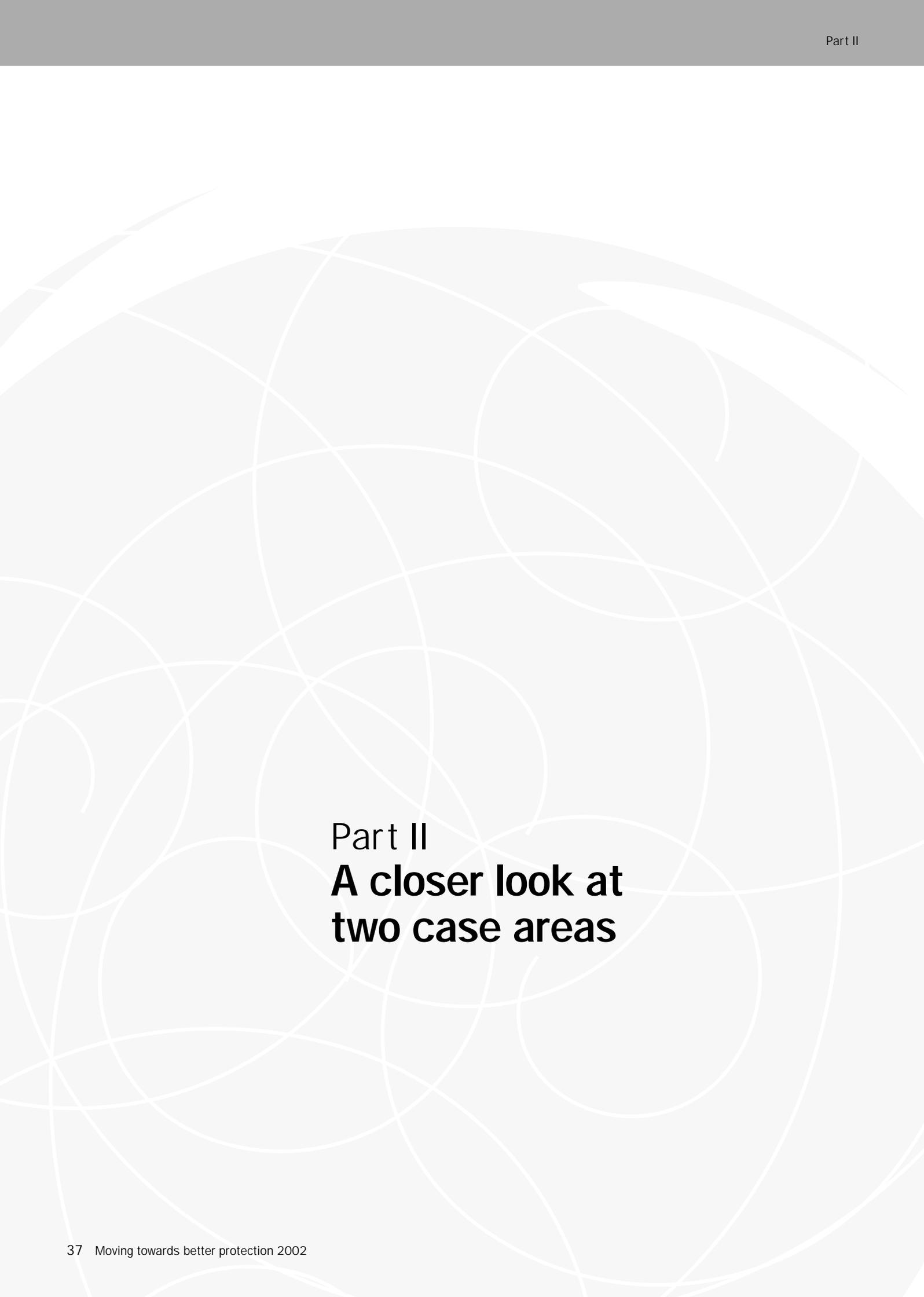
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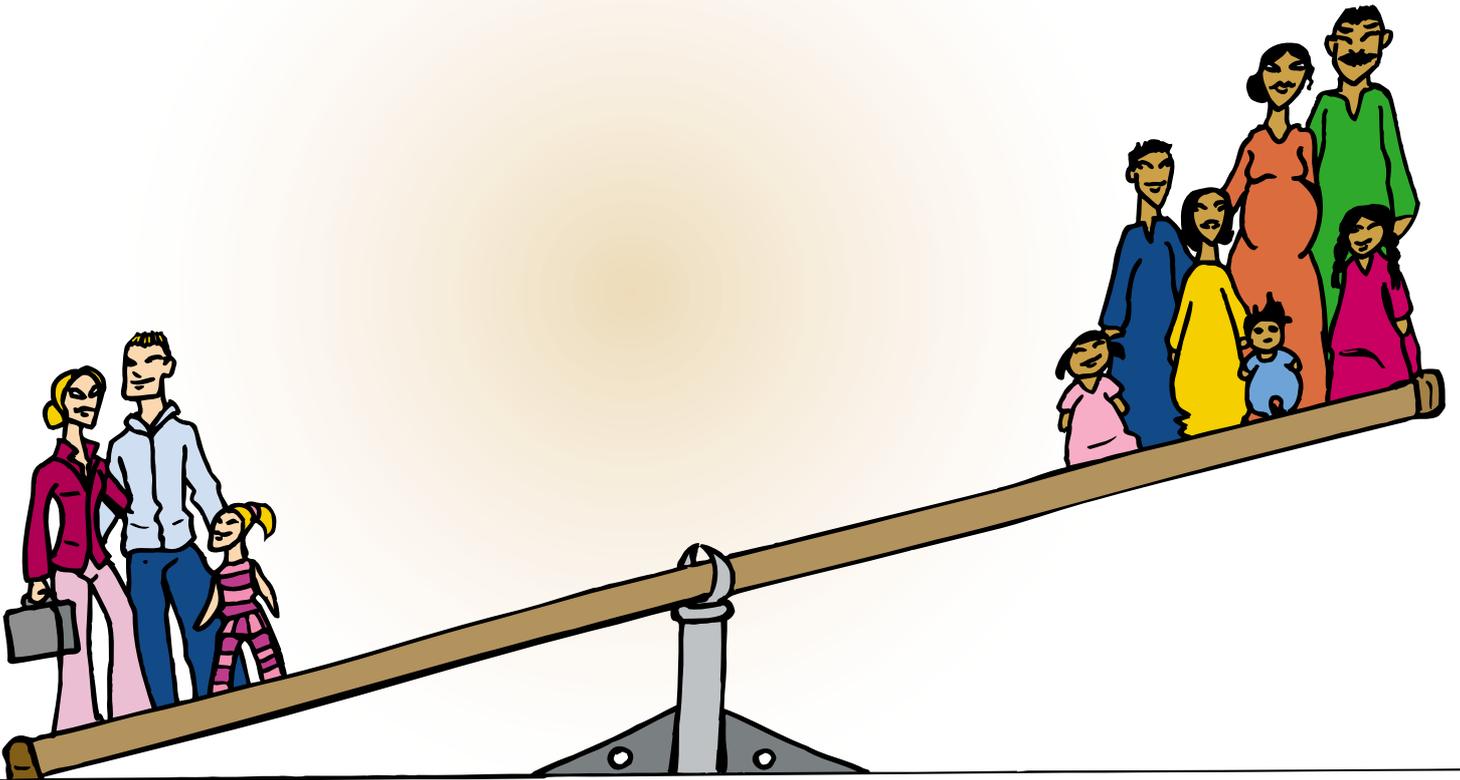
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Part II
**A closer look at
two case areas**



Chapter 4

Discrimination by Immigration Authorities: A marked increase in complaints

A marked increase in complaints about discrimination perpetrated by Norwegian Immigration Authorities

There has been a marked increase in the number of complaints by persons who feel that they have been discriminated by Immigration Authorities. Measured by the number of complaints, immigration and asylum cases made up SMED's second largest case area in 2002. SMED wishes to state, however, that this does not necessarily mean that the amount of discrimination by Immigration Authorities has actually increased. In order to ensure that we treat any discrimination by Immigration Authorities as much in accordance to principle as possible, SMED wishes to outline the relevant discrimination issues pertaining to immigration law.

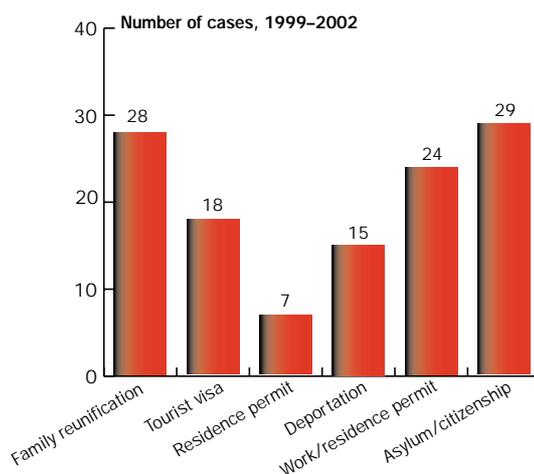
ethnic discrimination are discussed below. In those cases we have assessed as not dealing with ethnic discrimination, assistance has consisted of providing legal information and/or referring persons to other relevant instances that provide free legal aid².

The Immigration Act allows for systematic differential treatment between foreigners and Norwegian citizens

The entire purpose of the Immigration Act is to regulate the residency of foreigners in Norway. Hence the Immigration Act allows for and prescribes systematic differential treatment between foreigners and Norwegian citizens. That foreigners are specifically singled out by resolutions in the Immigration Act, denying them, for example, residence permits because they do not fulfill the strict demands of the Act, may seem unreasonable. This kind of case, however, is typically outside our jurisdiction, as it represents a legally sanctioned form of differential treatment between foreigners and Norwegian citizens.

The challenge facing the Center is to distinguish these cases from those cases in which discrimination has taken place on the basis of creed, race, skin colour and national or ethnic origin.

In addition to the Immigration Act, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) also plays a vital role in delineating the distinction that must be drawn. ICERD also sanctions differential treatment between citizens and non-citizens. As stated in ICERD Article



The diagramme provides an overview of the immigration cases that SMED has examined in the period from 1999 to 2002¹. SMED wishes to reiterate that these figures reflect the kinds of complaints that we have received. The important questions that arise during our assessment as to whether or not a case in fact deals with

- 1) Comment to the category «Asylum, citizenship, other»: we wish to emphasise that the category «Asylum, citizenship, other» is too encompassing to provide particularly useful information. Thus, in the following, «asylum» and «citizenship» will be registered as separate categories.
- 2) Thirty-six immigration cases have been registered as terminated, as they were not within our jurisdiction.

1, paragraph 2: «*This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.*»

In the *General recommendation XI on non-citizens (forty second session 1993)*, the U.N. Committee on Racial Discrimination emphasises that ICERD Article 1, paragraph 2 should not be interpreted as absolving States Parties from their obligation to report on immigration policy, noting that States Parties are obligated to file full reports in accordance with ICERD. In addition, it is noted that Article 1, section 2 is not to be interpreted in such a way that it limits the scope of the rights guaranteed under other human rights conventions. The conditions of the Norwegian Human Rights Act section 2 and the Immigration Act section 4 are also such that the latter cannot be applied contrary to Norway's general human rights obligations. The general prohibition against discrimination contained in the International Covenant on Civil and Political Rights (ICCPR) Article 26 is of particular relevance. The provision states:

«*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.*³»

Furthermore, ICERD also explicitly prohibits the discrimination of any particular nationality with regard to acquisition of citizenship. Article

1, paragraph 3 emphasises: «*Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality (our emphasis).*»

The Immigration Act and ICERD outline basic principles. Already in SMED's first report, *Underveis mot et bedre vern 1999 (Moving Towards a Better Protection 1999)*, a number of questions were raised with regard to the distinction that SMED has to make in its assessment of whether or not decisions by the immigration authorities constitute ethnic discrimination. In 1999 SMED emphasised that the specific features of each individual case determine whether or not cases fall within our jurisdiction. SMED also outlined the factors which typically play a role in confirming whether ethnic discrimination has taken place:

- Statements or actions which indicate or confirm discrimination based on ethnic origin.
- Indications that the handling of the case deviates from normal administrative or legal practice.
- Indications of faulty casework.
- Background information that casts the case in a new light.

Over the course of the past four years, the Centre has acquired a level of experience that has increased our ability to identify criteria relevant in determining whether findings by the Immigration Authorities entail discrimination. We wish to emphasise that the assessment as to whether or not a finding entails aspects of discrimination must always be made on a case



3) A consequence of the practice of the UN Human Rights Committee is that even though citizenship is not mentioned explicitly as a banned basis for discrimination, differential treatment carried out between citizens and non-citizens must also fulfill demands to impartiality and proportionality in order to be legal. See for instance *Gueye and others V France UN doc A/44/40*, 1989.

by case basis; it is impossible to provide an exhaustive list of the specific kinds of immigration cases in which SMED might offer assistance. This being said, SMED is currently in a much better position to identify and pinpoint cases where the applicant's ethnicity, national origin, or nationality have played a central role in the Norwegian Directorate of Immigration (UDI) findings. Clients that come to us for advice regarding other kinds of complaints are referred to the Norwegian Organisation for Asylum Seekers (NOAS), Juss Buss, or lawyers who offer free legal aid or who specialise in immigration law (cf. point 4 below).

Section 106 is in SMED's experience often applied in such a way that it conflicts with the prohibition against discrimination outlined in the International Covenant on Civil and Political Rights Article 26, as well as with the normal checks and balances meant to safeguard against the abuse of authority.

The fifth subsection of Section 106 of the Immigration regulations states that: *«A visa shall not be issued where there are grounds for rejection or expulsion, cf. § 27 and § 29 of the Act. Otherwise a visa shall be issued unless considerations regarding national security, foreign policy or immigration policy speak against it, or where there is reason to doubt the stated purpose of the journey or the correctness of the information given. The applicant shall be made aware that exceeding the time limit for exiting the country may result in expulsion, pursuant to §29 of the act, and that expulsion stands as an obstacle to subsequent entry (unofficial translation, our emphasis).»*

Complicated and important questions regarding the scope of SMED's jurisdiction

At the same time as we are able to recognise with greater certainty which immigration cases entail relevant aspects of discrimination, the complex questions regarding the scope of our mandate have also come into sharper relief. Some of these are explored below.

Those who contact us regarding visa cases experience that generalisations based on the behaviour of other applicants of the same *nationality* are given such emphasis that their individual circumstances are not taken into consideration.

Is SMED able to assist those who feel that the Immigration Authorities' handling of visa cases is discriminatory?

The fact that foreigners wishing to enter Norway must have a visa is in accordance with Section 25 of the Immigration Act. The specific criteria regarding when a visa is to be issued are outlined in the Immigration regulations. The fifth subsection of

The issue at hand is discrimination on the basis of nationality, while SMED's jurisdiction specifically applies to discrimination on the basis of ethnicity, creed, race, and national or ethnic origin. SMED is of course aware that nationality is not the same as either race, skin colour, ethnicity, or national origin. Nevertheless, SMED believes that although our mandate does not



mention discrimination on the basis of nationality, this form of discrimination, is so closely connected to discrimination based on ethnicity and national origin in the the area of immigration law that SMED ought to be able to provide assistance.

A larger challenge faced by SMED in this particular case area has to do with the conditions outlined in SMED's mandate: *«The cases must be brought by individuals staying in Norway.»* Those unable to obtain a visa to enter Norway due to generalisations based on the behaviour of other applicants of the same nationality will, necessarily, be barred from «staying in Norway.»

Taken literally, our legal mandate can be interpreted as limiting SMED's ability to provide assistance to those who experience discrimination in visa cases. During the hearing concerning the scope of the Centre's jurisdiction, however, the question was raised as to whether persons with «derived rights» are entitled to seek assistance from the Centre. This question is especially relevant in cases where the refusal of a visa not only affects the applicant, who is a direct party in the case, but also family members residing in Norway, friends, etc.

The Ministry responded *«[...]that nothing prevents the Centre from dealing with cases relating to the Immigration Act provided they have to do with discrimination. With regard to questions pertaining to derived rights the Centre will have to assess these in each individual instance. Otherwise, we refer to the rules of the Public Administration Act as to who is entitled to be party in a case (unofficial translation, our emphasis).»*

In light of the central questions

related to discrimination that emerge in cases of refusal of visa, SMED has settled on the following approach: we assist, because refusal also affects the applicant's family residing in this country, and we make sure to obtain the necessary authorisations, both from residents and from the party refused entry into Norway.

In this way we may – without exceeding our mandate – assist in resolving questions regarding discrimination in the practice of Norwegian immigration law, regardless of the location of the applicant. In our opinion, the legal rights of those petitioning the Norwegian Immigration Authorities should not depend on their location.

A closer look at how emphasis on general experiences might result in discrimination

That each case is evaluated on the basis of its own individual merits, and not on the basis of which group the Immigration Authorities believe the applicant to belong to, is a prerequisite for ensuring equality of opportunity. Thus, the prevention of decisions based on generalisations, safeguarding that each application is assessed individually, is central to ensuring protection against discrimination. If individual circumstances are downplayed and general experiences are over-emphasised, decisions can appear to be arbitrary, rendering them invalid according to general administrative law. This point is touched upon in the Parliamentary Ombudsman's *Annual Report of 1992, Case 29, pp 88* :

«It must be established that the mere assertion of the fact that the



applicant belongs to a nationality or a group with whom the authorities have bad experiences cannot give grounds for a refusal of an application for a visa (unofficial translation)».

In her doctoral thesis from 2001 entitled *Immigration Control, Law and Morality: Visa Policies towards Visitors and Asylum Seekers – An Evaluation of the Norwegian Visa policies within a Legal and Moral Frame of Reference*, Bente Puntervold Bø has undertaken an extensive analysis of Norwegian visa practices. She discusses specifically whether Norwegian visa practices discriminate on the basis of nationality, noting on page 344 that: «...*the nationality of the visa applicant is decisive for the outcome of the case. In other words, visa applicants from some countries are treated more favourably than applicants from other countries (our emphasis).*»

From a discrimination perspective, SMED's view is that the considerable emphasis placed on the nationality of the applicant is in itself problematic. In addition, the insufficient information provided by some Norwegian embassies further weakens applicants' legal rights. In order to be able to even get a chance of being granted a visa, visa applicants from countries that UDI has defined as having great emigration potential must present considerable documentation in order to confirm their ties to their country of origin. It is our experience, however, that the advice provided by the Norwegian embassies concerning the kinds of information relevant to the processing of visa applications is often quite arbitrary. Nevertheless, applicants who are unaware of the emphasis be-

ing placed on their nationality will not get a second chance to document their ties to their country of origin.

For this reason, SMED assists visa applicants in individual cases by informing them about the individual circumstances which should be emphasised in their applications. We also assist in filing complaints concerning rejections when general experience appears to have been emphasised at the expense of individual circumstances. Central to our argumentation in these cases is that decisions which emphasise an applicant's nationality, without also taking into account the individual circumstances of the case, constitute discrimination on the basis of nationality. This discrimination is incompatible with standard principles of public law as well as with the prohibitions against discrimination contained in the International Covenant on Civil and Political Rights, Article 26, and cf. the Human Rights Act sections 2 and 3.

Deportation – Discrimination of foreigners who have served jail time?

Foreigners who commit criminal acts must first serve their sentence before facing potential expulsion and deportation from the country. Norwegians committing similar crimes are able to start afresh once their debt to society has been paid. Does this constitute a form of discrimination that falls within SMED's mandate?

The former Department of Immigration under the Ministry of Justice argued against this in its response to a complaint filed by SMED in 1999. The Ministry of



Justice pointed out that no Norwegian *citizen* may be deported, regardless of his or her *ethnic origin*.

In cases of expulsion, the Ministry of Justice has stressed the importance of being able to distinguish between citizens and non-citizens without this constituting an act of ethnic discrimination. SMED does not disagree: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR), Protocol 4 Article 3, also only provides protection for citizens. Furthermore, expulsion and deportation is not considered a penalty under national law nor according to international treaties on human rights. The prohibition against double punishment contained in ECPHR Protocol 7 Article 4 does not prevent foreign citizens from being expelled and deported upon having served their sentence.

Nevertheless, SMED is of the opinion that it would be desirable if our jurisdiction were framed in such a way that enabled us to provide legal aid in these situations. For a person that has spent most of his or her life in Norway, and who has a family here, deportation can represent an extreme burden. Because deportation is not considered punishment in a legal sense, however, foreigners, unlike Norwegians, may still be expelled from the country after having served a prison sentence.

In our view, this differential treatment is especially unreasonable in cases where the expelled person has children living in Norway. As a result of immigration laws these children are made to suffer differential treatment due to the fact that their father or mother is not a Norwegian citizen.

Pursuant to section 29, second subsection, it follows that deportation shall not be ordered «[...] *if in consideration of the seriousness of the offence and the foreign national's connection with the realm, this would be a disproportionately severe reaction against the foreign national himself or the closest members of his family (unofficial translation).*» In cases where deportation represents a disproportionately severe reaction, The European Court of Human Rights (ECHR) has ruled expulsion to be at variance with Article 8 of ECHR on the right to respect for family life⁴. The ECHR has not been concerned with the question of discrimination. Insofar as it constitutes a disruption of family life that primarily affects children with parents who are not Norwegian citizens, SMED is of the opinion that expulsion and deportation is indeed relevant from a discrimination perspective.

In our view, cases involving deportation reveal the shortcomings of our mandate, framed in such a way that makes it necessary to draw a decisive line between discrimination based on ethnicity and national origin – where we are able to provide aid – and discrimination on the basis of lacking Norwegian citizenship – where we are not able to provide aid.

SMED wishes to reiterate that differential treatment between citizens and non-citizens can in many instances be fair and proportional, and hence does not in itself constitute discrimination. SMED feels, however, that we ought to be able to provide aid in those cases where the demands for fairness and proportionality *do not* appear to have been met.

For this reason SMED has expressed the opinion in our official

4) An unpublished graduate thesis (22 of November 2002) has compared the practice of the Supreme Court of Norway with the practice of the European Court of Human Rights. The paper concludes that the Supreme Court needs to place more emphasis on family considerations if Norwegian practice is not to be stricter than the precedent set by the ECHR practice. The thesis further emphasises that the ruling in Rt. 1996 pp. 1510 gives reason to doubt whether family considerations have been stressed at all, in cases featuring deportees sentenced for serious crimes.

response to the proposal for a new law on legal protection against ethnic discrimination (in NOU 2002:12), that the agency assigned to enforce the new law on discrimination should also be given the authority to assess, in concrete cases, whether differential treatment between citizens and non-citizens is fair and proportional.

In light of the limitations of our present mandate, cases concerning deportation typically fall outside our reach. As with all other case areas, SMED shall continue to undertake concrete assessment as to whether these cases raise relevant questions relating to discrimination. Along these lines, SMED might provide assistance in cases where the foreigner who is to be deported has a spouse who is not ethnically Norwegian—raising the question as to whether the deportee's familial ties to Norway have been given less consideration than the familial ties of those who are married to an ethnic Norwegian.

People who have been expelled do not currently have the right to receive free legal assistance from the State. The importance of processual guarantees in cases of expulsion of foreigners is recognised in the European Convention for the Protection of Human Rights Protocol 7 Article 1 (P7). Although P7 does not guarantee free legal aid, it does indicate State recognition that expulsion constitutes a sanction so serious as to warrant special guarantees for safeguarding the rule of law. SMED finds it unsatisfactory that individuals are not granted the right to free legal aid in cases which constitute the level of disruption that expulsion and deportation represent.

Does the processing of asylum applications raise questions of ethnic discrimination?

SMED receives a number of complaints from persons who have had their asylum applications rejected and who feel this to be discriminatory. That Immigration Authorities generally have strict guidelines for determining a person's need for protection cannot in itself be considered ethnic discrimination. As a result, SMED usually refers asylum seekers to NOAS, which may assist them with complaints in line with the UN Convention relating to the Status of Refugees. There is no doubt, however, that if the threshold for being granted the right to asylum varies depending on one's ethnicity or nationality, this does constitute discrimination and thus does fall within SMED's mandate. In light of the complexity of each asylum application, it is, however, very difficult to document that the admission of fewer applicants from some countries as opposed to others is connected to nationality or ethnicity. SMED does however have an agreement with NOAS, which evaluates more than a 1000 asylum cases each year; in cases where they see indications of ethnic discrimination or discrimination on the basis of national origin, these cases are referred to SMED. In addition, SMED registers all complaints concerning discrimination on the basis of ethnicity, nationality and national origin in asylum cases. The purpose of this is to see if a pattern emerges that may indicate discrimination in this area.



A word on so-called groundless applications

Morten Tjessem, the General Secretary of NOAS, emphasised the following at UDI's annual conference on the 13th of May 2003: *«Within Norwegian practice one does not have criteria for deciding when a case may be considered groundless. On the contrary one does have lists of countries that are considered as generally safe. This means that the applications from persons who have genuine claims for asylum are classified as manifestly groundless merely on the background of the country they come from. Cases that UDI considered to be groundless have concerned former concentration camp inmates and victims of sexual abuse from Bosnia, Serbs from Croatia who have been subjected to abuse, and Albanian women who claim to be victims of trafficking (our translation).»*

SMED realises that it may be difficult to find general criteria that will enable Immigration Authorities to clarify which applications are «groundless». Nevertheless, SMED remains skeptical to the fact that Immigration Authorities base their judgment of whether or not an application is «groundless» exclusively on the applicant's country of origin. This entails a real danger that individual circumstances are not being given sufficient consideration, and that individual asylum seekers from countries that have been deemed to be «safe» are being subjected to discrimination.

For this reason SMED shall continue to monitor whether the criteria used by Immigration Authorities in

deciding which applications are «groundless» place too much significance on applicants' nationality.

Discrimination in connection with application for family reunification?

The Centre has received many complaints over the past four years from persons requesting assistance in cases where their applications for residency permits for the purposes of family reunification have been rejected.

Under certain circumstances, close relatives to persons with residency in Norway have the right to residency or work permits cf. the Immigration Act section 9 cf. Immigration regulations section 22. In these cases the law does not authorise the use of subjective appraisal. As a result, the possibilities for direct discrimination are reduced significantly. Nevertheless, in certain instances we have seen that the demands pertaining to the *documentation* deemed necessary in order for a marriage to be recognised as valid have proved to be impossible for applicants from certain countries to fulfil. The prohibition against discrimination entails that different cases be treated differently. If the Immigration Authorities demand documentation which in some countries is impossible to obtain, SMED is of the opinion that this may represent indirect discrimination. We can illustrate this with the following case where SMED assisted: A woman residing in Norway on a permanent residency permit was married in Pakistan. Her husband was refused a residence permit in Norway for the purposes of family reunification.



The Immigration Authorities defended their decision by claiming that the Norwegian Authorities did not consider it sufficient that the marriage license was recognised by Pakistani Authorities. Norwegian Authorities, however, refused to assess the validity of the license themselves. UDI ruled that the marriage would have to be verified by British Authorities as the woman residing in Norway is a British citizen. However, British Authorities do not have any such official verification procedures. In our opinion it is indirect discrimination if the demand for verification is upheld, despite the fact that this kind of verification is impossible to acquire.

In those cases concerning residency or work permits for the purposes of family reunification for those other than close kin, and when the ability to provide support has not been documented, the Immigration Act does allow for the use of subjective appraisal; cf. the Immigration Act section 8 second subsection cf. the wording of the Immigration Regulation section 24 first subsection «*may be granted*», and the Immigration Regulation sections 24 second subsection and 25 «*when strong humanitarian considerations so indicate*». In these cases, discrimination might result from the Immigration Authorities' strict appraisal of applicants from certain countries. If SMED receives indications that the threshold for applicants from certain countries is higher than that for applicants from other countries, SMED will be able to provide assistance.

Rushed policy changes as the result of fluctuations in the political climate

It is important to ensure that any individual subjected to discrimination receive assistance in handling his or her particular case. It is of equal importance to ensure that the legal framework which is to determine the outcome of the applications of a larger number of persons does not leave room for unprofessional or disproportionate differential treatment.

The area regulated by the Immigration Act, however, is a hot topic of political debate. Changes in the political climate with regard to immigration policy often result in a number of suggestions regarding changes to the law, which in our opinion, often raise questions about disproportionate differential treatment. A current example is the reintroduction of the subsistence requirement for the right to family reunification for people who have been granted residency on humanitarian grounds. The subsistence requirement was reintroduced into Norwegian Law on the 1st of May 2003, after having been removed in 1997. The requirement stipulates that residents in this country must earn a minimum amount, established by the State, in order for his or her close relatives to be granted the right to residence in Norway for the purposes of family reunification. The reason the requirement was originally removed was that the group it targeted had great difficulty entering the labour market before they were joined by their family.

The reintroduction of the subsistence requirement will limit the right to enter into marriage for those



who have been granted residency on a humanitarian basis and who have a weak economy. This is particularly unreasonable considering that increasing unemployment affects immigrants especially hard. Here are some figures from the Ministry of Local Government and Regional Development and the Norwegian Directorate of Immigration's last Newsletter No. 19, published on the 28th of May 2003, 10th volume:

«In total, registered unemployment among immigrants rose from 7.9% in February 2002 to 9.8% in February 2003. For the entire Norwegian population it rose from 3.0% to 3.9%. Immigrants from Africa rank highest concerning registered unemployment with 17.8%. This is more than four times higher than for the entire population as such. Otherwise unemployment is on 12.8% and 11.1% for immigrants from Asia and Eastern Europe respectively (unofficial translation).»

In the letter introducing the public hearing on the introduction of the subsistence requirement the Ministry of Local Government states without further discussion that the suggestion does not conflict with the right to family life pursuant to Article 8 of the European Convention for the Protection of Human Rights or Article 17 of the UN International Covenant on Civil and Political Rights. We do not find it sufficient to point to the fact that other European countries also have similar requirements. In order for the Human Rights Conventions to function as a minimum standard for new legislation, it must be demonstrated that the conditions in the relevant conventions have been evaluated and not violated.

However, it appears as if the need for the reintroduction of this requirement was deemed to be so acute that it was given priority over concerns for thorough evaluation and the normal deadlines for a complete hearing. Unfortunately, the following reference to the need for urgent changes in policy also refers to changes in the immigration regulations:

«[...] it is important that the changes in the regulations may be implemented as soon as possible. Therefore Minister of Local Government Erna Solberg has decided to deviate from the ordinary length of the deadline for a hearing[...] (unofficial translation)»

In its official response to these changes SMED was very critical, both because we disagreed with the evaluations that the suggestions were based on, and because we find it unreasonable to propose limits on the freedom of a specific segment of the population suffering from a weak economy.

Because of the clear tendency that can now be seen with regard to very short deadlines concerning changes in immigration policy, the possibility for thorough evaluations and open debate has become severely reduced. This is extremely unfortunate. Therefore SMED gives priority to being prepared to comment on such changes at short notice in order to ensure that we will at least be able to present objections to those suggestions that may represent unfair or disproportionate differential treatment to certain segments of the Norwegian population.



A new law and a new enforcement agency

It is SMED's experience that the administration of immigration law raises central and complex questions about discrimination. In practice it is not easy to distinguish the legitimate regulation of immigrants' access to Norway from discrimination of applicants on the basis of ethnicity, national origin or nationality.

In addition to cases concerning discrimination of applicants from certain countries, SMED also receives a good many complaints from persons who wish to appeal decisions due to inadequate procedures, wrongful application of the law, overly long processing time, and mistaken or inadequate evaluation of facts. The lack of professionalism among Norwegian Immigration Authorities constitutes an unintended consequence of the administration of immigration policy which typically affects persons who do not have Norwegian citizenship to a larger extent than those who do. Nevertheless, SMED is only capable of assisting in individual cases when the oversight concerns ethnic discrimination of applicants from particular countries. This kind of principle distinction is necessary in order for SMED to maintain credibility when assisting in other complaints. The Immigration Authorities must be assured that the complaints we bring to them raise relevant questions about discrimination. Complaints regarding other oversights committed by the Immigration

Administration are referred Juss Buss, NOAS in cases concerning asylum, or other providers free legal aid.

In her doctoral thesis, mentioned above, Bente Puntervold Bøe states that the Parliamentary Ombudsman ought to use the possibilities his mandate gives him to undertake a more thorough testing of the Immigration Authorities' practice concerning visa cases. SMED would emphasise the following: in order to obtain effective protection against discrimination in the field of immigration law, it is very important that the agency which is given the authority to enforce the new Law against ethnic discrimination, is also given the authority to evaluate complaints concerning discrimination perpetrated by the Immigration Authorities. This agency will develop the specialised competence necessary in order to separate legal differential treatment from illegal discrimination. Competence of this kind is needed, not least in the area of immigration.

THE ROAD AHEAD: Increased protection against discrimination in the administration of Norwegian immigration policy from the Year 2005

Even though the administration of immigration policy is based on the fact that differential treatment between foreigners and Norwegian citizens is considered legitimate, exaggerated emphasis on the applicant's nationality, ethnicity, or national origin constitutes discrimination at variance with the prohibition

against discrimination pursuant to UN's International Covenant on Civil and Political rights Article 26 of The Human Rights Act section 2, as well as standard principles of public law.

The agency which, from the year 2005, will have specialised competence in distinguishing legal differential treatment from illegal discrimination, must also obtain competence in the evaluation of questions relating to discrimination by immigration authorities. In order to obtain effective protection against the discrimination which might occur during the administration of immigration policy, the agency will have to have the authority to evaluate discrimination based on ethnicity, national origin and nationality. It must also be able to make statements on the disproportional consequences of differential treatment between citizens and non-citizens authorised in the Immigration Act.

Until the new legal framework and the institutional apparatus is in place, SMED will continue to provide legal advice in cases which raise relevant questions on discrimination, regardless of whether the applicant resides in Norway or not, and regardless of whether discrimination has occurred at Norwegian embassies, at the Norwegian Directorate of Immigration or at the Appeals Board. The decisive factor for whether SMED will assist is that there are indications of discrimination by Norwegian Immigration Authorities.

SOCIAL SECURITY OFFICE



Chapter 5

**SMED's cases within the field
of health and social welfare**

Introduction

Many minorities have contacted the Centre with complaints of experiences of ethnic discrimination in their encounters with the public agencies responsible for health care, social welfare, child welfare and insurance. During the course of the past four years we have received 130¹ such cases, distributed over the following areas:

- health institutions (19 cases)
- health insurance offices (30 cases)
- welfare office (48 cases)
- child welfare (16 cases)
- reduced mobility for refugees dependent on social services (1 case)

The figures in parentheses indicate the way in which the cases have been registered by SMED's case workers. Occasionally registration entails a degree of simplification, as a case may include elements which fall under several different areas (for instance complaints regarding both the health insurance agency and welfare office). Many cases involve the denial of social services by one municipality to refugees registered in another municipality, leading to a de facto reduction of mobility for these persons. This aspect has not been registered, however, in those instances where we have chosen to deal with the welfare agencies directly. These cases have been registered under the «welfare office» category.

Complaints concerning the areas of health and social welfare constitute a relatively large proportion of SMED's cases, 14.6% in total. At the same time, it is rare that SMED is able to uncover sufficient documentation to prove that a person has

been subjected to negative differential treatment due to their ethnicity.

Nevertheless, the question remains as to whether or not public services are organised in such a way that they account for ethnic diversity and that ensure comparable treatment for ethnic minorities. As far as SMED is concerned, any qualitatively negative differential treatment of this kind should be considered discrimination.

SMED believes that structured, systematic training would greatly assist public sector employees in organising services to meet the needs of a diverse group of users. As long as this kind of competence is non-existent or underdeveloped, it will be difficult to pick up on the non-communicated conditions that are necessary for successful results.

When it comes to providing services to non-Norwegian speakers, SMED feels that interpreters should be used to a much larger degree than they are today, and that the quality of interpretation should be raised and standardised.

Health Services

Persons with minority backgrounds contact SMED about lack of information, quality of treatment, long waiting periods, and poor service, among other complaints.

It is the duty of health services providers to organise services in such a way that ensures that patients are treated with understanding and respect. Many of those who contact SMED express that they have not been pleased with their meetings with health services. They complain that they



1) Sixteen of the 130 classified under the heading of health and social welfare are not listed here. Fifteen of these cases were either too difficult to categorise or contained elements which fall under more than one heading. One case lacks significant details as the client has not followed up after the first meeting.

have not been given enough time, that they have not been provided adequate explanations, that they often do not understand the explanations that are given, that the doctors answer in a harsh and discouraging way, and that they have been met with general prejudice and bias. In response to letters from SMED, health personnel have also expressed frustration over their encounters with the patients in question, claiming to have made repeated attempts to make themselves understood, without success.

Trust is the basis of any patient/doctor relationship. When patients, for whatever reason, do not have confidence in health personnel, the quality of the service they receive is also affected. This may also have consequences for the patient's ability to participate in decisions concerning their treatment. Patient participation is a precondition for being able to guarantee high quality health care.

Complaints concerning the behaviour of health personnel may reflect the fact that health personnel have not succeeded in establishing the dialogue that is necessary in order for a patient to get the most out of their treatment. It can be demanding for health personnel to establish good rapport with different groups of patients. Health personnel must be given the opportunity to acquire the knowledge that is necessary in order to meet the needs of patients with ethnic minority backgrounds. In her report² «The Monologue of Interaction», Elin Berg demonstrates how the lack of knowledge among therapists concerning their patients' traditional/culturally tinted understandings of their situations, contributes to making successful treatment impos-

sible. It should be noted that none of the therapists themselves perceived themselves as lacking knowledge about their patients, nor did they explain unsuccessful treatment as the result of cultural/ethnic factors.

A significant problem facing the patient/doctor relationship seems to be the question of information. Many patients who contact the Centre complain that they do not understand what is going on during encounters with health service personnel. According to the Law on Patients' Rights [Pasientrettighetsloven] sections 3 to 5, information must be:

«Adapted to suit the receiver's individual capacity for understanding, determined by age, maturity, experience, and cultural and linguistic background [unofficial translation].»

SMED believes that there needs to be a conscious effort to present information in order to ensure that it is in accordance with these standards. At most hospitals today, for example, it is up to health personnel to assess on their own whether an interpreter is needed and to what extent interpreters should be used. This is unsatisfactory. SMED wishes to make the following suggestions, as a starting-point for improved quality of information:

- 1) Patients ought to be informed of their general right to request an interpreter when in contact with public health services. This information might be conveyed through informational brochures.
- 2) Interpretation should always be conducted by professional interpreters.
- 3) Quality of interpretation can be ensured by requiring that interpreters are well versed in health care terminology.

2) Elin Berg «The Monologue of Interaction» («Samhandlingens monolog»), a study of interaction between clients of immigrant background and staff in remedial action for drug abusers. SIRUS-rapport nr. 1, 2003.

- 4) Use of interpretation services ought to be logged in a journal.
- 5) The extent to which interpreter services are utilised ought to be made visible both in budgets and administrative planning.

The Social Welfare Service

Persons of minority background make up an increasing proportion of those persons whose only source of income is Social Security. The reasons for this are complex. SMED finds this development worrisome, and it is important to identify conditions which might play a role in this negative development.

The Law on Social Services [lov om sosiale tjenester] section 1–1 states:

«The purpose of this law is:

a) to further economic and social security, to improve living conditions for persons in difficulty, to contribute to an evening out of social status and increased equality, and to prevent social problems;

b) to contribute to ensuring each individual an opportunity to live independently and to have an active and meaningful existence in community with others [unofficial translation].»

An important prerequisite for effective social work is that the social worker is able to acquaint themselves with all of the circumstances which have contributed to the user ending up in a difficult situation. This also requires an awareness of relevant cultural and ethnic factors.

SMED's users complain about many of the same things that other

people who are dependent on social welfare benefits complain about, such as lengthy casework, the way in which entitlements are determined, documentation requirements, conditions placed on benefits, and accessibility, to name a few. The Social Welfare Service should be given credit, however, for using interpreters to a much larger extent than the public health agencies in their dealings with users.

Nevertheless, many complain that they do not receive the guidance they feel they are entitled to from the Social Welfare Service. In Oslo, many have additionally complained that they have not received application forms, that they experienced difficulties in submitting their applications, and in some cases, that they did not receive any written response to their applications. Although SMED is unaware of the reasons behind the relatively high threshold maintained by some social welfare offices in Oslo in regard to certain users, we are still worried by this kind of faulty casework. It seems as if refugees are particularly affected by these problems.

Many refugees move to Oslo from the municipalities that they were originally placed in, and there are many reasons why they might prefer to live in Oslo. Many of those who apply for Social Security benefits in Oslo are refused. The most common reason for rejection is that they have already been offered benefits in another municipality, and the Social Welfare Service in Oslo therefore feels no obligation to help them. SMED has previously been of the opinion that refusal of social services on these grounds does not conflict with this group's basic human rights, nor does it constitute negative differential treatment.



At the same time, most of those who choose to move to Oslo do so for very good reasons, and usually end up staying despite suffering great hardship. SMED is doubtful that grown-up people will accept for any length of time that public authorities have the ultimate say in where they are going to live; this in itself indicates the unfortunate nature of the current policy. SMED has asked the Parliamentary Ombudsman to look into the matter.

Child Welfare

In most of the cases brought to SMED concerning child welfare, the complaints deal with parents of minority background feeling that they have been treated with suspicion, that they have been overlooked or ignored, or that they have been generally misunderstood. In addition, there are complaints that child welfare authorities do not take religious, cultural, and ethnic factors into consideration when choosing foster families in cases of temporary foster care.

In some of the cases where parents have clearly expressed their wishes as to in which faith their child should be brought up, child welfare authorities have indicated that this is ultimately up to the parents themselves to take responsibility for during their visits with their children. However, it goes without saying that conditions conducive to parental influence do not exist in cases where visitation is strictly limited. In such cases, child welfare authorities must instead ensure that foster parents will be able to follow up the parents' wishes. Placement in a foster home will in most

cases be only temporary. It is therefore important that temporary placement not create insurmountable problems when children are eventually returned to their original family.

SMED also encounters that many of our users feel that that they have been misinterpreted by child welfare authorities. When parents are portrayed as authoritarian or insensitive to the needs of their child, many believe it is because their behaviour appears different than that which has previously been common in Norway. They feel that child welfare authorities have occasionally been too quick to conclude that parents' behaviour is detrimental to their child. This is especially the case in situations involving adolescents, where the normal level of conflict between parents and children is generally high. Parents in this situation often feel that child welfare authorities are too hasty in concluding that their children ought to be temporarily placed outside the family. Instead, they ask for a closer cooperation with the child welfare authorities, whereby child welfare staff might provide advice and guidance that can help to establish better forms of cooperation between parents and their children. SMED believes that child welfare authorities generally do try to cater to individual needs, although we still feel that greater awareness must be developed with regard to the significance played by ethnic background.

Health Insurance

SMED has received complaints from persons with disabilities who



have not been granted disability insurance, owing to the fact that they have not been members of the health insurance plan the last three years before becoming disabled. In most cases they have been referred to the social welfare office, although this is often experienced as less than satisfactory. This also affects some groups of refugees living in Norway on humanitarian grounds.

SMED will assess whether efforts should be made to change the rules governing disability insurance, in order to allow coverage to this group as well. In addition, many also complain about inadequate guidance counseling and about the handling of their cases in general.

SMED has received several complaints from Roma (Gypsies) living in Norway. In many of these cases, the health insurance offices have not done enough to obtain pertinent information before decisions regarding refusal or termination of policy coverage have been made. For instance, the fact that children have been taken out of school has been interpreted as a sign that the family has also left the country. Some families of Roma background take their children out of school when embarking on their annual travels, which most often take place some time between March and October. Most travel exclusively in Norway. Nevertheless, the health insurance offices have stopped the payment of aid to families with dependent children on the assumption that the families have left the country, and that the conditions for aid were therefore no longer being met. Because they have been travelling, the families have been unable to counter the health insurance officers'

claims before the until after the payments have already stopped.

SMED has argued that the Roma, as a national minority, have a right to practice their lifestyle in accordance with their culture and traditions. Public offices ought to organise their services in such a way that they do not cause unnecessary problems for their users. SMED believes that there is a need for special guidelines in order to ensure that this group is not subjected to injustice or unnecessary difficulties as a result of their travels. The National insurance administration has responded favorably to a proposed cooperation with the Centre on drafting such guidelines.

The Public Service Sector can Prevent Discrimination

As mentioned, SMED is seldom able to find evidence that public services discriminate directly. At the same time, the way in which services are organised often results in services being qualitatively worse for recipients that are not ethnically Norwegian. SMED believes that persons of minority background are subjected to indirect discrimination in the public service sector.

For this reason SMED calls for better organisation of public services. SMED points to three areas with a potential for improvement within the public service sector:

- Lack of competence among staff in handling difference.
- Lack of consciousness concerning the role cultural factors play in influencing final results.
- Language barriers making services inaccessible.



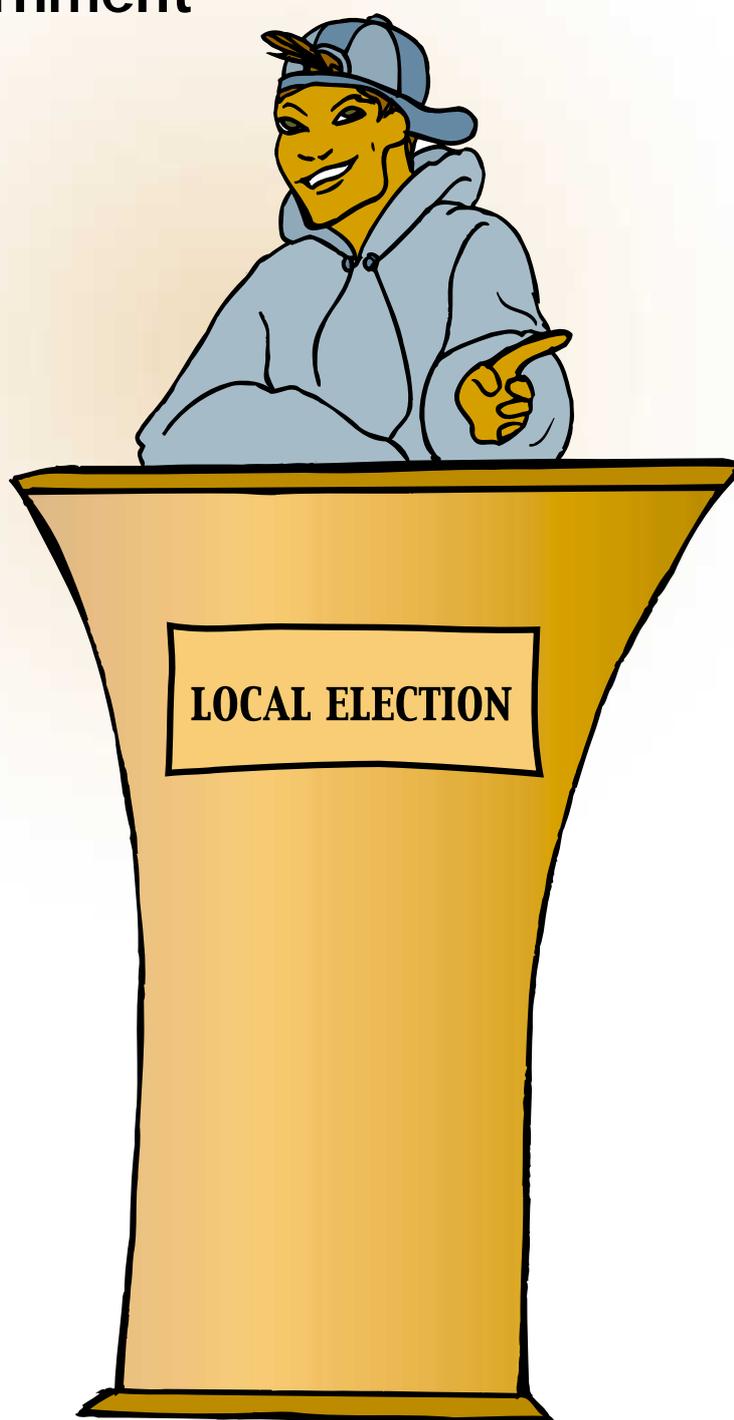




Part III
Future Challenges

Chapter 6

The political representation of immigrants in Norwegian local government



«EVERYONE SHOULD HAVE *the ability to influence the public policy affecting their daily lives. It is important that minorities themselves are included in the decision-making process concerning policy prioritisation and development [...]. The majority population must recognise the importance of sharing power and influence with minority groups. The Government, NGOs, and political parties must remove existing barriers to participation as well as expand the agenda to make room for minority issues [unofficial translation].*¹»

This passage, taken from a plan of action released by the current administration, highlights the fact that combating racism and ethnic discrimination involves more than simply hindering negative differential treatment. In addition to formal rights, it is crucial to ensure all members of society equal opportunity to influence and participate in the decision-making process. Although we know that discrimination occurs in all areas of public life, such as employment and the housing market, there is little documentation concerning the political representation of immigrants and their participation in local Norwegian politics.

Are immigrants under-represented in Norwegian county and municipal councils?

In order to answer this question the Centre for Combating Ethnic Discrimination (SMED) has completed a study of immigrants' political representation at the county and municipal level.

A word about the method and selection used in this study

The findings are based on data concerning political representation in all county councils and a selection of 17 municipalities², in which 64% of all eligible immigrant voters³ reside. We chose to focus specifically on representatives with immigrant backgrounds rather than all representatives with ethnic minority backgrounds because we wished to compare the percentage of eligible immigrant voters with the percentage of elected immigrant representatives. In order to compare these figures it was necessary to utilise an objective operational definition, leading us to adopt Statistics Norway's (SSB) definition of «immigrant background»⁴. The study reflects the political representation of immigrants exclusively, and does not take into account other individuals with minority backgrounds, such as those belonging to national minorities⁵.

In the summer of 2002 SMED sent out a questionnaire to all county councils and select municipalities. The questionnaire requested information regarding the number of representatives at the municipal and county level had immigrant backgrounds, and how many of these in turn were women or came from non-Western countries⁶. We also requested information regarding the party affiliations of sitting immigrant representatives.



Findings – county councils

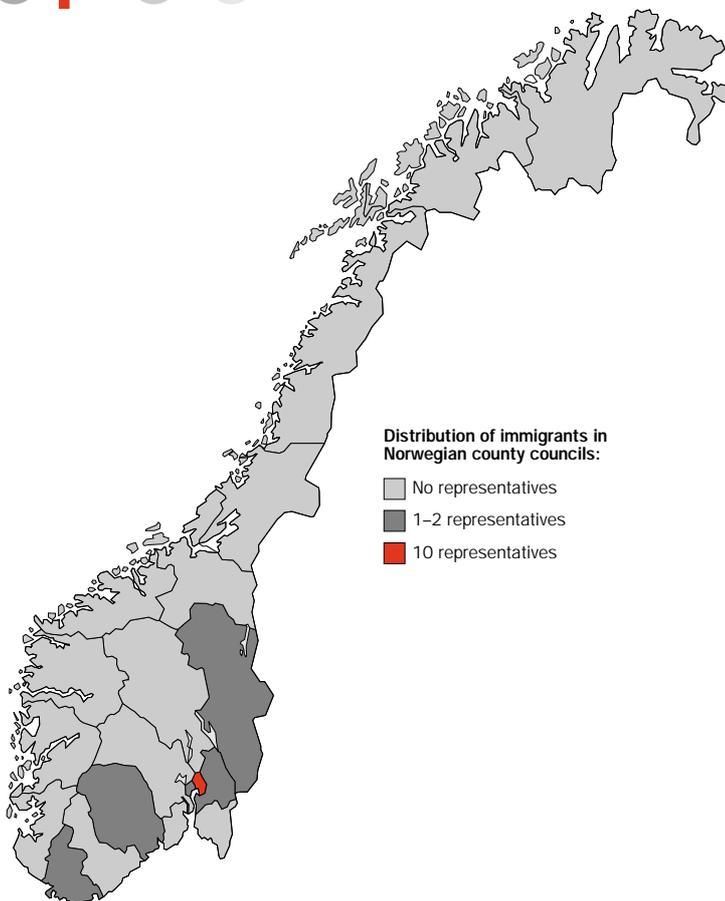
- Persons with immigrant backgrounds are grossly under-represented in Norwegian county councils.
- 14 of 19 counties have no immigrant representatives filling council seats.
- In total there are only 16 representatives with immigrant backgrounds at the county level, while one could expect 51 representatives with immigrant backgrounds (5.4% of 939 seats).
- In other words there are 68% fewer representatives with immigrant backgrounds than could be expected given the percentage of eligible immigrant voters.

The map shows the distribution of immigrant representatives in Norwegian county councils. Oslo alone has 10 representatives. Vest-Agder (2), Telemark (2), Akershus and Hedmark together have 6 representatives. The remaining 14 county councils have no representative with immigrant background.

Western vs. non-Western background and gender

Of the 16 immigrant representatives in Norwegian county councils, 13 have non-Western backgrounds. 7 of these 16 representatives are women⁷. Since the number of immigrant representatives is low, it is difficult to present any statistically meaningful trends, although the figures might nevertheless help to lend some perspective:

- The study reveals that there are fewer female than male representatives with immigrant backgrounds. Immigrant women fill only 0.7% of county council seats while immigrant men fill 1% of council seats. In total, immigrants fill 1.7% of the seats in Norwegian county government.
- Interestingly there are more non-Western immigrant representatives (13) than there are representatives with Western immigrant backgrounds (3). Discounting Oslo⁸ with its 10 immigrant representatives (all of which have non-Western backgrounds) there are only three non-Western immigrant representatives serving in all Norwegian county councils.



Political affiliation of immigrant representatives at the county level

The following chart shows the distribution of immigrant representatives according to party affiliation.

11 of the 16 immigrant representatives are affiliated with either the Labour Party, the Socialist Left Party or the Red Electoral Alliance. In other words, the socialist parties are home to a large proportion of the total number of immigrant representatives at the municipal level. Given that most non-Western immigrants consistently vote for socialist candidates⁹ it is not surprising that the socialist parties also have more immigrant representatives than the non-socialist parties. Centrist parties, for example, have relatively low voter support among immigrants¹⁰. Whether this can be attributed to their having fewer affiliated representatives with immigrant backgrounds or whether these parties fail to appeal to immigrant voters for other reasons is difficult to determine here. Whatever the case, these parties' low immigrant support parallels an extremely low number (1) of county council seats filled by immigrant representatives affiliated with these parties.

Findings- municipal councils

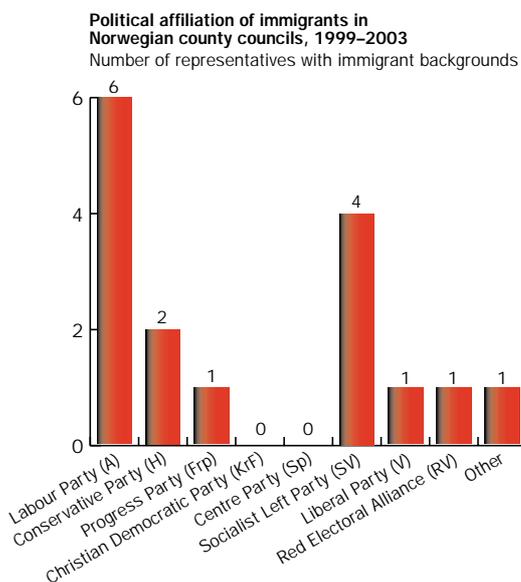
The study's findings are based on data from a selection of 17 Norwegian municipalities¹¹. These municipalities, from Tromsø in the north to Kristiansand in the south, are home to 64% of the country's eligible immigrant voters¹². Immigrants make up 8.9% of all eligible voters in these municipalities.

- The study shows that immigrants are grossly under-represented in Norwegian municipal councils.
- There are 39 immigrant representatives in the municipalities looked at in this study, compared with the 91 representatives which could be expected (8.9% of 1028).
- In other words, immigrants fill 57% fewer seats than could be expected given the percentage of eligible immigrant voters.

Western vs. non-Western background and gender

Of the 39 immigrant representatives filling municipal council seats, 36 have non-Western backgrounds. Twelve of the 39 immigrant representatives are women¹³.

- The study shows that immigrant women make up only one third of all immigrant representatives at the municipal level.
- Immigrant women make up only 1.2% of all representatives at the municipal level, while immigrant men make up 2.6% of the total. Immigrants fill only 3.8% of seats in municipal government while representing 8.9% of the total voting population.



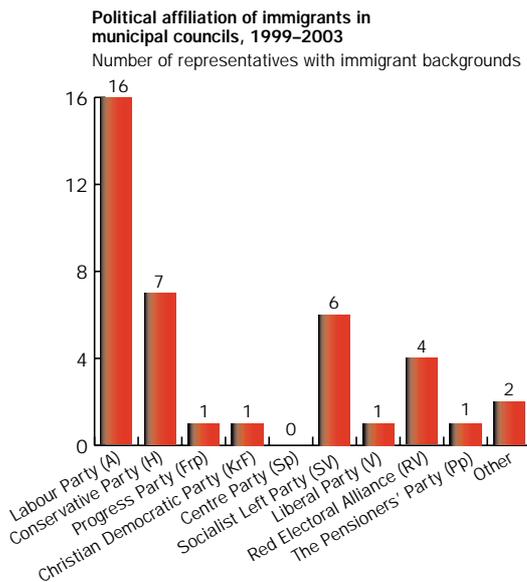
- Thirty-six of 39 immigrant representatives have non-Western backgrounds (in other words 92%). The tendency seen at the county level, where there is a larger number of non-Western than Western immigrant representatives, is even more pronounced at the municipal level.

Political affiliation of immigrant representatives at the municipal level

The following chart shows the distribution of immigrant representatives according to party affiliation.

As was the case at the county level, a greater proportion of immigrant representatives at the municipal level are affiliated with the socialist parties. Twenty-six out of 39 immigrant representatives are affiliated with either the Labour Party, the Socialist Left

Party or the Red Electoral Alliance. Here too the centrist parties have few affiliated immigrant representatives. The Conservative Party has seven affiliated immigrant representatives.



Conclusion

In a representative democracy, where the individual's political sovereignty is delegated to political representatives, the question will always remain as to who is best suited to represent our individual interests. Because political power is indirect, wielded by popularly elected officials, the question of legitimacy is an extremely important one¹⁴.

The goal of any democracy is to ensure that everyone is in the position to influence political decisions. Active participation in political debate and in the decision-making process is key to the cultivation of the individual qualities and the level of social integration necessary to maintaining a democratic society¹⁵. A high level of individual participation, and a high degree of political representation, can therefore be seen as both means to an end and ends in themselves¹⁶.

SMED's study shows that immigrants are grossly under-represented in both county and municipal government. At the county level there are 68% fewer immigrant representatives than could be expected given the total number of eligible immigrant voters. At the municipal level there is a 57% level of under-representation.

These findings indicate that the immigrant population of Norway is only to a very small degree politically integrated at the local level. This means that immigrants are to a lesser extent than others in a position to influence and determine the policies which affect their everyday lives.

SMED believes that the high degree of under-representation among Norway's immigrant population can ultimately undermine the legitimacy of municipal and county government.

The road ahead: From knowledge to action to social change

SMED has completed the first ever study concerning the representation of immigrants in Norwegian local government¹⁷ between 1999–2003. The results are far from uplifting.

SMED will continue to monitor developments in this area and plans on undertaking a follow-up study after local elections this autumn.

On the basis of the study presented here, SMED urges the political parties to examine their organisations in order to determine whether there might exist formal or informal barriers to participation for persons with immigrant backgrounds.

This study does not attempt to uncover why immigrants are under-represented in local Norwegian politics. In order to uncover the reasons for this under-representation SMED urges the government to initiate further research, which can more closely explore immigrants' experiences with the Norwegian political system and their parties' nomination processes¹⁸.

It has been argued that a high level of political representation, whereby elected bodies closely reflect in their make-up the make-up of the general population, is an important factor in establishing democratic legitimacy. At the same time, it is not certain that representatives that have immigrant backgrounds see themselves as representatives for «immigrant» interests, serving instead as representatives for a political party. It is possible that representatives with immigrant backgrounds are confronted with conflicting expectations¹⁹, and SMED encourages further qualitative research into the ways in which representatives experience the various, sometimes competing demands placed on them as a result of party affiliation on the one hand and ethnic background on the other.

The study reveals that in some areas, such as Oslo, immigrants are approaching a political representation equivalent to their proportion of eligible voters. Increased political participation and representation has been explained by «ghettoization²⁰». According to Bjørklund and Kval, areas with a high density of immigrants tend to stimulate collective political mobilisation.

SMEDs study has shown that immigrants are under-represented in Norwegian county and municipal government. The Centre for Combating Ethnic Discrimination sees this as a warning to the political parties that they must:

- recruit more immigrants into their organisations
- expand their agendas to make room for minority interests

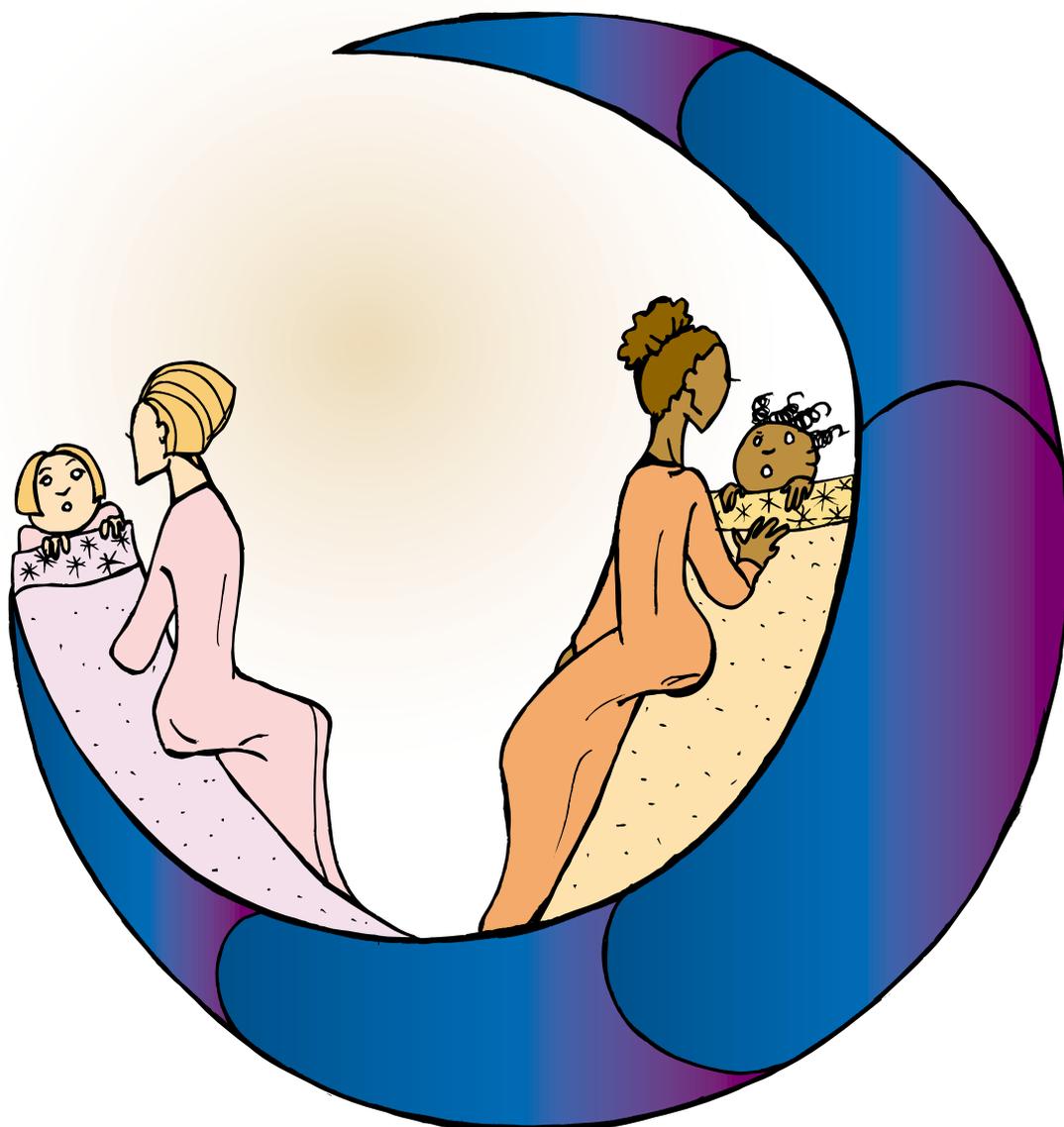
In order to encourage increased political participation by immigrants in Great Britain a program known as the MP Shadowing Scheme has been implemented. This program seeks to encourage political participation and representation by allowing young minorities an opportunity to «shadow» a Member of Parliament for six months. Participation in the program is voluntary, and it is up to the MP and the volunteer to determine the content and scope of the volunteer's engagement. When the program was first implemented in 1999 over 600 young people applied. Twenty-three of these young people were given the opportunity to «shadow» a Member of Parliament, and many of the volunteers have subsequently run for political office themselves²¹. The Centre for Combating Ethnic Discrimination believes that a similar project could be successful here in Norway.



Notes for Chapter 6

- 1) *National Plan of Action to Combat Racism and Discrimination 2002–2006*, page 4.
- 2) The study is based on data from Moss, Sarpsborg, Fredrikstad, Bærum, Asker, Lørenskog, Skedsmo, Oslo, Drammen, Sandefjord, Skien, Arendal, Kristiansand, Sandnes, Stavanger, Bergen, Trondheim, and Tromsø.
- 3) 118,926 out of 185,513 eligible immigrant voters, according to Statistics Norway (SSB).
- 4) Vebjørn Aalandslid and Benedicte Lie at SSB provided data concerning the number of eligible voters in all counties and the selected municipalities. SMED wishes to thank them for their generous assistance.
- 5) The terms «immigrant» and «immigrant background» refer to individuals whose parents were both born in another country. The designation «first generation immigrant» refers to individuals who have themselves immigrated to Norway, whereas «second generation immigrant» refers to the children of these individuals that have been born in Norway. «Immigrant» and «immigrant background» are used interchangeably throughout this article in reference to both of these groups.
- 6) National minorities in Norway include Romani, Roma, Kven, Jewish and Finnish communities.
- 7) By «non-Western background» we refer to individuals who do not come from a country within the European Economic Area area, the USA, Canada, Australia or New Zealand. Individuals coming from all other areas of the world are therefore referred to as «non-Western». This definition corresponds with SSB's definition of «non-Western».
- 8) 0.7% of the total number of county council seats.
- 9) Oslo is treated as both a county and a municipality for the purposes of this study.
- 10) Bjørklund, T. & Kval, K.-E. «Innvandrere og lokalvalget 1999», p. 99. *ISF rapport 2:2001*.
- 11) Bjørklund, T. & Kval, K.-E. «Innvandrere og lokalvalget 1999», p. 100. *ISF rapport 2:2001*.
- 12) The study is based on data from Moss, Sarpsborg, Fredrikstad, Bærum, Asker, Lørenskog, Skedsmo, Oslo, Drammen, Sandefjord, Skien, Arendal, Kristiansand, Sandnes, Stavanger, Bergen, Trondheim, and Tromsø.
- 13) During county council and municipal council elections in 1999 there were 185, 513 eligible immigrant voters in Norway. 118,926 of these lived in the municipalities selected for this study. In these municipalities there was a total 1,340,305 eligible voters in 1999. There were 118,926 immigrants in these municipalities, representing 8.9% of the population in these areas.
- 14) 0.7% of the total number of county council seats.
- 15) For a detailed discussion in Norwegian of political legitimacy in multicultural society, see *Sand i maskineriet. Makt og demokrati i det flerkulturelle Norge*. Brochmann, G., Borchgervink, T., & Rogstad, J. Gyldendal:2002.
- 16) The nomination and election of immigrants to government seats are factors which increase immigrant participation in the political process. «Voting Rights support successful integration – a Vienna case study», *Equal voices*, Issue 12, 2003. European Monitoring Centre on Racism and Xenophobia.
- 17) Hernes, G & Martinussen, W., «Demokrati og politiske ressurser», *NOU 1980:7*, p. 86.
- 18) Semen, S., «Innvandrere og politisk deltakelse i Hordaland: partimedlemskap, nominasjon og representasjon ved kommunestyre- og fylkestingsvalget i 1995». *IMER 16:1998*. While this report deals exclusively with the county of Hordaland, it discusses important aspects of party affiliation and nomination not touched upon by SMED's study.
- 19) The study undertaken in Hordaland during municipal elections in 1995 revealed that political parties by and large nominated to the electoral list those immigrant members (Western and non-Western) who wished to run for election. Semen, S., «Innvandrere og politisk deltakelse i Hordaland: partimedlemskap, nominasjon og representasjon ved kommunestyre- og fylkestingsvalget i 1995». *IMER 16:1998*, p. 29.
- 20) The possibility of conflicting expectations facing minority representatives was first discussed in *The People's Choice*, by Lazarfeld et. al. 1940, where it was shown that voters belonging to more than one social group with potentially conflicting interests.
- 21) Bjørklund, T. & Kval, K.-E. «Innvandrere og lokalvalget 1999», p. 99. *ISF rapport 2:2001*.
- 22) More information can be found on the Commission for Racial Equality's homepage: <http://www.cre.gov.uk/gdpract/polobv.html>





Chapter 7

Individually tailored language instruction for minority pupils

Primary language instruction, and language instruction in one's primary language – a child's right

All children and young people in Norway have the equal right to an education and are entitled to a curriculum suited to meet their individual needs and abilities. Pupils who speak a minority language as their primary language are to be given the same opportunities, rights and responsibilities as those pupils who speak Norwegian as their primary language. The goal is to ensure that all pupils, regardless of their language background, will leave elementary school with a meaningful education, with confidence in the Norwegian language and other disciplines.

Section §2–8 of the Law on Education and the forward to Chapter 24 of the Law clearly states that

«Municipalities shall offer primary language instruction to elementary school pupils who speak a primary language other than Norwegian or Sami, bi-lingual instruction in other disciplines, as well special Norwegian language instruction, until such time as their proficiency in the Norwegian language is sufficient to allow them to follow regular instruction (unofficial translation).»

In other words, municipalities are required by law to teach minority pupils their primary language as well as to provide bi-lingual instruction in other disciplines and give instruction in the Norwegian language until pupils have the language skills needed to follow regular instruction. This raises the question as to what is meant by «sufficient proficiency in the Norwegian language». The Law

suggests a subjective evaluation of pupils' language skills, paving the way for potential conflict between the school and a child's family with regard to the child's level of proficiency. Private schools are currently excused from these requirements.

In the strategic plan presented at the U.N. conference against racism, member-states were encouraged to meet the following minimum educational requirements:

- to ensure that all children receive a good education, free from discrimination
- to establish and implement standardized methods for measuring and following the scholastic development of children and young people with special needs
- to allocate resources which can be used to close the gaps in scholastic achievement

The municipalities' responsibility to provide instruction in a child's primary language, bi-lingual instruction in other disciplines, as well as special Norwegian language instruction, as outlined above, provides pupils with a set of legal rights. In cases where schools do not act according to these guidelines, the pupil or their parents/guardian have the right to demand primary language instruction. Whether the pupil is granted such instruction ultimately depends on educators' evaluation of the child's level of Norwegian language proficiency.

The publically commissioned study *NOU 2003 «I første rekke»* reports that there are approximately 40,000 pupils in Norwegian elementary schools whose primary language is a minority language. Of these,

Table 1: Pupils offered primary language instruction, according to language.
School year 1995/96–1999/2000

Primary language	95/96	96/97	97/98	98/99	99/00
Total	11,276	12,770	15,810	17,008	17,306
Urdu	886	1,191	2,052	2,067	2,515
Albanian	751	915	1,015	1,164	1,577
Vietnamese	1,521	1,514	1,816	1,827	1,570
Bosnian/Croatian	1,245	1,308	1,351	1,367	1,267
Arabic	327	407	748	978	1,096
English	886	878	1,100	1,304	1,005
Somali	326	581	603	844	1,005
Spanish	815	785	1,017	989	883
Turkish	674	743	856	866	781
Tamil	489	397	553	529	632
Kurdish	189	221	268	387	611
Persian	464	407	459	453	439
Other	2,703	3,423	3,972	4,233	3,925

roughly 18,600 receive some form of instruction in their primary language. Instruction is currently offered in around 100 different minority languages.

SMED has registered few complaints from families concerning primary language instruction or bi-lingual instruction in other disciplines. As a result we have only limited knowledge about the way in which schools implement the official guidelines outlined above.

A study undertaken by the College of Hedmark (Aasen and Mønnes 1998) for the Department of Churches, Research, and Education shows large variation in municipalities' use of resources with respect to primary language instruction and bi-lingual instruction in other disciplines. Among the larger municipalities Oslo stands out, offering primary language instruction to an extremely limited number of pupils with minority language backgrounds. The other municipalities are relative consistent with regard to the proportion of pupils who speak minority languages that receive special Norwegian language instruction. It seems that municipalities with relatively few inhabitants and municipalities with many schools but few pupils are most likely to use more resources for

tailored language instruction. The question which is most interesting for SMED is:

Does a general lack of primary language instruction, or varying quality of primary language instruction for different language groups, represent ethnic discrimination?

The answer to this question depends on what effect, or lack thereof, primary language instruction has on the scholastic achievement of children and young people. Is it the case that those receiving primary language instruction show better results than those minority pupils not receiving primary language instruction? Another interesting question is how the scholastic achievement of those receiving primary language instruction compares with that of those whose primary language is Norwegian.

Primary language instruction – pros and cons

Central to the debate is the question of whether or not a pupil's ability to read and write their primary language has positive effects on their general learning. Roughly speaking, the debate has been waged between two opposing camps:



- A nearly unanimous research community arguing in favor of primary language instruction as an aid to learning.
- A more popular, «common sense» understanding of how to most effectively integrate children and young people with minority backgrounds.

Researchers argue that children learn best in the language that they best understand. In addition, they argue that primary language skills must be developed first before effective learning in other languages becomes possible. For many laymen (including a number of politicians) and some researchers the arguments for primary language instruction are seen as sending a conflicting message: Isn't it better that children learn Norwegian as quickly as possible, given that everyone agrees that this is the ultimate goal? This argument rests on the assumption that primary language instruction has an adverse effect on children's Norwegian language skills, in addition to causing language confusion. Those seeking proof of a correlation between primary language instruction and general scholastic achievement often cite the fact that pupils with minority language backgrounds on average perform more poorly than other pupils with a majority language background.

The effect of primary language instruction on scholastic achievement

In his article «Morsmålsundervisning og skoleprestasjoner» («Primary language instruction and scholastic

achievement»), researcher Anders Bakken presents two hypotheses:

- H1: The linear hypothesis:
The level of scholastic achievement increases in proportion to the level of primary language instruction.

The linear hypothesis assumes that for each year of primary language instruction the level of scholastic achievement will increase. Alternatively, we can assume that primary language instruction will result in a step effect.

- H2: The step hypothesis:
Primary language instruction will have a positive effect on scholastic aptitude only after a period of four or more years.

It is worth noting that both hypotheses assume that those not receiving primary language instruction will have lower levels of scholastic achievement than those offered more personalised instruction. In order to test these hypotheses Bakken uses data provided by the Youth in Oslo study (1996). In addition, Bakken considers other factors which might play a role in whether primary language instruction has an effect on minority pupils' scholastic achievement:

- Parents' proficiency in the Norwegian language/employment situation (employed/unemployed).
- Ethnic background/country of origin.
- Language skills upon entering school (previous pre-school or kindergarten experience).



Table 2: The percentage of pupils in the top 40% of their class in various disciplines, according to the amount of primary language instruction received+

	Cumulative grade-point average #	Mathematics	English	Natural Sciences	Social Sciences
No primary language instruction	26	21	26	31	35
One year of primary language instruction	24	19	19	29	27
Two years of primary language instruction	30	22	30	38	46
Four to six years of primary language instruction	40*	31*	31	47*	51*

#) Grade-point average based on cumulative scores in mathematics, English, natural sciences, and social sciences.

+) Percentages based on an analysis which accounts for mother's socio-economic status, participation in the labour market, proficiency in the Norwegian language, and parent's country of origin.

*) Statistically significant.

Bakken concludes that one group especially stands out:

- Those that have had primary language instruction since early childhood (between the ages of 4 to 6) enjoy higher levels of scholastic achievement, roughly on par with the average for other pupils in Oslo.

For the other three groups the achievement reflected in grade-point average is somewhat lower (24–30). This difference is noticeable in most disciplines, with the exception of English, where there is no statistical correlation. For the natural sciences, mathematics and the social sciences there is a statistical correlation, and the findings seem to support the step hypothesis as those with the most primary language instruction tend to score highest.

Researchers' defense of primary language instruction can be divided into roughly four different categories. They argue that primary language:

- **Gives children better chances for learning (the learning argument):**
It is assumed that pupils who cannot follow instruction in Norwegian will learn better- both with regard to the Norwegian language and to other disciplines-

if they are given instruction in a language they can understand. Instruction must be tailored to the needs of the individual. Chances of learning the Norwegian language are increased by a well developed understanding of one's primary language.

- **Strengthens children's ethnic and cultural identity (the recognition argument):**
It is argued that primary language instruction results in a positive self image. The cultural assimilation forced upon the Sami people is an example of government policy which resulted in widespread feelings of low self-esteem.
- **Increases communication between children and their parents (the communication argument):**
It is argued that when competing languages are spoken within the family unit and within different generation sets children might lose respect for their parents and elders.
- **Increases the language base in a country which is becoming increasingly integrated into world markets (the economic argument).**



The way forward: Individually tailored language instruction as a condition for equal opportunity

SMED believes that pupils who are made to follow instruction which they lack the language skills to absorb, are in reality being offered a worse education than pupils who do not share the same language difficulties. This is discrimination.

In addition, SMED believes that individually tailored language instruction will contribute to the strengthening of minority children's self-esteem, a process which will in itself have positive repercussions for the future of our multi-cultural society.

The suggested amendments to the Law concerning private schools will allow for increased freedom for families to choose private alternatives to the public school system. SMED agrees with those that argue that increased segregation among school children as a result of the new private school laws would be extremely unfortunate. Therefore we recommend that also private schools be required to offer primary language instruction. Only then will the freedom to choose also exist for those children with the need for tailored language instruction.



SMED also supports:

- More research concerning which form of instruction is most successful. Future studies must account for pupils' language skills upon entering school, both in their primary language and Norwegian.
- A greater focus on increased quality of instruction, and on teachers' qualifications.
- Investigation into other ways to boost language competency. Tutoring programs and better school libraries, as well as a general focus on catching reading and writing difficulties can be effective measures. Increased commitment to such measures can help to shift the focus away from minority pupils as problems, and redirect attention towards ways in which schools can be improved to the benefit of all pupils.
- Focus on actual problems experienced by individual pupils. This can help reduce the tendency towards ethnic and language-based segregation in schools.

Appendix

Legal mandate for the Centre for Combating Ethnic Discrimination

Prescribed by the King in Council 11th September 1998.

Proposed by the Ministry of Local Government and Regional Development.

1. Background

In Report to the Storting No. 17 (1996–97) on Immigration and Norway as a Multicultural Society it is proposed that for a trial period of five years a programme be established which will help improve the legal assistance available to persons who suffer from discrimination and to document and monitor the situation with respect to the nature and scope of discrimination. Here the term discrimination means negative discriminatory treatment on the basis of religion or belief, race, colour or national or ethnic origin.

On 12th June 1997 the Storting approved the establishment of such a pilot programme through its discussion of Report to the Storting No. 17 (1996–97), cf. recommendation of the Local Government Committee on Immigration and Norway as a Multicultural Society, (Recommendation to the Storting No. 225 (1996–97)).

On 5th December 1997 the Storting allocated NOK 5 million for the pilot programme for 1998, cf. Proposition to the Storting No. 1 (1997–98) for the Budget Period 1998 and Budget Recommendation to the Storting No. 5 (1997–98).

2. Centre for Combating Ethnic Discrimination

On the precondition that the Storting allocate money for the programme in the Ministry of Local Government and Regional Development's budget, a programme shall be established for the trial period 1998 to 2002 to provide legal assistance for individuals who suffer from discrimination on the basis of religion or belief, race, colour or national or ethnic origin. The Centre shall furthermore document and monitor the situation with respect to the nature and scope of this type of discrimination.

The pilot programme shall be established as an administrative agency with special powers under the name Centre for Combating Ethnic Discrimination. It will operate nationwide.

3. Object

The object of the Centre for Combating Ethnic Discrimination is to ensure protection against discrimination.

4. Scope

The Centre for Combating Ethnic Discrimination will handle cases concerning discrimination, cf. the definition in section 1 above, from the entire country. This applies regardless if the discrimination is exercised by private or public bodies. The cases must be brought by individuals staying in Norway. Cases from individuals may also be brought by proxies such as non governmental organisations or others.

5. Instruments

a) Legal aid activities.

Pursuant to Act No. 5 of 13 August 1915 pertaining to the Courts of Justice, Section 218, sixth paragraph, the Centre shall provide legal assistance.

The Centre shall provide legal assistance free of charge to individuals by:

- providing advice and guidance
- channelling enquiries to the appropriate body
- assisting with representation of the party and negotiations

The Centre cannot bring cases before the courts. In cases involving questions of principle, the Centre can cover the cost of hiring a lawyer to take the case to court.

b) Documentation and external activities

The Centre shall document and monitor the situation with respect to the nature and scope of discrimination and pursue external activities by:

- recording enquiries and their follow-up
- obtaining documentation on discrimination
- preparing annual reports on the nature and scope of discrimination
- having contact with other parties to prevent and hinder discrimination
- forwarding proposals on steps to prevent discrimination in society

6. The board

The Centre shall be under the direction of a board. The board shall consist of seven members and three deputies with background and experience from anti-discrimination and human rights organisations, legal practice, business and industry, law enforcement or the prosecution authorities or other areas deemed relevant to the operations of the Centre. Half of the board members/deputies should preferably be persons with a minority background. The board shall be quorate when at least four board members in addition to the chair or deputy chair are present, i.e. altogether five persons. In the event of a tie, the meeting chair has the casting vote.

7. Appointment of the board

The King in Council shall appoint the chair, deputy chair and the other members of the board. Board members are appointed for two years and may be re-appointed once. National organisations that work against discrimination will be invited to propose candidates for board membership.

8. Manager

The board shall employ a manager for the Centre. The manager shall have the right to attend and speak at board meetings.

9. Responsibilities

The board has overall responsibility for the operations of the Centre and for ensuring that it is run within the framework of the terms of reference and the annual letter of allocation from the Ministry of Local Government and Regional Development. The board makes decisions on the long-term guidelines for the Centre and in cases of significant financial importance through the Centre's annual plan and budget. The board is responsible for appointing the manager of the Centre.

The manager is responsible for the daily operation of the Centre and for ensuring that operations are conducted within the framework of the guidelines set by the board. The manager is responsible for prioritising between various assignments and policy instruments, and for reporting on the operations of the Centre to the board. The manager employs the Centre's staff, who are covered by Act No. 3 of 4 March 1983 relating to Civil Servants.

The authority to issue instructions is exercised by the King, who also has the authority to amend the terms of reference. The board shall submit annual reports on the operations of the Centre to the Ministry of Local Government and Regional Development through the budget, annual plan, revised accounts and annual report.

10. Relationship to other public agencies

The Centre will not replace tasks or functions carried out by other public agencies or programmes bordering the Centre's area of responsibility, but will function as a supplement to them.

11. Entry into force

The terms of reference apply from the time the King decides and until the end of 2002.

(Since amended.)





The Centre for Combating Ethnic Discrimination
equal treatment • equal opportunity • equal rights



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