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Submission to the Joint Standing Committee on Migration

Inquiry into the Migration Treatment of Disability

BY: Migration


Disability and Anti-discrimination Law in Germany

This submission aims to demonstrate how the legal system of the Federal Republic of Germany treats disabled persons generally and prospective migrants with disability in particular.

Currently there is a multiplicity of anti-discrimination legislation in Germany prohibiting discrimination based on disability. In essence, German law does not differentiate between disabled and non-disabled persons applying for a permanent visa to migrate to Germany. In fact, there are measures and procedures in place to ensure that special assistance and attention is accorded to persons with disabilities.

1. Treatment of Prospective Migrants with Disability

In Germany, persons with disability are not treated differently when it comes to applying for a visa to travel to Germany including permanent residency visas as different treatment will amount to an act of discrimination and it would be incompatible with the principles espoused in the German Fundamental law ("Grundgesetz") and the Charter of Fundamental Rights of the European Union. In addition, there are special assistance and exemptions available to disabled persons. For example, an applicant is usually required to pass the citizenship test in order to become a German citizen. However, persons with mental disability could be exempted if they are unable to pass the test.

To bring it in line with the anti-discrimination law, health assessment as part of the visa procedure has been abolished altogether.¹ This extends to people who may require continuous significant medical attention i.e. people living with HIV AIDS provided the visa applicant does not pose as a threat to public safety and order, for example, if the applicant would deliberately use his disease to infect other persons.

Any other position would be a breach against the German Fundamental law and the Charter of Fundamental Rights of the European Union.

¹ Telephone call 21 February 2010 case officer Aliens office Authority Düsseldorf, Germany

2. Charter of Fundamental Rights of the European Union - German Fundamental law

As a member state of the European Union, Germany is obliged to adopt the European directives into its national law.

Article 21 of the Charter of Fundamental Rights of the European Union states that discrimination on the grounds of disability is prohibited.²

Further, Article 26 recognises the needs of people with disability and stipulates that measures be put in place to ensure their independence, social and occupational integration and participation in the life of the community.³

The Charter of Fundamental Rights of the European Union codifies the basic and human rights in the European Union. It is binding on every member state except Great Britain, Poland and the Czech Republic.

Article 3 of the German Fundamental law states that all people are equal before the law and no one should be discriminated against based on their disability.⁴ Under this article any discrimination based on disability in any area is unlawful.

3. Anti-discrimination law in Germany

In the last ten years several pieces of legislation have been enacted in Germany aimed to eliminate discrimination on the grounds of disability. Such legislation includes the General Law on Equal Treatment of 2006 (Allgemeines Gleichbehandlungsgesetz) and the Law of promoting the Equality of the Disabled (Behindertengleichstellungsgesetz). The majority of such legislation aims to eliminate discrimination in the areas of employment and community life.

3.1 General Law on Equal Treatment of 2006

Pursuant to the Employment Equality Directive (Directive 2000/78/EC) of the European Community (EC) Germany established the General Law on Equal Treatment of 2006 (AGG).

The underlining rationale for the European Union based legislation is that the European Community is not only an economic community but also a community of shared values. One of those core values is that people cannot be discriminated against on the basis of their disability.

²Article 21 Charter of the Fundamental Rights of the European Union

³Article 26 Charter of the Fundamental Rights of the European Union

⁴Article 3 German Fundamental Law

To reflect the objectives of the European Community Treaty, in particular, the attainment of a high level of employment and social protection, high standard of living, economic and social cohesion and solidarity and the free movement of persons, direct or indirect discrimination based on religion or belief, disability, age or sexual orientation is expressly prohibited.⁵

Article 1 of the Employment Equality Directive states that its purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in the areas of employment and occupation, with a view to impose on the Member States the principal of equal treatment.

The scope of the Directive is defined in Article 3. To the extent possible in the community, the Directive shall apply to all persons, both the public and private sectors (including public bodies), in relation to access to and conditions of and employment including self-employment. This extends to the initial selection criteria and recruitment process, promotion, access to all types and all levels of vocational guidance, vocational training and retraining (including practical work experience), employment and working conditions, dismissals and pay, membership of and involvement in the organisation of workers or employers and benefits specific to a particular profession.⁶

Article 5 of the Directive stipulates that reasonable accommodation shall be provided in order to guarantee compliance with the principle of equal treatment of persons with disability. This means that employers are required to take appropriate measures, on needs basis, to enable a person with disability to have access to training and career progression, unless such measures would impose a disproportionate burden on the employer.⁷

Article 9 of the Directive states that the Member States shall ensure that appropriate judicial and/or administrative avenues are available to all persons who consider themselves having been treated unfairly due to failure in applying the principles of equal treatment, even after the relationship in which the discrimination is alleged to have occurred has ended.⁸

In the case of *Chacon Navas v Eurest Colectividades SA* (C-13/05) disability, the European Court of Justice defined the term of "disability", for the purposes of the Directive, to be "a limitation which results in a particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."⁹

⁵ Preamble to the Employment Equality Directive (Directive 2000/78/EC), Recital 11

⁶ Article 3 of the Employment Equality Directive (Directive 2000/78/EC)

⁷ Article 5 of the Employment Equality Directive (Directive 2000/78/EC)

⁸ Article 9 of the Employment Equality Directive (Directive 2000/78/EC)

⁹ C-13/05 *Chacon Navas v Eurest Colectividades SA*

By enacting the General Law on Equal Treatment of 2006 (Allgemeines Gleichbehandlungsgesetz), Germany has fulfilled its obligation under the European Directive.

The purpose of the General Law on Equal Treatment of 2006 (AGG) is to eliminate discrimination on the basis of ethnic background, gender, religion or belief, disability, age or sexual orientation.¹⁰ In that law the several instructions of the Directive as mentioned above were realised.

AGG provides a person with disability institute legal proceedings against discrimination suffered, in the areas of employment and other civil matters.

If a disabled person is declined in the job application process and he actually possesses similar skills and qualifications as other applicants he or she is entitled to make a claim against the employer on the basis of discrimination. Further, a disabled person who has suffered discrimination is allowed to make a claim and if there is a likelihood of such discrimination continuing he or she is then allowed to seek injunctive relief from the court.

3.2 Laws Promoting the Equality of the Disabled

In 2002 Germany passed the Law of Promoting the Equality of the Disabled (Behindertengleichstellungsgesetz). The purpose of this legislation is to eliminate and prevent discrimination of disabled persons and to guarantee equal participation in community life. It also contains special measures and requirements to enable a self-sufficient lifestyle.¹¹

Essential to this law is the principle of 'Barrierefreiheit' (meaning lack of barriers). The intention is to allow persons with disability, to the extent possible, to become self-reliant and self-sufficient without outside assistance.

To this end, places providing public services especially new Federation buildings and existing Federations Buildings undergoing major works are required to have facilities to accommodate the needs of persons with disability. Public streets and squares and public transport have to be accessible by persons with disability. Specifically access to public buildings, footpaths and train stations has to be wheelchair accessible.

Further, the "lack of barriers" principle also applies to communication. Accordingly, forms and other documents from public authorities are available in Braille for persons with visual impairment. In addition, public authorities have to provide interpreter for sign language. The costs for these services are borne by the authorities.

When the rights of a person with disability is infringed, the Law of promoting the Equality of the Disabled gives the person as well as organisation serving persons of

¹⁰ §1 of the General Law on Equal Treatment of 2006 (AGG)

¹¹ § 1 of the Law of Promoting the Equality of the Disabled

disability (even though they were not directly affected by the discriminatory act) standing to institute legal proceedings against the alleged offender.

Pursuant to § 71 of the Ninth Social Security Code (one of the twelve Social Security Codes), since October 2000 all private companies and public authorities with twenty or more employees have to fill 5 % of their jobs with men and women with severe disability. A person is deemed to have severe disability if the pension office gives the person a rating of having a degree of disability of 50 % or more. Failure to observe this requirement will result in penalties such as fines.¹²

I would like to thank the Committee for giving me the opportunity to present this submission.

Jasmin Reinartz 18/03/2010

¹² § 71 of the Ninth Social Security Code

