



## European network of legal experts in gender equality and non-discrimination

### NEWS REPORT

<b>Country:</b>	Austria
<b>Title:</b>	Supreme Court: Dismissal of notary employee because of her wearing full-face veil (Niqab) not discrimination on the basis of religion
<b>Date:</b>	21 December 2016
<b>Expert:</b>	Schindlauer, Dieter
<b><u>Context</u></b>	
<b>Issue at stake:</b>	Dismissal of employee because of her deciding to wear a Niqab in office of notary covered by exception for genuine and determining occupational requirements
<b>Ground of discrimination:</b>	Religion/belief
<b>Source:</b>	National court decision, Supreme Court Dec. Nr. 9ObA117/15v, 25 May 2016
<b>Field:</b>	Employment
<b>Applicable law:</b>	Equal Treatment Act, §§ 17/1, 20/1, 20/2

### **Content**

**Case:** U vs. Dr. M., Supreme Court Decision Nr. 9ObA117/15v, 25 May 2016 (published 4 July 2016)

**Facts:** An employee of a notary, after having worked in her job for several years converts to Islam and slowly changes her way of clothing according to a more and more strong attachment to the religion. Originally, her employer was mildly opposing the wearing of a headscarf (hijab), but accepted this and also her later wearing of the abaya (a full-length, sleeveless outer garment worn by some Muslim women). He decreased her contact with client, though, and assigned her to "foreign-born" clients, mostly. When she started to wear a full-face veil (niqab), she was warned, that this would not be tolerated in a notary-office. She refused to apply to the order not to wear it and was dismissed. The claim was about unfair, discriminatory dismissal on the basis of religion and about discrimination on the basis of religion in relation to working conditions.

**Decision of the Court:** The Supreme Court, deciding on the substance matter after two contradicting judgements at the first and second instance, ruled that the dismissal was not discriminatory as it was covered by the exception for genuine and determining occupational requirements (Art 4(1) of Directive 2000/78/EC, as transposed in § 20/1 Austrian Equal Treatment Act).

Regarding the niqab, the Court first of all clarifies that discrimination by prohibition of religious clothing constitutes direct discrimination. It then argues, that the prohibition of wearing the niqab also interferes with Art 8 ECHR and, therefore, needs an additionally sound justification. Regarding the justification, the Court refers to the judgement of the ECtHR *SAS v France* (appl. Nr. 43835/11) and the importance such a prohibition has on communication in society at large and on interpersonal relationships unhampered by a

veil. It then transposes the situation of the state (France) and public space to the Austrian workplace relationship of the claimant and the respondent of the actual case. It concludes: "The non-veiling of her face constitutes - by reason of the nature of the particular occupational activities of the claimant as being an employee of a notary, and of the context in which they are carried out, a genuine and determining occupational requirement. The main argument being that "it is among the undisputed basic rules of interpersonal communication in Austria to not cover one's face"; and that, therefore, wearing a niqab at the office is heavily impairing the communication with the society, clients, colleagues and employer.

The Court rejects the additional claim based on indirect discrimination on the basis of gender, as the dismissal was based on an individual order directly targeting a religious piece of clothing and there is no provision, criterion or practice that even appears neutral in that context and would leave room for a test of indirect discrimination.

In the same judgement, the Court finds clear, direct discrimination based on religion of the claimant in the field of working conditions by the employers' restrictive use of her in client contact, because of her wearing the hijab and the abaya (before starting to wear the niqab).

**Key points of analysis:** The Supreme Court, with this judgement draws a very distinctive line between the wearing of a hijab and of a niqab. While the Court does not accept any explanation of the defendant (like "my clients would be alienated" or "my reputation as being impartial would suffer") regarding the time when the claimant was only wearing religious items that do not cover the face, the Court clearly allows a ban of the niqab in a workplace. According to the reasoning of the judgement, the specificities of the job in question do not seem particularly important, as, in jobs different from the one at stake here, even in those without client contact, the communication with society, colleagues and the employer remains a requirement. This seems to be rather narrow in terms of compliance with the Directive, as in this case, the claimant had even offered to remove the veil for times of client contact. It could amount to a de-facto general ban on the niqab in the workplace, which would indeed appear to be in possible conflict with the aim of the European Directive.

**Internet link source: (German)**

[https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT\\_2016\\_0525\\_OGH0002\\_009OBA00117\\_15V0000\\_000&ResultFunctionToken=eaf4d4d6-fcbb-4fb8-8fab-4f5e19d0833e&Position=1&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=False&SucheNachText=True&GZ=9ObA117%2f15v&VonDatum=&BisDatum=04.07.2016&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=.](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_2016_0525_OGH0002_009OBA00117_15V0000_000&ResultFunctionToken=eaf4d4d6-fcbb-4fb8-8fab-4f5e19d0833e&Position=1&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=False&SucheNachText=True&GZ=9ObA117%2f15v&VonDatum=&BisDatum=04.07.2016&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=)