CASE DIGESTS

International Standards on Ethnic Profiling: Standards and Decisions from the European Systems

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REVIEW OF KEY EUROPEAN LEGAL STANDARDS, including jurisprudence and commentaries, which address ethnic profiling. This Digest includes standards from the European Convention on Human Rights, European Union treaties, directives and regulations; decisions of the European Court of Human Rights and the Court of Justice of the European Union; and recommendations from the European Commission against Racism and Intolerance, the Council of Europe Human Rights Commissioner and the European Parliament. Produced by lawyers at the Open Society Justice Initiative with the aim of supporting a wide audience, including litigators, non-discrimination advocates and public authorities, in accessing Council of Europe and European Union human rights standards and recommendations and applying these in remedying or preventing ethnic profiling practices.

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Acknowledgments

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The digest, together with a complementary digest on relevant international standards from United Nations bodies, was discussed at a convening on Litigating Ethnic Profiling hosted by the Open Society Justice Initiative from 11-12 July 2013.

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Introduction: the problem of ethnic profiling

"Ethnic profiling" is the use by law enforcement of generalizations based on impermissible grounds such as race, ethnicity, religion or national origin - rather than individual behavior or objective evidence - as the basis for suspicion in directing discretionary law enforcement actions. By its nature, ethnic profiling departs from a basic principle of the rule of law: that law enforcement determinations should be based on individuals' personal conduct, not on their membership of or appearance as belonging to an ethnic, racial, national, or religious group.

Ethnic profiling takes place in law enforcement actions such as identity checks; stop and searches; raids; border and customs checks; vehicle inspections; home searches; mass identity checks; selection of targets for surveillance; data mining; and other police-initiated actions. Such actions may be in the context of domestic policing, immigration control, counter-terrorism operations, or any other law enforcement or security activities. Ethnic profiling can arise in the initial decision to target an individual or in the treatment of an individual after an initial encounter, if law enforcement are more likely to search, arrest or charge people from a particular ethnic background. It can also take place in the discretionary decision-making of individual law enforcement officers, but may also result from law enforcement policies and practices that - while not necessarily defined by reference to ethnicity, race, national origin or religion - in practice, have an impact on those groups that is neither proportionate nor necessary to achieve legitimate law enforcement objectives.

Ethnic profiling, whether it is explicit and deliberate, or unintended, has direct and harmful consequences for individuals and communities, as well as law enforcement and national security.

Ethnic profiling also violates human rights. Under the core international human rights treaties all persons have a right not to be discriminated against, which is violated by the practice of ethnic profiling. As law enforcement officers profile ethnic or religious minorities, they are, wittingly or not, contributing to a growing sense of marginalization and discrimination in minority and immigrant communities. Profiling stigmatizes entire racial, ethnic, or religious groups as more likely to commit crimes and thereby sends a signal to the broader society that certain groups of minorities constitute a threat. Profiling constitutes unlawful discrimination and it perpetuates and reinforces discriminatory attitudes and behavior and xenophobia.

The enjoyment of a number of other human rights is also negatively impacted by ethnic profiling. Police stops based on ethnic profiling can curtail a person's right to freedom of movement. A physical check, pat down or search conducted as part of the stop can be invasive and amount to a violation of the right to privacy. A person's right to liberty and security can also be impacted where the encounter with the police results in their use of force. Those that have been subject to ethnic profiling often experience repeated stops by police and being delayed for work or school. The fear often caused by ethnic profiling may also prevent people from exercising their right to freely practice their religion or from engaging in peaceful political activities such as demonstrations.

Ethnic profiling not only breaches fundamental human rights, it is also ineffective. Research from widely varied settings strongly suggests that ethnic profiling is inefficient and may be counter-productive, alienating persons and groups whose assistance is needed by police and law enforcement to prevent, detect and investigate crime and terror threats. Policing is profoundly dependent on the cooperation of the general public; law enforcement needs the public to report crimes, to provide suspect descriptions and witness testimony. Without public cooperation, law enforcement officers rarely identify or apprehend suspects, or obtain convictions.

How to Use this Digest

The digest provides an overview of the provisions in European regional treaties that are relevant to making arguments challenging ethnic profiling practices, such as the right not to be discriminated against, the right to liberty and security of person, the right to privacy, and the right to freedom of movement. It includes provisions from the European Convention on Human Rights as well as relevant European Union treaties, directives and regulations.

The European Convention on Human Rights is a Council of Europe instrument that sets basic human rights standards that the 49 member States of the Council of Europe are obliged to adhere to. Decisions rendered by the European Court of Human Rights (ECtHR), the Strasbourg-based treaty body mandated with overseeing member States' compliance with Convention norms, are binding and precedence-setting, yet infrequently relied upon before domestic courts. The European Court of Human Rights is also the only European treaty body that has decided on an application regarding ethnic profiling and has found the practice to constitute unlawful discrimination.

The European Union, an economic and political union of 27 Member States, has some of the most well-developed anti-discrimination standards globally. However, the EU mandate's reach is limited when it comes to Member States' home affairs matters, which include policing. As a result, judgments by the Luxembourg-based Court of Justice of the European Union (CJEU), tasked with upholding the rule of European law through binding decisions, has only tangentially addressed ethnic profiling practices.

The digest offers a summary of cases by both the European Court of Human Rights and the Court of Justice of the European Union on which future legal challenges against ethnic profiling may be based.

In addition to the summary of relevant case-law, the digest also provides an overview of recommendations on the subject of ethnic profiling made by various Council of Europe and European Union bodies, including the European Commission against Racism and Intolerance (ECRI), the Council of Europe Human Rights Commissioner, the European Parliament, the EU Network of Independent Experts on Fundamental Rights and the Fundamental Rights Agency. While these recommendations are non-binding, they serve as an important source of guiding principles on the issue.

The digest is intended to support a wide audience, including litigators, non-discrimination advocates and public authorities, in accessing European human rights standards and recommendations and applying these in remedying or preventing ethnic profiling practices. The recommendations can be used in litigation and advocacy to support arguments why ethnic profiling violates European legal obligations and the rights of individuals. They can also be used to guide how public authorities should act and the types of measures they should take to ensure that policing does not compromise the State's human rights obligations.

I. COUNCIL OF EUROPE

1. ECHR Legal Framework

The core European human rights treaty, the European Convention on Human Rights, does not contain explicit provisions regarding ethnic profiling. However, a number of rights protected by the Convention are relevant to making legal arguments and claims regarding ethnic profiling. In particular, provisions on the right to liberty, privacy, non-discrimination and freedom of movement can also be relied upon in making arguments about why ethnic profiling breaches member States' human rights obligations.

1.1 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

    a) the lawful detention of a person after conviction by a competent court;

    b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

    c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

    d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

    e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

    f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

1.2 Protocol No. 4 to the ECHR

Article 2 – Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

1.3 Protocol No. 12 to the ECHR

Article 1 – General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

2. ECHR Jurisprudence

The European Court of Human Rights is mandated with overseeing Council of Europe member States' compliance with their obligations under the European Convention on Human Rights, through the issuance of binding judgments. The overwhelming majority of applications are individual applications lodged by a person, group of individuals, company or NGO that alleges a violation of their Convention rights. (Information on how to launch an application with the Court is explained online.[1]) The European Court of Human Rights is the only European treaty body that has decided on an application regarding ethnic profiling and has found the practice to constitute unlawful discrimination (*Timishev v. Russia*, discussed below).

2.1 Ethnic profiling and right to liberty (Article 5)

General principles

It is well-established in the Court's case-law that the right to liberty as stipulated by Article 5(1) concerns the physical liberty of the person and its objective is to prohibit the arbitrary dispossession of this liberty.[2] Mere restrictions on the liberty of movement fall under the scope of Article 2 of Protocol No. 4.[3] To determine whether deprivation of liberty has occurred, the Court will consider the concrete situation and will take account of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.[4] The Court has also established that the distinction between a deprivation of, and a restriction upon, liberty is merely one of degree and not one of nature or substance.[5]

The Court also requires that a deprivation of liberty should not be arbitrary.[6] To that end, the Court has held that (i) detention should be carried out in good faith; (ii) it should be closely connected to the ground of detention relied on by the Government; (iii) the place and conditions of detention should be appropriate; and (iv) the length of the detention should not exceed that reasonably required for the purpose pursued.[7] Additionally, the Court requires "reasonable suspicion." This means that there must be an existence of facts that would satisfy an objective observer that the person concerned may have committed the offence,[8] and the deprivation should not be a part of a policy targeting a certain group.[9]

[1] http://www.echr.coe.int/Pages/home.aspx?p=applicants&c=
[2] *Guzzardi v. Italy*, Application no. 7367/76, ECtHR, Judgment of 6 November 1980, at para. 92.
[3] *Guzzardi v. Italy*, Application no. 7367/76, ECtHR, Judgment of 6 November 1980, at para. 92; Ashingdale v. the UK, Application no. 8225/78, ECtHR, Judgment of 28 May 1985, at para. 41;
[4] *Engel and Others v. the Netherlands*, Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), ECtHR, Judgment of 8 June 1976, at paras. 58/59; *Guzzardi v. Italy*, Application no. 7367/76, ECtHR, Judgment of 6 November 1980, at para. 92; *Ashingdale v. the UK*, Application no. 8225/78, ECtHR, Judgment of 28 May 1985, at para. 41*; H.L. v. the UK*, Application no. 45508/99, ECtHR, Judgment of 5 October 2004, at para. 89; *Foka v. Turkey*, Application no. 28940/95, ECtHR, Judgment of 24 June 2008, at para. 74.
[5] *Guzzardi v. Italy*, Application no. 7367/76, ECtHR, Judgment of 6 November 1980, at para. 92; *Ashingdale v. the UK*, Application no. 8225/78, ECtHR, Judgment of 28 May 1985, at para. 41*; H.L. v. the UK*, Application no. 45508/99, ECtHR, Judgment of 5 October 2004, at para. 89; *Foka v. Turkey*, Application no. 28940/95, ECtHR, Judgment of 24 June 2008, at para. 74.
[6] *Kafkaris v. Cyprus* [GC], Application no. 21906/04, ECtHR, Judgment of 12 February 2008, para. 116.
[7] *Saadi v. the United Kingdom*, Application no. 37201/06, ECtHR, 29 January 2008, para. 74.
[8] *Fox, Campbell and Hartley v. the United Kingdom*, Application nos. 12244/86 12245/86 12383/86, ECtHR, Judgment of 30 August 1990, at para. 32.
[9] *Shimovolos v. Russia*, Application no. 30194/09, ECtHR, Judgment of 21 June 2011 at para. 54.

Relevant case-law

This section examines the criteria set by the ECtHR for determining whether and when police identity checks or stop and searches violate the right to liberty. In practice, police stops may vary from a brief check of a minute or two, to quite lengthy detentions in the street during which the person is subject to pat downs or searches of clothing and bags, to wait while documents are checked against databases, and to questioning. While stops in some countries can lead to being taken to a police station and held during legally-established periods of time for purposes of further verification of documents, the majority of police stops take place in the street. Even when people are not held in a formal place of detention, it is clear that a police stop is described by the fact that persons are not in fact at liberty to go without the permission or acquiescence of the office.

The threshold required for a police stop to constitute a deprivation of liberty under Article 5 has not been definitively established. Factors will include the duration, nature of the restriction, and whether there was an "element of coercion." Even when there has been a deprivation of liberty, the European Commission and Court have not lightly found a violation. Because the former European Commission on Human Rights considered the obligation to carry and produce an identity document to be an "obligation prescribed by law" for the purposes of Article 5(1)(b), a short detention to secure compliance with this was no violation. In addition, where a person is detained because they resist a lawful search, then the detention of that person may also be lawful.

Filip Reyntjens v. Belgium

ECommHR, Application no. 16810/90, Decision on admissibility of 9 September 1992

Claim under Article 5 inadmissible as manifestly unfounded

The applicant refused to submit to a routine identity check as a matter of principle during a traffic stop. As a result, he was taken to the local police station for questioning for more than two hours. He complained, *inter alia*, that his detention violated his right to liberty under Article 5.

The applicant argued that the detention he was subjected to violated his Article 5 rights as it did not fall under any of the reasons for detention authorized by that article. The Commission noted that the obligation to carry one's identity card and to show it to the police when requested was an "obligation prescribed by law," and detention on this basis could thus be authorized by Article 5(1)(b). The Commission considered the detention in this case had been necessary "to secure the immediate fulfilment of the applicant's legal obligation" and had only lasted for a short period, and thus concluded "that a fair balance was struck between the need to secure fulfilment of that obligation and the right to liberty" (p. 152). As a result, the Commission found "no appearance of a violation" and rejected this part of the application as manifestly ill-founded.

Relevance: The Commission does not examine whether the applicant's detention amounted to a deprivation of his liberty in this case, since even if it had, it would have been authorized by Article 5(1)(b). In the Commission's view detention following the refusal to submit to an identity check, when it is an obligation prescribed by law, could be lawful in order to secure the fulfillment of such an obligation. This is the only case to have considered the legality of a general right to check identity without cause, and the European Court thus has not given its view on the compatibility of such measures with the Convention. Nevertheless, the Commission seems to have accepted them here. (For a distinction between ID checks with no basis of suspicion as opposed to stop and searches, see *Gillan and Quinton v. the United Kingdom* below.)

The Commission also considered the length of time spent in detention when determining whether a fair balance had been struck between the need to secure the fulfillment of such a lawful obligation and the right to liberty: in this case, the short duration of the detention was a factor that allowed the Commission to conclude a fair balance had been struck by the domestic authorities.

(*The applicant also argued that identity checks carried out with no specific legitimate reason and the recording of information after such a check infringed his right to respect for private life under Article 8, and that the obligation to carry an identity card and to show it to the police when requested violated his freedom of movement under Article 2 of Protocol No. 4. These aspects of the case are discussed below.*)

Cisse v. France

ECtHR, Application no. 51346/99, Decision on admissibility of 16 January 2001

Claim under Article 5 inadmissible as manifestly unfounded

The applicant, a Senegalese national, was a member and spokeswoman of a group of aliens from various African countries without residence permits in France. In an effort to call attention to the difficulties in having their immigration status reviewed, the group occupied a church in Paris in 1996 amid widespread publicity. On the day the church was forcibly evacuated, the police set up a checkpoint at the church exit to verify whether the aliens evacuated had documentary evidence that they had permission to stay in France. While all occupants were stopped and questioned, only dark-skinned occupants were sent to a detention center. The applicant was one of those taken into custody, since she had been refused permission to remain in France, and was subsequently expelled from France for three years. She claimed violations of Article 5(1)(c) (disputing the existence of a reasonable suspicion as the basis of her identity check and the legality of the evacuation order in the absence of an emergency); Article 14 together with Article 5 (alleging her skin color was the decisive criterion for her identity check) and Article 11 (claiming her right to freedom of assembly was violated).

The Court examined the "reasonableness" of the suspicion on which her arrest was based, and found the "authorities had reasonable grounds for suspecting the applicant of an offence when they arrested her and that the essence of the guarantee afforded by that Article remained intact in the instant case" (p. 14). In reaching this decision the Court considered the following factors: the applicant's role as a member and spokeswoman of the group, the group's collective action to have their immigration status reviewed, the fact that most of the occupants of the church were the members of the aliens' group and the group's own admission of being in breach of the law. As a result, this part of the application was found inadmissible.

Relevance: In this admissibility decision the Court is not receptive to the applicant's arguments that her identity check had lacked any reasonable suspicion. This is due to the high visibility of her role within the group and the group's admittedly illegal activities.

Foka v. Turkey

ECtHR, Application no. 28940/95, Judgment of 24 June 2008

No violation of Article 5

The applicant claimed that she had been arrested and ill-treated by Turkish-Cypriot customs officers at a checkpoint, she had been forced into a police car, had had her bag searched and its contents confiscated. She alleged that she had been persecuted because of her ethnic origin, religious beliefs and her opposition to the Turkish military occupation of the northern part of Cyprus. She relied on Articles 3, 5, 8, 9, 10 and 14 of the ECHR.

The Court noted that although Article 5(1) could apply to deprivations of liberty of a very short length, it was traditionally not applied in cases where the applicants did not spend more time in a police station than it was necessary for certain formalities to be accomplished (para. 75). What set this case aside was the presence of an "element of coercion," as the applicant was forced into the police car. The Court found that this "element of coercion" had an effect not only on the applicant's freedom of movement, but also her liberty (para. 78). Accordingly, the Court held that the applicant was deprived of her liberty within the meaning of Article 5(1) (para. 79). However,

the Court found that this deprivation of liberty had been in accordance with the law and had not been arbitrary: the police had been legally permitted to arrest the applicant without a warrant because she had obstructed the police in the execution of their duty when she had resisted the search of her bag, and her deprivation of liberty had not been excessively lengthy (paras. 85-87). Therefore, in the Court's view, there had been no violation of Article 5 (para. 89).

Relevance: In this case, the Court explains the relationship between restrictions on the freedom of movement and deprivations of liberty. It is noteworthy that although there will generally be no deprivation of liberty where the restriction did not exceed the time necessary for the police to complete certain formalities, Article 5(1) may nevertheless be engaged if an "element of coercion" is present. What constitutes an "element of coercion" is a question that needs further clarification and development in the context of police stop and search practices. Although the cases above have concerned deprivation of liberty where the person was taken to the police station after refusing to comply with the search or request for identity documents, stop and searches usually do not involve an arrest or transfer of the person to a police station. *Gillan and Quinton v. the United Kingdom* (below) further refines the standard specifically for people who have not been taken to a police station.

Gillan and Quinton v. the United Kingdom

ECtHR, Application no. 4158/05, Judgment of 12 January 2010

No ruling on claim under Article 5

The applicants had been subjected to a stop and search by the UK police under sections 44-47 of the Terrorism Act 2000, which stipulated, *inter alia*, that 1) senior police officers, if they considered it "expedient for the prevention of acts of terrorism," could authorize any uniformed police officer in a given area to conduct stop and searches; 2) authorizations were subject to confirmation by the Secretary of State, had a temporal limit but could be renewed indefinitely; 3) even though the purpose of such searches was to find articles that could be used for acts of terrorism, the stop and searches did not need to be based on a suspicion that the person(s) stopped would carry articles of that kind; 4) persons failing to submit to a search were liable to imprisonment, a fine, or both. The applicants complained that stop and searches violated Articles 5, 8, 10 and 11 of the ECHR, and their complaints focused on the "general compatibility of the stop and search powers" of the police with these provisions.

In assessing the compatibility of the powers with Article 5, the Court observed that even though neither applicants' stop and search lasted longer than 30 minutes, both of them "were entirely deprived of any freedom of movement" during the police conduct (para. 57). Moreover, the applicants "were obliged to remain where they were and submit to the search," otherwise they could have faced arrest, detention and criminal charges (para. 57). The Court stated that "[t]his element of coercion [was] indicative of a deprivation of liberty" under Article 5(1)" (para. 57). However, the Court decided it was not required to rule on this question in the particular case due to a finding of violation of Article 8 (para. 57, discussed below).

Relevance: As noted above, the Court's case-law indicates that the right to liberty generally will not be engaged in cases where the applicant's deprivation of liberty/movement is restricted solely for the length of time during which his or her legal obligations are fulfilled, unless there is an "element of coercion." This case suggests that such an "element of coercion" could arise if the police resort to the use of force during the stop, or the applicant is forced to remain in one place during a search and faces criminal liability if they refuse to comply, even if the length of detention or stop and search is short. Whether the relevant elements are sufficient to constitute a restriction on liberty and engage Article 5 will depend on the circumstances of each case.

(*The applicants also argued that the stop and searches violated their right to privacy under Article 8, and in making its ruling on that aspect of the case the Court discussed the possibility of such broad stop and search powers being used in a discriminatory manner, both discussed below. They*

further argued violations of their rights to freedom of assembly and expression under Articles 10 and 11.)

2.2 Ethnic profiling and right to privacy (Article 8)

General principles

The Court has viewed the concept of "private life" as a broad term not susceptible to exhaustive definition.[10] The Court has found that the concept covers a person's physical and psychological integrity,[11] aspects of a person's physical and social identity could fall into the remit of "private life,"[12] the notion might apply to interaction of persons in a public context,[13] and that personal autonomy is an important principle underlying the interpretation of the Article 8 guarantees.[14] Elements of the personal sphere include gender identification, name, sexual orientation and sexual life.[15] The article also protects a right to identity and personal development, the right to establish and develop relationships with other human beings and the outside world and it might include activities of a professional and business nature.[16]

Relevant case-law

This section explores whether and under what circumstances police identity checks, stop and searches, or other manifestations of ethnic profiling might violate the right to respect for private life. While the former European Commission of Human Rights did not find that a routine identity check constituted an interference with private life, the European Court of Human Rights has not addressed this question directly, and has held that an associated search will be an interference with private life (at least when there is an element of coercion, and especially when conducted in public). Any interference with private life must be in accordance with law and be proportionate to a legitimate aim. The Court has held that excessively broad powers to stop and search, granting effectively unfettered powers to stop without any requirement of necessity, may not be "in accordance with law."

In terms of proportionality, the Court may look at the impact of the interference as well as on the efficiency of the practice in order to determine the level of interference allowed into one's private life under the Convention. A typical identity check or stop and search will characteristically involve an element of coercion due to their compulsory nature and the lack of advance consent on the part of the individual stopped. Moreover, as the majority of these police activities are conducted in public view and on occasion in an undignified manner, an element of humiliation and embarrassment may be involved as well, particularly in the case of stop and searches. Both the element of coercion and the element of humiliation and embarrassment have the potential to

[10] *P.G. and J.H. v. the UK*, Application no. 44787/98, ECtHR, Judgment of 25 September 2001, at para. 56; *Pretty v. the UK*, Application no. 2346/02, ECtHR, Judgment of 29 April 2002, at para. 61; *Peck v. the UK*, Application no. 44647/98, ECtHR, Judgment of 28 January 2003, at para. 57; *Gillan and Quinton v. the UK*, Application no. 4158/05, ECtHR, Judgment of 12 January 2010, at para. 61.
[11] *X and Y v. the Netherlands*, Committee of Ministers, Judgment of 25 March 1985, Series A no. 91, p. 11, at para. 22.
[12] *Mikulic v. Croatia*, Application no. 53176/99, ECtHR, Judgment of 7 February 2002, at para. 53.
[13] *P.G. and J.H. v. the UK*, Application no. 44787/98, ECtHR, Judgment of 25 September 2001, at para. 56.
[14] *Pretty v. the UK*, Application no. 2346/02, ECtHR, Judgment of 29 April 2002, at para. 61.
[15] *B. v. France*, Application no. 13343/87, ECtHR, Judgment of 25 March 1992, at para. 63; *Burghartz v. Switzerland*, Application no. 16213/90, ECtHR, Judgment of 22 February 1994, at para. 24; *Dudgeon v. the UK*, Application no. Application no. 7525/76, ECtHR, Judgment of 22 October 1981, at para. 41; *Laskey and Others v. the UK*, Application nos. 21627/93; 21628/93; 21974/93, ECtHR, Judgment of 19 February 1997, at para. 36.
[16] *Burghartz v. Switzerland*, Application no. 16213/90, ECtHR, Judgment of 22 February 1994, at para. 47; *Friedl v. Austria*, Application no. 15225/89, ECtHR, Judgment of January 31 1995, at para. 45; *Niemietz v. Germany*, Application no. 13710/88, ECtHR, Judgment of 16 December 1992, at para. 29; *Halford v. the UK*, Application no. 20605/92, ECtHR, Judgment of 25 June 1997, at para. 44.

augment the level of interference into one's private life and contribute to negative stereotyping on minority groups whom these practices might affect disproportionately. However, such arguments have not yet been fully explored before the Court.

Filip Reyntjens v. Belgium

ECommHR, Application no. 16810/90, Decision on admissibility of 9 September 1992

Claim under Article 8 inadmissible as manifestly unfounded

The applicant refused to submit to a routine identity check as a matter of principle during a traffic stop. As a result, he was taken to the local police station for questioning for more than two hours. He complained, *inter alia*, that his detention violated his right to liberty, that identity checks carried out with no specific legitimate reason and the recording of information after such a check infringed his right to respect for private life and that the obligation to carry an identity card and to show it to the police when requested violated his freedom of movement (claims under Articles 5, 8 and Article 2 of Protocol No. 4).

The applicant complained that identity checks without a specific legitimate reason and the recording of information after such checks were not necessary in a democratic society and violated his Article 8 rights. The Commission held that "the obligation to carry an identity card and to show it to the police whenever requested to do so [did] not as such constitute an interference in a person's private life within the meaning of Article 8" (p. 152). It noted that the identity cards did not contain information relating to private life under the applicable legislation (p. 152). Consequently, the Commission found the Article 8 claim manifestly ill-founded.

Relevance: This case suggests that a routine identity check in itself is unlikely to constitute an interference with private life. Moreover, the judgment seems to imply that an identity check without any grounds for reasonable suspicion could be permissible under Article 8, as long as the check is prescribed by law and the identity cards checked do not contain any information relating to private life.

However, while a simple identity check may not interfere with the right to private life, subsequent cases have affirmed that a search may expose information relating to private life to the authorities or even the public and will involve Article 8. Furthermore, this is a decision of the former European Commission of Human Rights, and the European Court has yet to give its opinion on the compatibility of routine identity checks with Article 8.

(*The applicant also argued that his detention when he refused to submit to the check was a violation of Article 5, discussed above; and that the obligation to carry an identity card and to show it to the police when requested violated his freedom of movement under Article 2 of Protocol No. 4, discussed below.*)

Wainwright v. the United Kingdom

ECtHR, Application no. 12350/04, Judgment of 26 September 2006

Violation of Article 8

The applicants, family members visiting their incarcerated relative at a detention facility, claimed that the strip searches they had had to undergo in order to see their family member had been distressing and degrading, and a violation of Articles 3, 8 and 13 of the Convention.

While there had been "no verbal abuse by the prison officers", nor "touching of the applicants" (para. 48), the Court found that the way the searches had performed had nevertheless been disproportionate to the legitimate aim of preventing contraband from entering the facility. The Court noted that police had "failed to comply with their own regulations and had demonstrated sloppiness" by giving the applicants consent forms after the searches instead of beforehand, searching the applicants fully naked instead of half-naked, and exposing one applicant by failing

to close window blinds in the room where she was searched (paras. 45-46). The Court found that "[w]here procedures are laid down for the proper conduct of searches on outsiders to the prison who may very well be innocent of any wrongdoing, it behoves the prison authorities to comply strictly with those safeguards and by rigorous precautions protect the dignity of those being searched from being assailed any further than is necessary" (para. 48). It therefore found that the United Kingdom was responsible for violating the applicant's right to private life under Article 8 (para. 49).

Relevance: The requirement of proportionality and the officers' failure to follow proper procedures are two issues that could easily arise in the context of stop and search complaints as well. As to the former issue, the proportionality of the use of stop and searches might be challenged in light of the low hit rate of such activities. As far as compliance with proper procedures are concerned, this case could indicate the need for law enforcement officials to conduct stop and searches in strict compliance with adequate guidance (and to create such guidance where it may be lacking). Based on this judgment, those procedures must contain rigorous precautions to protect the dignity of those stopped and ensure that consent is obtained in a proper way.

Gillan and Quinton v. the United Kingdom

ECtHR, Application no. 4158/05, Judgment of 12 January 2010

Violation of Article 8

The applicants had been subjected to a stop and search by the UK police under sections 44-47 of the Terrorism Act 2000, which stipulated, *inter alia*, that 1) senior police officers, if they considered it "expedient for the prevention of acts of terrorism," could authorize any uniformed police officer in a given area to conduct stop and searches; 2) authorizations were subject to confirmation by the Secretary of State, had a temporal limit but could be renewed indefinitely; 3) even though the purpose of such searches was to find articles that could be used for acts of terrorism, the stop and searches did not need to be based on a suspicion that the person(s) stopped would carry articles of that kind; 4) persons failing to submit to a search were liable to imprisonment, a fine, or both. The applicants complained that stop and searches violated Articles 5, 8, 10 and 11 of the ECHR, and their complaints focused on the "general compatibility of the stop and search powers" of the police with these provisions.

The Court considered that the search had been an interference with the applicants' private life. It noted that the breadth of the term of "private life" meant that it was not susceptible to "exhaustive definition," but "personal autonomy [was] an important principle underlying the interpretation of its guarantees" (para. 61). However, it repeated its prior finding from *Foka v Turkey* that "any search effected by the authorities on a person interferes with his or her private life" (para. 61). Although the government claimed that the search had been only superficial, and had not involved perusing diaries or documents, the Court held that the police "use of the coercive powers" to stop a person and conduct a search of their person, clothing and belongings had "amount[ed] to a clear interference with the right to respect for private life." Moreover, the seriousness of the interference searches cause may be compounded by their public nature, due to an element of humiliation and embarrassment or the public exposure of personal information should intimate items be revealed during the search (para. 63). This was different from searches of passengers at airports or visitors to public buildings, as passengers might be seen as giving advance consent to searches, whereas in this case the police had the powers to stop people "anywhere and at any time, without notice and without any choice as to whether or not to submit to a search" (para. 64).

The Court then examined whether that interference was "in accordance with law", holding that it was not and therefore constituted a violation of Article 8. This requires that the power to stop both have a basis in domestic law and be compatible with the rule of law, which requires some measure of protection against arbitrary interferences: the law must clearly indicate the scope of the discretion conferred, and powers impacting fundamental rights cannot be unfettered (para. 76-77).

The Court had regard to the fact that a senior police officer was empowered to authorize any uniformed police officer within their jurisdiction to carry out stop and searches if they deemed them to be "expedient" (para. 80); the fact that temporal and geographical restrictions provided by Parliament, as well as the safeguard provided by the Independent Reviewer, failed to act as a real check on the issuance of authorizations (paras. 81-82); the breadth of the discretion of the individual police officer to carry out a stop and search (para. 83); the statistical and other evidence proving the police officers' overreliance on this practice (para. 84); and the difficulty an individual would face trying to challenge the practice by way of judicial review or an action in damages (para. 86). As a result, the Court held that the power to authorize stops under these provisions, as well as the stop and search powers themselves, were not "in accordance with the law," as they were not sufficiently circumscribed or subject to adequate legal safeguards against abuse (para. 87).

Relevance: The *Gillan* judgment is so far the only merit decision by the Court on an Article 8 claim against stop and search practices. For this reason, many elements of its ruling bear relevance for future litigation on ethnic profiling. The Court reiterates that a search of a person, including their clothing and belongings, constitutes an interference with the person's private life under Article 8, at least where an element of coercion is present. The Court's analysis suggests that there will be such an element of coercion any time that the search is compulsory and the individual cannot be seen as consenting to the search in advance. The Court also recognizes that conducting such stop and searches in public, as will often be the case in ethnic profiling litigation, may involve an element of humiliation and embarrassment which are capable of compounding the seriousness of interference with the right to respect for private life.

The Court also examines whether stop and searches under discretionary powers are "in accordance with law" for the purposes of Article 8. The requirement that powers affecting fundamental rights must define the criteria for exercising discretion, and cannot grant an unfettered power, will often be relevant in litigating ethnic profiling, as such profiling often takes place because law enforcement are granted broad or unfettered discretion about who to stop. Here, the Court implies that stop and searches should only be authorized if they are necessary (as opposed to being "expedient") and proportionate, with effective safeguards providing a check on authorizations. If legislation affords too broad discretion to a police officer in conducting stop and searches, it is unlikely to be compatible with the ECHR. In making its assessment in this case, the Court seems to be swayed by statistical (and other) evidence indicating unreasonable overreliance by the police on stop and searches, which illustrates the potentially persuasive power of statistics.

(*In discussing the violation of Article 8, the Court identified the possibility of such broad stop and search powers being used in a discriminatory manner, discussed below under Article 14. The applicants also claimed a violation of their right to liberty under Article 5, discussed above, and further argued violations of their rights to freedom of assembly and expression under Articles 10 and 11.*)

Aksu v. Turkey [GC]

ECtHR (Grand Chamber), Application no. 4149/04, Judgment of 15 March 2012

No violation of Article 8

The applicant, a Turkish national of Roma origins, claimed a breach of the Convention due to what he considered as degrading anti-Roma language in three publications: a book entitled "The Gypsies of Turkey" written by an associate professor and approved by a publications advisory board before publication; and two dictionaries, "Turkish Dictionary for Pupils" and "Turkish Dictionary," written by the Language Association, a non-governmental organization. The applicant claimed that some of the language in these publications was offensive to his Roma/Gypsy identity; and therefore, alleged a violation of Article 14 (discrimination), in conjunction with Article 8 (respect for private life).

The Court did not examine the applicant's Article 14 claim on ethnic discrimination, as it found that the applicant was not able to provide "*prima facie* evidence that the impugned publications had a discriminatory intent or effect," and thus, proceeded to rule that the main issue in the case instead concerned the applicant's right to respect for his private life (para. 45), but instead reformulated the application as an Article 8 claim. The Court reiterated that a person's ethnic identity is an important element of a "person's physical and social identity" protected under the above article (para. 58). Therefore, the Court maintained that "negative stereotyping of a group, when it reaches a certain level, [was] capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group" (para. 58). In this regard, the Grand Chamber explained that States' obligation to uphold Article 8 has two components: (i) States have a negative obligation to "protect the individual against arbitrary interference by the public authorities", and (ii) States have "positive obligations inherent in the effective respect for private life" which may involve "the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves" (para. 59). In light of the above, it held that the main question in the case was whether the Turkish government complied with its "positive obligation under Article 8 to protect the applicant's private life from alleged interference by a third party" (para. 61). The Court determined that the domestic authorities had not overstepped their margin of appreciation or disregarded their positive obligation to protect the applicant's private life when not finding in his favor. As a result, the Court found no Article 8 violation in this case.

Relevance: Ethnic profiling cases will often be based on claims that ethnic minorities are subjected to law enforcement activities in disproportionately high numbers. This is likely the consequence of the presumption by the law enforcement officers that these groups have a higher propensity to commit crime, and where these excessive stops, searches or other law enforcement activities take place in public then they are also likely to convey or reinforce this belief in the public. Such repeated actions, especially in public, could be capable of impacting on "the group's sense of identity and the feelings of self-worth and self-confidence of members of the group." This reinforcing of a belief that minorities are more likely to be criminals could be even stronger where reasonable suspicion of committing a crime is required for a stop, but is not present or is itself based on the ethnicity of the person. Therefore, it might be argued that such ethnic profiling is a form of negative (racial) stereotyping which, according to the *Aksu* decision, the State has an obligation to counter by preventing the police from arbitrarily interfering with the individual's private life.

Ferdinand Jozef Colon v. the Netherlands

ECtHR, Application no. 49458/06, Decision on admissibility of 15 May 2012

Claim under Article 8 inadmissible as manifestly unfounded

Beginning in 2002, in light of a rise in violence in Amsterdam, the mayor designated most of the old city center a security risk area for set time periods. As a result of this, the public prosecutor was empowered to issue orders, valid for twelve-hour periods, allowing anyone to be searched for weapons in the area. Evaluation reports on these preventive searches in the security risk areas commissioned by the city in 2006 and 2007 indicated a steady decline in weapons-related violence.

The applicant, a Netherlands national, refused to submit to a search in the designated security risk area in 2004, was arrested and taken to a police station where he refused to give a statement. He was convicted for refusing to comply with the search order, but no sentence was imposed. He complained that his right to respect for privacy was violated by the mayor's designation of a security risk area as it enabled random searches on people for an extensive period of time in a large area without the safeguards of judicial review. He also alleged that his freedom of movement was unlawfully restricted. The claims were brought under Articles 8, 14 and Article 2 of Protocol No. 4 of the Convention.

The Court reaffirmed that the stop and search had constituted interference with the applicant's rights under Article 8 (para. 65), but found it to be in accordance with the law given the availability of sufficient safeguards even in the absence of prior judicial control (paras. 74-79) and ruled it had pursued the legitimate aims of public safety and prevention of disorder or crime (para. 80). On the question of whether the interference had been necessary in a democratic society, the Court balanced the protection of the individual against arbitrary interference by public authority with the State's obligation to protect individuals from violence, both of which are protected by Article 8 (para. 85). Considering the factual and legal framework of the stop and searches, the Court accepted that the designation was complementary to other measures of fighting violent crime; that there were geographical and temporal restrictions on security risk area designations; and that no single executive authority could order stop and searches alone (paras. 91-93). Moreover, the Court had regard to the level of crime in the area concerned and to evaluation reports which indicated that the preventive searches were effective in reducing violence (para. 94). Thus, while there was always a possibility the applicant might be subjected to a preventive search he considered "unpleasant" and "inconvenient" in the area again when the order was in effect, the domestic authorities had been entitled to determine that the public interest outweighed the subjective disadvantage caused by the interference with the applicant's private life (para. 95). As a result, even though the stop and search power constituted interference with the applicant's right to respect for his private life, the State provided "relevant" and "sufficient" reasons for the interference, and it was in accordance with the law and pursued the legitimate aims of protecting public safety and preventing disorder or crime (para. 95). Therefore, the Court found this part of the application manifestly ill-founded (para. 96).

Relevance: This case illustrates the factors which the Court may look at in determining whether a policy or system of stop and searches is justified. As the Court recalls, a search will be an interference under Article 8, and such "an interference will be 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'" (para. 88). The Court considers that the reasons the government gave for using stop and searches were "relevant" and "sufficient" because of the legal framework surrounding such searches and their perceived *effectiveness* as indicated by evaluation reports (para. 95). The fact that the searches were part of a broader strategy to combat crime in the area, and that the government was actively reviewing the effectiveness of its strategy in achieving the objective, are further factors in support. This illustrates the importance that statistics and other evaluation reports may play in shaping the Court's assessment of the public interest served. Conversely, it appears that the Court takes a rather cursory view of the "subjective disadvantage" stop and searches may cause to the individual, which was outweighed by the public interest in reducing crime. To challenge the proportionality of the practice, applicants could consider bringing additional evidence of the impact of stops on the targeted community—demonstrating that this is more than merely "unpleasant" and "inconvenient"—and also evidence to show the inefficient or ineffective nature of the practice.

(*The applicant also argued that the stop, and the prospect of future stops, violated his freedom of movement under Article 2 of Protocol No. 4, discussed below, and a discrimination claim regarding his lack of standing to challenge the designation order, which was dismissed for failure to exhaust domestic remedies.*)

2.3 Ethnic Profiling and the Prohibition of Discrimination (Article 14)

General principles

The prohibition of discrimination in the enjoyment of Convention rights and freedoms is stipulated by Article 14 of the ECHR on a non-exhaustive list of grounds. The Grand Chamber held that:

> "The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall 'within the ambit' of one or more of the provisions in question […]. The prohibition of discrimination in Article 14 thus […] applies also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide." [17]

The Court has further held that Article 14 "comes into play whenever 'the subject-matter of the disadvantage … constitutes one of the modalities of the exercise of a right guaranteed', or the measures complained of are 'linked to the exercise of a right guaranteed.'" [18]

Discrimination, in the Court's established view, means differential treatment of persons in relevantly similar situations, without an objective and reasonable justification, that is, unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized.[19] However, States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.[20] States are also allowed, and in certain cases, obligated to treat groups differently in order to correct "factual inequalities."[21] Moreover, the Court has ruled on several occasions that discrimination could be established when a general policy or measure had disproportionately prejudicial effects on a specific group even when it was not particularly aimed at that group.[22] In the Court's view, furthermore, discrimination that is potentially contrary to the Convention might arise from an actual situation as well.[23]

[17] *Andrejeva v. Latvia*, ECtHR (GC), Judgment of 18 February 2009, para. 74 (emphasis added).
[18] *Niedzwiecki v. Germany*, ECtHR, Judgment of 25 October 2005, para. 30; *Glor v. Switzerland*, ECtHR, Judgment of 30 April 2009, para. 46 (emphasis added).
[19] *Fredin v. Sweden (No. 1)*, Application no. 12033/86, ECtHR, Judgment of 18 February 1991, at para. 60; *Willis v. the United Kingdom*, Application no. 36042/97, ECtHR, Judgment of 11 June 2002, at para. 48; *Okpisz v. Germany*, Application no. 59140/00, ECtHR, Judgment of 25 October 2005, at para. 33; *Timishev v. Russia*, Application nos. 55762/00 and 55974/00, ECtHR, Judgment of 13 December 2005, at para. 56; ; *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, ECtHR, Judgment of 13 November 2007, at para. 175; *Horvath and Kiss v. Hungary*, Application no. 11146/11, ECtHR, Judgment of 29 January 2013, at para. 101.
[20] *Willis v. the United Kingdom*, Application no. 36042/97, ECtHR, Judgment of 11 June 2002, at para. 39; *Okpisz v. Germany*, Application no. 59140/00, ECtHR, Judgment of 25 October 2005, at para. 33; *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, ECtHR, Judgment of 13 November 2007, at para. 175.
[21] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECtHR, Judgment of 23 July 1968, Series A no. 6, at para. 10; *Thlimmenos v. Greece* [GC], Application no. 34369/97, ECtHR, Judgment of 6 April 2000, at para. 44; *Stec and Others. v the United Kingdom* [GC], Application no. 65731/01, ECtHR, Judgment of 12 April 2006, at para. 51; *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, ECtHR, Judgment of 13 November 2007, at para. 175; *Horvath and Kiss v. Hungary*, Application no. 11146/11, ECtHR, Judgment of 29 January 2013, at para. 101.
[22] *Hugh Jordan v. the United Kingdom*, Application no. 24746/94, ECtHR, Judgment of 4 May 2001, at para. 154; *Hoogendijk v. the Netherlands*, Application no. 58461/00, ECtHR, Decision of admissibility of 6 January 2005, at p. 21; *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, ECtHR, Judgment of 13 November 2007, at para. 175.
[23] *Zarb Adami v. Malta*, Application no. 17209/02, ECtHR, Judgment of 26 June 2006, at para. 76; *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, ECtHR, Judgment of 13 November 2007, at para. 175.

Relevant case-law

Ethnic profiling, a practice that leads to a difference in treatment based exclusively or to a decisive degree on a person's ethnicity, race, religion or national origin, cannot be justified in a contemporary European society under the Court's jurisprudence. In order to attack the practice as discriminatory before the Court, however, the complainant will generally need to specify which of his Convention rights has been impacted as a result of discriminatory treatment (unless the relevant State has ratified Protocol 12 to the ECHR, which establishes a general prohibition against discrimination by any public authority). Ethnic profiling will generally be a form of "indirect discrimination", which arises from the discriminatory application or impact of a general policy or measure rather than a measure explicitly targeted at a particular group.

In its only merit decision on ethnic profiling so far, the Court held that no law enforcement actions may be based exclusively or to a decisive extent on race or ethnicity, and found that the applicant's right to freedom of movement was restricted on the basis of the complainant's ethnicity. It has also held that the authorities must investigate allegations of racist motives in violent crimes or use of force by police, and it could be argued that there is an obligation to investigate evidence of racism in any violation of rights by the police, even where violence is not used. The Court has yet to rule on, for example, whether alleged racial bias in conducting stop and searches, or the failure to investigate it, passes Convention muster.

Cisse v. France

ECtHR, Application no. 51346/99, Decision on admissibility of 16 January 2001

Claim under Article 5 inadmissible as manifestly unfounded

The applicant, a Senegalese national, was a member and spokeswoman of a group of aliens from various African countries without residence permits in France. In an effort to call attention to the difficulties in having their immigration status reviewed, the group occupied a church in Paris in 1996 amid widespread publicity. On the day the church was forcibly evacuated, the police set up a checkpoint at the church exit to verify whether the aliens evacuated had documentary evidence that they had permission to stay in France. While all occupants were stopped and questioned, only dark-skinned occupants were sent to a detention center. The applicant was one of those taken into custody, since she had been refused permission to remain in France, and was subsequently expelled from France for three years. She claimed violations of Article 5(1)(c) (disputing the existence of a reasonable suspicion as the basis of her identity check and the legality of the evacuation order in the absence of an emergency); Article 14 together with Article 5 (alleging her skin color was the decisive criterion for her identity check) and Article 11 (claiming her right to freedom of assembly was violated).

Regarding the complaint under Article 5 taken together with Article 14, the Court noted that "the system set up at the church exit for checking identities was intended to ascertain the identity of persons suspecting of being illegal immigrants" (p. 14). Therefore, the Court could not reach the conclusion that the applicant had been the victim of racial discrimination and declared this part of the application also inadmissible.

Relevance: The Court refuses to consider the applicant's claim on racial discrimination and fails to analyze whether the suspicion of someone being an illegal immigrant might have lawfully been based on race.

Alex Menson and Others v. the United Kingdom

ECtHR, Application no. 47916/99, Decision on admissibility of 6 May 2003

Claim under Article 14 (together with Article 2) inadmissible as manifestly unfounded

The applicants complained, *inter alia*, that the police failed to carry out a proper and comprehensive investigation into the killing of their sibling, on the account of his race. They relied on Articles 2, 13 and 14 (in conjunction with Article 2) of the Convention.

While the Court found the application manifestly ill-founded, it noted that "where [the] attack [was] racially motivated, it [was] particularly important that the investigation [was] pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence" (p. 13).

Relevance: see discussion in the *Nachova* case below.

Nachova and Others v. Bulgaria [GC]

ECtHR (Grand Chamber), Application nos. 43577/98 and 43579/98, Judgment of 6 July 2005

No violation of Article 14 (together with Article 2) for deprivation of life allegedly on the basis of ethnicity , violation of Article 14 (together with Article 2) for failure to investigate possible racist motives

The case concerned the killing of two unarmed Roma fugitives by a member of the military police who was attempting to arrest them as they were trying to escape. One Roma eyewitness reported the use of racial epithets on the premises by the officer who killed the victims. The applicants, family members of the victims, relied on Articles 2, 13 and 14.

While ruling that racist motives had not been established in the killing of the two victims, the Court condemned racial violence as a "particular affront to human dignity" that has "perilous consequences." Therefore, "special vigilance and a vigorous reaction" were required of the authorities, who needed to combat racism and racist violence with all available means (para. 145). In condemning the failure of the authorities to investigate whether police violence was hatred-induced, the Grand Chamber also held that when evidence of racist verbal abuse uttered by law enforcement agents emerged in an operation where force against ethnic or other minorities had been used, a thorough examination needed to be carried out to expose racist bias (para. 164).

Relevance: In the above two cases the Court argues that state authorities have an obligation to investigate and expose racist motivations in the context of *violent* incidents in order to condemn and combat racism as well as to maintain a trustful relationship between minorities and authorities. It could be argued that this obligation extends to allegations of racism in police action not necessarily involving violence as well, like stop and searches, in order to achieve the abovementioned aims. This might be particularly applicable in cases where the police engage in the use of racial epithets, like in the *Nachova* case where the need to investigate possible racist motives was triggered by the racist language used by the police.

(*In addition to the obligation to investigate discriminatory motives for police violence, the Court also addressed the burden of proof in discrimination cases, discussed below*.)

Timishev v. Russia

ECtHR, Application nos. 55762/00 and 55974/00, Judgment of 13 December 2005

Violation of Article 14 (together with Article 2 of Protocol No. 4)

The applicant claimed that after his car had been stopped at a checkpoint at an administrative border in Russia, he was refused entry to the Kabardino-Balkaria region on the basis of an oral

instruction from the region's Ministry of the Interior not to admit anyone of Chechen ethnic origin. The applicants complained under Article 2 of Protocol No. 2, Article 14 and Article 2 of Protocol No. 1.

The Court found a violation of the applicant's freedom of movement (Article 2 of Protocol No. 4), because it ruled that the restriction had not been in accordance with the law (para. 49, discussed below). It then considered whether the restriction on the applicant's freedom of movement had operated against him in a discriminatory manner on the basis of his ethnicity. It held that the applicant's freedom of movement had been restricted solely on the ground of his ethnic origin. Given that the applicant had established a difference in treatment, the Court held that the burden fell on the state to justify such difference (para. 57). As it did not provide any valid justification, the difference in treatment had constituted racial discrimination and there was a violation of Article 14 read in conjunction with Article 2 of Protocol No. 4 of the Convention (para. 59). The Court highlighted that "no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin [was] capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures" (para. 58).

Relevance: *Timishev* sets the core standard to date on ethnic profiling, clearly stating that law enforcement decisions such as stops which are based solely, or to a decisive degree, on race are prohibited. The fact pattern in this case was quite simple, given that there was an (oral) order prohibiting Chechens specifically. Ethnic profiling is most often evident in police ID checks or stop and searches; however, the practice is rarely based on ethnicity-specific orders, and provision of proof is thus more challenging.

(*The applicant also claimed that the stop violated his freedom of movement under Article 2 of Protocol No. 4, discussed below.*)

D.H. and Others v. the Czech Republic [GC]

ECtHR (Grand Chamber), Application no. 57325/00, Judgment of 13 November 2007

Violation of Article 14 (together with Article 2 of Protocol No. 1)

The eighteen applicants before the European Court of Human Rights were all school children from the town of Ostrava, who were placed into "special schools" for children with mental disabilities between 1996 and 1999. The decision to place them in these schools was made by the head teacher on the basis of a psychological examination, and with the consent of the child's parent or guardian. Statistics presented to the Court demonstrated the segregated nature of schools in Ostrava.

The Grand Chamber held by 13 votes to 4 that there had been indirect discrimination against the school children in the provision of education, finding a violation of Article 14 read in conjunction with Article 2 of Protocol No. 1 (right to education). The decision held that disproportionate assignment of Roma children to special schools without an objective and reasonable justification amounted to unlawful discrimination. However, perhaps the most groundbreaking elements of the Court's decision was that it explicitly embraced the principle of indirect discrimination. The Court found that when a discriminatory difference in treatment was the outcome of disproportionately prejudicial effects of a general policy or measure, even if its language was neutral on the surface, the situation might amount to "indirect discrimination," even without the intent to discriminate (paras. 183-184). The Court also held that a *prima facie* allegation of discrimination shifts the burden to the defendant state to prove that any difference in treatment is not discriminatory (discussed below).

Relevance: The Court's recognition of "indirect discrimination" is relevant to challenging ethnic profiling, as it is frequently less the outcome of racist intent or animus by individual officers, but a pattern of practice that reflects reliance on stereotypes or the product of geographic focus of these powers in areas of high minority residence. Policies that at face value appear neutral, seeking to

address crime or public safety, might prove discriminatory when statistical evidence shows clearly disproportionate outcomes negatively affecting persons on the basis of their visible ethnicity or religion—that is: indirect discrimination.

(*In addition to the its findings on indirect discrimination, the Court also addressed the burden of proof in discrimination cases, discussed below.*)

S. and Marper v. the United Kingdom [GC]

ECtHR, Applications nos. 30562/04 and 30566/04, Judgment of 4 December 2008

No necessity to examine separately the complaint under Article 14, concerns of discriminatory trend voiced in Article 8 reasoning

The two applicants, both charged with criminal offences but not convicted, alleged that the police's refusal to destroy their fingerprints, cellular samples and DNA profiles amounted to a violation of their right to respect for private life (Article 8), and the prohibition of discrimination based on the argument that the applicants were treated in a discriminatory manner when compared to others in an analogous situation, namely other unconvicted persons (Article 14).

The Court found that "the blanket and indiscriminate nature of the powers of retention" of the aforementioned data failed to strike a fair balance between the public and private interests and that the State had overstepped its margin of appreciation. Therefore, the retention at issue was a disproportionate interference with the applicants' right to respect for private life and could not be considered necessary in a democratic society (para. 125). Although the Court found the applicant's Article 14 claim did not need to be examined separately in light of the reasoning of the conclusion of the Article 8 violation (above), it noted with concern an expert body's report of, *inter alia*, the over-representation of ethnic minorities in the database, who had not been convicted of any crime (para. 124). The report voiced concerns that the police could infer ethnic identity from the biological samples, which could lead to the reinforcement of racist views of propensity to criminality (para. 40).

Relevance: It is arguable that the over-representation of ethnic minorities among those stopped and searched, if proved, would be viewed with similar concern by the Court as their disproportionately high numbers in the database.

Turan Cakir v. Belgium

ECtHR, Application no. 44256/06, Judgment of 10 March 2009

Violation of Article 14 (together with Article 3)

The applicant, a Belgian national of Turkish origins, alleged that he had been ill-treated when arrested at his home and while in police custody for reasons of racial prejudice, citing racist insults on the part of the police officers. He complained that the Belgian authorities had failed to conduct an effective investigation into these allegations. The applicant relied on Articles 3, 6(1) 13 and 14.

Building on its earlier decisions on the obligation to investigate allegedly racially motivated violence, the Court considered that State authorities needed "to take all reasonable steps to unmask any racist motive" and to establish whether there was a link between ethnic hatred and prejudice and the violence that had occurred (para. 77). The Court observed that in practice it would often be extremely difficult for an applicant to prove racial discrimination; therefore, the obligation of the State to investigate possible racist motives in an act of violence was "an obligation of means and not of absolute result" (para. 77). This obligation implied that the state authorities needed "to take reasonable steps to collect and preserve evidence, investigate all the means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without ignoring suspicious matters indicative of racial prejudice" (para. 77).

Moreover, the Court ascertained that investigating whether a link existed between racist attitudes and an act of violence was not only an aspect of procedural obligations of the State under Article 3, but it might also implicitly flow from the obligation of the state under Article 14 to ensure the respect of fundamental rights without discrimination (para. 78). As a result, after finding that the authorities had violated Article 3 for not carrying out an effective investigation into the incident, the Court decided to examine separately the claim that they had also failed to investigate the existence of a link between racist attitudes and the police violence in the particular case (para. 79). The Court found a violation of Article 14 in conjunction with Article 3 of the Convention. It found that the authorities, who had refused to consider the racist allegations separately from the charges of violence, had failed in their obligation to take all the necessary measures to ascertain whether discriminatory conduct could have played a role in the events in question (paras. 80-81).

Relevance: In this case the Court reiterated that state authorities have an obligation to investigate and expose racist motivations in the context of *violent* incidents not only as a procedural obligation but also as an obligation under Article 14. It could be argued that this obligation extends to police action not necessarily involving violence as well, like stop and searches, so that the fulfillment of the abovementioned aims is guaranteed. This might be particularly applicable in cases where the police engage in the use of racial epithets, like in the *Nachova* and *Turan Cakir* cases (above) or the *B.S.* case (below), where the need to investigate possible racist motives was triggered by the racist language used by the police. However, some evidence of discrimination will be needed to trigger this obligation to investigate, which may be more challenging where the police are relatively courteous during stops and refrain from using racially charged language (see further the section on "Burden of proof" below).

Gillan and Quinton v. the United Kingdom

ECtHR, Application no. 4158/05, Judgment of 12 January 2010

No separate Article 14 claim raised, concerns of discriminatory trend voiced in Article 8 reasoning

The applicants had been subjected to a stop and search by the police. Their complaints focused on the "general compatibility of the stop and search powers" of the UK police under sections 44-47 of the Terrorism Act 2000. This legislation stipulated, *inter alia*, that 1) senior police officers, if they considered it "expedient for the prevention of acts of terrorism," could authorize any uniformed police officer in a given area to conduct stop and searches; 2) authorizations were subject to confirmation by the Secretary of State, had a temporal limit but could be renewed indefinitely; 3) even though the purpose of such searches was to find articles that could be used for acts of terrorism, the stop and searches did not need to be based on a suspicion that the person(s) stopped would carry articles of that kind; 4) persons failing to submit to a search were liable to imprisonment, a fine, or both. The applicants complained that stop and searches under these provisions violated Articles 5, 8, 10 and 11 of the ECHR.

No Article 14 complaints were raised in this case. Nevertheless, the Court noted with concern the broad discretion police officers had in their decision to stop and search, and found "the statistical and other evidence" that indicated the wide extent to which stop and search powers were relied on to be striking (paras. 83 and 84). In light of the large number of stop and searches and their small hit rate, the Court found "a clear risk of arbitrariness in the grant of such broad discretion" to police officers. Furthermore, it stated that "the risks of the discriminatory use of the powers against [black and Asian applicants was] a very real consideration" in light of "available statistics" that proved the above ethnic groups were disproportionately affected. The Court also condemned police practice to stop and search white people that had the sole objective of improving racial balance in the statistics (para. 85).

Relevance: It is noteworthy that the Court brings up the issue of ethnic profiling on its own initiative. Even though this case does not concern members of an ethnic minority group, the Court asserts that "the risks of the discriminatory use of powers against [black or Asian applicants] is a

very real consideration," as evidenced by statistics (para. 85). The fact that the Court proactively voices concerns over ethnic profiling might be indicative of its preparedness to adjudicate cases alleging and challenging the practice. The centrality of "available statistics" in the Court's argument underlines the importance statistical evidence could play in swaying the Court in favor of a decision against ethnic profiling. It is also reassuring that the Court did not only condemn ethnic profiling, but also recognized and condemned the authorities' efforts to conceal such a practice by stopping other people for the sole purpose of improving the racial balance of the statistics.

(The applicants also argued that the stop and searches violated their right liberty under Article 5 and to privacy under Article 8, both discussed above. They further argued violations of their rights to freedom of assembly and expression under Articles 10 and 11.)

Stefanou v. Greece

ECtHR, Application no. 2954/07, Judgment of 22 April 2010

Claim under Article 14 (together with Article 3) rejected for lack of compliance with the six-month time-limit

The applicant complained that he had been seriously ill-treated by the police because of his Roma origin. He further claimed that no effective investigation had been carried out into his complaints and that the criminal proceedings brought as a result of his complaint had lasted too long. The applicant brought the claims under Articles 3, 6(1), 13 and 14.

Although eventually finding the Article 14 application as being launched out of the six-month time-limit, the Court reiterated the State's obligation to investigate the link of racist motives and violent incidents (para. 58).

Relevance: Similarly to the *Cakir* judgment (above), this case could be used to argue that the authorities' obligation to investigate a potential link between police violence and racial bias extends to police action not necessarily involving violence as well, like stop and searches. This might be particularly applicable in cases where the police engage in the use of racial epithets, or like in this case, admit to "having used the applicant as a 'visual suspect' only because he was 'of the same age and appearance as the other Roma youths'" (para. 59).

B.S. v. Spain

ECtHR, Application no. 47159/08, Judgment of 24 July 2012

Violation of Article 14 (together with Article 3)

The applicant, a woman of Nigerian origin working as a prostitute at the material time, was stopped for questioning by the police on four occasions in 2005. She claims she was physically and racially abused during each stop. She alleged that investigation into her complaints was inadequate (Article 3) and that she was targeted by the police due to her ethnicity (Article 14).

The Court reiterated that the authorities were obligated to investigate whether acts of violence could be attributed to racist motives (paras. 58-59). The domestic courts failed to examine the applicant's complaint of racist bias by the police and disregarded her special vulnerability as an African woman working as a prostitute (para. 62). As a result, the authorities failed to satisfy their obligation to take all possible measures to ascertain whether or not racial bias or discriminatory attitudes might have played a role in the events. Therefore, the Court found a violation of Article 14 in conjunction with Article 3 (para. 63).

Relevance: This judgment builds on earlier judgments, including *Nachova* and *Cakir* (above), with regard to findings on the State's obligation to explore any indications of a link between racial motives and police violence. The Court also recognized the phenomenon of intersectional

discrimination, as advised by the two third-party interveners (paras. 56-57). This may be relevant in presenting arguments in the context of ethnic profiling, as a combination of factors, including race, gender and sexual orientation, may render individuals more susceptible to being targeted by the police or more vulnerable than others during stops and/or searches.

Horvath and Kiss v. Hungary

ECtHR, Application no. 11146/11, Judgment of 29 January 2013

Violation of Article 14 (together with Article 2 of Protocol No. 1)

The applicants, two young men of Roma origin, complained that they had been wrongly placed in "special schools" for the mentally disabled and that their education there had amounted to discrimination. The Court highlighted the long history of wrongful placement of Roma children in "special schools" in Hungary. The Court found that adequate safeguards were missing that would have prevented Roma children from being mistakenly and systematically diagnosed with "mild mental disability" or some other learning disability. As a result, it held the applicants' right to education had been violated on the basis of their ethnicity (Article 2 of Protocol No. 1 and Article 14).

The Court held that "where the difference in treatment [was] based on race, color or ethnic origin, the notion of objective and reasonable justification [had to] be interpreted as strictly as possible" (para. 112). The Court underlined the long history of misplacement of Roma children in special schools across Europe and established that in light of the recognized bias in placement procedures, "the State ha[d] specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests" (paras. 115 and 117).

Relevance: It could be reasoned that the State's positive obligation to put an end to indirect ethnic discrimination in the educational context should be extended to the arena of policing as well. There is substantial evidence pointing to profiling practices being prevalent across the EU. Similarly to racial bias recognized in the sphere of education, racial bias, if recognized in the field of policing, should trigger positive obligations for the State to fight racial discrimination (a form of which is ethnic profiling).

2.4 Ethnic profiling and freedom of movement (Article 2 of Protocol No. 4)

General principles

The Court has recognized that the right to freedom of movement as set out in Article 2(1) and (2) of Protocol No. 4 is meant to guarantee a person's right to liberty of movement within a territory and to leave that territory, implying a right to leave for a country of the person's choice as long as he or she is admitted into the country.[24] Therefore, any measure that infringes this right or restricts its exercise will be prohibited unless it is considered "necessary in a democratic society" in the pursuit of the legitimate aims listed in Article 2(3) of Protocol No. 4.[25] Consequently, if a person is

[24] *Baumann v. France*, Application no. 33592/96, ECtHR, Judgment of 22 May 2001, at para. 61; *Napijalo v. Croatia*, Application no. 66485/01, ECtHR, Judgment of 13 November 2003, at para. 68; *Bartik v. Russia*, Application no. 55565/00, ECtHR, Judgment of 21 December 2006, at para. 36.

[25] *Baumann v. France*, Application no. 33592/96, ECtHR, Judgment of 22 May 2001, at para. 61; *Napijalo v. Croatia*, Application no. 66485/01, ECtHR, Judgment of 13 November 2003, at para. 68; *Bartik v. Russia*, Application no. 55565/00, ECtHR, Judgment of 21 December 2006, at para. 36.

denied the use of an identity document that would have permitted him or her to leave the country, there is an interference with his or her right to liberty of movement.[26]

Relevant case-law

This section examines how the right to freedom of movement might be engaged in the context of ethnic profiling. The Court has been reluctant to find that simple identity stops, or the prospect of future stops, limit a person's freedom of movement—at least in the absence of special circumstances. The Court has not examined what circumstances might give rise to a violation, however, and this could allow arguments that repeated and discriminatory targeting of a particular group may constitute a violation, especially if there is evidence of actual impact on travel patterns. Despite this reluctance, it was in the context of freedom of movement that the Court issued its sole merit judgment on ethnic profiling, finding a discriminatory violation of the right to freedom of movement where a person was stopped at a checkpoint based on an oral order to prevent anyone of Chechen origin from passing.

Filip Reyntjens v. Belgium,

ECommHR, Application no. 16810/90, Decision on admissibility of 9 September 1992

Claim under Article 2 of Protocol No. 4 inadmissible as manifestly unfounded

The applicant refused to submit to a routine identity check as a matter of principle during a traffic stop. As a result, he was taken to the local police station for questioning for more than two hours. He complained, *inter alia*, that the obligation to carry an identity card and to show it to the police when requested violated his freedom of movement (claims under Articles 5, 8 and Article 2 of Protocol No. 4).

Regarding the applicant's freedom of movement claim, the Commission found that "the mere obligation to carry an identity card and to show it to the police whenever requested to do so [did] not constitute a restriction of the liberty of movement" unless "there were special circumstances" that in this case did not present themselves. As a result, this part of the application was manifestly ill-founded (p. 153).

Relevance: The Commission does not specify what the "special circumstances" might be under which an identity check would amount to a restriction on the liberty of movement. However, it could be argued that the stop being based exclusively or to a decisive extent on a person's ethnicity, race, national origin or religion would amount to a "special circumstance."

(*The applicant also argued that his detention when he refused to submit to the check was a violation of Article 5, and that identity checks carried out with no specific reason and the recording of information after such a check infringed his right to respect for private life under Article 8, discussed above.*)

Ferdinand Jozef Colon v. the Netherlands

ECtHR, Application no. 49458/06, Decision on admissibility of 15 May 2012

Claim under Article 2 of Protocol No. 4 inadmissible as manifestly unfounded

Beginning in 2002, in light of a rise in violence in Amsterdam, the mayor designated most of the old city center a security risk area for set time periods. As a result of this, the public prosecutor was empowered to issue orders, valid for twelve-hour periods, allowing anyone to be searched for

[26] *Baumann v. France*, Application no. 33592/96, ECtHR, Judgment of 22 May 2001, at para. 62; *Napijalo v. Croatia*, Application no. 66485/01, ECtHR, Judgment of 13 November 2003, at paras. 69 and 73; *Bartik v. Russia*, Application no. 55565/00, ECtHR, Judgment of 21 December 2006, at para. 36.

weapons in the area. Evaluation reports on these preventive searches in the security risk areas commissioned by the city in 2006 and 2007 indicated a steady decline in weapons-related violence.

The applicant, a Netherlands national, refused to submit to a search in the designated security risk area in 2004, was arrested and taken to a police station where he refused to give a statement. He was convicted for refusing to comply with the search order, but no sentence was imposed. He complained that his right to respect for privacy was violated by the mayor's designation of a security risk as it enabled random searches on people for an extensive period of time in a large area without the safeguards of judicial review. He also alleged that his freedom of movement was unlawfully restricted. The claims were brought under Articles 8, 14 and Article 2 of Protocol No. 4 of the Convention.

The applicant alleged a violation of his freedom of movement, claiming "he felt inhibited by his fear" that he would experience the same humiliation (para. 97). The Court, however, agreed with the Government, stating that while "there [had been] a chance that the applicant might be put to the inconvenience of" undergoing a search, he had been "in no way prevented from entering that area, moving within it and leaving it again" (para. 100). Therefore, the Court ruled that his freedom of movement had not been impacted, finding this part of the complaint manifestly ill-founded as well (para. 100).

Relevance: In dismissing the applicant's Article 2 of Protocol No. 4 complaint, the Court applies a strictly spatial approach to the definition of "liberty of movement," discounting the psychological barriers the applicant claimed restricted his free movement. However, the applicant did not claim that his actual stop constituted a restriction on his freedom of movement—he merely alleged that his fear that he would be stopped, and feel humiliated, again did so. Moreover, his Article 14 claim was not based on ethnic discrimination allegations. Therefore, it is not unreasonable to assume that the Court would go further than labeling a stop and search merely an "inconvenience" if complaints against stop and search operations were grounded in allegations of ethnic profiling. This might be particularly applicable should statistical evidence be available to corroborate that the "chance" of being coerced to undergo a stop and search was significantly higher for members of certain minority groups than members of the majority population, and if the applicant can present evidence of the impact of those stops and searches on the applicant and on the targeted population.

(*The applicant also argued that the stop violated his right to privacy, discussed above, and raised a discrimination claim regarding his lack of standing to challenge the designation order, which was dismissed for failure to exhaust domestic remedies*.)

Timishev v. Russia

ECtHR, Application nos. 55762/00 and 55974/00, Judgment of 13 December 2005)

Violation of Article 2 of Protocol No. 4

The applicant claimed that after his car had been stopped at a checkpoint on an administrative border in Russia, he had been refused entry to the Kabardino-Balkaria region on the basis of an oral instruction from the region's Ministry of the Interior not to admit anyone of Chechen ethnic origin. The applicants complained under Article 2 of Protocol No. 2, Article 14 and Article 2 of Protocol No. 1.

The Court considered that preventing the applicant from crossing the border had constituted a restriction on his right to freedom of movement, and primarily examined whether the refusal to let him cross had had a lawful basis (para. 47). The Court recalled that the restriction on the freedom of movement had taken place on the basis of an oral order issued by an official at the Kabardino-Balkar Ministry of the Interior and it had not been properly formalized or recorded (para. 48). Moreover, the Prosecutor General had found that the order violated the freedom of movement

enshrined in the Russian Constitution (para. 48). As a result, the Court found a violation of the applicant's freedom of movement (Article 2 of Protocol No. 4), ruling it had not been in accordance with the law (para. 49).

Relevance: It is worth noting that by finding the restriction had not been in accordance with the law, the Court avoided ruling on the question "whether the political and social situation" at the given time and place necessitated checkpoints and identity checks, including whether the authorities' reliance on them was proportionate to the aim pursued.

(*The applicant also claimed that the stop was discriminatory, in violation of Article 14, discussed above.*)

2.5 Burden of proof

General principles

Since allegations of racial discrimination might be particularly difficult to prove, the question of which party the burden of proof falls on is highly important in ethnic profiling cases. The Court has established that when the applicant has proved a difference in treatment, the burden of proof shifts to the State to show that such difference was justified.[27] The Court has also held that in certain cases the party who alleges something might not be the one that needs to prove the allegation.[28] When the events at issue lie wholly, or in large part, within the exclusive knowledge of the State, the burden of proof may rest on the State to provide a satisfactory and convincing explanation.[29] Furthermore, overcoming its initial objection to relying on statistics as evidence, the Court has come to rely extensively on statistics the applicants have produced to establish a difference in treatment on the basis of sex, stressing the importance of "undisputed official statistics"[30] or statistics revealing a dominant trend of discrimination.[31]

Relevant case-law

In light of the challenges of proving ethnic profiling, this section underlines the importance of documentation of such cases. Allegations of ethnic profiling are rendered less difficult to prove if there is statistical evidence behind such claims. The below rulings illustrate how the Court has considered shifting the burden of proof in cases alleging racial bias, including where it has considered this in the context of allegedly racially motivated police violence, and where it has done so on the basis of statistics. It also stresses the importance of the Court's recognition of "indirect discrimination," which ethnic profiling is typically a form of, and the less strict evidential rules that apply in those cases.

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[27] *Chassagnou and Others v. France* [GC], Application nos. 25088/94, 28331/95 and 28443/95, ECtHR, Judgment of 29 April 1999, at paras. 91-92; *Nachova and Others v. Bulgaria* [GC], Application nos. 43577/98 and 43579/98, ECtHR, Judgment of 6 July 2005, at para. 157; *Timishev v. Russia*, Application nos. 55762/00 and 55974/00, ECtHR, Judgment of 13 December 2005, at para. 57; *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, ECtHR, Judgment of 13 November 2007, at para. 177; *Horvath and Kiss v. Hungary*, Application no. 11146/11, ECtHR, Judgment of 29 January 2013, at para. 108.

[28] *Aktas v. Turkey*, Application no. 24351/94, ECtHR, Judgment of 24 April 2003, at para. 272; *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, ECtHR, Judgment of 13 November 2007, at para. 179.

[29] *Salman v. Turkey* [GC], Application no. 21986/93, ECtHR, Judgment of 27 June 2000, at para. 100; *Anguelova v. Bulgaria*, Application no. 38361/97, ECtHR, Judgment of 13 June 2002, at para. 111, *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, ECtHR, Judgment of 13 November 2007, at para. 179.

[30] *Hoogendijk v. the Netherlands*, Application no. 58461/00, ECtHR, Decision of admissibility of 6 January 2005, at p. 21; *Zarb Adami v. Malta*, Application no. 17209/02, ECtHR, Judgment of 20 June 2006, at paras. 77-78.

[31] *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, ECtHR, Judgment of 13 November 2007, at para. 191.

Nachova and Others v. Bulgaria [GC]

ECtHR (Grand Chamber), Application nos. 43577/98 and 43579/98, Judgment of 6 July 2005

Violation of Article 14 could be found when state fails to refute allegation of discrimination

The case concerned the killing of two unarmed Roma fugitives by a member of the military police who was attempting to arrest them as they were trying to escape. One Roma eyewitness reported the use of racial epithets on the premises by the officer who killed the victims. The applicants, family members of the victims, relied on Articles 2, 13 and 14.

Although the Court eventually found no violation of Article 14 together with Article 2 in respect of the killing itself (the *substantive* aspect), the Grand Chamber reiterated that the burden of proof might be shifted to the authorities to provide an explanation in cases "where the events lie wholly, or in large part, within the exclusive knowledge of the authorities" (para. 157). The Court could not exclude the possibility that in certain cases, the state would have to disprove an arguable allegation of discrimination, or that an Article 14 violation could be found on the basis of a state's failure to refute such allegation. However, in this case, where an individual incident of racially motivated violence was alleged, such an approach would have required the Government "to prove the absence of a particular subjective attitude on the part of the person concerned". The Court did not consider that the alleged failure of the authorities to carry out an effective investigation into the evidence of a racist motive for the killing, which constituted a separate violation of Article 14 together with Article 2 in respect of the obligation to investigate (the *procedural* aspect, see above), should shift the burden of proof to the Government with regard to the discriminatory nature of the killing itself (para. 157).

Relevance: Since ethnic profiling allegations are usually extremely difficult to prove, the possibility to reverse the burden of proof is highly relevant in stop and search cases. In this case, the individual nature of the alleged violation meant that the Court was reluctant to reverse the burden of proof, as to do so may have placed the state in the impossible position of having to disprove the mental state or motivation of the individual officer involved, who was alleged to have been motivated by racial bias. However, where a general trend of targeting members of ethnic minority groups in law enforcement practices is revealed, the state would no longer be required to prove intent in one particular case but to disprove allegations of institutional racism. In such a case, the shift in the burden of proof should not be considered to place an impossible burden on the state.

(*The Court made these findings on the burden of proof in the context of its discussion of the obligation under Article 14 to investigate discriminatory motives for police violence, discussed above.*)

D.H. and Others v. the Czech Republic [GC]

ECtHR (Grand Chamber), Application no. 57325/00, ECtHR, Judgment of 13 November 2007

Elucidation of "indirect discrimination"

The eighteen applicants before the European Court of Human Rights were all school children from the town of Ostrava, who were placed into "special schools" for children with mental disabilities between 1996 and 1999. The decision to place them in these schools was made by the head teacher on the basis of a psychological examination, and with the consent of the child's parent or guardian. Statistics presented to the Court demonstrated the segregated nature of schools in Ostrava. The applicants relied on Article 14 read in conjunction with Article 2 of Protocol No. 1.

The Grand Chamber held by 13 votes to 4 that there had been indirect discrimination against the school children in the provision of education, finding a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights read in conjunction with Article 2 of Protocol No. 1 (right to education). The decision held that disproportionate assignment of Roma

children to special schools without an objective and reasonable justification amounted to unlawful discrimination. However, perhaps the most groundbreaking element of the Court's decision was that it explicitly embraced the principle of indirect discrimination, reasoning that a *prima facie* allegation of discrimination shifts the burden to the defendant state to prove that any difference in treatment is not discriminatory.

The Court found that when a discriminatory difference in treatment was the outcome of disproportionately prejudicial effects of a general policy or measure, even if its language was neutral on the surface, the situation might amount to "indirect discrimination," even without the intent to discriminate (paras. 183-184). As proving discriminatory treatment might be extremely difficult otherwise, the Court held that less strict evidential rules should apply in cases of alleged indirect discrimination (para. 186). As a result, the Court ruled that reliable and significant statistics presented by the applicants will suffice to constitute *prima facie* evidence of discrimination. It noted that indirect discrimination could also be proved without statistical evidence (para. 188).

Cognizant of the fact that indirect discrimination would be extremely difficult to prove otherwise, the Court established that the burden shifts on to the State when an applicant alleging indirect discrimination presented "a rebuttable presumption that the effect of a measure or practice was discriminatory" (para. 189). In order to shift the burden to the State, the applicants should provide *prima facie* evidence of the discrimination, which can be formed by "the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact" (para. 178). Notably, in this case in the lack of official information on the ethnic origin of pupils, the Court accepted the statistics referenced by the applicants while acknowledging that they might not have been "entirely reliable" (para. 191). It was sufficient for the Court that they appeared to reveal a "dominant trend" confirmed both by the State and independent supervisory bodies (para. 191). The Court held that discriminatory intent did not need to be proved in cases in the area of education (similarly to employment or the provision of services), and therefore, accepted the applicants' evidence as "sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination" (paras. 194-195).

Relevance: Ethnic profiling is usually a form of "indirect discrimination," since it tends to be the outcome of apparently neutral policies applied disproportionately against members of ethnic minorities. Therefore, it is highly relevant that the Court has established that less strict evidential rules apply in cases of "indirect discrimination," and statistics, when available, could potentially play a decisive role even if they are not entirely reliable but seem to reveal a dominant trend.

Moreover, discriminatory intent needs not to be proved in the spheres of education, employment or the provision of services if discriminatory impact is proved. It could be argued that the same principles should be followed in cases concerning the effects of policing as well. If the complainant alleges "indirect discrimination," which is usually the case in litigation against alleged ethnic profiling practices, the burden should shift to the State to disprove it.

(*The Court made these findings on the burden of proof in the context of its discussion of indirect discrimination, discussed above. The Court also used a similar approach to shifting the burden of proof in a case of indirect discrimination in the case of* Horvath and Kiss v Hungary, *also discussed above.*)

3. European Commission against Racism and Intolerance (ECRI)

The European Commission against Racism and Intolerance (ECRI), established by the Council of Europe (CoE) in 1993, is an independent human rights monitoring body whose mandate is to combat racism and intolerance.

3.1 General Policy Recommendations

ECRI issues General Policy Recommendations (GPR) that are addressed to all CoE member States. These recommendations provide detailed guidelines that policy makers are invited, but not obligated, to use when formulating national strategies and policies in various areas.

3.1.1 General Policy Recommendation no. 11 on combating racism and racial discrimination in policing

ECRI has underlined that racial profiling is not an acceptable or valid response to the challenges that the everyday reality of combating crime, including terrorism, pose. This is because racial profiling, as a form of racial discrimination, violates human rights, reinforces stereotypes, and lacks effectiveness, leading to less human security (para. 25). ECRI has issued four recommendations to member State governments on racial profiling.

Firstly, ECRI has recommended that member States should clearly define and prohibit racial profiling by law (para. 1). It has defined racial profiling as "the use by the police with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities" (para. 28). ECRI has clarified that "[t]he use of these grounds has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (para. 28). ECRI has suggested that in order to avoid racial profiling the police should base their control, surveillance or investigation activities on individual behavior and/or accumulated evidence (para. 29). ECRI has also stressed that "the notion of objective and reasonable justification should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds" (para. 30). ECRI has further suggested that it is the effectiveness and necessity of and the harm caused by racial profiling that should be considered in the assessment whether the proportionality test between the means employed and the aims sought has been satisfied (paras. 31-34). ECRI has clarified that the list of grounds in its definition of racial profiling is non-exhaustive—as racial profiling may be based on ethnic origin as well, for example—and it includes both actual and presumed grounds (para. 35). Moreover, ECRI has acknowledged that racial profiling can take the form of indirect racial discrimination and discrimination by association (para. 38). In terms of sanctions for racial profiling, ECRI has proposed that both legal sanctions and remedies as well as more flexible remedial mechanisms should be put in place to address individual officer behavior and racial profiling resulting from institutional policies respectively (para. 39).

Secondly, ECRI has recommended that member States should "carry out research on racial profiling and monitor police activities in order to identify racial profiling practices, including by collecting data broken down by grounds such as national or ethnic origin, language, religion and nationality in respect of relevant police activities" (para. 2). ECRI has stated that a lack of understanding of the prevalence and impact of racial profiling practices contributes to their continued use by the police, and has emphasized the importance of having data on policing activities, and the criminal justice system, broken down by grounds such as national or ethnic

origin, language or religion (with due regard to confidentiality—"disaggregated data") for the purposes of accountability and well-informed policy-making (paras. 40-41).

Thirdly, ECRI's recommendations include the introduction of "a reasonable suspicion standard, whereby powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria" (para. 3). ECRI has considered the introduction of a reasonable suspicion standard "a particularly important tool in combating racial profiling" (para. 44).

Fourthly, ECRI has recommended that the police should be trained on "the issue of racial profiling and the use of the reasonable suspicion standard" (para. 4). ECRI has suggested that "the training must cover the unlawfulness of racial profiling as well as its ineffectiveness and harmful nature," include practical examples and practical principles and be complemented by more general training intended to raise awareness on human rights issues and racial discrimination (paras. 45-47).

3.2 Country Reports

ECRI monitors manifestations of racism and intolerance in each of the Council of Europe member States and publishes its findings and recommendations in country reports. In the framework of its country-monitoring work, ECRI conducts visits to member States and engages in confidential dialogue with the national authorities.

In numerous country reports, ECRI has specifically recommended that national authorities take steps to address and investigate racial profiling, either in the case of identity checks;[32] in the context of stop and search operations carried out by police and customs and immigration officials;[33] in the context of countering all crime, including terrorist crime;[34] or combatting illegal immigration.[35] In line with its recommendations in General Policy Recommendation no. 11, ECRI has recommended that national authorities clearly define and prohibit racial profiling by law,[36] conduct in-depth research on racial profiling and monitor police and security activities to identify racial profiling practices.[37] As to monitoring the activities of authorities, ECRI has recommended that a system for monitoring the frequency of police checks on individuals be introduced and evaluated with the participation of civil society actors.[38] It has also recommended the monitoring of the implementation of an immigration law due to allegations of it leading to racial profiling.[39]

[32] ECRI Report on France (fourth monitoring cycle), CRI(2010)16, June 15, 2010, para. 140.
[33] ECRI Report on Norway (fourth monitoring cycle), CRI(2009)4, February 24, 2009, para. 145.
[34] ECRI Third report on the Netherlands, CRI(2008)3, June 29, 2007, para. 26.
[35] ECRI Report on Ireland (fourth monitoring cycle), CRI(2013)1, February 19, 2013, paras. 154-155; ECRI Report on France (fourth monitoring cycle), CRI(2010)16, June 15, 2010, para. 140.
[36] ECRI Report on France (fourth monitoring cycle), CRI(2010)16, June 15, 2010, para. 143; .
[37] ECRI Report on Norway (fourth monitoring cycle), CRI(2009)4, February 24, 2009, para. 145; ECRI Third report on the Netherlands, CRI(2008)3, June 29, 2007, para. 26; ECRI Report on Ireland (fourth monitoring cycle), CRI(2013)1, February 19, 2013, para. 155
[38] ECRI Third report on Norway, CRI(2004)3, June 27, 2003, para. 70.
[39] ECRI Report on Ireland (fourth monitoring cycle), CRI(2013)1, February 19, 2013, paras. 154-155.

4. Council of Europe Human Rights Commissioner

The Commissioner for Human Rights is an independent institution with a mandate to promote the awareness of and respect for human rights in 47 Council of Europe member states. As part of this mandate, the Commissioner conducts country visits, provides advice and information on the prevention of human rights violations and releases opinions and other publications, including thematic reports.

The Commissioner for Human Rights has consistently condemned the practice of ethnic profiling.

The Commissioner has stated that profiling of Muslims or people appearing to be of Middle-Eastern decent in the combat against terrorism is "unacceptable" and a potential violation of Article 14 of the European Convention of Human Rights. The Commissioner has called the underlying assumption of this type of terrorist profiling—that the targeted groups are more prone to commit acts of terrorism— "dangerous" and denounced the large number of innocent people harassed as a result of this practice. The Commissioner also questioned the effectiveness and productiveness of this practice, warned against its deleterious effects on police-community relations and recommended that effective police methods be developed that are based on individual behavior and/or accumulated intelligence.[40]

Similarly, the Commissioner has also stated that stop and searches on ethnic or religious grounds are not effective but counter-productive and violate human rights standards. The Commissioner has called for the establishment of a reasonable suspicion standard as the basis of a stop and search. The Commissioner has recommended that stop and searches be "taken within a comprehensive approach based on clear legislation; rules on accountability; available complaints mechanisms; and active support from high level police leadership to implement rights-based procedures." The Commissioner has also warned against the detrimental impact of disproportionate stop and searches on police-community relations.[41]

The Commissioner has condemned ethnic profiling practices targeting the Roma, including special (biometric) databases,[42] targeted police raids, discriminatory border checks, and other forms of ethnic profiling, including disproportionate stop and searches.[43] The Commissioner has called for these practice to end and recommended the monitoring of police activities, in particular through the collection of disaggregated data.[44]

[40] Council of Europe Commissioner for Human Rights. "Racial and religious profiling must not be used in the combat against terrorism" (viewpoint), May 29, 2007.
[41] Council of Europe Commissioner for Human Rights. "Stop and searches on ethnic and religious grounds are not effective" (viewpoint), July 20, 2009.
[42] Council of Europe Commissioner for Human Rights. "Address by Thomas Hammerberg, Council of Europe Commissioner for Human Rights, before the Committee on Justice of the Dutch Senate" (speech), September 28, 2010; Council of Europe Commissioner of Human Rights. Human Rights of Roma and Travellers in Europe, Strasbourg: Council of Europe Publishing, February 2012: p. 81.
[43] Council of Europe Commissioner of Human Rights. Human Rights of Roma and Travellers in Europe, Strasbourg: Council of Europe Publishing, February 2012: p. 81-82.
[44] Council of Europe Commissioner of Human Rights. Human Rights of Roma and Travellers in Europe, Strasbourg: Council of Europe Publishing, February 2012: p. 84.

II. EUROPEAN UNION

1. European Union Legal Frameworks

1.1 Consolidated Version of the Treaty on European Union

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall […] combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

   The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

   The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

1.2 Consolidated Treaty on the Functioning of the European Union

Part One – Principles

Title II – Provisions Having General Application

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Part Two – Non-discrimination and citizenship of the Union

Article 18

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

   (a) the right to move and reside freely within the territory of the Member States;

   (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

Article 21

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance

with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

TITLE V – Area of Freedom, Security and Justice

CHAPTER 1 – General Provisions

Article 67

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

Article 72

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

CHAPTER 2 – Policies on Border Checks, Asylum and Immigration

Article 77

1. The Union shall develop a policy with a view to:

   (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

   (b) carrying out checks on persons and efficient monitoring of the crossing of external borders;

   (c) the gradual introduction of an integrated management system for external borders.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

   (a) the common policy on visas and other short-stay residence permits;

   (b) the checks to which persons crossing external borders are subject;

   (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

(d) any measure necessary for the gradual establishment of an integrated management system for external borders;

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

CHAPTER 5 - Police Cooperation

Article 87

1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures concerning:

(a) the collection, storage, processing, analysis and exchange of relevant information;

(b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;

(c) common investigative techniques in relation to the detection of serious forms of organised crime.

3. The Council, acting in accordance with a special legislative procedure, may establish measures concerning operational cooperation between the authorities referred to in this Article. The Council shall act unanimously after consulting the European Parliament.

In case of the absence of unanimity in the Council, a group of at least nine Member States may request that the draft measures be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft measures concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The specific procedure provided for in the second and third subparagraphs shall not apply to acts which constitute a development of the Schengen acquis.

1.3 Charter of Fundamental Rights of the European Union

Chapter III – Equality

Article 20 - Equality before the law

Everyone is equal before the law.

Article 21 - Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

CHAPTER VII – General Provisions

Article 51- Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

1.4 Data Protection Directive[45] (95/46/EC)

Section II – Criteria for making data processing legitimate

Article 7

Member States shall provide that personal data may be processed only if:

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed;

1.5 Racial Equality Directive[46]

CHAPTER I - General Provisions

Article 1 - Purpose

[45] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

[46] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC)

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2 - Concept of discrimination

2. For the purposes of paragraph 1:

   a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

   b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Article 3 - Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

[…]

(h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 8 - Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Article 15 - Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

1.6 Freedom of Movement Directive[47]

Chapter VI – Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27 - General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

   The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

1.7 Schengen Borders Code[48]

TITLE I – General Provisions

CHAPTER II - Control of external borders and refusal of entry

Article 6 - Conduct of border checks

1. Border guards shall, in the performance of their duties, fully respect human dignity. Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.

[47] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004/38/EC)
[48] Regulation establishing a Community Code on the rules governing the movement of persons across borders (562/2006, Schengen Borders Code)

2. While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Title III – Internal borders

Chapter I – Abolition of border control at internal borders

Article 20 - Crossing internal borders

Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.

Article 21 - Checks within the territory

The abolition of border control at internal borders shall not affect:

a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

   (i) do not have border control as an objective,

   (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime,

   (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders,

   (iv) are carried out on the basis of spot-checks;

b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;

c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

d) the obligation on third-country nationals to report their presence on the territory of any Member State pursuant to the provisions of Article 22 of the Schengen Convention.

2. Jurisprudence of the CJEU

The Court of Justice of the European Union (CJEU) has a range of different functions. Most importantly from the perspective of litigating ethnic profiling, it is tasked with interpreting EU law in order to make sure it is applied in the same way in all EU Member States. This may happen in the form of advice (called "preliminary rulings") to national courts that are in doubt about the interpretation or validity of an EU law. In addition, it also settles legal disputes between EU governments and EU institutions, and individuals, companies or organizations can also bring cases before the Court if they feel their rights have been infringed by an EU institution.

This chapter provides the summaries and relevant holdings of some CJEU rulings that could be utilized in ethnic profiling-related litigation. The following cases reflect on a multiplicity of issues, including standing and presumptions; databases with ethnic or national component; the scope of the Racial Equality Directive; or the safeguards that need to be in place in order to ensure that checks near the border do not become *de facto* border checks in violation of the Schengen Borders Code.

Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV

Case C-54/07, CJEU, Judgment of 10 July 2008

CJEU interprets the scope of the concept of "direct discrimination," the reversal of the burden of proof and appropriate penalties in case of racial discrimination

The applicant, Centrum voor gelijkheid van kansen en voor racismebestrijding (Center for equal opportunities and combating racism), a Belgian body promoting equal treatment launched complaints after the director of Firma Feryn NV, the defendant company, publicly stated he would not recruit "immigrants." There was no identifiable complainant contending that they had been the victim of that discrimination.

The Labor Court in Brussels asked the Court of Justice for its interpretation of the Racial Equality Directive (RED) regarding the scope of the concept of "direct discrimination," the reversal of the burden of proof and appropriate penalties in the given case (para. 20).

The Court observed that if national legislation provided for it, associations with a legitimate interest in ensuring compliance with the RED, or other bodies established pursuant to Article 13 of the Directive, could bring proceedings without a specific complainant (para. 27). It held that public statements, like the one in question, constituted direct discrimination in respect of recruitment, as they were likely to discourage certain applicants to apply, and thus, to hinder their access to the labor market (para. 28). It ruled that such statements were sufficient for a presumption of the existence of a directly discriminatory recruitment policy under the Directive (Article 8(1)). Therefore, the burden shifted to the employer to prove no violation of the principle of equal treatment had occurred, by showing that the actual recruitment practice was not discriminatory (para. 34). The Court also stated that Article 15 of the Directive required that sanctions needed to be effective, proportionate and dissuasive, even in the absence of an identifiable victim (para. 40). The sanctions may include a finding of discrimination, an adequate level of publicity, a prohibitory injunction or a fine (para. 39).

Relevance: The Court's finding is relevant for ethnic profiling cases as it expands on the notion of *prima facie* evidence on direct discrimination under the Racial Equality Directive, and its corollary, the reversal of the burden of proof. It underlines that a presumption of discrimination may be found to exist under the RED if it is based on facts such as *statements* giving rise to a presumption of a discriminatory attitudes and practices. In such situations, it is for the person or institution which has the presumption against it to adduce evidence that it has not breached the

principle of equal treatment, which it can do, among others, by showing that the actual practice does not correspond to the presumption that was created.

It is further important that legal challenges for the purposes of the RED do not require an identifiable complainant/victim. RED allows for associations with a legitimate interest in ensuring compliance with the obligations under that directive to bring legal or administrative proceedings without acting in the name of a specific complainant or in the absence of an identifiable complainant if national legislation permits it. The decision also encourages national authorities and courts to be creative in choice of effective sanctions against discrimination.

Heinz Huber v. Bundesrepublik Deutschland

Case C-524/06, CJEU, Judgment of 16 December 2008

CJEU sets limits to allowable differences in data processing on the basis of nationality

The applicant, an Austrian national but resident of Germany, claimed that he was discriminated against by reason of the processing of his data in a centralized register (AZR) that contained certain personal data only on foreign nationals (both EU and non-EU citizens) residing more than three months in Germany. No comparable database existed for German citizens (para. 32). The data stored in the AZR were used, *inter alia*, in the application of the legislation relating to the right of residence, for statistical purposes and in the fight against crime (para. 46). The Court was asked to rule on the compatibility of the AZR with the prohibition of discrimination on grounds of nationality (Article 12 EC) and the requirement that the processing of personal data needed to be necessary for the performance of a task carried out in the public interest or in the exercise of official authority (Data Protection Directive) (para. 40).

While the Court examined the arguments relating to applying legislation relating to the right of residence and for statistical purposes in light of the requirements of the Data Protection Directive, it examined data processing for the purposes of fighting crime under Article 12 EC, because the scope of application of the Data Protection Directive did not extend to data processing for the latter purpose (para. 46). As to the fight against crime, the Court reiterated that the principle of non-discrimination required that comparable situations could not be treated differently and that different situations could not be treated in the same way, unless such treatment was based on objective considerations and was proportionate to the objective pursued. The objective nature of the basis for any different treatment must be irrespective of nationality amongst EU Member States (para. 75). The fight against crime necessarily involved the prosecution of crimes and offences committed, irrespective of the nationality of their perpetrators (para. 78). Therefore, the difference in treatment between German nationals and other Union citizens in this respect was discriminatory on the basis of nationality (para. 80).

As to the data processing for the application of legislation regarding the right of residence, the Court held that the right of residence of a Union citizen in the territory of a Member State of which he was not a national was not unconditional but might be subject to limitations (para. 54). As a result, as long as only data necessary for the purposes of applying legislation relating to the right of residence were processed and the centralized nature of the register enabled more effective application of the legislation, the requirement of necessity in the Data Protection Directive was satisfied in this regard (para. 62).

Regarding data processing for statistical purposes, the Court found that Member States were entitled to have exact knowledge of population movements on their territory (para. 63), but such statistics did not necessitate the processing of such individualized information as in this case (para. 65). Therefore, the requirement of necessity in the Data Protection Directive was not satisfied in this respect (para. 68).

Relevance: The decision provides judicial confirmation of the principle of equality between EU nationals resident in a Member State and its own nationals as regards the storage of personal data

aimed at the prevention of crime. The creation of a special database on EU nationals that does not contain data on the Member State's own nationals amounts to discrimination on grounds of nationality. However, Member States are entitled to collect anonymous data on individuals for statistical purposes.

Aziz Melki and Selim Abdeli v. France

Cases C-188/10 and C-189/10, CJEU, Judgment of 22 June 2010

CJEU sets limits to discretion in police stops connected to border surveillance between Member States and Schengen States

The applicants, two Algerian nationals unlawfully present in France, had been subject to a police identity stop, pursuant to Article 78-2, paragraph 4, of the Code of Criminal Procedure in the area within 20 kilometers of the French land border with Belgium. Following this, both of the applicants had been made the subject of a deportation order and been detained. They argued, *inter alia*, that the impugned provision of the Code of Criminal Procedure, in so far as it amounted to border controls at the borders with other Member States, was contrary to the principle of freedom of movement for persons (Article 67(2) TFEU), providing for the absence of internal border control for persons.

The Court held that national legislation empowering the police authorities of the Member States to check the identity of any person, solely within an area of 20 kilometers from the land border of a Member State with other Schengen States, cannot have an effect equivalent to border checks. Where the power to check identity applied regardless of their behavior and of specific circumstances giving rise to a risk of breach of public order, then such legislation could only be lawful if it provided a sufficient framework for that power to guarantee that its practical exercise does not de facto amount to border checks. The Court explained that police measures do not have border control as an objective when they:

1) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;
2) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders; and
3) are carried out on the basis of spot-checks (paras. 69-70).

Relevance: This is the first case examining checks carried out irrespective of a person's behavior and of specific circumstances giving rise to a risk of breach of public order (suspicionless spot checks). The decision underlines the necessity to provide very strict legislative framework for ID checks and the fact that the rule of law in the EU requires binding national laws to control discretion to make suspicionless spot checks to ensure they do not have equivalent effect to border checks. However, the abolition of internal border control in the EU's Schengen Area does not render suspicionless spot checks in the territory illegal *per se*.

Malgozata Runevic-Vardyn and Lukasz Pawel Wardyn v Vilniaus miesto savivaldybes administracija and Others

Case C-391/09, CJEU, Judgment of 12 May 2011

CJEU interprets the scope of the Racial Equality Directive

The first applicant is a Lithuanian national belonging to the Polish minority in the country; the second applicant is a Polish national. The two applicants are a married couple residing in Belgium. The application of the Lithuanian Civil Code—providing that entries must be made on certificates of civil status in Lithuanian—led to discrepancies between the spelling of the first applicant's name on her Lithuanian birth certificate as well as the couples' names on their Lithuanian marriage certificate and the preferred Polish versions of their names. The referring Lithuanian court asked the CJEU whether the Racial Equality Directive as well as Article 18 and 21 TFEU

precluded rules of a Member State which require that surnames and forenames of individuals be entered on the certificates of civil status of that State in a form which complies with the spelling rules of the official national language.

The CJEU ruled that national rules on the spelling of the names on the certificates of civil status did not fall within the scope of the Racial Equality Directive (RED). The CJEU also held that Article 21 TFEU did not preclude a Member State from refusing to amend the joint surname of a married couple who are citizens of the Union on condition that that refusal does not give rise, for those Union citizens, to serious inconvenience at administrative, professional and private levels, this being a matter which it is for the national court to decide (para. 95).

Relevance: One of the important holdings in the judgment is that the scope of the Racial Equality Directive cannot be defined restrictively (para. 43). The court also rules that the concept of "services" in RED does not include national rules which relate to the manner in which surnames and forenames are entered in certificates of civil status (paras 44-45). Furthermore, the court also bears in mind that the Council rejected the Parliament's "any public body" proposal, citing the Councils unwillingness "to take into account an amendment proposed by the European Parliament whereby 'the exercise by any public body, incl*uding police, immigration, criminal and civil justice authorities,* of its functions' would be included in the list of activities listed in Article 3(1) of that directive and thus come within its scope" (para. 46., emphasis added).

Atiqullah Adil v. Minister for Immigration, Integration and Asylum

Case C-278/12 PPU, CJEU, Judgment of 19 July 2012

CJEU sets limits to discretion in police stops connected to border surveillance between Member States and Schengen States

The applicant, who claimed to be an Afghan national, had been stopped in the framework of a "mobile security monitoring check" conducted by the royal mounted police in the Netherlands while traveling on a bus from Germany. He was later placed in detention pursuant to the law on foreign nationals. The stop took place on a motorway within a zone of 20 kilometers from the German border. The applicant disputed the lawfulness of the stop, and consequently, his detention.

The Court examined the questions referred for a preliminary ruling in light of the Schengen Borders Code (Regulation (EC) No. 562/2006) (para. 37). The Dutch Government pointed out that the checks are carried out, in practice, either on the basis of profiling or on the basis of sample stops. However, it claimed that the profiles depend on information or data showing an increased risk of illegal residence or cross-border crime on certain routes, at certain times or on the basis of the type and other characteristics of the vehicles. The Court found that the national legislation enabling officials responsible for border surveillance and the monitoring of foreign nationals to carry out checks, in a geographic area 20 kilometers from the land border between Schengen States, for the purposes of combating illegal residence, was lawful under Community [now: EU] law as long they did not constitute systemic border checks and when the following conditions were met:

1) those checks may be based on general information and experience, i.e. without an individual reasonable suspicion of illegal residence, regarding illegal residence after the crossing of a border.
2) they can also be carried out but only to a very limited degree in order to obtain such general information and experience-based data concerning illegal residence after crossing of the border; and
3) the conducting of those checks had to be subject to detailed rules and limitations with regard to, inter alia, their intensity and frequency, i.e. 6 hours per day and a maximum of 90 hours per week (paras. 84-88).

Relevance: Similarly to *Gillan*, *Colon* and *Melki and Abdeli*, this case focused on the breadth and purpose of the order, the nature and purpose of the stop, ID check (and search) and the degree of focus on specific threats. The Court sets certain procedural limits on checks carried out within the border zone around the Schengen area on the basis that EU law requires rules and limitations on police powers to be sufficiently detailed to enable effective supervision of the exercise of the power to ensure compliance with the objective of the abolition of internal border controls.

However, the Court (similarly to the referring national court) fails to address whether the profiles used by the Dutch police have been in conformity with EU non-discrimination provisions, since it is arguable that the broad powers granted to the Dutch police to identify suspect vehicles expose those checked to racial bias. The profiles Dutch authorities rely on have yet to be brought for review before the CJEU.

3. Other EU bodies

3.1 European Parliament

Recommendations in the European Union are non-binding acts. They allow the given institution to express their views in a given subject area and suggest a line of action with no legal consequences in case of non-compliance by the Member States.

The European Parliament has issued a recommendation on the problem of profiling, in particular on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control.[49] The European Parliament has stated that ethnic profiling "raises deep concerns about conflict with non-discrimination norms" (para. D). It has voiced concerns about the "danger […] that innocent people may be subject to arbitrary stops, interrogations, travel restrictions, surveillance or security alerts" due to profiling and emphasized that "law enforcement must always be conducted with respect for fundamental rights" (paras I-J). The European Parliament has emphasized that the use of ethnicity, national origin or religion as factors in law enforcement investigations "must pass the scrutiny tests of effectiveness, necessity and proportionality" (para. W). It has warned that "profiling based on stereotypical assumptions may exacerbate sentiments of hostility and xenophobia in the general public" and reminded that the European Court of Human Rights has established that the use of race as an exclusive basis for law enforcement action is discriminatory and its case-law suggests that ethnic profiling is forbidden (paras. X-Z). The European Parliament has recommended, *inter alia*, that a clear definition of profiling should be adopted, anonymous ethnic statistic should be used to identify discrimination in law enforcement practices, strong safeguards and effective and accessible redress mechanism should be established for victims of profiling together with a set of criteria to assess profiling activities' effectiveness, legitimacy and consistency with European Union norms (para. 1).

3.2 EU Network of Independent Experts on Fundamental Rights (2002-2006)

Set up by the European Commission upon the request of the European Parliament, the EU Network of Independent Experts on Fundamental Rights had a mandate to monitor the situation of fundamental rights in the European Union and the Member States, on the basis of the Charter of Fundamental Rights. It issued non-binding reports and opinions on specific issues related to the protection of fundamental rights in the European Union.

The EU Network of Independent Experts on Fundamental Rights issued an opinion on ethnic profiling in 2006, in which they recommended that a legal framework:

"a) clearly prohibit ethnic profiling, to the extent that indicators relating to 'race' or ethnicity, religion or national origin, cannot be used as proxies for criminal behaviour, either in general or in the specific context of counter-terrorism strategies;
b) facilitate the proof that such ethnic profiling is being practiced by law enforcement authorities by allowing the use of statistics to highlight the discriminatory attitudes of such authorities, insofar as this may be reconciled with the rules relating to the protection of private life in the processing of personal data;
c) define with the greatest clarity possible the conditions under which law enforcement authorities may exercise their powers in areas such as identity checks or stop-and-search procedures;

[49] European Parliament recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control (2008/2020(INI))

d) sanction any behavior amounting to ethnic profiling not only through the use of criminal penalties, but also (or instead) through other means, including by providing civil remedies to victims or by administrative or disciplinary sanctions, insofar as the rules relating to evidence in criminal proceedings may constitute an obstacle to effectively combating such behavior and protecting the victims of such behaviour."[50]

3.3 European Union Agency for Fundamental Rights

The European Union Agency for Fundamental Rights (FRA) is a specialized EU agency whose mandate is to help ensure that the fundamental rights of people living in the EU are protected. It provides expert advice to EU institutions and the Member States on fundamental rights issues. Although its recommendations are not binding, they are meant to serve as guidance for both EU and Member States institutions.

In 2010 the Fundamental Rights Agency issued a report on ethnic profiling as it relates to EU norms on the protection of personal data and non-discrimination. The FRA has warned that stop and searches motivated "solely or mainly" on the basis of one's race, ethnicity or religion, constitute discrimination and are unlawful.[51] The report suggested that suspicion should be based on individual behavior (that does not include physical appearance) and has warned about the damaging effects of ethnic profiling on community relations and the inefficiency of the practice.[52] The FRA recommended that officers receive training on ethnic profiling and their stop and search operations be monitored through the collection of racially disaggregated data, provided that anonymity and informed consent are guaranteed.[53]

[50] EU Network of Independent Experts on Fundamental Rights. "Ethnic Profiling," CFR-CDF.Opinion4.2006, December 2006, p. 7.
[51] European Union Agency for Fundamental Rights. "Towards More Effective Policing—Understanding and Preventing Discriminatory ethnic Profiling: A Guide." Luxembourg: Publications Office of the European Union, 2010, p. 64.
[52] European Union Agency for Fundamental Rights. "Towards More Effective Policing—Understanding and Preventing Discriminatory ethnic Profiling: A Guide." Luxembourg: Publications Office of the European Union, 2010, p. 64.
[53] European Union Agency for Fundamental Rights. "Towards More Effective Policing—Understanding and Preventing Discriminatory ethnic Profiling: A Guide." Luxembourg: Publications Office of the European Union, 2010, p. 64.

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