CASE DIGESTS

Discrimination Legal Update

JUNE 2013

SUMMARIES of decisions related to discrimination, including ethnic profiling, from international and regional and national courts and tribunals from March 2012 to May 2013. Prepared by lawyers and legal staff at the Open Society Justice Initiative to bring these decisions to the widest possible audience.

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JUSTICE INITIATIVE

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UN Human Rights Committee

Naidenova et al. v. Bulgaria

Decision of 30 October 2012, UNHRC, Comm. No. 2073/2011

Forced eviction of illegal but long-term Roma settlement without providing alternative housing: violation of right to home (Article 17), no finding of discrimination (Articles 2 and 26)

The applicants are Bulgarian nationals of Roma ethnicity belonging to the Dobri Jeliazkov community. They were issued an eviction order on the basis that their houses were constructed unlawfully on municipal land. The community consists of impoverished Roma who had lived in the location for over seventy years. During that time, they were de facto recognized by public authorities through police registration of their addresses. The applicants claim that the order violates their rights under Article 17 of the Covenant because the forced evictions would subject them to unlawful and arbitrary interference with their homes. The Committee found the order lawful because Article 65 of the Municipal Property Act and Article 178 of the Territory Law allow for eviction of individuals and demolition of buildings constructed on municipal land without proper permits. However, the interference was arbitrary because the State party had not identified any urgent reason for forcibly evicting the community before providing adequate alternative accommodations. Accordingly, the State party was permitted to enforce the eviction order only after it ensured the immediate availability of satisfactory replacement housing. Separate claims of discrimination under Articles 2 and 26 were rejected as not sufficiently substantiated.

Link to full decision (PDF)

Narrain et al. v. Mauritius

Decision of 16 July 2012, UNHRC, Comm. No. 1744/2007

Distribution of parliamentary seats between communities no longer recorded in census: violation of right to political participation (Article 25(b))

The First Schedule of the Mauritian Constitution requires that every political candidate declare their affiliation with one of four communities: Hindu; Muslim; Sino-Mauritian; or General Population, for those who do not appear, from their way of life, to belong to one of the other three communities. The Constitution further provides for the allocation of eight seats of the National Assembly on the basis of the General Population categorization. The applicants are members of a registered political party called *Rezistans ek Alternativ* (Resistance and Alternative). They presented themselves as candidates in the general election of the National Assembly held in 2005, but their nomination was denied because they did not declare any community. The applicants claimed they were unable to determine which community they belonged to because they were unaware of the "way of life" criteria. The Supreme Court declared the law repugnant to the constitution and a democratic society and ordered the applicants to be listed as candidates. No applicant succeeded in the ensuing election. The Electoral Supervisory Committee petitioned the Supreme Court for direction on how to apply the regulation in the future. The Supreme Court held that it is legally obligated to declare nomination papers that failed to declare a community as invalid. In considering the communication, the Human Rights Committee noted the State's claim

that General Population is a residual category, encompassing all people not belonging to the three other groups. However, it concluded that since community affiliation has not been the subject of a census since 1972, the continued maintenance of the requirement of mandatory classification of a political candidate is arbitrary, and therefore is in violation of Article 25(b) of the ICCPR. In light of its decision regarding Article 25, it decided not to examine the communication under Article 26 (prohibition on discrimination). The Committee held the applicants' claim under Article 18 inadmissible due to failure to exhaust domestic remedies.

Link to full decision (PDF)

UN Committee on the Elimination of Discrimination against Women (CEDAW)

Jallow v. Bulgaria

Decision of 28 August 2012, CEDAW, Comm. No. 32/2011

Failure to protect immigrant spouse and daughter from domestic violence: violation of obligations to eliminate discrimination (Articles 2(b)-2(f)), to modify social patterns of prejudice (Article 5(a)), and to eliminate discrimination in marriage and family matters (Articles 16(1)(c),(d) and (f))

Isatou Jallow moved from the Gambia to Bulgaria after marrying A.P., a Bulgarian national. Once in Bulgaria, A.P. allegedly became abusive toward Jallow and subjected her to physical and psychological violence, including sexual abuse, and attempted to force her to take part in pornographic films and photographs. Even after social workers and police became involved, authorities took no measures to protect Jallow from further domestic violence and sexual abuse. In March 2009, prosecutors—without interviewing Jallow—refused to continue investigating the alleged domestic violence due to insufficient evidence. An order granting A.P. custody of the couple's daughter was issued solely on the basis of A.P.'s statement and the Court did not consider Jallow's allegations of domestic violence. In November 2010, Jallow submitted a communication to the Committee on behalf of her daughter and herself claiming that Bulgarian authorities failed to provide adequate protection against domestic violence and that the state's actions relative to her situation amounted to gender-based discrimination.

The Committee concluded that Bulgaria had violated Articles 2(b)-2(f), 5(a), 16(1)(c), 16(1)(d) and 16(1)(f) of CEDAW, read in conjunction with Articles 1 and 3, when it failed to investigate allegations that A.P. had committed domestic violence against Jallow and her daughter. In the Committee's view, these actions, together with the State's failure to inform Jallow properly about her daughter's whereabouts and her condition, violated Articles 2(b) and 2(c). The Committee determined that Bulgaria had also failed to protect Jallow's rights to equality within marriage and as a parent, and to treat her daughter's interests as paramount, in violation of Articles 5(a), 16(1)(c), 16(1)(d) and 16(1)(f). The Committee explained that Bulgaria's actions were based on stereotypes concerning the roles of women and men within marriage, according to which men are perceived to be superior to women. The authorities' reliance on these stereotypes caused them to act on the statements and actions of A.P. and to disregard Jallow's allegations of violence. It also meant that they ignored Jallow's vulnerable position and disregarded evidence concerning the disproportionate impact of domestic violence on women. The Committee urged Bulgaria to compensate Jallow and her daughter for violating their rights under CEDAW. It also recommended that the State Party adopt measures to ensure that women victims/survivors of domestic violence, including migrant women, have effective access to justice and other services (e.g., translation services). It also called on Bulgaria to provide regular training on CEDAW and the Optional Protocol and to adopt legislative and other measures to ensure that domestic violence is taken into account in the determination of custody and visitation rights of children.

Link to full decision (PDF)

J.S. v. United Kingdom

Decision of 27 November 2012, CEDAW, Comm. No. 38/2012

Inadmissible for failure to exhaust local remedies (Article 4(1) OP)

J.S., an Indian national, was born in 1976. When he was born, the British Nationality Act 1948 prevented his mother from passing her U.K. citizenship onto him. Under section 5 of the Act, only fathers could pass their citizenship onto their children. The applicant applied for UK citizenship, but this was rejected. He did not challenge this rejection by judicial action under the Human Rights Act 1998, because he claimed could not afford to. The Committee declared the communication inadmissible under Article 4(1) of the Optional Protocol due to the failure of J.S. to exhaust domestic remedies, noting that J.S. had not established that such remedies had been unreasonably prolonged or were unlikely to bring him effective relief. Having found the Committee inadmissible under Article 4(1), the Committee decided not to examine any other inadmissibility grounds and remained silent on the author's legal standing, as a man, to bring a communication under the Optional Protocol to CEDAW.

Link to full decision (PDF)

Committee for the Elimination of Racial Discrimination

Dawas and Shava v. Denmark

Decision of 6 March 2012, UNCERD, Comm. No. 46/2009

Failure to investigate racist motivation for attack on immigrant family: violation of obligation to end racial discrimination (Article 2(d)) and to provide effective protection and remedies against racial discrimination (Article 6)

Iraqi-born Mahali Dawas, his wife and eight children were attacked in June 2004 in their home in Denmark by up to 35 Danish young people who beat Dawas and his son, damaged the home and shouted racist phrases at the family. While four of the youths were convicted in local court on charges of violence, vandalism and weapon possession, their sentences were light and the family did not receive any compensation. The family, who had refugee status in Denmark, then filed a civil lawsuit addressing the racist nature of the attack, but the High Court of Eastern Denmark upheld a lower court decision denying that the attack was racially-motivated. According to the Committee, Danish authorities violated the Convention on the Elimination of Racial Discrimination by failing to investigate the possibility that the crime had been racially motivated. There is an obligation to investigate racially motivated threats of violence, which necessarily also applies where violence is committed. "The Committee considers that the onus was on the State party to initiate an effective criminal investigation, instead of giving the petitioners the burden of proof in civil proceedings." The Committee recommended that Denmark pay the family for property damage and emotional distress and also reevaluate its policy for investigating and prosecuting racist crimes.

Link to full decision (PDF)

TBB-Turkish Union v. Germany

Decision of 4 April 2013, UNCERD, Comm. No. 48/2010

Statements by public figure denigrating immigrant communities not investigated: violation of obligation to end racial discrimination (Articles 2(1)(d)), to condemn racist propaganda (Article 4), and to provide effective protection and remedies against racial discrimination (Article 6)

The German cultural journal *Lettre International* published an interview with Mr. Thilo Sarrazin, the former Finance Senator of the Berlin Senate and member of the Board of Directors of the German Central Bank, in which he made a number of racist remarks, including several specifically against Turkish and Arab people. For example, Sarrazin claimed that most Arabs and Turks in Berlin have no productive function, are neither willing nor able to integrate, reject the German state, make no effort to educate their children and just produce "new little headscarf girls."

The applicant, the Turkish Union, filed a criminal complaint "as the interest group of the Turkish citizens and citizens with Turkish heritage of Berlin and Brandenburg." It claimed, inter alia, that Mr. Sarrazin's statements constituted inciting hatred against a segment of the population (*Volksverhetzung*). The Office of Public Prosecution declined to pursue the case, based on the

freedom of expression in Article 5 of the Basic Law. The Turkish Union claims that it was arbitrarily denied protection against racially discriminatory statements directed against it as a group of individuals of Turkish heritage and, as the representative of this group, claimed that this violated Articles 2 (1) (d), 4(a) and 6.

The Committee ruled that the Turkish Union had standing to bring the claim, as Article 14(1) gives the Committee competence to receive communications from "groups of individuals" and the Union's activities with the Turkish population satisfied the victim requirement in Article 14(1). The Committee found that Sarrazin's statements contained ideas of racial superiority, denied respect to the Turkish population as human beings, and depicted generalized negative characteristics of the Turkish population. It also incited racial discrimination in order to deny the Turkish population access to social welfare in accordance with Article 4(a). The Committee held that the criterion of disturbance of public peace, required under German law for a finding of incitement, does not adequately translate into domestic legislation the State party's obligations under the Convention to enact legislation to end racial discrimination and to condemn racist propaganda, in particular as neither Article 2(1)(d) or Article 4 contain such a requirement. The Committee therefore concluded that the absence of an effective investigation into the statements by Mr. Sarrazin amounted to a violation of Articles 2(1)(d), 4 and 6 of the Convention. The Committee recommended that the State party review its policy and procedures concerning the prosecution in cases of alleged racial discrimination consisting of dissemination of ideas of superiority over other ethnic groups and of incitement to discrimination on such grounds, in the light of its obligations under Article 4 of the Convention. The State party must also widely publicize the Committee's Opinion, including among prosecutors and judicial bodies.

Link to full decision (PDF)

European Court of Human Rights

General Discrimination

Aksu v. Turkey

Judgment of 15 March 2012, ECtHR Grand Chamber, App No. 4149/04

State-funded publications included allegedly anti-Roma language: no violation of right to private life (Article 8) or prohibition of discrimination (Article 14)

The applicant, a Turkish national of Roma origin, claimed a breach of the Convention due to what he considered degrading anti-Roma language in three state-funded publications. He claimed that some of the language in these publications was offensive to his Roma identity, alleging a violation of Article 14 (discrimination), in conjunction with Article 8 (respect for private life) of the Convention. In the absence of prima facie evidence of discriminatory intent or effect, the Court only examined the Article 8 challenge. It declared that negative stereotyping could "impact a group's sense of identity and the feelings of self-worth and self-confidence of [its] members" (para. 58). In this regard, the Grand Chamber explained that States' obligation to uphold Article 8 had two components: (i) States had a negative obligation to "protect the individual against arbitrary interference by the public authorities", and (ii) States had "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). 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 reviewed the balance struck by the national judicial authorities between Article 8 and Article 10 (freedom of expression), and ultimately found no Article 8 violation. The national courts had focused on the academic nature of the works in question, an area of expression the importance of which the Court has stressed in recent cases.

Link to full decision

Hode and Abdi v. United Kingdom

Judgment of 11 June 2012, ECtHR, App No. 22341/09

Inability of immigrants with limited leave to remain as refugees to be joined by spouses post-flight: violation of prohibition of discrimination (Article 14) together with right to family life (Article 8)

In 2006 the first applicant was granted asylum status in the United Kingdom and given an initial limited period of leave to remain in the country. In 2007 he married the second applicant in Djibouti. She applied for a visa to join him in the United Kingdom. However, under the Immigration Rules only spouses who were part of the refugee's family unit before he or she left the country of permanent residence qualified for a "family reunion" visa. The second applicant was thus denied leave to enter the country. Because the United Kingdom had only granted her

husband five years' leave to remain in the country, he was not considered "present and settled" in the United Kingdom. Therefore she could not join him on any other type of visa. The second applicant gave birth to two children in 2008 and 2011.

In April 2011 the Immigration Rules were amended to permit "post-flight spouses" to join their refugee partners in the United Kingdom during the refugee's initial period of leave to remain.

The Court found a violation of Article 14 in conjunction with Article 8. The Immigration Rules had obviously affected the home and family life of the applicants and their children as it had impacted their ability to set up home and enjoy family life while living together. The facts of this case therefore fell within the ambit of Article 8. The applicants enjoyed "other status" for the purpose of Article 14 of the Convention because they were a refugee who had married after leaving his country of permanent residence and his spouse. It appeared that the United Kingdom was not treating all refugees of the same status equally. Refugees who had married before leaving their country of permanent residence and students and workers, whose spouses had been entitled to join them, were in an analogous position to the applicants for the purpose of Article 14 as they had also been granted a limited period of leave to remain. Offering incentives to certain groups of immigrants might amount to a legitimate aim for the purposes of Article 14. However, in a previous case the Upper Tribunal (Asylum and Immigration) had found no justification for the particularly disadvantageous position that refugees had found themselves in when compared to students and workers, whose spouses had been entitled to join them. In fact, the Tribunal had gone so far as to call on the Secretary of State for the Home Department to give urgent attention to amending the Immigration Rules so as to extend them to the spouses of those with limited leave to remain as refugees. The Immigration Rules had subsequently been amended in the manner suggested by the Tribunal. The Court therefore did not consider that the difference in treatment between the applicants, on the one hand, and students and workers, on the other, was objectively and reasonably justified. Furthermore, there was no justification for treating refugees who had married post-flight differently from those who had married pre-flight. The Court accepted that in permitting refugees to be joined by pre-flight spouses, the United Kingdom had been honoring its international obligations. However, where a measure resulted in the different treatment of persons in analogous positions, the fact that it had fulfilled the State's international obligation did not in itself justify the difference in treatment.

Link to full decision

X and Others v. Austria

Judgment of 19 February 2013, ECtHR Grand Chamber, App. No. 19010/07

Prohibition on second-parent adoption for same-sex couples: violation of right to private and family life (Article 8) and prohibition of discrimination (Article 14)

A female same-sex couple and the biological child of one of the partners complained that their legal exclusion from second parent adoption constituted discrimination contrary to Articles 8 and 14 of the ECHR. Second parent adoption is available to married and unmarried opposite-sex couples in Austria, but unavailable to same-sex couples because of Article 182(2) of the Civil Code (which requires second parent adoption to occur within opposite-sex couples). The Court considered the complaint to be different from previous adoption cases concerning sexual orientation heard by the Court. Those had concerned discrimination in adoption by single

individuals (*Fretté v France*; *E.B. v France*) and discrimination between opposite-sex married couples and same-sex couples in civil partnerships (*Gas and Dubois v France*). In the present case, the key complaint was that same-sex couples were treated differently than both unmarried and married opposite-sex couples. The Court held by a majority (ten to seven) that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention on account of the difference in treatment of the applicants in comparison with unmarried opposite-sex couples in which one partner wished to adopt the other partner's child. It unanimously held that there had been no violation of Article 14 taken in conjunction with Article 8 when the applicants' situation was compared with that of a married couple in which one spouse wished to adopt the other spouse's child.

Link to full decision

Eweida and Others v. United Kingdom

Judgment of 15 January 2013, ECtHR, App Nos. 48420/10, 59842/10, 51671/10 and 36516/10

Prohibition on employees wearing religious symbols and requirement of employees to wed or advise same-sex couples against their religious convictions: violations of Article 9 (Freedom of Religion) in one case but not in the others; no violation of Article 14 (Prohibition of Discrimination) in any case

Several employees who expressed or displayed various signifiers of Christian belief at work complained that restrictions on religious expression violated Article 9 and Article 14 taken in conjunction with Article 9, on freedom of thought, conscience, and religion and prohibition of discrimination.

The first two applicants—Nadia Eweida, an airline employee, and Shirley Chaplin, a geriatric nurse—challenged the restrictions of their respective employers, which prohibited the wearing of Christian crosses on a necklace while at work. Eweida was serving at a British Airways check-in desk when the airline officially restricted the display of religious symbols. Because male Sikh employees were allowed to wear a dark blue or white turban or to display the Sikh bracelet in summer, and because female Muslim ground staff members were authorized to wear a hijab in British-Airways-approved colors, Eweida felt discriminated against as a Christian by the ban. In a similar case, Shirley Chaplin was asked by her employer to remove the cross and chain during work due to health and safety regulations at the hospital.

The other two applicants—Lillian Ladele, a registrar at the Islington Borough Council, and Gary McFarlane, a relationship counselor—refused respectively to wed and advise same-sex couples. In their view, same-sex relationships were against their faith. Ladele's employer had an equality and diversity policy, safeguarding "community cohesion by promoting shared community values and understanding, underpinned by equality, respect and dignity for all." McFarlane worked as a therapist in relationship counseling, but refused to advise gay or lesbian couples. The British Association for Sexual and Relationship Therapy follows a Code of Ethics and Principles of Good Practice that establishes that therapists "must be aware of his or her own prejudices and avoid discrimination, for example on grounds of religion, race, gender, age, beliefs, sexual orientation, disability."

The applicants brought claims under Article 9, freedom of thought, conscience and religion, and under Article 14, the prohibition of discrimination, in conjunction with Article 9. The Court found

no violation for any of the applicants except Ms. Eweida. For each applicant the Court first engaged in an analysis of whether their controversial actions constituted a "manifestation of religious belief" and therefore fell under the ambit of Article 9. The Court affirmed for all of applicants that their desire to wear a cross or their refusal to serve same-sex couples qualified as such, even though none of these actions are mandates of Christianity. The Court then evaluated whether the State (as an employer and a judicial system) met its positive obligation to protect the applicants' right to manifest their religion. In doing so, it balanced the interference suffered by the applicant against the employer's interest, paying particular attention as to whether the employer was the State or a private party. Because the domestic courts examined each case in detail the Court did not find the UK's lack of domestic legislation on religious freedom to violate the State's positive obligations.

In Ms. Eweida's case, the Court found that in the balance, British courts had not fairly weighed the impact on Ms. Eweida against the desire of the private employer, British Airways, to project a certain corporate image. The Court found that because British Airways allowed other employees to wear obvious items of religious clothing and later revised its uniform code to allow employees to wear religious jewelry, the original restriction was unreasonable and not of crucial importance to the brand. The Court found a violation of Article 9, though it made not finding under Article 14.

In Ms. Chaplin's case the Court found that despite the importance of wearing her cross visibly, it did not outweigh the health and safety reasons the public hospital cited when asking her to remove it. The Court recognized that this is a field where domestic authorities must be allowed a wide margin of appreciation and that hospital managers are far better placed to make clinical safety decisions than the Court. Accordingly, the Court found no violation of Articles 9 or 14.

Regarding Ms. Ladele's complaint, which only raised questions under Article 14 in conjunction with Article 9, the Court examined whether her situation amounted to indirect discrimination. To do so, it considered whether the public authority's requirement to make all registrars also register same-sex civil unions pursued a legitimate aim and was proportionate. The Court held that the aim was legitimate because it sought to promote equal opportunities and required all employees not discriminate against others. It noted that the Court's jurisprudence has made clear that any difference in treatment because of sexual orientation requires particular, serious justifications. It also found the act to be proportionate, even though the consequences for the applicant were serious—she ultimately lost her job. The authority's policy aimed to secure the Convention rights of others, and the Court allows a wide margin of appreciation to an authority and domestic courts when striking a balance between competing Convention rights. Therefore, the Court found that no violation of Article 14 in conjunction with Article 9 occurred.

Regarding Mr. McFarlane, the Court found that given the importance of freedom of religion it was necessary to engage in a balancing test of the parties' interests, even though Mr. McFarlane knew of his employer's policy on serving same-sex couples before he started working there. That he could have changed jobs to avoid the conflict did not negate the importance of conducting a balancing test, it was merely a factor to weigh. The Court ultimately found that because the private employer's actions were intended to let it provide a service without discrimination, the State authorities had a wide margin of appreciation to determine where to strike the balance. Accordingly the Court found no violation of Article 9, alone or in conjunction with Article 14.

Link to full decision

Horvath and Kiss v. Hungary

Judgment of 29 January 2013, ECtHR, App No. 11146/11

Segregation of Roma students into special classes for persons with mental disabilities: violation of the right to education (Article 2, Protocol 1) and prohibition of discrimination (Article 14)

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 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 in Hungary and 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). The Court accepted that the Hungarian Government's position to retain special schools had been motivated by the intention to find a solution for children with special educational needs. However, 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 Government was not able to disprove that indirect discrimination had been taking place; and therefore the Court found a violation of the applicants' right to education on the basis of their ethnicity (Article 2 of Protocol No. 1 and Article 14).

Link to full decision

Ethnic Profiling

Colon v. the Netherlands

Decision of 15 May 2012 (Admissibility), ECtHR, App No. 49458/06

Searches within specially-designated security risk area: claims under right to private life (Article 8) and freedom of movement (Article 2 of Protocol 4) manifestly ill-founded

The applicant, a Netherlands national, refused to submit to a search in a designated security risk area in 2004, was arrested and taken to a police station where he refused to give a statement. He was convicted, but not sentenced, for refusing to comply with the search order. He complained that his right to respect for privacy was violated by the mayor's designation of the area as 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 (Article 8). He also alleged that his freedom of movement was unlawfully restricted (Article 2 of Protocol No. 4). The Court noted that the legal framework on preventive searches in Amsterdam provided for temporal and geographical limits on search authorizations and no single executive authority was empowered to order a search by itself. It also highlighted the perceived effectiveness of the preventive searches in reducing violence as evidenced by the evaluation reports (para. 94). The Court found that 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, 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 the Article 8 claim manifestly ill-founded (para. 96). Regarding freedom of movement, the Court stated that the applicant had been "in no way prevented from entering that area, moving within it and leaving it again" (para. 100); therefore, it found that part of the complaint manifestly ill-founded as well (para. 100).

Link to full decision

B.S. v. Spain

Judgment of 24 July 2012, ECtHR, App. No. 47519/08

Failure to investigate allegations of racial motives in police conduct: violation of prohibition of discrimination together with prohibition of ill-treatment and responsibility to investigate (Article 14 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. 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. As a result, the authorities failed to satisfy their obligation to take all possible measures to ascertain whether or not racial bias might have played a role in the events. Therefore, the Court found a violation of Article 14 in conjunction with Article 3.

Link to full decision

Court of Justice of the European Union

Ethnic Profiling

Atiqullah Adil v. Minister for Immigration, Integration and Asylum (the Netherlands)

Judgment of 19 July 2012, CJEU, No. C-278/12 PPU

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

The applicant, who claimed to be an Afghan national, had been stopped in a "mobile security monitoring check" conducted by police in the Netherlands while he was 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. While domestic proceedings were still underway, the Court made a preliminary ruling on the interpretation of the Schengen Borders Code (Regulation (EC) No. 562/2006). The applicant's complaint called into question whether Dutch legislation conformed with the Schengen Border Code. The Dutch legislation in question enabled officials responsible for border surveillance and the monitoring of foreign nationals to carry out ID checks in a geographic area 20 kilometers from the land border between Schengen States in order to establish lawful residency. The Court found that the Dutch legislation was lawful under the Schengen Borders Code as long as the following conditions were met. First, checks had to be based on general information and experience regarding the illegal residence of persons at the places where the checks were made. Second, checks might be carried out to a limited extent in order to obtain such general information and experience-based data. And lastly, the State must place certain limitations on how checks are conducted with regard to, *inter alia*, their intensity and frequency (para. 88). The case will return to the national court for further proceedings consistent with the CJEU's interpretation of the Schengen Borders Code.

Link to full decision

Inter-American Court of Human Rights

Nadege Dorzema et al. ("Guayubín Massacre") v. Dominican Republic

24 October 2012, Case 1351/05

Attack by army on vehicle carrying Haitian migrants and subsequent deportation of survivors: violation of the rights to life (Article 4), humane treatment (Article 5), personal liberty (Article 7), fair trial (Article 8), equal protection (Article 24), and judicial protection (Article 25)

On 18 June 2000, members of the Dominican army opened fire on a vehicle along the Dominican Republic's border with Haiti. The vehicle was transporting a group of Haitians, seven of whom lost their lives and several others were wounded. The acts were prosecuted in military courts, even though family members of those executed had requested that the cases be subject to the jurisdiction of the regular courts. After several years of proceedings, the military courts acquitted the soldiers involved. Some of the victims who survived were expelled from the Dominican Republic without having received even the minimum due process protections which the American Convention guarantees to migrants irrespective of their status. These acts took place in the context of structural discrimination against Haitians or persons of Haitian origin at the hands of Dominican agents. (Of the six petitions against the Dominican Republic submitted to the Commission to date, the three most recent have involved the forced expulsion of and discrimination towards Haitians or Dominicans of Haitian descent.) The Court found violations of the applicants' rights protected by the American Convention on Human Rights, including the right to life (Article 4, with respect to the seven deceased), humane treatment (Article 5, with respect to those injured in the attack), personal liberty (Article 7, illegal and arbitrary detention), judicial protection (Article 25, with respect to the removal proceedings against victims), and freedom of movement and of residence (Article 27, collective expulsion).

Link to full decision (PDF)

ECOWAS Community Court of Justice

Kemi Pinheiro (San) v. the Republic of Ghana

6 July 2012, ECOWAS, Suit No. ECW/CCJ/APP/07/10, Judgment No. ECW/CCJ/JUD/11/12

Definition of "peoples" rights under the African Charter and individual standing to claim collective rights under the Charter and the ECOWAS Supplementary Protocol on Free Movement: no violation

The applicant is a Nigerian national who sought to enroll in the Ghana School of Law, and claimed that he was denied acceptance because he was not of Ghanaian nationality. Although Nigerian and British citizens normally may attend the school, a limitation was placed on the intake of students from those countries in 2009 in order to clear a backlog of Ghanaian applicants. Pinheiro alleged violations of the rights of "peoples" under the African Charter, specifically the right to self-determination (Article 20) and the right to pursue economic and social development (Article 22). He also claimed a violation of the right of establishment under the ECOWAS Supplementary Protocol on Free Movement, Right of Residence and Establishment. Ghana argued that the advertisement for the law school course was limited to Ghanaians, and that the violations he claims are not rights enjoyed by individuals.

The Court found that "peoples" rights under the African Charter should be enjoyed collectively and not individually. Thus an individual may only complain of a violation of a people's right in his capacity as a people's representative. Accordingly, the applicant could not invoke the rights of peoples under the Charter because Articles 20 and 22 did not contain a right to be enrolled in Ghana Law School. The Court then evaluated whether the applicant was able to bring a right of establishment claim against the state of Ghana under the Protocol on Free Movement. It held that while the refusal to internally implement a community protocol is a violation, the Protocol does not empower individuals with standing to sue a member state for violations of Community obligations. Only another member state or the ECOWAS Commission can access the Court to compel a member state to fulfill an obligation.

Link to full decision (PDF)

Spanish Supreme Court

Lleida Headscarf Ban

Judgment of 6 February 2013, No. 4118/2011

Municipal ban on full-face veils in public areas struck down

In 2010 the city council in Lleida, a Spanish municipality, approved a reform to the Municipal Ordinance on Civility and Coexistence, to prohibit wearing in public areas "accessories that impede or complicate the identification and the visual communication". The revision explicitly included "full veils" among these "accessories". The revised ordinance was initially upheld by the Supreme Tribunal of Catalonia, but subsequently overturned by the Supreme Court (*Tribunal Supremo*) which repealed the municipal regulation. The Supreme Court grounded its decision on the city council's lack of competence to regulate or limit freedom of religion. According to Spain's Constitution, the exercise of fundamental rights can only be regulated by law (i.e. by an act of the National Parliament). However, the judgment also contains findings on the general prohibition of full-face veils and freedom of religion, which could apply to other municipal regulations and even a potential national prohibition on wearing the burqa or veil. According to the Supreme Court, the jurisprudence of the European Court of Human Rights, which upholds bans on wearing religious symbols including headscarves, would not extend to this type of prohibition in Spain. First, the Spanish Constitution—in contrast with those of Turkey and France—does not include the principle of *laïcité*, an important notion of secularism embedded in the cultural and historical context of those states. Second, the European Court's precedents refer to a prohibition on headscarves in specific places (schools or universities), and not to a more general prohibition on wearing a burqa in all public spaces. According to the Supreme Court, in a democratic society such as Spain, in which freedoms and fundamental rights are guaranteed, it cannot be presumed that all the women wearing full-face veils do so because they are obliged by third persons. A general ban thus violates the right to freedom of religion, as it is an illegitimate intervention of the public authorities into the private beliefs of individuals. The Spanish Supreme Court is the first tribunal at its level to acknowledge what has been asserted by full-face veil wearing women on many occasions—that the veil represents a deep inner conviction to lead what they see as a pious life.

***Note**: The prohibition against full-face veils in public spaces is currently the subject of a case before the European Court of Human Rights in the case of* S.A.S. v France, *in which the Open Society Justice Initiative has submitted a third party intervention.*

Link to full decision (PDF)

United States, Federal District Court for the Southern District of New York

Ethnic Profiling

Floyd et al. v. City of New York et al.

Trial concluded on 21 May 2013, No. 08 Civ. 01034 (Southern District of New York)

Trial will determine constitutionality of NYPD stop-and-frisk policies

This is a federal civil class action lawsuit filed in 2008 challenging the New York Police Department's (NYPD) stop-and-frisk policy and practice. The case alleges that the NYPD maintained a policy and practice of unreasonable, suspicion-less, and racially discriminatory stops, in violation of the US Constitution's Fourth Amendment prohibition against unreasonable searches and seizures and the Fourteenth Amendment's Equal Protection Clause barring racial discrimination. It asks for a federal court ruling declaring NYPD's stop-and-frisk practices and policies unconstitutional and requiring change.

A bench trial in this case commenced on 18 March 2013 and ran through 21 May 2013. A decision is expected sometime in the next six months. The *Ligon* (see below) and *Davis* cases were both filed later as cases related to *Floyd*. Each concerns a specific subset of stop-and-frisk violations that fall under the umbrella of the *Floyd* case, which takes on the entirety of the City's stop-and-frisk practices. All three cases are before Judge Sheindlin in the Southern District of New York. Once *Floyd* is decided, *Ligon* will join in the remedy phase.

Link to case page

Link to trial press page

Ligon v. City of New York

Order of 8 January 2013, No. 12 Civ. 2274 (Southern District of New York)

Interim relief order suspends component of stop-and-frisk policy by NYPD (currently stayed pending an interlocutory appeal)

This is a federal civil class action lawsuit challenging the NYPD's "Operation Clean Halls". Operation Clean Halls is part of the NYPD's stop-and-frisk program in which police officers patrol private apartment buildings across New York City in agreement with building landlords.

New York Civil Liberties Union, the Bronx Defenders, LatinoJustice PRLDEF, and a civil rights attorney filed the case on behalf of residents of enrolled buildings and individuals who were unlawfully stopped and arrested on trespassing charges.

The plaintiffs contend that the practice violates the rights of residents and their guests, the majority of whom are Black and Latino. Claims are based on the US Constitution, the New York State Constitution, the federal Fair Housing Act and New York common law.

On 8 January 2013 US District Judge Scheindlin granted plaintiffs' motion for a preliminary injunction ordering the NYPD to immediately cease the practice, declaring it unlawful. Judge Scheindlin found that the NYPD has known or should have known that its officers routinely violate constitutional rights, in particular the Fourth Amendment protection against unreasonable searches and seizures, through the operation. This is the first federal ruling to find the practice under Mayor Bloomberg's administration to be unconstitutional. Judge Scheindlin held for the purposes of issuing the injunction that the NYPD routinely stopped people without reasonable suspicion.

Judge Scheindlin further found the NYPD fails to train officers adequately about when they may legally make trespass stops, and that the practice "has risen to the level of deliberate indifference". She also outlined training and supervision remedies to be considered.

However, upon interlocutory appeal, where the City claimed that an immediate end to the program would amount to an unreasonable financial burden, Judge Scheindlin stayed the order while the case is on appeal to the Second Circuit Court of Appeals.

Link to case page

Link to 8 January 2013 decision granting interim relief (PDF)

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The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo, and Washington, D.C.