OPEN SOCIETY JUSTICE INITIATIVE

SEYDI AND OTHERS v. FRANCE: APPLICATION

8 May 2016

STATEMENT OF THE FACTS

Introduction

1. Racial profiling is a pervasive and longstanding problem in French policing. Young men from visible minorities are disproportionately singled out for identity checks, pat-downs and searches based on their skin colour, presumed race, ethnic or national origin. Consistent studies by French, European and international bodies have repeatedly demonstrated the prevalence of these discriminatory checks. (Doc. 1, paras. 2 -3).

2. The treatment of the six applicants in this case reflects this pattern. Identity checks are regulated by Article 78-2 of the French Criminal Procedure Code. The vague and general nature of Article 78-2 together with the absence of any record of checks, permits discriminatory stops. The French courts have interpreted the law in a way that does not satisfy Article 14: in the applicants' cases, the courts (i) failed to ensure that, once a *prima facie* case of discrimination was shown, the burden of proof shifted to the state to offer an objective and reasonable justification, and (ii) failed to accept that reliable and significant statistics are sufficient to constitute the *prima facie* evidence the applicant is required to produce, contrary to the non-discrimination standards of the Convention.

Background: Racial Profiling in Europe

3. Racial profiling has been described by the European Commission on Racial Intolerance (ECRI) 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" (Doc. 1, fn. 37, para. 1).

4. Studies in different national contexts consistently find that the use of these widespread discriminatory practices, generally carried out in public view, humiliate and violate the dignity of victims, pave the way for other acts of discrimination and abuse, and generate feelings of fear and insecurity amongst affected groups and communities (Doc.1, fn.28). In France, many identity checks result in charges of "insult" and "rebellion". (Doc. 57 p.19; Doc.1, fn.28).

5. Such discriminatory practices also damage relations between police and members of the public, with negative consequences for police effectiveness and public security (Doc.58, pp 6-7; Doc. 66).

Identity checks under French Law

6. Police stops and identity checks in France are used both to investigate crimes and to prevent threats to public order. The majority of stops are carried out under Article 78-2 of the Code of Criminal Procedure (CCP), which permits four types of identity checks. A check under Article 78-2 al 1 allows police to stop an individual who they have reason to suspect of having committed a crime or of preparing to do so, or who can provide help to the police. Three further sub-sections of this article permit police to carry out checks unrelated to behaviour. Under Article 78-2 al 2, a prosecutor is

allowed to determine specific places and times where police can stop anyone without basing these checks on individual suspicious behaviour. Article 78-2 al 3 allows for stops to check identity where the police believe there is a risk to public order, and Article 78-2 al 4 allows the police to conduct identity checks in any airport, rail station, or other international transport site, again regardless of an individual's behaviour (Doc. 49).

7. In a 2015 Decision, the French *Défenseur des Droits* noted that police officers select targets for identity checks "to a great extent based on subjective criteria such as their feeling or their 'instinct'…This can be based on multiple factors such as the individuals' profile, their supposed ethnic origin, their clothing or other, and/or based on stereotypes."(Doc. 55, p.8).

8. Under existing legal and administrative provisions, French police do not have a duty to record or release information about their stop and search practices, and France does not collect or publish statistics on ethnicity that can reveal unequal treatment (Doc. 55, pp.13-14; Doc. 56, p. 8).

9. For the vast majority of stops, individuals receive no record of the stop nor reasons to explain why they were singled out. Only when judicial or administrative proceedings follow a stop is any record made. (Docs. 13, 19, 29, 41, 47-for all p.5; Doc. 55, pp.13-14). None of the six applicants in this case received any record of the check.

The Individual Stops

10. Each of the applicants in this case was subjected to an identity check. Applicants 4 and 6 were stopped pursuant to Art. 78-2 al 1. Applicants 1, 4 and 5 were stopped pursuant to Art.78-2 al 2 (prosecutors' orders) and Applicants 2 and 3 were stopped pursuant to Art.78-2 al 3 (public order).

Applicant 1: Mounir Seydi

11. On 15 September 2011 at around 16h00, Mounir Seydi, a young French student of African origin was stopped for an identity check as he was exiting the Croix Marie metro station in Lille, while accompanied by his friend Tawan Siathone. Evidence presented before the Paris Court of Appeal, and noted in its 24 June 2015 decision, indicated that other passersby who were leaving the metro station at the same time were not checked, and that the witness Tawan Siathone, who was of foreign nationality (Thai), was not checked. Once Mr. Seydi presented his student identity card, the police let him go wishing the young men a pleasant day (Doc. 7, p.7; Doc. 3). The Court of Appeal found that the stop was justified by Art.78-2 al 2 (prosecutors order) and that the claimant had not proved that the stop was discriminatory.

Applicant 2: Lyes Kaouah

12. On 27 September 2011, at around 20h30, Lyes Kaouah, a French citizen of North African origin, was subjected to an identity check and a search while speaking with his friend, Amine Dif, outside his home in Vaulx-en-Velin. The two men were surrounded by 15 police officers. In answer to the young man's question as to why they were so numerous, one of the police officers responded that "when you are [a group of] fifteen, you carry your balls, but when you are only two, there's no one there". Intimidated by the police officers, Mr. Kaouah and Mr. Dif identified themselves. Mr. Kaouah verbally provided his personal information, as he did not have his identity card, and witnessed as Mr. Dif was patted down. The two men were then told to leave. Mr. Kaouah and Mr. Dif were not given an explanation for the check. These facts were uncontested during the domestic proceedings and accounted for in the 2 October 2013 decision of the Tribunal de Grande Instance de Paris (Doc. 18, p.3; Doc. 9). It was not suggested in the domestic proceedings that Mr. Kaouah posed any threat to public order. The Court of Appeal stated that the « dangerous » nature of the town constituted a justification for the check. (Doc. 13, p.6).

Applicant 3 : Amine Dif

13. On 27 September 2011, Amine Dif, a French citizen of North African origin, was subjected to an identity check and a search while speaking with his friend, Lyes Kaouah, as described above. Mr. Dif showed his identity card, was patted-down from his head to his feet, police searched the pockets of his trousers and jacket and emptied his bag. These facts were uncontested during the domestic proceedings and accounted for in the 2 October 2013 First Instance Decision of the Tribunal de Grande Instance de Paris. (Doc. 18, p.3 ; Doc. 15). As in Kaouah, it was not suggested in the domestic proceedings that Mr. Dif posed any threat to public order. As in Kaouah, the Court of Appeal stated that the « dangerous » nature of the town constituted a justification for the check, without any suggestion of a specific threat to public order (Doc. 19, p.6).

Applicant 4: Bocar Niane

14. On 11 November 2011, shortly after 20h00, Mr. Bocar Niane, a French citizen of African origin, was stopped and searched by police while exiting his parents' house on rue Emile Cordon in Saint-Ouen, by four police officers, while accompanied by his sister Mariame. The unchallenged evidence presented in the domestic proceedings indicated that the police officers pushed Mr. Niane against a wall although he did not resist, kicked open his legs, patted him down, threatened to "taze" him, and threatened to give him a fine for "degrading a public good" for placing his foot against the wall while the police checked his identity document (Doc. 22). During the stop Mr. Niane indicated to the police officers that he was doing nothing wrong as "he was simply accompanying his younger sisters" (Doc. 30).

15. According to the evidence presented during the proceedings, in particular an affidavit presented by Mr. Niane's sister Mariame, he had been walking rapidly wearing a hood (capuche) (Doc. 22). In the Court of Appeal decision, it was said that the check took place while Mr. Niane was running out of a building and wearing clothing that hid his face, although the evidence suggested that he was "walking briskly" rather than running (Doc. 29). The Court of Appeal considered that in a town affected by delinquency, this behaviour was objectively suspicious (Doc. 29, p.7).

Applicant 5: Karim Touil

16. Karim Touil, a French citizen of North African origin, experienced three checks over a 10 day period in the center of the city of Besançon :

- On 22 November 2011 at about 13h30, he was stopped for the first time, near the Quick restaurant on the *grande rue*. The stop involved an identity check as well as a body pat-down from shoulders to feet.
- On 1 December 2011 at 13h30, while Mr. Touil was sitting with two friends, he was checked for the second time. A police officer said to a colleague: "Let's check that one" and then said "we know your codes from the *cités*". One of his friends, Kevin Chatelain, responded that he did not live in a *cité*. The officer told him "You, shut up, stay there." Mr. Touil was then forcibly taken by the shoulder into the entry of a building, where the police checked his identity card, emptied his bag on the ground, asked Mr. Touil to remove his shoes and frisked him from his feet to his head. The officers left without providing a reason for the check. These facts were unchallenged during the domestic proceedings, and recorded as such in the 2 October 2013 First Instance decision (Doc. 40, p. 3).
- On the same day, 1 December 2011, the third check took place in front of the *Hôtel de Ville* at 15h30 which involved a frisk and search. The first instance decision states that three officers had lined Mr. Touil and his friends up against a wall saying "identity check… keep your mouths shut", and frisked and searched the young men. An officer told Mr. Touil, using the informal "tu", "You're too fat, you need to lose weight, do some sports". Mr. Touil asked the officer to speak

politely to him, to which the officer reacted by threatening to slap him. Mr. Touil replied that the officer did not have the right. The officer proceeded to slap him hard on his cheek and then wrench his arm behind his back in order to push him against the wall (Doc. 40, p.3). The officer stated "Empty your shit". Once Mr. Touil's things were on the ground he said "That's fine, pick up your things." (Doc. 40, p. 3; Doc. 33; Doc. 35). Mr. Touil's friends who witnessed the events told him to complain. The police then put him in a police van and took him to the police station, where he was held for a while and then let go. The Court of Appeal decision of 24 June 2015 notes that this check went badly for Mr. Touil, who was subjected to verbal and physical aggression, and the Court of Appeal deplored that the officer made a remark about Mr. Touil's weight telling him to do some sports (Doc.41, p.7). However, the Court considered that the evidence did not suggest that his racial origin was the sole motivation for the check, without giving any other reasons (Doc. 41, p.7). The Court did not accept that the statistics and the witness statement were sufficient to demonstrate a *prima facie* case of discrimination.

Applicant 6: Dia Abdillahi

17. On 12 February 2012, Dia Abdillahi, a French citizen of African origin, was stopped by police for an identity check while walking home from the Post Office in Saint-Germain-en-Laye with his cousin Benyachourpi Manssouri (Doc. 47, p. 2; Doc. 48, p. 2). Four police officers in civilian clothes got out of an unmarked police vehicle which had been driving in the opposite direction but then spun around and stopped beside them. The police officers surrounded Mr. Abdillahi and Mr. Manssouri. One of the officers said "contrôle police". They then frisked them. The police addressed them by using the impolite form of "you" *(tu*) (Doc. 43; Doc.46, p. 3). They required Mr. Abdillahi to empty his pockets and remove the first of two layers of trousers he was wearing due to the cold weather, in view of passersby and frisked him again. Noting his presence in Saint-Germain-en-Laye while he lives in Marseille, one of the officers remarked "Ah! You're on vacation, you don't work? You better find work because if *Sarko* gets in, you won't be able to remain like this." The men were then told to proceed on their way without receiving any explanation for their check. These facts, as noted in the decision of the *Tribunal de Grande Instance*, were not contested during the proceedings. The Court of Appeal and Court of Cassation decisions note the State's explanation for the check that a theft had just been committed in the city center by two North African men. This vague assertion by the State was not supported by any material elements of evidence during the proceedings (Doc.46, p. 3, Doc. 47, p.2; Doc.48, p.2). The Court of Appeal accepted that, despite the absence of any evidence to support it, this suspect description constituted an objective basis for the stop (Doc. 47, p. 6).

18. In each of these cases, the French courts unreasonably rejected the probative value of the evidence submitted by the applicants. In some cases, they noted that the controls had either been carried out in areas allegedly affected by delinquency or took into account inappropriate, vague or stereotyped justifications.

Evidence of Discrimination

19. Every quantitative study examining identity check practices in France has consistently found a pattern of discrimination especially affecting young men based on their presumed ethnic origin, nationality, appearance or skin colour (Doc.1, paras. 2-3; Doc. 62).

20. A 2009 study concluded that persons perceived to be "black" were between 3.3 and 11.5 times more likely to be stopped than persons perceived to be "white", while persons perceived to be Arab were between 1.8 and 14.8 times more likely to be stopped than whites (Doc. 62 fn. 1, pp.9-11, 27-29; Doc. 53).

21. A January 2017 survey by the *Défenseur des Droits* indicates that young men between 18-25 years old perceived as black or Arab are 20 times more likely to be checked than the rest of the population (Doc. 57, pp. 17, 23).

ALLEGED VIOLATIONS OF THE CONVENTION

22. *Summary.* Racial profiling by the police is pervasive in France, and amounts to unlawful discrimination. The application of Article 78-2 of the French Criminal Procedure Code in this case was discriminatory, and violated numerous fundamental rights and freedoms guaranteed by the Convention.

Discrimination: Article 14 (with Article 8, and with Article 2, Protocol 4)

23. The racial profiling carried out on the applicants pursuant to Article 78-2 amounted to unlawful discrimination on the basis of their skin colour, race, ethnic origin, or national origin, engaging private life and freedom of movement (Doc.1, para. 4).

- *Quality of Law.* The legal basis for the identity checks carried out on the Applicants (Article 78-2) was not sufficiently precise to ensure that discrimination did not occur (Doc.1, para. 11).
- *Difference in Treatment.* The applicants presented statistical evidence of a structural problem that French police stop racial minorities disproportionately. They also presented individual evidence that they were singled out for identity checks based on their skin colour, ethnic origin, or national origin, and other evidence in support (Doc.1, para. 18).
- *Burden of Proof.* Having established a *prima facie* case of discrimination, it is for the State to demonstrate a non-discriminatory justification (Doc.1, para. 29).
- *No Justification.* The police failed to provide any objective or reasonable justification for the stops (Doc.1, para.34).
- *Proportionality*. The State cannot justify such unlawful and arbitrary treatment by reference to vague formulations such as the need to combat crime, control immigration, or maintain public order. More effective and non-discriminatory policing methods must be introduced (Doc.1, para. 39).
- *Positive obligation.* The French authorities have failed to put in place mechanisms and procedures to enable them to know whether there is a pattern of police discrimination, thus failing in their positive obligation to implement legislation, procedures, and practices that prevent discrimination. The fact that individuals checked do not receive a stop form or other material evidence that they were stopped creates a climate of impunity in which police officers are free to discriminate without consequences (Doc.1, para. 44).

Article 13: Lack of an Effective Remedy

24. The applicants, like others stopped under Article 78-2, were not provided with a record of the encounter, as there was no subsequent penal or administrative procedure. This lack of a record and the absence of any obligation on the police to provide the person checked with the reasons for the check deprived the applicants of an effective remedy for the discrimination against them (Doc.1, para. 59).

Remedies

25. The discriminatory treatment of the applicants was permitted to occur due to (a) the lack of a clear legal basis for identity stops by the police, (b) the failure by the French authorities to have in place a system for establishing patterns of discrimination by the police, and (c) the lack of any effective procedures to hold the police to account, such

as the issue of *récipisses.* The applicants will request just satisfaction for the discrimination, together with individual and general measures

EXHAUSTION OF DOMESTIC REMEDIES

Administrative Complaint

26. On 2 March 2012, the applicants wrote to the Minister of the Interior to demand a justification for the stops (Docs. 4, 10, 16, 23, 38, 44). On 16 March 2012, the Chief of Staff replied that he would refer the matter to the Directorate-General of the National Police (Docs. 5, 11, 17, 24, 39, 45). No further response was received.

Tribunal de Grande Instance

27. On 11 April 2012 the applicants made a claim against the Minister of the Interior and the Judicial Agent of the State for the damage suffered as a result of the discriminatory identity checks carried out. In response, the State argued that non-discrimination norms did not apply to police identity checks, and asserted that the claimants bore the burden of proof, which should not be reversed. The State did not provide any evidence that the authorities had carried out an investigation or that they had sought to identify or interview the police officers involved.

28. On 2 October 2013, the TGI rejected the claims. The Court adopted the French authorities' interpretation of the applicable law, placing the entire burden of proof on the applicant to prove that the State authorities had committed a "heavy fault" as required by article L.141-1 of the Code of Judicial organisation (Docs. 6, 12, 18, 26, 40, 46, for all pp-7-8).

Cour d'Appel

29. On appeal, the applicants argued that the TGI had placed an inappropriate burden of proof on the applicants to prove the discriminatory nature of the checks, and to prove a "heavy fault", failing to apply national, European and international non-discrimination norms (Doc.28).

30. On 24 June 2015, the Court of Appeal confirmed the judgments finding against the claimants (*Dif, Kaouah, Niane, Abdillahi, Benyachourthi, Touil, Omouri, Seydi*). The Court ruled that each of the applicants needed to provide serious, precise and consistent evidence demonstrating the discriminatory character of the checks, and that despite the witness statements provided and the body of evidence demonstrating a pattern of discriminatory identity checks, including rigourous statistics, this burden had not been met. In some of the cases (*Niane, Abdillahi, Kaouah, Dif*) it considered that the State had provided an objective justification for the checks (Docs.7, 13, 19, 29, 41, 47). The Court overturned the judgment in five other cases, finding that in each of those cases the claimant had been able to prove that white people had not been stopped.

Cour de Cassation

31. On appeal, the applicants argued that European non-discrimination norms had been incorrectly applied by the Court of Appeal, in that the burden placed on the applicants to demonstrate discrimination was too great, and that the Court did not take sufficient account of the value of the statistics and reports which demonstrated a pattern of discrimination (Doc. 30, pp. 23-24).

32. On 9 November 2016 the *Cour de Cassation* rejected the appeals of the six applicants (Docs.8, 14, 20, 31, 42, 48). In *Touil, Seydi, Kaouah* and *Dif*, the Court agreed that the statistics and studies demonstrated a pattern of frequent identity checks carried out against "visible minorities". However, they concluded that this evidence was insufficient in itself to create a presumption of discrimination, and that the witness statements did not demonstrate the different treatment. In *Abdillahi* and *Niane*, the

Court found that the Court of Appeal had, while not shifting the burden of proof, relied on objective elements to conclude that the stops were not discriminatory. The Court found that the Court of Appeal had taken sufficient account of elements relating to the manner the checks were carried out, such as physical and verbal abuse, but did not find that these proved discrimination (Doc.8, p. 6; Doc. 14 p.6; Doc. 20, pp.5-6; Doc. 31, p.5,; Doc. 42, p.6; Doc. 48, p.5).

SEYDI AND OTHERS v. FRANCE

DOCUMENT 1: ADDITIONAL SUBMISSIONS

BACKGROUND: THE SCALE OF THE PROBLEM IN FRANCE

1. For decades, persons of immigrant origin in France, both the recently-arrived and those whose families have been living in France for multiple generations, have reported frequent discriminatory identity checks where they are singled out based on their presumed ethnic origin, nationality, appearance or skin colour. In a context in which stop practices are not systematically recorded and ethnic data on stop practices is absent, these practices were long denied by authorities who therefore failed to take any steps to remedy the problem.

Statistics and Studies

2. In the absence of official data, multiple consistent reports and studies issued over the past 25 years have lent credence to complaints of racial profiling as a well-documented practice in France. In addition to discrimination in the choice of persons stopped, survey results also indicate different treatment in the manner that checks are carried out.

3. Some of these reports and studies, summarised at Doc.62, were presented by the six applicants in the domestic proceedings. The French Courts recognized that the statistical evidence presented demonstrated that there was a pattern of over-controlling "visible minorities" based on discriminatory motives. Nonetheless, the courts found that this, together with the witness statements and other evidence presented, was insufficient to establish the discriminatory character of the checks.[1]

DISCRIMINATION: ARTICLE 14 (TAKEN WITH ARTICLE 8 AND WITH ARTICLE 2, PROTOCOL 4)

4. This is a case about discrimination. On a daily basis, the French police use their discretionary powers under Article 78-2 of the Criminal Procedure Code to routinely stop young people from ethnic minorities. This practice is bad policing, as it rarely results in arrests, and creates distrust between the police and the communities they work for. It is also discrimination, contrary to Article 14.

5. While the French courts have accepted that such stops in a mixed town where white people are present can amount to unlawful discrimination, they concluded it was not discrimination in a town that was considered "delinquent", a proxy for poor towns with a disproportionately high number of ethnic minorities. This has the effect of enabling the police to engage in racial profiling in the *banlieux*, but not in the *centre ville*.

6. In addition, despite formally accepting a shifting of the burden of proof, the applicants were still required to prove the discriminatory nature of the stops. The courts also accepted justifications for stops provided by the French authorities that relied on stereotypes about ethnic minorities. This decision has left the applicants with no remedy for the violation of their convention rights.

[1] Doc. 8, pp. 5-6; Doc.14, p. 6; Doc.20 p. 6; Doc. 42, p. 6; Doc.7, pp. 6-7; Doc. 13, p. 6; Doc. 19, p. 6; Doc. 29, p. 7; Doc. 41pp. 6-7;Doc. 47, pp. 6- 7.

1. Convention Rights are Engaged

7. An identification stop by the police engages both the right to respect for private life and freedom of movement.

Respect for Private Life (Article 8)

8. In *Gillan and Quinton v. UK*, the Court affirmed that the use of coercive powers conferred by legislation that requires individuals to submit to a detailed search of their person, clothes or belongings – such as with police stops and searches – is an interference with their private life".[2] The Court found that the seriousness of the interference could be compounded if it is of a 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. The Court also distinguished such public police searches from those in airports or public buildings, as they could be done "anywhere and at any time, without notice and without any choice as to whether or not to submit to a search".[3]

Freedom of Movement (Article 2, Protocol 4)

9. It is well established that the right to free movement as set out in Article 2, Protocol 4 guarantees a person's right to liberty of movement within a territory.[4] Where a person's liberty of movement is restricted solely or primarily on the ground of ethnic origin, this will constitute a violation of Article 14 taken in conjunction with Article 2, Protocol 4.[5]

10. Prior jurisprudence has found that though mere police identity checks by themselves may not constitute a restriction on liberty of movement, they could constitute such a restriction where there are "special circumstances" related to the stop.[6] Special circumstances have not been defined. However, where an arguable showing that the stop was based exclusively or to a decisive extent on a person's ethnic origin (which the Court has found is not capable of being objectively justified in a contemporary democratic society[7]) this could amount to such a "special circumstance." Here, the widespread pattern of discriminatory identity checks and the awareness amongst young men from visible minorities that they may be checked affects their movememt on a daily basis.[8]

2. Quality of Law (Le Principe de la Légalité, Securité Juridique)

11. The legal basis for the identity checks carried out on the applicants under Article 78-2 was not sufficiently precise to ensure that discrimination did not occur.

12. *Legal standards*. It is settled caselaw that any interference with Convention rights must be "in accordance with the law", which also refers to the quality of domestic law, requiring that it should be accessible to the person concerned and foreseeable as to its effects.[9] These requirements will depend on the content of the law in question, the field it covers, and the number and status of those to whom it is addressed.[10] The

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[3] *Gillan and Quinton v. the United Kingdom*, Judgment of 12 January 2010, para. 64.
[3] *Gillan and Quinton v. the United Kingdom*, Judgment of 12 January 2010, para. 64.
[4] *Baumann v. France*, Judgment of 22 May 2001, para. 61*; Napijalo v. Croatia*, Judgment of 13 November 2003, para. 68; *Bartik v. Russia*, Judgment of 21 December 2006, para. 36
[5] *Timishev v. Russia*, Judgment of 13 December 2005, para. 59.
[6] *Filip Reyntjens v. Belgium*, ECommHR, Decision of 9 September 1992, p.153.
[7] *Timishev v. Russia*, para. 58.
[8] Open Society Justice Initiative, *Equality Betrayed : the Impact of Ethnic Profiling in France*, September 2013, p.13, https://www.opensocietyfoundations.org/reports/equality-betrayed-impact-ethnic-profiling-france.
[9] *Rotaru v. Romania*, [GC], Judgment of 4 May 2000, para.52.
[10] *Groppera Radio AG v. Switzerland*, judgment of 28 March 1990, para.68; *Gillian and Quinton v. UK*, Judgment of 12 January 2010, para. 77.

scope of any discretion and the way in which it is exercised must be set out with sufficient clarity to avoid any arbitrary interference.[11]

13. In the context of police stops, in *Gillan* the Court made clear that the rule of law requires that there is some measure of protection against arbitrary interferences: the law must clearly indicate the scope of the discretion conferred upon the competent authorities and the manner of its exercise, and powers impacting fundamental rights cannot be unfettered.[12]

14. Compared to the legal provisions considered by the Court in *Gillan*, Article 78-2 provides even wider and vaguer powers, without even the minimal safeguards that existed in that case. Under Article 78-2, checks may be carried out under Prosecutor's orders (alinea 2) that merely set out general conditions for checks (including place, time, and investigation or prevention of certain types of offences) or to prevent violations of public order (alinea 3), without requiring objective and reasonable grounds. Officials that carry out the stop are not required to explain the legal basis or reasons for the stop to the individual checked nor to keep a record of the stop, much less provide a copy of that record to the individual concerned. This legal framework provides law enforcement officials with almost unlimited discretion such that the door is wide open to discriminatory and arbitrary application.

15. The Orders presented by the State in the cases of *Niane*, *Seydi* and *Touil* were visibly standardized orders, likely pre-signed on which only the date is changed at regular intervals. They are unreasoned, target a large number of infractions, cover a relatively large area and, in the case of *Touil* and *Seydi*, are insufficiently limited in time covering a period of 6 days and 8 days respectively.

16. The domestic courts did not examine the legal framework for identity checks, although the Cour d'Appel did raise concerns with regard to the lack of a record (*traçabilité)* of the stops.

3. Difference in Treatment

17. The applicants presented individual evidence that they were singled out for identity checks based on their skin colour, presumed race, ethnic or national origin. They also presented statistical evidence that French police stop ethnic minorities disproportionately.

<u>*Prima Facie* Evidence of Discrimination</u>

18. It is established caselaw "that applicants may have difficulty in proving discriminatory treatment […] In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination."[13] In demonstrating a *prima facie* case, the applicants were able to provide (a) statistics demonstrating a pattern of discrimination for police stops in Paris, (b) evidence relating to each individual stop and (c) other evidence of discrimination.

(a) Use of Statistics

19. There are clear and concordant statistical studies which demonstrate that the French police disproportionately stop visible minority youths for no good reason, sufficient to demonstrate a *prima facie* case of discrimination, set out from para.2 above.

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[11] *Tolstoy v. the UK*, Judgment of 13 July 1995, at para.37; *Goodwin v UK*, Judgment of 27 March 1996, para.31; *Gillan and Quinton v.UK*, paras. 76-77, 79-87; *Achour v. France*, Grand Chamber Judgment of 29 March 2006, para. 41.
[12] *Gillan and Quinton v.UK*, Judgment of 12 January 2010, paras.76-77.
[13] *D.H. v. The Czech Republic*, Grand Chamber Judgment of 13 November 2007, para.186.

20. The Court has established that "when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence."[14] The Court recognizes that the statistical evidence produced need not necessarily be the State's official statistics. In such cases, the Court may accept the statistics submitted by the applicants "that can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination."[15]

21. In this case, the applicants presented evidence from the reports set out above which conclude that the police stop individuals from ethnic minorities disproportionately. These reports, including from official bodies such as the CNRS, are undoubtedly independent and reliable.

22. In a situation where there is a structural problem with regard to discrimination, the use of reliable statistics alone will be sufficient to establish a *prima facie* case. The situation in France amounts to structural discrimination.

(b) Individualised evidence (attestations)

23. The six applicants also submitted direct evidence that they had been treated in a discriminatory fashion. This evidence was deemed insufficient by the French Courts, failing to provide effective protection against discrimination.

24. Each of the applicants submitted a statement from an eye-witness corroborating their account of the stop. In some cases the witnesses were also checked by the police (Abdillahi, Dif, Kaouah, Abdillahi, Touil), in others they were not (Niane, Seydi, Touil). The accuracy and credibility of these statements was not challenged, In fact the French authorities relied on information obtained from those statements about the applicants' checks in order to construct their defence, i.e. that there was a basis for the stop.

25. The French courts rejected the probative value of the evidence submitted by the applicants. In order to do so, they noted that the controls had either been carried out in areas allegedly affected by delinquency or took into account inappropriate, vague or stereotyped justifications. The courts failed to accept that reliable and significant statistics are sufficient to constitute the *prima facie* evidence the applicant is required to produce, contrary to the standards required by the European Convention.

26. The lack of any evidence from the police is also relevant when establishing whether there is a *prima facie* case. According to the Court's established caselaw, the standard of proof may be met through the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[16] Where arguable allegations of indirect discrimination have been established or in other instances where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof in such cases may be regarded as resting on the authorities to provide satisfactory and convincing explanations.[17] In the absence of such explanations, the Court can draw inferences which may be unfavourable for the respondent Government.[18]

(c) Other Evidence of Discrimination

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[14] *D.H. v. The Czech Republic*, para.188.
[15] *D.H. v. The Czech Republic*, paras.190-195.
[16] *Al-Nashri v. Poland*, Judgment of 16 February, 2015, para. 394; *Desde v. Turkey*, Judgment of 1 February 2011, para. 90; *Labita v. Italy*, Judgment of 6 April 2000, para. 121.
[17] *D.H. v. The Czech Republic*, paras. 176-177, 179, 189.
[18] *Al-Nashri v. Poland*, Judgment of 16 February, 2015, para. 396; *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber Judgment of 13 December 2012, para. 152.

27. The domestic courts failed to take into account other sources of evidence that were relevant to establishing a *prima facie* case of discrimination, failing to provide effective protection against violations of Art.14.

- *Other Reports.* Numerous reports have demonstrated a pattern of racial profiling by the police in France, as set out above.
- *Notoriety.* Ethnic profiling has been recognized as a problem in France by the President of the Republic, the United Nations and others. The courts failed to consider this corroborating evidence.
- *Manner of the Stops.* Several of the appplicants describe how they were treated during the stops, which included the use of the *tutoiement* form of address, unnecessary pat-downs, referred to ethnic stereotypes, and on occasion used discriminatory language.

4. Reversal of the Burden of Proof

28. Having established a *prima facie* case of discrimination, it is for the State to demonstrate that there was a race neutral reason for the interference with Convention rights. The French courts incorrectly required the applicants to demonstrate conclusively – rather than merely showing a rebuttable presumption - that their treatment amounted to discrimination, rather than requiring that government provide an objective and reasonable justification for the difference in treatment and drawing an inference from its failure to do that.

29. Where an applicant can establish an arguable allegation that a difference in treatment is discriminatory, the burden of proof will be on the State to show that such a difference is not based on discrimination.[19] The Court has also held that in certain cases the party making allegations may not be the one that needs to prove the allegation.[20] These findings not only recognize the particular evidentiary difficulties in proving indirect discrimination, they also underpin broader policy concerns; specifically, a reaffirmation of the duty of States to combat discrimination in any context it may arise.[21]

30. In these cases, the domestic courts formally accepted the principle of reversing the burden of proof, but in practice they still required the applicants to prove the discrimination against them.

31. *Arguments*. The French courts wrongly applied Article 14 by finding that discrimination occurred only where the applicants could produce comparative evidence that, for a period of time, *only* black or North African people had been stopped and that white people had not been stopped. This improperly placed the burden of proof on the applicant to prove discrimination without ever shifting the burden to the government. In the three cases of Mizius, Amponsah and Novembre (not before this court), the *Cour d'Appel de Paris* found that the comparative evidence indicating blacks and Arabs were *exclusively* checked over a period of 90 minutes meant that there was a *prima facie* case, and so concluded that there had been discrimination. The *Cour d'Appel de Paris* similarly found that a *prima facie* case had been made out in Ahidazan and Zekoum, not before this court, as the witness

[19] *D.H. v. The Czech Republic*, paras. 176-177, 189; *Horvath and Kiss v. Hungary*, Judgment of 29 January 2013, para. 108.
[20] *Aktas v. Turkey*, Judgment of 24 April 2003, para. 272; *D.H. and Others v. the Czech Republic*, para. 179; *Nachova and Others v. Bulgaria* Grand Chamber ,Judgment of 6 July 2005, para. 157.
[21] *D.H. and Others v. the Czech Republic*, para. 176; *Timishev v. Russia*, Judgment of 13 December 2005, para. 56; *Nachova and Others v. Bulgaria*, Grand Chamber Judgment of 6 July 2005, para. 145.

statement noted that the young North African men were the only ones at a restaurant terrace singled out and the others were whites.[22]

32. In the cases of the six applicants, where similar comparative evidence did not exist, but was implied by the statistics and the context, the Court found that no *prima facie* case had been made out, and so never required that the government provide a reasonable and objective justification, and made no finding of discrimination. In Seydi, the evidence was that the applicant was the only one singled out amongst a mixed population at a metro station, and his Asian friend accompanying him was not checked, but this did not suffice for the Court to consider that a *prima facie* case had been made out. Such an interpretation of the Convention obligations is at odds with this Court's jurisprudence. The evidence in this case is similar to that presented in *D.H.* in that the data offered by the applicants to show that persons of visibly North African descent are stopped disproportionately were "not disputed by the Government." Also as in *D.H.*, the government has "not produced any alternative statistical evidence." Even if, as in *D.H.*, "the Court accepts that the statistics submitted by the applicants may not be entirely reliable," they "reveal a dominant trend that has been confirmed" by numerous "independent supervisory bodies which have looked into the question."[23]

5. The police failed to provide non-discriminatory justifications for the stops

33. The police failed to provide any objective or reasonable justification for the stops, or failed to provide a non-discriminatory justification. The French courts accepted justifications that were not sufficient because they (a) were not supported by evidence, and (b) were vague, or relied on racial stereotypes.

34. *Legal Standards.* Any difference in treatment of similarly situated individuals or groups in their exercise of this right without an objective and reasonable justification constitutes discrimination within the meaning of Article 14 of the Convention.[24] The Court has found that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified.[25]

(a) Lack of evidence to justify stops

35. Because the French police keep no records of identity stops, the police are not able to provide any independent evidence to justify any stop that is alleged to be discriminatory. Throughout the domestic proceedings, the government provided no evidence to justify the individual stops, instead trying to interpret the applicants' statements to suggest they were doing something suspicious or providing a *raison plausible* for a stop. Nor did they provide any evidence to counter the statistical and expert evidence demonstrating that French police consistently stop non-white minorities disproportionately when using their powers under Art.78-2. Specifically:

- *No system for recording checks.* The police have no system for keeping a record of checks, and so they had no independent evidence about any of these checks with which they could provide a justification for the stops. They had no ability to respond to a *prima facie* case of discrimination.
- *Using the applicants' affidavits*. The government had to construct justifications by reading the statements submitted by the applicants and then speculating as to what individual police officers "must have" had in their minds when carrying out the stop, so as to provide a legal basis upon which they relied. This is not sufficient evidence with which to rebut a *prima facie* case of discrimination.

[22] Doc.7, pp. 6-7; Doc. 13, p. 6; Doc. 19, p. 6; Doc. 29, p. 7; Doc. 41pp. 6-7;Doc. 47, pp. 6- 7.
[50] *D.H. and Others v. the Czech Republic*, para. 191.
[24] *Timishev v. Russia*, para.56; *Willis v. the UK*, Judgment of 11 June 2002, para. 48
[25] *Timishev v. Russia*, para. 58.

- *Lack of investigation.* The authorities did not interview any police officers or carry out any investigation into these stops.

(b) Vague and Stereotyped justifications

36. The French courts accepted a number of justifications that were not sufficient to rebut a *prima facie* case of a discriminatory police stop. The Minister of Interior sought to justify stops on the basis that they were taking place in towns with high levels of delinquency or that relied on stereotypes.

- In the case of Dif, Kaouah and Niane, the Minister of Interior justified the stop on the basis that it took place in an "area widely known to be particularly affected by delinquency". Such a practice would permit arbitrary stops in many minority towns.
- In the case of Niane, the Minister of Interior justified the stop because the applicant was "very briskly exiting a building and wearing a hood".
- In the case of Abdillahi, the Court accepted that a stop could be justified on the basis of a radio report that a theft had been committed several kilometres away by "two north African men". Such a general description cannot be sufficient to provide reasonable suspicion, without any details of age, appearance, clothing, or other distinguishing characteristics, any more than if a theft was committed by "two white men".

37. These explanations are too vague to justify a difference of treatment, and would not have been sufficient were the person stopped not from a minority group. Domestic law, if interpreted in such a way, would not be sufficiently precise to avoid the risk of discrimination by the police and would allow discriminatory checks in many poor towns considered to be particularly affected by delinquency.

6. Proportionality

38. The State cannot justify such unlawful and arbitrary treatment by reference to vague formulations such as the need to combat crime, control immigration, or maintain public order. More effective, less harmful, and non-discriminatory policing methods must be introduced that are more proportionate to the possible risks. Racial discrimination is a particularly odious form of discrimination, leading to a narrow margin of appreciation.[26]

39. The French courts accepted some of the purported justifications provided by the State discussed above, finding that the police had complied with the formal provisions of Article 78-2, and that criminal acts had taken place in the geographical areas where the identity checks took place. The French courts did not consider the effectiveness and negative impacts of the checks, nor alternatives.

40. *Arguments.* The authorities have provided no evidence demonstrating the effectiveness of discriminatory stops as compared to non-discriminatory methods for selecting who to single out or alternative policing methods relying more on community policing and intelligence. In fact, they are unable to do so as the lack of recording makes it impossible for the authorities to assess their effectiveness.

41. The studies available, described at Doc.62, indicate that a mere 4–5% of checks lead to any form of follow up. An even smaller percentage of this would result in charges, many of which are likely charges for insult or rebellion due to the conflictual nature of the interaction resulting from the stop itself.

[26] *Timishev v. Russia*, para. 56; *Nachova and Others v. Bulgaria*, Grand Chamber Judgment of 6 July 2005, para. 145

42. The negative impacts of discriminatory identity checks, described at Doc.62, are considerable. These include significant impacts on those directly targeted, their families and communities, as well as on policing and society as a whole.[27]

43. Such interferences with the applicants' rights are not in accordance with the Convention as even if there was an objective justification for the interference, the response was not proportionate.

7. The Positive Obligation to Prevent Discrimination

44. The French authorities have failed to put in place mechanisms and procedures to enable them to know whether there is a pattern of police discrimination, thus failing in their positive obligation to implement legislation, procedures, and practices that prevent discrimination. The fact that individuals checked do not receive a stop form or other material evidence that they were stopped creates a climate of impunity in which police officers are free to discriminate without consequences.

Relevant Legal Standards

45. The Convention and other human rights standards applicable to France require the authorities to take steps to prevent discriminatory police stops. This includes a positive obligation on Member States to have in place a legal, administrative, and bureaucratic framework against discrimination. In France, this framework permits discrimination as it fails to collect information to identify whether discrimination is occurring, and does not have in place sufficient safeguards to prevent discrimination in practice. This leaves victims of ethnic profiling unable to bring an effective challenge against the police.

46. *Legal Framework.* The Convention requires not only that States avoid actively discriminating, but also imposes a positive obligation to ensure respect for the rights protected, including respect for private life under Article 8.[28] The Court has interpreted other positive obligations under the Convention as requiring that there is a legal and administrative framework to protect Convention rights,[29] and that there must be an effective "law enforcement machinery" as well as an "effective judicial system".[30] Concretely, under Article 8 the Court has required that the legal and administrative framework be "adequate", affording an "acceptable level of protection to the applicant in the circumstances"[31] When considering the adequate legal basis for interferences by the police in Article 8, the Court has found that police officers must comply with the law.[32]

47. *Police Operations.* The Convention requires that the police take proper precautions in operational planning so as to avoid a violation of the right to private life, even if that operation was well intentioned.[33] International human rights law also recognizes the

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[27] Open Society Justice Initiative, *Equality Under Pressure : the Impact of Ethnic Profiling in the Netherlands*, November 2013, https://www.opensocietyfoundations.org/sites/default/files/equality-under-pressure-the-impact-of-ethnic-profiling-netherlands-20131128_1.pdf ; Open Society Justice Initiative, *Equality Betrayed : the Impact of Ethnic Profiling in France*, September 2013 ; Center for Constitutional Rights, *Stop and Frisk : the Human Impact*, July 2012 July 2012, https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf.; Emmanuel Blanchard, « Des cérémonies de dégradation », January 2017. http://lmsi.net/Des-ceremonies-de-degradation; Fabien Jobard and René Levy, "Police, justice et discriminations raciales en France : état des saviors", in Commission Nationale Consultative des Droits de l'Homme, *La lutte contre le racism, l'antisémitisme et la xénophobie année 2010*, Paris, 2011, p. 184.

[28] *X and Y v the Netherlands*, ECtHR, Judgment of 26 March 1985, para. 23.

[29] E.g. *Osman v UK*, Grand Chamber Judgment of 28 October 1998, at para.115.

[30] *Oneryildiz v Turkey*, Grand Chamber Judgment of 30 November 2004, at para.92.

[31] *Söderman v. Sweden*, Grand Chamber Judgment of 12 November 2013, at para 91.

[32] *Perry v the United Kingdom*, Judgment of 17 July 2003, paras. 46-49.

[33] *Keegan v the United Kingdom*, Judgment of 18 July 2006, paras. 33-36.

importance of non-discrimination in police operations. The UN Committee on the Elimination of all forms of Racial Discrimination has stated that "The fulfilment of these obligations [by the State not to discriminate and to guarantee rights on an equal basis] very much depends upon national law enforcement officials who exercise police powers".[34]

48. The French courts did not find that there were any positive obligations imposed on the state by the obligation against discrimination. The *Cour d'Appel* made reference to the fact that there was no record of checks, in accordance with the observations of the Human Rights Defender.

Arguments

49. In order to provide an effective remedy against discriminatory police stops, there is a positive obligation on Member States to (A) gather sufficient information to know whether there has been discrimination, and (B) introduce safeguards to reduce incidents of discrimination.

(a) There is a Positive Obligation to Collect Information on Discrimination

50. The positive obligation to prevent discrimination must include a duty to collect sufficient information to assess whether an apparently neutral policy has a discriminatory effect, without which the Convention prohibition of discrimination is merely theoretical and illusory.

51. In *Gillan and Quinton v the UK*, the Court noted the importance of the statistics regarding the use of the enhanced stop power, in terms of its use, effectiveness, and the fact that these statistics enabled them to see that it had been deployed disproportionately against black and Asian individuals.[35]

52. The European Commission against Racism and Intolerance (ECRI) has recommended that Council of Europe Member States "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",[36] a call supported by the Council of Europe Commissioner for Human Rights.[37]

53. The EU Network of Independent Experts on Fundamental Rights, established by the European Commission, explained the importance of data collection both in terms of "proving discrimination may be difficult" without access to records and statistics of stops, and given that "ethnic profiling typically takes the form of *practices* by public authorities, which remain unregulated or may even be prohibited by law, [o]nly the monitoring of the behaviour of the public authorities by the use of statistics may serve to highlight such practices."[38] It also noted that "the absence of any monitoring of the behaviour of the police, in particular by the collection of data allowing to evaluate the impact of such searches on the members of visible minorities, are particularly problematic, since they create a sense of impunity within the police" (page 8).

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[34] *General Recommendation 13 on the training of law enforcement officials in the protection of human rights* (1997), para.2.
[35] *Gillan and Quinton v. the United Kingdom*, Judgment of 12 January 2010, paras. 84-85.
[36] European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation 11 on Combatting Racism and Racial Discrimination in Policing*, 29 June 2007, para.2 https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N11/e-RPG%2011%20-%20A4.pdf.
[37] Council of Europe Commissioner of Human Rights, *Human Rights of Roma and Travellers in Europe* (2012), pp. 83-84.
[38] EU Network of Independent Experts on Fundamental Rights, *Ethnic Profiling*, CFR-CDF. Opinion 4, December 2006, p. 6.

54. The UN Special Rapporteur on contemporary forms of racism has also highlighted "the importance of disaggregated data collection in regard to racial and ethnic profiling", considering that this is "essential in order to measure actions of law enforcement agencies, particularly in connection with discretionary actions such as identity check and stop and search."[39]

(B) Safeguards against Discriminatory Police Stops

55. The State must have in place sufficient safeguards to provide practical and effective protection against discrimination, and a procedural obligation to investigate possible racist motives for acts of violence. These should enable the authorities to identify when discrimination is taking place, and provide victims with an effective remedy where discrimination has occurred, so as to provide just satisfaction and deter future repetitions of the same conduct. Such safeguards may include the ability to identify police officers involved in stops, a duty to provide an explanation for a stop, and a duty to provide a written record.

56. The Court has recognized that there are procedural positive obligations on States to implement safeguards to enable investigations of discrimination in police arrest and custody contexts. For example, in *Nachova and Others v. Bulgaria* the Court found that authorities had a duty under Article 14, in conjunction with Article 2 to "take all possible steps to investigate whether or not discrimination may have played a role."[40] Determining racial motivations necessarily requires an examination of context and evidence. Indeed, the Court found that in such cases governments would likely be required to "prove the absence of" racial prejudice, which requires the availability of evidence.

57. In *Gillan* the Court considered there was a clear risk of arbitrariness in the grant of a broad discretion to police officers.[41] More gravely so when data demonstrates that the practice of stop and search disproportionately affects members of racial minorities (at para.85).

58. In *Gillan* the UK argued that safeguards against abuse were provided by the right of an individual to challenge a stop and search through judicial review or an action in damages. However, the Court concluded that this was insufficient and that if it was not required of officer, through an explicit obligation, to demonstrate a "reasonable suspicion", it is virtually impossible for the applicant to prove that the power to stop and search was improperly exercised (at para.86).

Article 13: Lack of an Effective Remedy

59. The applicants have a strong claim that they were subjected to unlawful discrimination. However, the failure to accept that reliable and significant statistics are sufficient to constitute the *prima facie* evidence the applicant is required to produce, and the narrow interpretation of discrimination provided by the domestic courts means that individuals stopped in a district characterized by the presence of visible minorities will not have an effective claim for discrimination. The Courts concluded that there is only a claim for discrimination in areas that contain white people. Individuals stopped without a witness present, or a witness willing to provide a statement, will not be able to create a presumption of discrimination. The lack of a record and the fact that the police do not have to indicate the reasons for such a stop compounds the difficulty in bringing a claim. In such circumtances, where the French courts have essentially

[39] UN Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racisms, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere*, , 20 April 2015, para. 62.
[40] *Nachova and Others v. Bulgari*, Grand Chamber Judgment of 6 July 2005, paras. 160-161; *Cobzaru v. Romania*, Judgement of 26 July 2007, para.88
[41] *Gillan and Quinton v. the UK*, Judgment of 12 January 2010, para. 85.

excluded any remedy for discrimination that takes place in poor towns, or without a witness, the Court should also consider whether there has been a separate violation of Article 13.

60. *Legal Standards.* Article 13 requires that there is an effective remedy for an arguable claim of discrimination. While the fact that an application fails does not necessarily demonstrate that a remedy is ineffective,[42] where there is no prospect of success there will be an issue of effectiveness.[43] There must be a procedure whereby the the substance of the complaint can be determined.

61. Here, the French courts have essentially precluded any claim in circumstances where an individual from an ethnic minority is stopped by the police in an area where that minority are the majority or where there is no witness.

62. The applicants, like all those stopped under Article 78-2, were not provided with a record of the encounter nor any document indicating the reasons they were stopped as there was no subsequent penal or administrative procedure.

63. In the cases of Seydi and Touil, where the authorities provided no alternative justification for the checks, the applicants presented a witness statement, rigorous statistical evidence and reports demonstrating a pattern of discrimination, but the Courts nonetheless considered they had not met their burden of demonstrating discriminatory treatment.

64. This excessively high burden on the applicants to demonstrate the discriminatory nature of the checks, the lack of a record and the absence of any obligation on the police to provide the person checked with the reasons for the check deprived the applicants of an effective remedy for the discrimination against them.

[42] *Amann v. Swizterland*, Judgment of 16 February 2000, at para.89.
[43] *MSS v. Greece*, Judgment of 21 January 2011, at para.394.