IN THE EUROPEAN COURT OF HUMAN RIGHTS
Application No. 25883/21–Wa Baile v. Switzerland

WRITTEN COMMENTS OF THE OPEN SOCIETY JUSTICE INITIATIVE

I. INTRODUCTION

1. This case raises important issues in policing, including the application of the right to respect for private life and the prohibition of discrimination in the enjoyment of rights and freedoms set forth in the European Convention on Human Rights ("Convention"). To assist the Court in considering the application, the Open Society Justice Initiative[1] ("OSJI") provides an overview of: a) legal standards prohibiting ethnic profiling; b) legal requirements for lawful police stop and searches; and c) obligations to prevent ethnic profiling and protect victims.

II. LEGAL STANDARDS PROHIBITING ETHNIC PROFILING

2. Ethnic profiling is a form of discrimination. Ethnic profiling is the use by law enforcement of generalisations grounded in ethnicity, race, religion, or national origin, rather than objective evidence or individual behaviour, as the basis for making law enforcement and/or investigative decisions about who has been or may be involved in criminal activity. It violates the right to non-discrimination under international, European and domestic law; and can lead to the violation of other important fundamental rights, including freedom of movement, the right to respect for private life and the right to be free from inhuman and degrading treatment.[2] International, regional and domestic institutions and courts have repeatedly condemned ethnic profiling.

International findings

3. The international human right to non-discrimination is set out in a number of treaties, including the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on the Elimination of Racial Discrimination.[3] Numerous international adjudicative bodies have considered its meaning and implications.

4. The UN Human Rights Committee ("HRC") addressed the issue of ethnic profiling in an individual communication brought against Spain by Rosalind Williams Lecraft.[4] In finding a violation of the right to non-discrimination under Article 26 of the ICCPR, the HRC found that identity checks should not be "carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted. This would not only adversely affect the dignity of those affected, but also contribute to the spread of xenophobic attitudes among the general population; it would also be inconsistent with an effective policy to combat racial discrimination."[5] In "more recent concluding observations, the [HRC] regularly expresses concern at the continuous practice of racial profiling by law enforcement officials, targeting in particular specific groups, such as migrants, asylum seekers, people of African descent, Indigenous Peoples, as well as religious and ethnic minorities including the Roma; a concern echoed by the Committee against Torture."[6]

5. The UN Committee on the Elimination of Racial Discrimination ("CERD")'s repeated condemnation of ethnic (racial) profiling as a form of racial discrimination and its extensive practice in combating are set out in detail in its General Recommendation of 24 November 2020.[7] For example, in 2005 it stated that States "should take the necessary steps to prevent questioning,

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[1] See https://www.justiceinitiative.org/publications/ethnic-profiling for OSJI publications and resources.
[2] See CERD, *General Recommendation No. 36 Preventing and Combating Racial Profiling by Law Enforcement Officials*, UN Doc. CERD/C/GC/36, 24 November 2020, paras. 28 and 29, for a fuller list.
[3] Article 26 of ICCPR and see Articles 2 and 5 of ICERD.
[4] *Rosalind Williams Lecraft v. Spain*, HRC, Views of 27 July 2009, UN Doc. CCPR/C/96/D/14931/2006. OSJI was counsel for the complainant.
[5] *Rosalind Williams Lecraft v. Spain*, at para. 7.2.
[6] CERD, *General Recommendation No. 36*, para. 6, referring to CCPR/C/NZL/CO/6, paras. 23-24; CCPR/C/AUT/CO/5, paras. 19-20; CCPR/C/FRA/CO/5, para. 15; CCPR/C/ESP/CO/6, para. 8; CCPR/C/RUS/CO/7, para. 7; CCPR/C/USA/CO/4, para. 7; CAT/C/USA/CO/3-5, para. 26; CAT/C/CPV/CO/, para. 20; CAT/C/ARG/CO/5-6, para. 35; CAT/C/NLD/CO/7, paras. 44-45.
[7] CERD, *General Recommendation No. 36*, paras. 4 and 5.

arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion."[8]

6. The UN Independent Expert on minority issues and a number of UN Special Rapporteurs have also emphasised that ethnic profiling practices contravene the right to equality and non-discrimination and have called for a range of measures to be adopted.[9]

Regional decisions

7. The Council of Europe ("CoE") Commissioner for Human Rights ("CHR"), the European Parliament, the CoE's European Commission against Racism and Intolerance ("ECRI"), the European Commission and the European Union Fundamental Rights Agency ("FRA") have all condemned ethnic profiling.[10] Most recently, on 28 January 2021, the CoE's Parliamentary Assembly ("PACE") adopted a resolution noting that, while ethnic profiling is "discriminatory by nature and is therefore illegal," it remains "a widespread and documented phenomenon across Europe."[11] The resolution calls upon CoE Member States to "take determined action to tackle ethnic profiling."[12]

8. Ethnic profiling has also been considered by this Court, which has confirmed that it violates Convention rights. In 2005, in *Timishev v. Russia*, the Court held that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin can be objectively justified.[13] The Court found a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 4 in circumstances where the police acted on instructions to stop individuals of a specific ethnicity from entering or leaving Chechnya.

9. In 2010, in *Gillan and Quinton v. the United Kingdom* ("*Gillan*"), this Court noted that the risk of discriminatory use of broad stop and search police powers was "a very real consideration" in determining whether the grant of broad discretion to police officers created an unacceptable risk of arbitrariness in breach of Article 8 of the Convention, with the "available statistics" in that case showing that minority groups were disproportionately affected by the powers.[14]

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[8] CERD, *General Recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, UN Doc. A/60/18, pp. 98-108, 2005, para. 20. Another example includes CERD, *General recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent*, UN Doc. CERD/C/GC/34, 3 October 2011, para. 31, where States were urged to "take resolute action to counter any tendency to target, stigmatize, stereotype or profile people of African descent, by law enforcement officials, politicians and educators."

[9] Special Rapporteur on the rights of migrants, Jorge Bustamante, *Mission to the United Kingdom*, A/HRC/14/30/Add.3, 16 March 2010, at para. 72 and 84; Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, *Australia: Study on human rights compliance while countering terrorism*, A/HRC/4/26/Add.3, 14 December 2006, paras. 52-53; Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin A/HRC/4/26, 29 January 2007, at para. 40; Special Rapporteur on contemporary forms of racisms, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, A/HRC/29/46, 20 April 2015, see paras. 26 and 63-75; Report of the Independent Expert on minority issues: *Mission to Canada*, A/HRC/13/23/Add.2, 8 March 2010, see paras. 100-101; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Doudou Diène, E/CN.4/2004/18, 21 January 2004, at para. 9; Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, A/HRC/4/26, 29 January 2007, paras. 45-55.

[10] OSJI, "International Standards on Ethnic Profiling: Standards and Decisions from the European Systems," November 2013, pp. 33, 47-48; FRA, "Preventing unlawful profiling today and in the future: a guide," (2018); European Parliament resolution of 19 June 2020 on the anti-racism protests following the death of George Floyd (2020/2685(RSP)); European Commission, *A Union of equality: EU anti-racism action plan 2020-2025*, 18 September 2020, section 2.2.

[11] PACE, *Ethnic profiling in Europe: a matter of great concern*, Resolution 2364 (2021) ("PACE Resolution), para. 3.

[12] PACE Resolution 2364, para. 7.

[13] *Timishev v. Russia*, Judgment of 13 December 2005, at para. 58. See also *Finci and Sejdic v. Bosnia and Herzegovina*, Grand Chamber Judgment 22 December 2009, at para. 44 and *Aziz v. Cyprus*, Judgment of 22 June 2004, at paras. 34-38.

[14] *Gillan and Quinton v. the United Kingdom*, Judgment of 12 January 2010, at para. 85.

10. More recently, in 2019, in *Lingurar v. Romania*, this Court found that a violent police raid on a majority Roma village constituted "ethnic profiling" and violated Article 3 and Article 14 taken in conjunction with Article 3. In particular, this Court noted that the authorities extended to the whole Roma community within the area "the criminal behaviour of a few of their members on the sole ground of their common ethnic origin." The Court found that the Government failed to prove that considerations other than ethnicity played an important role.[15]

Select European jurisprudence

11. Various European domestic courts and equality bodies have reinforced the international and regional decisions set out above. For example, in 2004, in *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, the UK House of Lords ("HL") found that a "preclearance" procedure, where British immigration officers at Prague Airport could refuse entry to those passengers they believed were intending to claim asylum in the UK on arrival, was discriminatory.[16] Statistics showed that Roma were 400 times more likely than their non-Roma peers to be refused entry.[17] The HL found that because the immigration officers treated the Roma less favourably on the basis of their ethnicity, they engaged in stereotyping, which amounted to direct discrimination.[18] The motive for the stereotyping was irrelevant.[19] The HL found the practice to be unlawful not only under domestic law, but also under international law, including the Universal Declaration of Human Rights, the ICCPR, ICERD and the Convention.[20]

12. In 2006, the HL reiterated these findings, stating that "the object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. That was the trap into which the immigration officers fell at Prague airport, as the evidence showed that all Roma were being treated in the same way simply because they were Roma. So a police officer who stops and searches a person who appears to be Asian…must have other, further, good reasons for doing so. It cannot be stressed too strongly that the mere fact that the person appears to be of Asian origin is not a legitimate reason for its exercise."[21]

13. In 2010, the Cypriot Equality Body found mass checks and ensuing police activities against Chinese women and undocumented migrants to be unconstitutional because they were motivated by a presumption of guilt on the basis of race or ethnicity. It based its finding on provisions of the Convention that form part of the Cypriot Constitution, the HRC's *Rosalind Williams Lecraft* decision (see above), and a statement by the CHR condemning ethnic profiling.[22]

14. In 2012, in a friendly settlement of a complaint before the Hungarian Equal Treatment Authority regarding the imposition of bicycle accessory fines almost exclusively on Roma, the police acknowledged that the practice may have disproportionately affected Roma. The police agreed to deliver anti-discrimination training to officers, provide free accessories to the community and communicate data for the next two years to verify whether the practice had been discontinued.[23]

15. In separate cases decided in 2012 and 2016, the Higher Administrative Court of Rhineland-Palatinate in Germany held that identity checks of a black man and a "dark-skinned family" carried out on trains violated the prohibition of discrimination under the German Basic Law. This was on

[15] *Lingurar v. Romania*, Judgment of 16 April 2019, paras. 39, 40 and 75-77.
[16] *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004 ("*Prague Airport case*").
[17] *Prague Airport case*, para. 34.
[18] *Prague Airport case*, para. 74.
[19] *Prague Airport case*, paras. 36 and 73.
[20] *Prague Airport case*, para. 98.
[21] See *R (on the application of Gillan (FC) and another (FC)) v. Commissioner of Police for the Metropolis and another*, [2006] UKHL 12, United Kingdom: House of Lords (Appellate Committee), 8 March 2006, at paras. 43-45.
[22] European Network of Legal Experts in the Non-Discrimination Field, "European Anti-Discrimination Law Review," No. 11, (18 February 2011), pp. 52-53.
[23] European Network of Legal Experts in the Non-Discrimination Field, "European Anti-Discrimination Law Review," No. 15 (November 2012), p. 64.

the basis that the Court could not be convinced that the plaintiffs' skin colour was not at least one of the decisive criteria for the checks.[24]

16. On 9 November 2016, the French *Cour de Cassation* ("CDC") ruled that non-discrimination law applies to police stops and that a shifting of burden of proof is applicable when evidence creating a presumption of discrimination is presented. The authorities must then demonstrate that the check was based on objective grounds.[25] In its intervention before the Court, the French Human Rights Defender stressed the importance of this shifted burden of proof in the case of police checks.[26]

III. LEGAL REQUIREMENTS FOR LAWFUL POLICE STOP AND SEARCHES

17. The FRA has stated:

> "To be lawful, stop and search actions and referrals to second line border checks must be based on reasonable and objective grounds for suspicion. 'Gut feeling' is not a reasonable or objective ground for stopping and searching a person or referring a person to a second line border check."[27]

18. The legal requirement for reasonable and objective grounds is also made clear in this Court's caselaw, including under Articles 8 and 14.

Interferences and justifications

19. With regard to Article 8, the Court has held that "any search effected by the authorities on a person interferes with his or her private life" and that "the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear" such interference.[28] It has further established that "any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group, thus affecting the private life of members of the group."[29]

20. An interference with Article 8 is justified only if it is "in accordance with the law," pursues one or more of the legitimate aims referred to in paragraph 2 of Article 8, and is "necessary in a democratic society" in order to achieve the aim or aims.[30] Similarly, as set out by the Court in *Molla Sali v. Greece*:

> "[I]n the enjoyment of the rights and freedoms guaranteed by the Convention Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations. For the purposes of Article 14, a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realized."[31]

21. Once the applicant has shown a difference in treatment, it is for the Government to show that it was justified.[32] Both direct and indirect discrimination (which does not require a discriminatory intent)

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[24] See Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court of Rhineland-Palatinate), Judgment of 29 October 2012, file number 7 A 10532/12.OVG and Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court of Rhineland-Palatinate), Judgment of 21 April 2016, file number 7 A 11108/14.OVG. See also Oberverwaltungsgericht Nordrhein-Westfalen (Administrative Court of North Rhine-Westphalia), Judgment of 7 August 2018, file number 5 A 294/16.

[25] Decision numbers 15-24207, 15-24208, 15-24209, 14-24210, 15-24211, 15- 24212, 15-24213, 15-24214, 15-25872, 15-25873, 15-25875, 15-25876, 15-25877, 9 November 2016.

[26] French Human Rights Defender, Decision MDS-2016-132, 29 April 2016.

[27] FRA, *Preventing unlawful profiling today and in the future: a guide*, 2018.

[28] See *Gillan*, at paras. 61 (referring to *Foka v. Turkey*, Judgment of 24 June 2008) and 63.

[29] *Aksu v. Turkey*, Judgment of 15 March 2012, para. 58.

[30] *Liberty and Others v. the United Kingdom*, Judgment of 1 July 2008, para. 58.

[31] *Molla Sali v. Greece*, Grand Chamber Judgment of 19 December 2018, para. 135. See also, for example, *Guberina v. Croatia*, Judgment of 22 March 2016, para. 69 and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, para. 72.

[32] See *D.H. and others v. the Czech Republic*, Grand Chamber Judgment of 13 November 2007, para. 177. OSJI acted as co-counsel before the Second Section of the European Court of Human Rights and then before the Grand Chamber, presenting oral arguments in support of the applicants.

fall under the scope of Article 14.[33] No difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin or on general biased assumptions or prevailing social prejudice in a particular country is capable of being objectively justified.[34]

In accordance with the law

22. In reaching its decision in *Gillan*, this Court highlighted the clear risk of arbitrariness in the breadth of discretion conferred under the national legislation, including that the decision to stop and search was based exclusively on the "hunch" or "professional intuition" of the police officer concerned.[35] In the circumstances, the Court held that the interference with the right to respect for private life under Article 8 was not "in accordance with the law" and therefore a violation.[36] Specifically, noting the risk of discrimination, the Court made clear that the legal powers under which police are entitled to stop and search a person must be sufficiently circumscribed and subject to adequate legal safeguards against abuse.[37] It rejected the argument that litigation provided sufficient safeguards, stating that:

> "In particular, in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised."[38]

23. The European Code of Police Ethics provides that "police investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence or crime."[39] Noting that ethnic profiling undermines the rule of law, the HRC has stated that the standard of reasonable suspicion (as also recommended by ECRI and PACE's Rapporteur) should be used to ensure that control, surveillance or investigation activities are carried out only when the suspicion is founded on objective criteria.[40] In the context of arrest and detention in consideration of Article 5, the Court has found that reasonable grounds for suspicion form an essential safeguard against arbitrary action.[41]

24. Relatedly, this Court has considered that an element of coercion in the exercise of police powers of stop and search is indicative of a deprivation of liberty, notwithstanding the short duration of the measure.[42] It has further noted that "reasonable suspicion" "presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."[43]

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[33] *D.H. and others v. the Czech Republic*, para. 184; *Guberina v. Croatia*, Judgment of 22 March 2016, para. 71.

[34] *Timishev v. Russia*, para. 58; *D.H. and others v. the Czech Republic*, para. 176. In *Biao v. Denmark*, the Court referred to its conclusion in *Konstantin Markin v. Russia*, Judgment of 7 October 2010, that general biased assumptions or prevailing social prejudice in a particular country do not provide sufficient justification for a difference in treatment on the ground of sex and held that similar reasoning should apply to discrimination against naturalised nationals.

[35] *Gillan*, para. 83.

[36] *Gillan*, paras. 85-87.

[37] *Gillan*, paras. 85-87.

[38] *Gillan*, para. 86. See also *Vig v. Hungary*, Judgment of 14 January 2021, paras. 60-63, finding a violation in the absence of any real restriction or review of enhanced police checks, including the need to demonstrate reasonable suspicion. In an earlier case, *Colon v. the Netherlands*, Judgment of 15 May 2012, an argument that an interference was not "in accordance with the law" because of the ineffectiveness of available judicial remedies (lack of prior judicial control) was rejected by the Court on the basis that this may be dispensed with provided that sufficient other safeguards are in place.

[39] Appended to Recommendation Rec(2001)10 adopted by the Committee of Ministers of the CoE. on 19 September 2001. See para. 47.

[40] CoE Commissioner for Human Rights, "Stop and searches on ethnic and religious grounds are not effective," July 20 2009. CoE: ECRI, *ECRI General Policy Recommendation No. 11*, recommendation 3. See also PACE, *Ethnic profiling in Europe: a matter of great concern*, Rapporteur Boriss Cilevics, Doc. 15199, 14 December 2020, para. 55.

[41] *Gusinskiy v. Russia*, Judgment of 29 May 2004, para. 53.

[42] See European Court of Human Rights, "Guide on Article 5 of the Convention – Right to liberty and security," updated on 31 August 2020, at para. 13.

[43] *Fox, Campbell and Hartley v. the United Kingdom*, Judgment of 30 August 1990, at para. 32, also stating that what may be regarded as "reasonable" will however depend on all the circumstances.

25. Jurisdictions that include reasonable suspicion as a requirement for stop and searches include Scotland, England and Wales, the United States and Canada.[44]

26. Reasonable suspicion cannot be based on stereotyping or generalisations, including that certain groups are more likely to be engaged in criminal activity.[45]

27. Courts and committees have considered the application of these standards in relation to a range of purported justifications offered by authorities, including those set out below.

High crime area

28. In *Illinois v. Wardlow*, the Supreme Court of the United States ("SCUS") held that "an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."[46] Similarly, in *R v. Mann* the Supreme Court of Canada held that the high crime nature of a neighbourhood is not by itself a basis for detaining individuals, noting that that the "presence of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime."[47] More recently, Birmingham Magistrates' Court in the UK held that "being in a high-crime area is not a justification for anyone being stopped and searched."[48]

"Furtive" behaviour

29. Reasonable suspicion must be "articulable," with the police officer able to point to specific facts rather than a "hunch."[49] A refusal to cooperate with the police or "furtive" behaviour "absent additional indicia of suspicion generally does not suffice to establish reasonable suspicion."[50]

Immigration control

30. The HRC found that physical or ethnic characteristics should not by themselves be deemed indicative of possible illegal presence in the country.[51] In *U.S. v. Brignoni-Ponce*, the SCUS held that a patrol was not permitted to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status, when the only ground for suspicion was that the officers believed that the occupants appeared to be of Mexican ancestry. Except at the border,

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[44] Scotland: see Scottish Government, "Stop and Search of the Person in Scotland: code of practice for constables," 13 January 2017, section 4.1, referring to legal test under "almost all statutory provisions." England and Wales: reasonable grounds for suspicion are required under ordinary stop and search powers such as section 1 of Police and Criminal Evidence Act 1984 (to find stolen or prohibited articles) and section 23 of the Misuse of Drugs Act 1971 (to find controlled drugs); see Home Office, *Revised Code of Practice for the exercise by Police Officers of Statutory Powers of stop and search*, 2014, para. 2.2. United States of America: see *Floyd et. al v. The City of New York*, Opinion and Order of 12 August 2013, pages 22 and 23, citing development of caselaw including *Terry v. Ohio* 392 U.S. 1, 21-22 (1968), *United States v. Place* 462 U.S. 696, 702 (1983): at page 23: "In general, reasonable suspicion requires an individualized suspicion of wrongdoing. While the Supreme Court has recognized certain narrow exceptions to this requirement, there is no exception for stops of pedestrians for the general purpose of controlling crime." Canada: *R v. Mann* [2004] 3 SCR 59, para. 45.

[45] Home Office, Revised Code of Practice for the exercise by Police Officers of Statutory Powers of stop and search, para. 2.2B (b); *U.S v. Montero-Camargo* 208 F. 3d 1122 (U.S. Court of Appeals, 9th Cir. 2000), p. 1129-1132. In the Canadian case of *R v. Faqi* (2010 ABPC 157, at para. 11), it was noted that police "acting pursuant to negative stereotyping, racial profiling, and other such activities cannot form the basis for a bonafide inquiry." In the context of arrest and detention, this Court has held that Article 5(1)(c) does not permit a policy of general prevention directed against an individual or a category of individuals who are perceived by the authorities, rightly or wrongly, as being dangerous or having propensity to unlawful acts (*Shimovolos v. Russia*, Judgment of 21 June 2011, para. 54).

[46] *Illinois v. Wardlaw*, 528 U.S. 119 (2002), at page 124.

[47] *R v. Mann* [2004] 3 SCR 59, para. 47.

[48] Vikram Dodd, "Police officer convicted of assaulting black man and 15-year-old boy," *The Guardian*, 2 August 2021, available at: https://www.theguardian.com/uk-news/2021/aug/02/police-officer-declan-jones-convicted-assaulting-two-black-males

[49] *Terry v. Ohio* 392 U.S. 1 (1968). The FRA has stated that "gut feeling" is not a reasonable or objective ground for suspicion ("Preventing unlawful profiling today and in the future: a guide," p. 59).

[50] See for example *United States v. Bellamy* 592 F. Supp. 2d 308, (EDNY 2009) pp. 318-19; *Fla. v. Bostick* 501 U.S. 429 (1991), at p. 437.

[51] *Rosalind Williams Lecraft v. Spain*, para. 7.2.

officers may stop vehicles only if they are aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that the vehicles contain those who may be illegally in the country.[52] A subsequent border patrol case found that Hispanic appearance is not a relevant or appropriate factor in determining reasonable suspicion.[53] Similarly, in *Melendres v. Arpaio*, the District Court found that using race as a factor in determining whether there was reasonable suspicion of illegal presence violated the Constitution (protection against unreasonable searches and seizures).[54] The CDC has ruled that checks of documents relating to citizenship and immigration status can only be based on objective elements deduced from circumstances external to the person themselves.[55]

Legitimate aim

31. Stops which fall short of the above standards do not pursue a legitimate aim. In 2007, ECRI underscored that racial profiling cannot constitute a possible response to the challenges posed by the everyday reality of combating crime. As a form of racial discrimination, it violates human rights, reinforces stereotypes, is not effective, and is conducive to "less, not more" human security.[56] Similarly, in 2021 PACE acknowledged that ethnic profiling is "counterproductive as it reduces the efficiency of investigative work, making the work of the police more predictable and subject to prejudice."[57] Ethnic profiling has, for example, "resulted in the overlooking of criminals who do not fit the established profile."[58] Stop and searches not based on reasonable suspicion have lower arrest rates.[59]

Proportionate and necessary in a democratic society

32. In 2006, the Slovenian Constitutional Court found that a law authorising identity checks on the basis of suspicion aroused by one of the following circumstances - his or her "behaviour, conduct, and appearance or by being situated in a certain place or at a certain time" - was not proportionate in pursuing the legitimate aim of ensuring (*inter alia*) general security and was therefore unconstitutional.[60] In particular, the absence of additional conditions enabled police to check identity where there was "no justified reason."[61] The Court noted that a "suspicion or the degree of the standard of evidence must certainly always be concretized and must be expressed in linking circumstances."[62]

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[52] *United States v. Brigoni-Ponce*, 422 U.S. 873 (1975), pp. 878-887.
[53] *U.S. v. Montero-Camargo*, 208 F.3d 1122 (2000), warning against *(inter alia*) sending a clear message that non-white people are "assumed to be potential criminals first and individuals second." *Cf. United States v. Cobo-Cobo*, Not Reported in Fed. Supp. (2016), p8.
[54] *Melendres v. Arpaio*, 989 F. Supp. 2d. 822 (2013) at 827.
[55] Cass. crim., 25 April 1985, numbers 84-92.916 et 85-91.324, Bull. crim. number 159, D. 1985. 329, concl. Dontewille; JCP 1985. II. 20465, concl. Dontenwille, note Jeandidier v. aussi Cass., civ 1ère., 28 March 2012, number 11-11.099.
[56] CoE: ECRI, *ECRI General Policy Recommendation No. 11*, para. 25.
[57] PACE Resolution, para. 4.
[58] CoE Commissioner for Human Rights, "Stop and searches on ethnic and religious grounds are not effective," July 20 2009, referring to OSJI, "Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory," 2009. See also Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, A/HRC/4/26, 29 January 2007, paras. 51-53 noting that "profiling practices based on ethnicity, national origin and religion have proved to be largely unsuccessful."
[59] UK Home Office, *Police powers and procedures, England and Wales, year ending 31 March 2020 – Second Edition*, (2020), p. 12-13, noting a "much lower arrest rate" under no suspicion powers which can be used only in special circumstances including with a time limitation of up to 24 hours.
[60] Slovenian Constitutional Court, Case U-1-152103, Decision of 23 March 2006, at para. 15. The Court noted that the statute did not contain detailed criteria on when an individual circumstance such as appearance can be a sufficient basis for using the offending provision.
[61] Slovenian Constitutional Court, Case U-1-152103, para. 15.
[62] Slovenian Constitutional Court, Case U-1-152103, para. 17.

33. As set out in the previous section, ethnic profiling is not effective in pursuing legitimate aims such as combating crime.[63] It is therefore not beneficial and, to the contrary, leads to considerable negative effects.[64] As acknowledged by the Supreme Court of Canada, practices such as the overpolicing of racial minorities and the carding of individuals within those communities without reasonable suspicion of criminal activity are "more than an inconvenience, taking a toll on physical and mental health, impacting ability to pursue employment and education opportunities, contributing to the continuing social exclusion of racial minorities, encouraging a loss of trust in the fairness of [the] criminal justice system, and perpetuating criminalization."[65]

34. Studies in various 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.[66] This Court has found that the seriousness of the Article 8 interference involved in a search 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.[67] More generally, in *East African Asians v. United Kingdom*, the European Commission of Human Rights found that publicly to single out a group of persons for differential treatment on the basis of race may constitute a special form of affront to human dignity amounting to degrading treatment contrary to Article 3.[68]

35. Such discriminatory practices also damage relations between police and members of the public, with negative consequences for police effectiveness and public security.[69] For example, ethnic profiling can lead to "a) the over-criminalization of certain categories of protected persons; b) the reinforcement of misleading stereotypical associations between crime and ethnicity and cultivating abusive operational practices; c) disproportionate incarceration rates of protected groups; d) higher vulnerability of persons belonging to protected groups to abuse of force or authority by law enforcement officials; e) underreporting of acts of racial discrimination and hate crimes and f) the

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[63] The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *Piechowicz v. Poland*, Judgment of 17 April 2012, para. 212).

[64] PACE Resolution, para. 4: "Ethnic profiling can have a negative impact on both the people being stopped and society at large. It promotes a distorted view of, and stigmatizes, parts of the population. It can also reflect deeply rooted racism." CERD, *General Recommendation No. 36*, para. 26: "Racial profiling has negative and cumulative effects on the attitudes and wellbeing of individuals and communities, taking into account that a person may be regularly subjected to racial profiling in his or her daily life." See also OSJI and Rights International Spain, *Under Suspicion, The Impact of Discriminatory Policing in Spain*, September 2019.

[65] Supreme Court of Canada, *R v. Le*, Judgment of 31 May 2019, at para. 95. See also Abigail A. Sewell and Kevin A. Jefferson, "Collateral Damage: the Health Effects of Invasive Police Encounters in New York City," J Urban Health. 2016 Apr; 93(Suppl 1): pp.42–67, noting minorities who live in neighborhoods with a wider ethno racial disparity in police behavior have poorer health outcomes in most respects. See contrast with the situation described in *Colon v. the Netherlands*, Judgment of 15 May 2012, para. 95, referring to a potentially "unpleasant" and "inconvenient" experience (albeit "at the very least") found by this Court to be outweighed by the effectiveness of "preventative" searches carried out under a specific legal framework. See above on effectiveness.

[66] OSJI, *Equality Under Pressure : the Impact of Ethnic Profiling in the Netherlands*, November 2013; 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; Emmanuel Blanchard, "Des cérémonies de degradation," January 2017, available at: 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*, 2011, p.184.

[67] *Gillan* at para. 63, also distinguishing searches 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."

[68] *East African Asians v. the UK*, European Commission of Human Rights, Report adopted by Commission on 14 December 1973, para. 207.

[69] French National Consultative Commission for Human Rights, *Opinion on the Prevention of Abusive And/Or Discriminatory Identity Check Practices*, 8 November 2016, pp. 6-7.

handing down by the courts of harsher sentences against targeted communities, among others."[70] "The low positive result rate from random police stops means that the vast majority of the people being stopped have done nothing wrong. That undermines public trust in the police, ties up police resources and erodes the perception of police legitimacy."[71] Unchecked and widespread profiling has also contributed directly to civil unrest.[72] It also contributes to racist hatred.[73]

IV. OBLIGATIONS TO PREVENT ETHNIC PROFILING AND PROTECT VICTIMS

36. This Court has repeatedly held that racial discrimination is a particularly invidious kind of discrimination and that, in view of its perilous consequences, authorities must use all available means to combat racism.[74] In the context of ethnic profiling, such means include implementing the standards, findings and recommendations surveyed in this intervention.[75] These include (but are not limited to):

    a) Legislation, procedures and practices defining, prohibiting and preventing ethnic profiling, accompanied by clear guidance for law enforcement agencies;[76]

    b) Monitoring of police activities including the collecting of disaggregated data;[77]

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[70] CERD, *General Recommendation No. 36*, para. 30. See also para. 26 regarding potential reduced reporting of crimes and information for intelligence purposes.

[71] The Honourable Michael H. Tulloch, *Report of the Independent Street Checks Review*, (2018), para. 65.

[72] See, for example, Philip V McHarris, "The George Floyd protests are a rebellion against an unjust system," *The Guardian*, 4 June 2020 available at https://www.theguardian.com/commentisfree/2020/jun/04/george-floyd-protests-riots-rebellion, Rebekah Delsol, "Riots in England: Inquiry Falls Short on Police Ethnic Profiling," Open Society Foundations, 1 December 2013; and Lanna Hollo and Rachel Neild, "Policing on Trial: Europe Grapples with Ethnic Profiling," Open Society Foundations, 5 July 2013.

[73] CERD, *General Recommendation No. 36*, para. 27.

[74] *Nachova and others v. Bulgaria*, Grand Chamber, 5 July 2005, para. 145; *Timishev v. Russia*, para. 56; and *Makhashevy v. Russia*, Judgment of 31 July 2012, at para. 153. In the context of Article 8, positive obligations include that the legal and administrative framework be "adequate", affording an "acceptable level of protection to the applicant in the circumstances" (*Söderman v. Sweden*, Grand Chamber Judgment of 12 November 2013, at para 91).

[75] In the United States, judicial remedies and settlements often include packages of such measures. For example, in *Floyd et. al v. The City of New York*, a permanent injunction was granted with "Immediate Reforms" to the New York Police Department's policies, training, supervision, monitoring and discipline regarding stop and frisk and a "Joint Remedial Process" for a more thorough supplementary set of reforms as necessary: United States District Court Southern District of New York, Opinion and Order of 12 August 2013, p. 13-14. In addition, "the Durban Declaration and Programme of Action, adopted by Member States at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance…States were urged to design, implement and enforce effective measures to eliminate racial profiling." (CERD, *General Recommendation No. 36*, para. 7.)

[76] CoE: ECRI, *ECRI General Policy Recommendation No. 11*, paras. 38-41; PACE Resolution, para. 7.1. Recommendations put forward by the Cypriot Equality Body have included a definition of racial profiling in the law and the issuance of police guidelines (see European Network of Legal Experts in the Non-Discrimination Field, "European Anti-Discrimination Law Review, No. 11," pp. 52-53). See Special Rapporteur on contemporary forms of racisms, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, A/HRC/29/46, 20 April 2015, paras. 44-51 for examples of legislative, policy and institutional initiatives.

[77] CoE: Commissioner of Human Rights, *Human Rights of Roma and Travellers in Europe*, February 2012, p. 84; CoE: ECRI, *ECRI General Policy Recommendation No. 11*, paras. 40-42. Also see reference to *Gillan* (above) regarding the Court's use of statistics. 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." 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." EU Network of Independent Experts on Fundamental Rights, Ethnic Profiling, CFR-CDF. Opinion 4, December 2006,

In this context it is worth noting that receipts/stop forms ensure that police are accountable for their actions and such data also inform pattern of practice analysis which can identify patterns of bias, even where individual stops may appear lawful.[78]

c) Effective independent investigations, examining both individual cases and pattern and practice, and effective judicial remedies, including as set out in the caselaw below.[79]

37. The Supreme Court of Canada has found that courts must be able to assess the extent to which the police, in seeking to form reasonable suspicion over a person or a place, rely upon overtly discriminatory or stereotypical thinking, or upon "intuition" or "hunches" that easily disguise unconscious racism and stereotyping.[80]

38. The applicant in *B.S. v. Spain* was stopped for questioning by the police on four occasions. As the domestic courts failed to examine her complaint of racist bias by the police and disregarded her special vulnerability as an African woman working as a prostitute, the authorities failed to satisfy their obligation to take all possible measures to ascertain whether or not racial bias or discriminatory attitudes might have played a role in the events. Therefore, this Court found a violation of Article 14 in conjunction with Article 3.[81]

39. In *Grigoryan and Sergeyeva v. Ukraine*, this Court found a violation of Article 14 in conjunction with Article 3 on the basis that the authorities failed to take any reasonable steps to reveal possible racial or ethnic motives behind treatment the applicant suffered at the police station. It noted that this was all the more regrettable in view of concerns expressed in a number of international reports about instances of racial profiling and harassment by police against those of foreign origin/non-Slavic appearance.[82]

40. In *Lingurar v. Romania*, the Court found a violation of Article 14 of the Convention in conjunction with Article 3 of the Convention in its procedural aspect, arising from a failure by the domestic courts to censure ethnic profiling. Instead, the courts accepted the authorities' justification for the use of force, in which negative inference seemed to have been drawn from the ethnic composition of the community.[83]

41. The Court of Justice of the European Union has made it clear that the payment of money alone "is not such as to ensure effective judicial protection for a person who requests a finding that there was a breach of his or her right to equal treatment" and "cannot ensure a truly deterrent effect."[84]

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pp. 6 and 8. See also 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 on the importance of data collection and paras. 52-58 on examples of oversight and equality bodies.

[78] See PACE, *Ethnic profiling in Europe: a matter of great concern*, Rapporteur Boriss Cilevics, Doc. 15199, 14 December 2020, paras. 44 (including examples of international good practice) and 63.

[79] See also CERD, *General Recommendation No. 36*, para. 24 and 52-57; and Report of the Independent Expert on minority issues: Mission to Canada, A/HRC/13/23/Add.2, 8 March 2010, para. 101.

[80] *R v. Ahmad*, Supreme Court of Canada, Judgment of 29 May 2020, para. 25.

[81] *B.S. v. Spain*, Judgment of 24 July 2012, paras. 62 and 63. The Court also reiterated at para. 58 that the authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence. See also para. 89 of *R.B. v. Hungary*, Judgment of 12 April 2016.

[82] *Grigoryan and Sergeyeva v. Ukraine*, Judgment of 28 March 2017, paras. 95-97.

[83] *Lingurar v. Romania*, Judgment of 16 April 2019, paras. 79-81.

[84] *Diskrimineringsombudsmannen v. Braathens Regional Aviation AB*, Grand Chamber of the Court of Justice of the European Union, Judgment of 15 April 2021, paras. 47 and 49.