
# Guide on Strategic Litigation to Combat Ethnic Profiling in the European Union

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AMSTERDAM, JUNE 2020

PILP

JURISTEN COMITÉ NEDERLANDS NJC VOOR DE MENSENRECHTEN

# Preface

**This guide aims to provide practical guidance to** legal practitioners, legal scholars, anti-discrimination experts and NGOs that work in the field of anti-racism, anti-discrimination, and ethnic profiling and that are not (efficiently) using strategic litigation (yet).

**The guide is inspired by, and written on the basis of**, our own experiences with strategic litigation on this topic. In February 2020, PILP-NJCM has, together with a coalition of civil society organisations and two individual claimants, started legal proceedings against the Dutch Royal Marechaussee (See chapter 5 of this guide for more information on these legal proceedings). At the moment of writing, we are still awaiting the first court hearing.

PILP-NJCM wants to thank its partners, clients and comrades who collaborated with us in our case on ethnic profiling. They keep on inspiring us and are an immense pleasure to work with: **Mpanzu**, **Robby**, **Gerbrig**, **Jaïr**, **Dionne**, **Tikho**, **Dave**, **Thijs**, **Lisa**, **Mirthe** and **Marjolein**.



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This guide was funded by the European Union's Justice Program (2014-2020). The content of this guide represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of information it contains.

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# CHAPTER 1
# ETHNIC PROFILING

**“I had just returned from Rome. I was selected for an additional check, together with another black man and a black woman with her children. I was surprised and asked: what is going on? They told me: ‘we are looking for criminals and asylum seekers’.”**

Quote from Mr. B., one of the claimants in the Dutch ethnic profiling case

Ethnic profiling is harmful, discriminatory and a violation of human rights.

In this chapter we will discuss what ethnic profiling is, and why it is harmful, as well as ineffective. In doing so, the chapter does not pretend to be complete nor comprehensive.

For more in-depth information about the topic, please follow the links provided in the footnotes.

# 1.1. What is ethnic profiling?

According to the European Commission against Racism and Intolerance ("ECRI"), ethnic profiling may be defined as

*"[t]he 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".*[1]

In other words, ethnic profiling occurs when law enforcement decisions are based on the basis of appearance rather than on the basis of behaviour or evidence, without there being a justification for this particular treatment. Ethnic profiling may occur during stops, ID checks and searches in the context of regular police activities, but also in the context of immigration control, counter-terrorism surveillance, in fraud controls by the tax authorities, or when using risk profiles for other governmental activities. These examples are not meant to be exhaustive.

People who are selected for a police stop on the basis of their ethnicity (meaning one of the grounds identified by ECRI in its definition of ethnic profiling in the previous paragraph), are treated unequally in relation to people who are not selected for a stop. If this selection on the basis of ethnicity takes place without an objective and reasonable justification, such treatment amounts to making prohibited distinctions and hence to discrimination. It is also possible that people are identified on other apparently non-discriminatory grounds, such as wearing a tracksuit or flying from a specific country, that have a discriminatory effect. This amounts to indirect discrimination.

The only exception, in which there can be a reasonable and objective justification for the use of grounds as ethnicity in a decision to stop or search someone, is when working with a profile of a concrete suspect.[2] For example, one could think of a report by an incoming airplane that a passenger, being a black man wearing red pants, has behaved aggressively on board. In such a situation, the border police should presumably be allowed to use ethnicity in its response, and upon arrival of that flight, stop and hold all black men wearing red pants in order to identify the suspect. In that case, there is a specific description based on a specific incident that has already occurred, and the use of ethnicity is objective and can be reasonably justified.

In all other cases the use of (perceived) ethnicity as a criterion for selection decisions will not be based on such concrete information, but rather on unconscious assumptions and conventional imaginary stereotypes about certain ethnic minorities,

both at organisational and operational levels. The use of ethnicity as an element in finding criminals, refugees or terrorists will hence reflect and strengthen institutional and structural racism and prejudices.
It is important to stress that it is irrelevant whether the authorities in question had the intention to discriminate in their decision-making, or whether those involved were aware of the potentially discriminatory effect.[3] Exactly because ethnic profiling is often based on unconscious assumption and stereotypes, it is the concrete action of unjustified difference in treatment on the basis of grounds such as ethnicity that matters, and not the awareness thereof.

# 1.2. Why is ethnic profiling harmful?

**Ethnic profiling is a harmful practice.**
The damages related to ethnic profiling manifest themselves in a number of ways, both individually and societally. On an individual level, ethnic profiling is harmful to human well-being. Health studies have shown that people who experience discrimination are in poorer physical health, and in particular are prone to more psychological issues. The reason for this, studies show, is that these experiences produce tension and stress; they are generally described as terrorising, humiliating and even traumatic.[4] Such effects may even occur with people who have not experienced discrimination themselves (or not yet), but who observe that people who look like them do.[5] The negative effects of ethnic profiling are articulated by several individuals interviewed by Amnesty International, who share that they "feel hurt" and "not accepted", and "deeply affected."[6]

Ethnic profiling is also harmful on a societal level. Firstly, ethnic profiling damages social cohesion. Ethnic profiling sends the signal that certain groups in society are second-class citizens. Even appropriate conduct by police officers does not change the fact that proactive searches (especially if performed frequently) can implicitly convey a message about the status of an individual in society, and may consequently create a sense of exclusion.[7] This may cause people to reject society.[8] Quantitative research by the European Union Agency for Fundamental Rights (FRA) into the experiences and perceptions of discrimination by Muslims in twelve European countries, including the Netherlands, shows that people who experience discrimination, intimidation or violence as a result of their background or place of origin feel less connection with the country in which they live.[9]

Secondly, ethnic profiling increases mistrust in law enforcement. Minority groups that have the impression that they are subject to 'stop and search' checks because of their ethnic background or because they are immigrants have less confidence in law enforcement than minorities who are of the opinion that such 'stop and search' checks are not related to their ethnicity.[10] People who have less faith in the authorities are also less willing to share information with them; this, too, diminishes the effectiveness of investigative work. The structural negative stereotyping of certain nationalities and groups in society thus comes with multifaceted negative consequences.

**The negative effects of ethnic profiling are articulated by several individuals interviewed by Amnesty International, who share that they "feel hurt" and "not accepted", and "deeply affected".**

# 1.3. Ethnic profiling is not effective

Ethnic profiling is not only harmful, it is also not effective. Researchers have studied from a theoretical perspective why ethnic profiling is not effective. The assumption is that the vast majority of people of any ethnic group reject criminality, and for this reason, **in the context of fighting criminality, ethnicity is both an over-inclusive and under-inclusive criterion.** If people are selected fully or partially on the basis of their ethnicity, many people of that ethnicity who have committed no criminal act will still be stopped and searched. Meanwhile, people of other ethnicities who have engaged in criminal activity will not be selected. This may be illustrated by way of example.

Say that the police have decided to stop twice as many 'non-white' drivers as 'white' drivers for proactive roadside checks, perhaps because police figures have shown that 'non-white' drivers are much more frequently found to be driving under influence. This will lead to a dramatic increase in the number of 'non-white' people who are wrongly stopped by the police – but it will not lead to a more successful police operation, because 'white' drivers who are driving under influence will then go unchecked, which will skew the statistics. Research into the benefits of proactive checks conducted in the Netherlands demonstrates that these benefits, expressed in numbers of fines or arrests after an identity check or traffic stop,[11] stop-and-frisk action[12] are not just low, but exceedingly low.[13]


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# CHAPTER 2
# STRATEGIC LITIGATION

**This chapter will discuss, based on in-house knowledge and previous dialogues with other strategic litigation experts, what strategic litigation is or can be.**

We think that there is no one-size-fits-all approach, definition or practice for strategic litigation. What strategic litigation is can differ per case, country and cause. PILP-NJCM is specialised in strategic litigation on human rights in the Netherlands. The contents of this chapter are hence based on the experiences of conducting strategic litigation by PILP-NJCM within the specific context of the Netherlands. PILP-NJCM has taken on high profile cases on the right to privacy, the right to protest, arms trade, sexism, statelessness and various other topics. One of our currently pending cases, which we have been working on since the start of our project, is on ethnic profiling (see Chapter 5 for details on that case).

# 2.1. Cause lawyers versus case lawyers

The best way to define strategic litigation is, in our view, to compare it with 'regular' litigation. Strategic litigators are cause lawyers, where 'regular' litigators are case lawyers.

**Strategic litigators are the legal allies of the communities and civil society organisations they work with.** They will provide legal advice where necessary, but they will only start litigation if they estimate that doing so will be helpful (and not harmful) to the cause that the community is fighting for. On the contrary, case lawyers ('regular' lawyers) will in general take up a case if the individual asking for help requests them to do so, and when they estimate that there is a chance to win a case, even if winning (or conducting) a case for a particular individual could harm the interests of the broader community and the cause as a whole.

In our view, **strategic litigation refers to the strategic use of litigation in two ways:**

1. The strategic use of the tool of litigation in opposition to other tools that one could use to further a particular cause,
2. The strategic use of all tools and choices within the tool of litigation itself: such as claimants, timing, legal forum, partners, framing etcetera.

A classic example of strategic litigation is the case of *Brown vs Board of Education* (1954) on racial segregation in US schools.[14] The case was prepared and started by the NAACP[15], as one of the tools they employed to combat racism and racial injustice. The case and its legal outcome are directly linked to (and fuelled) the mass civil rights movement and civil disobedience protests that followed.[16] The claimants in the case were all NAACP members. Being launched within the specific context of the fifties, the NAACP considered it wisest to name the only male member (Oliver Brown) as first plaintiff.[17] The timing of the case was perfect: the US government even intervened with an Amicus letter asking the Supreme Court to decide in favour of the NAACP because:

*"Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith."*[18]

The case was a legal win, and inspired the civil rights movements. Yet, society did not change merely because of the verdict.[19] A strategic litigation case can only be supplementary to other tools. It took litigating other cases,[20] military intervention[21] and the civil rights movement to tackle racial segregation in schools. Whilst racial inequality and segregation still have not ceased to exist in the US today.

# 2.2. Strategic use of a tool for change

Litigation is a tool that may bring specific benefits for people combatting ethnic profiling; benefits that other tools, such as activism, campaigning, or lobbying, are less likely to provide. However, the use of this particular tool also carries specific risks and problems.

Litigation will not solve the problem of ethnic profiling or the structural and institutional racism that it stems from. It is not a solution, it is a tool that can be applied to hopefully get closer to actual solutions to these problems.

It should be recognized that employing strategic litigation, being a tool with its own merits and application, will take up time, labour hours, funding and efforts that your community or NGO cannot put into other tools, like the organising of a neighbourhood protest. This can be illustrated by the following example.

After 9/11, and because of the upcoming of the populist right, the anti-racist movement in the Netherlands was weakened. One of the outspoken anti-Muslim and anti-migrant voices was (and still is) the politician Geert Wilders. The public attorney had started criminal prosecution cases on several complaints against Wilders, one of these relating to the fact that Wilders, in a pub during an election campaign, asked his crowd whether they wanted more or fewer Moroccans in the Netherlands. When the crowd chanted "less, less, less" Wilders answered: "we'll take care of it."[22] A majority of the leadership of the Dutch anti-racist movement decided to put most of their efforts in these court cases against Geert Wilders, acting on behalf of the victims in the case. In hindsight, it may not have been the best strategy, as its effectiveness with regards to the cause of anti-racism was criticised.[23] It also meant that the leaders of the anti-racist movement were shifting their energy from street protests to the court house. It followed that the focus on the case led to less and smaller protests against racism in those years.[24]

**Communities, activists and NGOs should hence always view strategic litigation in opposition with or in combination with other tools**, just as they would argue for (or against) the use of the tool of civil disobedience protests versus (or linked with) the tool of a "softer" media campaign.

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# 2.3. (Dis)advantages

Here, we will discuss the advantages and disadvantages of using strategic litigation, in opposition to other tools, with the cause of combatting ethnic profiling in mind. Most of these advantages and disadvantages will also be applicable to other causes.

In general, an advantage of strategic litigation is that you enter an arena that has its own rules, in which, in principle, the adversary party (for instance the police or the State) has to show up and respond to your claims. This is something that the adversary would not necessarily have to do in reaction to other tools, such as writing a report or organising a protest. Through this particular merit of strategic litigation, you may obtain new information and new facts, which may provide novel input for your campaign. Furthermore, **obtaining a verdict from a judge can give your case and cause more weight and authority**. Using the authority of the law may help your cause, and support the other tools for change that you might be using.

A disadvantage of using this tool, however, is that the legal and procedural ways in which this tool functions can make it less accessible for the people involved. There is a risk your case can become a "tool of lawyers". This "juridicialisation" of a communities' discourse might prove alienating. Also, even if lawyers may foresee an exciting win from a legal point of view, that legal win does not necessarily contribute to the community and the cause.

Below, we will go into more detail of the advantages and disadvantages with regards to three particular aspects of strategic litigation: winning (and losing), claimants and media (timing).

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## 2.3.1. WINNING AND LOSING

**One of the biggest perks of the tool of strategic litigation is that you can win a case.** But what is winning? To win with strategic litigation could mean different things, and differs per topic and per country. In some countries, it is possible to go to court, ask the judges to decide a practice is wrong and should be abolished, and to convince the judges to do this.[25] In such a situation, winning would be to get a legal victory or a legal precedent that, hopefully, will be followed up by the national authorities.[26]

Winning can thus be understood in multiple ways. Think, for example, of a case about a law that explicitly allows the police to use discriminatory risk profiles that will lead to ethnic profiling. A won case could not only lead to the scrapping of that law, but may also bring personal gains for the claimants, such as damages, restoration of rights, or settlements that can benefit the community as a whole.[27]

An example is provided by a case of a man living in Toronto, who had been racially profiled. As an outcome of the court case, he received 80.000 Canadian dollar as damages.[28] Besides these personal damages, the ruling also fulfilled an important expressive function. Even though the case was only about one particular victim, the judges denounced racial profiling in general:

*"Racial profiling has a serious impact on the credibility and effectiveness of our police services. It has led to distrust and injustice. It must stop."*[29]

Additionally, even if a legally won case is not complied with by the authorities, such a case can still inspire, strengthen a campaign, and give the cause more legitimacy and authority. It can show the harmful effects of ethnic profiling to a bigger public. Also, a win could open up new doors, could make the authorities more willing to talk about solutions, and can get the victims or (representatives of) affected communities a (better) seat at the table. A legal win in one particular country can even have a positive impact on campaigns and court cases and their outcomes in other countries.

You can also 'win' a strategic court case (get positive results) whilst not winning the case from a legal perspective. A court case that was started can give you media attention, can empower activists and communities, and can get you information that you previously did not have. A lost case today could provide the basis for a won case tomorrow. A lost case might also be helpful by showing the hypocrisy of the system, and can inspire people to go into the streets, or a lost case may motivate sympathetic politicians to act and to try to amend the law.

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**So, it is possible to 'win' a case by losing.** Unfortunately, however, it is also possible to actually lose a case.

**A case can be lost with a negative effect in broadly three ways:**

1. **The judge can determine that, for instance, the ethnic profiling engaged in by the authorities is not contrary to the law (or state that the disputed practice is not considered to be ethnic profiling).** Such legal statements may harm your campaign and community and can give ammunition to the authorities and parties that are less willing to change the practices and/or laws that lead to ethnic profiling. A lost case can also set a negative legal precedent, making it more difficult to win (in court) on this issue in another future case.

2. **You can lose a case on procedural grounds (such as being declared inadmissible).** Think about cases where the judge thinks another judge (administrative instead of civil) should decide, or cases where it is decided the claimants have no legal standing to go to court. Although this may be less harmful than losing a case on the merits (on the content of the case), sometimes the media cannot see the difference and will paint a procedural loss as if it were a loss on the merits of the case.

3. **You can also "lose" a case even though you have legally won.** For instance, the verdict can spur the government to make new laws that in effect circumvent the outcome of the verdict, the media can attack your claimant and/or cause, or the win in court can make it more difficult to win by using lobby or other tools.

## 2.3.2. CLAIMANTS

A pro of strategic litigation is that it can provide a community, victims of racism or leaders of the fight against ethnic profiling with a stage to voice their opinions, where they can get attention for the problems they are facing and the solutions they propose.

In strategic litigation, a rights-based approach is adopted, which can inspire others, including other victims and communities, to fight for their rights. **Strategic litigation can thus be empowering**.

An advantage of the strategic use of litigation, opposed to regular litigation, is to have the opportunity to find the best claimant(s) possible: claimants that are representative of the cause, that are "media friendly" and who's cases are as clear-cut as possible (as less fuzz as possible). If, for instance, you could choose from two cases with victims of ethnic profiling: the first case is about a stop and search issue (the only black person in the train was asked for papers), the second also involved other facts (half of the people in the train were non-white, the black people that were stopped and searched were also quite loud and were said to have damaged a seat), you would probably choose for the first.

It might be tempting to, if possible, only go to court with victims of ethnic profiling that are do-good citizens (for instance a doctor, teacher and teacher without criminal records). Yet, this could be considered politically problematic: people who have a criminal record, lack an academic education or are on welfare also have the right not to be discriminated. If you want your campaign and case to be representative you could opt for involving both kinds of clients.

**An advantage of the strategic use of litigation, opposed to regular litigation, is to have the opportunity to find the best claimant(s) possible: claimants that are representative of the cause, that are "media friendly" and who's cases are as clear-cut as possible (as less fuzz as possible).**

A disadvantage is that people going to court may become targeted by media or opposition parties. Even if they win their cases, they might still receive threats[30], attacks or face other negative consequences, such as getting fired.[31] Moreover, losing a case can also mean that the initiators of a case are compelled to pay large sums of money in the form of damages for the other party or court fees.

To mitigate these risks, strategic litigators will often want to work with claimants who are already activists,[32] since it is likely that they will be already exposed to media attention and will not back down when receiving pressure. Yet, this is not always possible. Mostly, a strategic case will benefit from the support of (representative) NGOs and communities, and where possible it is recommendable that these groups become (co-)claimants. A case can also be supported by means of an *amicus curiae* (an expert letter written to court as 'friends of the court').[33]

When challenging a structural problem such as ethnic profiling, using a strategic case as a complementary tool might help to illustrate the bigger picture. Yet, if a case is (too) much focused on what happened to a specific person on a specific occasion, this might enable the authorities to argue that the particular case constitutes an exception and to deny the existence of a structural problem. Having community leaders, NGO professionals and/or experts to support (as co-claimants) may help to mitigate this risk.

## 2.3.3. MEDIA (TIMING)

With most types of cases, the timing of when to file your complaint or launch your litigation, is, for a large part, in your hands. Media are generally interested in writing about interesting court cases. 'Amnesty International sues State and police force on ethnic profiling' will often make a better headline than 'Amnesty International writes report on ethnic profiling'. Because of this, **litigation can often instigate media attention on a moment of your choosing**.

Preparing a media moment requires some preparations. For instance, can you get one or two journalists on board beforehand (under embargo)? In this way, you are more certain that they will not only publish a story about your case on a strategic moment in time, but hopefully also through a framing that supports your case. Thereby, if possible, try to ascertain that there is no major other news event that day, such as a royal wedding or a big international summit.

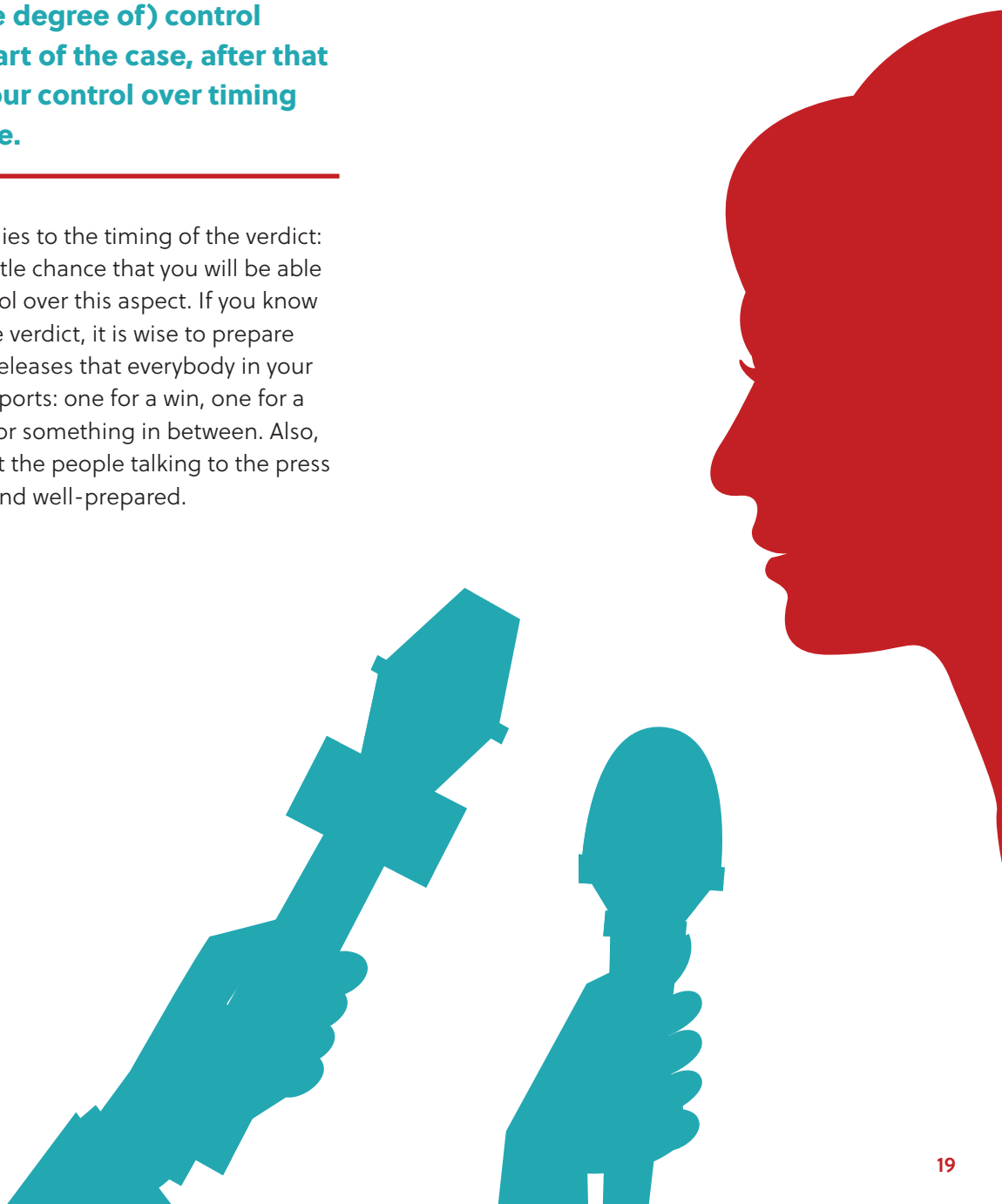
**It is furthermore important to think in advance about who speaks to the media and about how that comes across.** For example, having only white NGO staff and lawyers talk about ethnic profiling is generally and politically not a good idea. Also, having a person of colour purely talking as the victim (and not as an expert or activist) will probably also not be the best way to frame your campaign and case. The nature and effect of ethnic profiling is not complicated for most victims and affected communities: they will generally know very well what it is and why it hurts. For (certain) media, politicians and authorities, it may be a bit more difficult to grasp. Hence, if possible, **always try to explain what ethnic profiling is** and what broader impacts flow from the practice.

Launching a case can also be done through a supporting event, such as bringing the summons to court together with the afflicted community, and turning that moment into a small protest and press conference. Good examples of this tactic can be found with South African t-shirt activists and litigations.[34] The Treatment Action Campaign[35] for instance, whose members all wear t-shirts saying 'HIV positive' at protests, as well as showing up with a big group in court hearings.

A disadvantage on the issue of media and timing is the fact that, although in most cases you will have (some degree of) control over the start of the case, after that moment your control over timing will be gone. It can take years for a case to get to the stage of a court hearing. A court hearing is something most media can write about and cover. But until then, you have little to offer to the media, nor to the affected community regarding the litigation. As a result, attention and support for the case might diminish in the meantime.

**A disadvantage on the issue of media and timing is the fact that, although in most cases you will have (some degree of) control over the start of the case, after that moment your control over timing will be gone.**

The same applies to the timing of the verdict: there is very little chance that you will be able to assert control over this aspect. If you know the date of the verdict, it is wise to prepare several press releases that everybody in your campaign supports: one for a win, one for a loss and one for something in between. Also, make sure that the people talking to the press are available and well-prepared.



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# CHAPTER 3
# EU AND HUMAN RIGHTS FRAMEWORK

**This chapter will provide the reader with an overview of the European and international legal framework that applies to ethnic profiling practices and situations.**

However, when preparing a strategic litigation case, one should always also consider the available national legal tools, such as anti-discrimination legislation, the Constitution, or private law. By highlighting and explaining relevant provisions that may be applied in strategic litigation, this chapter aims to provide insight into how struggles against ethnic profiling may be captured and addressed in legal terms.

Although this chapter may be considered to contain a somewhat dry enumeration of legal provisions, these provisions can serve as tools through which the struggle against ethnic profiling may be continued in court. It should be noted, however, that although the chapter discusses the most important legal sources, it is not meant to be exhaustive. Depending on the circumstances of the case, other legal instruments not mentioned here might also provide relevant support.[i]

i. A legal instrument not dealt with in this chapter, for instance, is the Universal Declaration of Human Rights.

# 3.1. European Convention on Human Rights (ECHR)

## 3.1.1. THE PROHIBITION OF DISCRIMINATION UNDER THE ECHR

Since 1953, the European Convention on Human Rights (ECHR) protects the human rights of people in the (currently 47) Member States of the Council of Europe. The ECHR has direct effect in all Member States, which means that national courts are able to apply the provisions in the ECHR directly, without a need to transfer these provisions to national law. Accordingly, the ECHR will provide a sound basis for strategic litigation in these Member States.

The ECHR does not directly prohibit ethnic profiling, but does contain a prohibition of discrimination. **In Article 14 of the ECHR and in Article 1 of Protocol no. 12 to the ECHR, discrimination is prohibited "on any grounds", explicitly including sex, race, colour, national or social origin and association with a national minority.** Below, both these articles will be discussed in order to understand how the prohibition of discrimination relates to ethnic profiling. For a right to be applicable to a specific, factual situation, the situation should fall within the scope of the right. The scope has been determined through case law by the European Court of Human Rights. Where necessary, some case law will be discussed here. A more extensive overview of cases in which the prohibition of discrimination is applied to situations of ethnic profiling is provided in chapter 4.

### 3.1.1.1. How does article 14 apply to ethnic profiling practices?

According to the European Court of Human Rights, the difference in treatment of persons in similar situations constitutes a violation where there is no objective and reasonable justification for discriminatory treatment. The Court has defined this as:

*"a difference in treatment of persons in analogous, or relevantly similar, situations" that "is based on an identifiable characteristic".*[36]

Both direct and indirect discrimination fall under the scope of Article 14.[37] Direct discrimination is when a person is treated less favourably than another person in a similar situation on grounds of, for instance, 'race' or ethnic background. Indirect discrimination means that in a seemingly neutral provision, standard, or method persons of a certain 'race' or ethnicity are particularly disadvantaged in comparison with others of a different ethnicity.

Ethnic profiling practices may be defined as situations of both direct and indirect discrimination. It may constitute direct discrimination, because **when ethnicity, skin colour and other physical features are, for instance, involved in selection decisions or incorporated into risk profiles, individuals are treated less favourably than others on the basis of their ethnicity, skin colour and other physical features ("identifiable characteristics").** When certain individuals are selected from a group of persons due to their physical characteristics and then, for instance, subjected to stop and check (which the rest of the group is not subjected to), others who do not have these physical characteristics but are found in the same space and have acted in the same manner are not subject to the same screening.

Ethnic profiling may also represent indirect discrimination, when an apparently neutral characteristic (such as outfit, or flight origin) in risk profiles, or as the ground for a selection decision, has the effect that, for instance 'non-white' people have a greater chance of being selected for screenings than 'white' people. As arguing for something to be considered indirect discrimination could prove more difficult, it is important to mention the stigmatising effect of such screenings, where 'non-white' people are checked in front of 'white people' that are not screened. It is the public nature of most checks that makes this process stigmatising.

**Ethnic profiling may also represent indirect discrimination, when an apparently neutral characteristic (such as outfit, or flight origin) in risk profiles, or as the ground for a selection decision, has the effect that, for instance 'non-white' people have a greater chance of being selected for screenings than 'white' people.**

In order for discriminatory treatment in the sense of Article 14 of the ECHR to actually constitute a violation, there should be no objective and reasonable justification for the treatment. In the context of ethnic profiling practices, this means that the system or procedure in question must (1) be intended to serve a legitimate goal, and (2) the selected means that lead to the discriminatory treatment must be proportional and necessary for achieving that goal.[38] It is probable that a procedure in which ethnic profiling is applied does serve a legitimate goal (one could think of regulating immigration, or fighting crime). Yet, this does not mean that the means selected to achieve this goal are proportionate and necessary.

If there are other means to achieve the same end, that would be less in conflict with the prohibition of discrimination, it may be argued that the means are not proportionate. For instance, in the Dutch case on ethnic profiling (see chapter 5), the border police applied risk profiles that included race, skin colour and other 'non-Dutch' external characteristics as selection criteria. Yet, there are other conceivable solutions, such as the random selection of a person for screening, or the check of everyone on the flight in question instead of only persons who look 'suspicious' based on non-objective grounds. As such means would cause less harm (see also chapter 1) than the risk profiles currently applied, it may well be argued that the latter are not proportionate. Also, in the same example, it was argued that the means are not necessary, because the use of the selection criteria has not been proven to be effective. **Accordingly, if there is no objective justification for ethnic profiling, and the means used are not proportionate and necessary, it constitutes a violation of Article 14 of the ECHR.**

#### 3.1.1.2. Article 14 as an accessory right

Article 14 represents an accessory right: it enshrines in law the enjoyment of the (other) rights and freedoms set out in the Convention, without distinction. This means that Article 14 can only be invoked together with another human right in the Convention.[39] In the context of ethnic profiling, Article 8 (right to private and family life) and Article 2 of Protocol 4 to the Convention (freedom of movement) are of particular relevance.

#### 3.1.1.3. Article 8: private and family life

"Private and family life", within the definition of Article 8, is, according to the case law of the European Court of Human Rights, a broad term which includes the physical and psychological integrity of a person.[40] The European Court of Human Rights has on multiple occasions determined that the application of compulsory measures and monitoring powers by government officials, such as stopping and searching people, falls under the scope of Article 8. For instance, in one case the authorities conducted stops and preventive searches of persons who were found/located in a particular risk area, with the aim of fighting terrorism. The stops and searches were conducted on public roads, without a reasonable suspicion of any unlawful action. The European Court of Human Rights ruled that even in a public context, there is a personal zone of interaction with others that falls within the scope of private life within the definition of Article 8.[41] The public nature of a search (compulsorily having to share personal information or show what the individual is carrying) can only contribute to the intensity of the interference because of the element of humiliation involved.[42] Thus, ethnic profiling practices can constitute an interference with the right to respect of personal life, in combination with the prohibition of discrimination in Article 14.

#### 3.1.1.4. Article 2, protocol No. 4: freedom of movement

Article 2 of Protocol no. 4 determines that any person within the territory of a country that has ratified the ECHR has the right to freedom of movement.[43] In certain situations, ethnic profiling practices may constitute an interference with this freedom. For instance, in a police control where certain people are stopped, separated from the group, and checked, the aspect of separating persons, requiring them to proceed to a certain place and stopping them for a check, may constitutes a restriction of this right to freedom of movement. In combination with the prohibition of discrimination in Article 14, ethnic profiling may thus also be addressed through this legal provision.

#### 3.1.1.5. Article 1, protocol No. 12: non-discrimination

Finally, it deserves mentioning that the ECHR also offers protection against discrimination through another provision, namely Article 1 of Protocol no. 12 to the European Convention. This latter article contains an independent prohibition on discrimination, and may thus be invoked in and of itself. Also, Article 1 of Protocol no. 12 offers a broader protection against discrimination than Article 14 of the ECHR, in the sense that it prohibits discrimination in the enjoyment of every right set out in the law, including the rights and freedoms enshrined in national law.

**Article 1 of Protocol no. 12 offers a broader protection against discrimination than Article 14 of the ECHR, in the sense that it prohibits discrimination in the enjoyment of every right set out in the law, including the rights and freedoms enshrined in national law.**

# 3.2. Other European legal instruments

Additionally, ethnic profiling may be addressed through a number of other key European legal standards.[ii] These include the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights of the European Union, and the Race Equality Directive. Below, it will briefly be discussed how these standards may be used to challenge ethnic profiling practices and situations. The interpretation and implementation of the European legal instruments discussed in this section falls within the responsibility of the Court of Justice of the European Union (CJEU) in Luxembourg. A factor that may be relevant in deciding whether to aim for a case to end up at the ECtHR or at the CJEU is that the ECtHR currently knows long waiting times, and that the major parts of applications is declared inadmissible by a single judge, including at times "strong" cases. This might be a reason to consider turning to the CJEU instead (see below, section 3.2.1.).

It should be noted, however, that although these arguments may be applied in domestic legal proceedings, a case can only be submitted to the CJEU by a national judge, and not by individuals or NGOs. This is called the preliminary ruling procedure. A court of a European Union Member State may, if it has doubts about the interpretation or validity of EU law, ask questions about the matter to the CJEU. In response, the CJEU will hand down a decision on the matter, which the national court is then obliged to implement. It could be a strategic angle for a case to aim at convincing the national judge to ask such preliminary questions.

## 3.2.1. UNION LAW: TEU AND TFEU

The TEU and TFEU are the two core treaties that form the constitutional basis of European Union. The TEU sets out the general principles and objectives of the EU, whereas the TFEU generally contains organisational and functional details of the European Union. During law enforcement stops, searches, and checks, European Union citizens are hindered as they are exercising their rights to move and reside freely, which are protected by Articles 20 and 21 of the TFEU. When these citizens exercise their rights under Articles 20 and 21 of the TFEU to move and reside freely within the Union, restrictions on those rights must be in compliance with the requirements that the TFEU sets on such restrictions. This means that such persons can invoke a number of legal provisions.

Depending on the factual situation of the casus at hand, these legal provisions may include the prohibition on discrimination on the basis of nationality as set out in Article 18 of the TFEU, or the fundamental European Union values of equality and prohibition on discrimination based on ethnicity, as dictated in Articles 2 and 3 of the TEU, and Article 10 of the TFEU. The prohibition on discrimination in these Articles is elaborated in the Charter of Fundamental Rights of the European Union ("Charter") and the Race Equality Directive. Both these legal instruments will be discussed below.

ii. Please note that invoking these European instruments within the national legal order often involves a complex and technical legal exercise. It is important always to ask the advice and assistance of lawyers or other legal experts with knowledge of European Law.

## 3.2.2. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The Charter of Fundamental Rights of the European Union ("the Charter") enshrines certain political, social and economic rights into European Union Law. The Charter binds all Member States of the European Union as well as the European Union itself. Hence, the Charter sets out certain rights that institutions of the European Union must respect when exercising their powers. Member States only have to respect these rights when they are implementing European Union law. The Court of Justice of the European Union ensures that the Charter is applied correctly.

#### 3.2.2.1. The prohibition of discrimination under the Charter

Articles 20, 21 (1) and 51 (1) of the Charter show that **where a Member State is implementing Union law, all forms of discrimination, and specifically on the basis of race, colour, ethnic or social background, religion and nationality, are prohibited**. Also, the principle of equal treatment is a general principle of law of the Union that is set out in Articles 20 and 21 of the Charter. The principle of equal treatment requires that comparable situations are not handled differently and different situations are not handled equally unless such different handling is objectively justified.[44] Article 21 has the same content and scope as the corresponding Article 14 of the ECHR.[45] Therefore, we can suffice here with a reference to the discussion of Article 14 of the ECHR in section 3.1.1. of this chapter.

As mentioned above, for the Charter to be applicable to a particular case, it is a prerequisite that the Member State in question is "implementing" European Union law. Generally, the term "implementing" can be interpreted broadly. "Implementing" also applies where Union law is violated and, as a result, an appeal is made to a fundamental right.[46] However, whether and how it can be argued that there is a situation of "implementing" highly depends on the specific circumstances of the case, which makes a difficult to provide general guidance on this matter. It recommendable to ask the help and advice of an expert of European Union law to this end.

## 3.2.3. RACE EQUALITY DIRECTIVE (DIRECTIVE 2000/43/EC)

The Race Equality Directive intends to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting the principle of equal treatment into effect in the Member States. European Directives are, in principle, not directly applicable in Member States (in contrast to European Regulations). Generally, directives lay down certain results that should be achieved, yet Members States have the liberty to decide how to do so in their national legislation. This means that the provisions of the Directive should be transposed in national legislation before the prescribed deadline. For individuals or organisations engaged in strategic litigation, this means that a first step would be to **assess how the Directive has been transposed in the legislation of a particular country**.

However, although a Directive may not be, in principle, directly applicable, a Directive may contain provisions that have direct effect. The latter term refers to whether individuals can rely on EU law in domestic courts. If the time limit for transposition has expired, individuals may invoke, under certain circumstances, provisions from the Directive in national courts. In order to address ethnic profiling on the basis of the Race Equality Directive, two steps are necessary: first, that the casus falls within the scope of the Directive, and second, that there has been a violation of the Directive. These steps will be discussed below turn.

#### 3.2.3.1. Addressing ethnic profiling under the Race Equality Directive: scope

The Race Equality Directive prohibits any direct or indirect discrimination on the basis of race or ethnic origin. The Directive applies

*"to all persons, as regards both the public and private sectors, including public bodies"*

in relation to, principally, social domains such as, but not limited to, employment, social protection, social advantages, education and access to and supply of goods and services available to the public. Thus, in order for a casus of ethnic profiling practices or situations to fall within the scope of this Directive, it is necessary to argue that the specific law enforcement action during which ethnic profiling took place falls within the boundaries of one of the social domains listed in the Directive.

The categories "social advantages" and "access to and supply of goods and services available to the public" seem to offer the most promising legal points of departure in this respect. Contained in the concept of "social advantages", according to case law of the CJEU, is not only a positive right to receive an advantage, but also a negative right to not be burdened. Also, also an understanding of "mobility" has been understood to fall within the meaning of this concept. The term further comprises advantages that only the State can extend, such as "access to government functions" and "permission... to reside". Being stopped as part of a stop, search or check is, in essence, a repressive power of the State and/or the law enforcement authorities in question. Doing so deprives the person who is stopped of the right and social advantage of moving freely within the territory of the State or freely crossing the borders of the Union. Hence, it may be argued that remaining exempt from being stop also falls within the scope of a 'social advantage', and that accordingly the Race Equality Directive applies to such situations.

Depending on the factual situation of the casus at hand, also the category of "access to services available to the public" may also provide a relevant legal angle. For instance, if a stop or search takes place at an airport by the border police, arguably the free and equal access to that airport, and the passage within it for everyone regardless of ethnicity, can be interpreted as such a service. The performance of checks has an influence on the access to this service. It should be noted, however, that there is no case law yet on the interpretation of "services" in this context. Yet, there is a plausible case to argue that such a situation falls within the scope of the Race Equality Directive.

#### 3.2.3.2. Addressing ethnic profiling under the Race Equality Directive: violation

Once it is determined that the casus at hand falls within the scope of the Race Equality Directive, it can be argued that there has been a violation of the Directive. According to Article 2 (2) (a) of the Race Equality Directive,

*"direct discrimination" is when "one person is treated less favourably than another is, has been, or would be treated in a comparable situation on grounds of racial or ethnic origin".*

Case law of the Court of Justice of the European Union reveals that profiling on the basis of stereotypes and prejudices about certain groups can lead to direct discrimination based on race.[47] A person who is stopped on the basis of (for example) assumed race or ethnic origin will clearly be treated less favourably than another person not of that same assumed race or ethnic background would be treated. The Directive also covers indirect discrimination in Article 2 (2) (b), which is defined as:

*"an apparently neutral provision, criterion or practice" that puts "persons of a racial or ethnic origin at a particular disadvantage compared with other persons".*

Ethnic profiling in searches, stops or checks may have the effect that certain persons have a greater chance of being checked than other persons, and may therefore be qualified as indirect discrimination. Furthermore, Article 2 (4) of the Race Equality Directive stipulates that an instruction to discriminate on the basis of ethnicity or race is to be considered equivalent to direct discrimination. Accordingly, an instruction to law enforcement personnel that they can use ethnicity (in part) as an indicator for selection and screening on the basis of ethnicity or race, could also amount to a violation of the Race Equality Directive.

**The system of potential justification of discrimination under Union law differs from the system under the ECHR. Under the ECHR, both direct and indirect discrimination may be permissible if there is an objective and reasonable justification (which must be interpreted as strictly as possible). If the Racial Equality Directive could be argued to be applicable to ethnic profiling, there are no justifications for direct discrimination. For indirect discrimination, an objective and reasonable justification is required.**

The system of potential justification of discrimination under Union law differs from the system under the ECHR. Under the ECHR, both direct and indirect discrimination may be permissible if there is an objective and reasonable justification (which must be interpreted as strictly as possible). If the Racial Equality Directive could be argued to be applicable to ethnic profiling, there are no justifications for direct discrimination.[iii] For indirect discrimination, an objective and reasonable justification is required.

iii. See article 4 of the Racial Equality Directive. The limited circumstances listed in this article under which a difference in treatment shall not be considered discrimination do not apply to the context of ethnic profiling.

## 3.2.4. OTHER RELEVANT EUROPEAN LEGAL INSTRUMENTS

### 3.2.4.1. Schengen Borders Code (Regulation 2016/399)

Depending on the factual situation of the case at hand, several additional European legal instruments may be invoked in litigation. For instance, if ethnic profiling takes place by border guards at the crossing of an internal or external border of the European Union, the Schengen Border Code may apply. According to the Border Code, border guards must perform their tasks with complete respect for human dignity and without discrimination of persons on the basis of grounds such as race or ethnic origin (Article 7). Moreover, in the application of the Schengen Borders Code, the Charter must also be observed (Article 4).

### 3.2.4.2. EU Data Protection Directive (Directive 2016/680/EU)

It could also be argued that under certain circumstances, the EU Data Protection Directive may be applicable to a case on ethnic profiling. This Directive covers the processing of personal data by competent authorities in connection with the investigation or prosecution of criminal offences or the enforcement of criminal punishment, including the protection against and prevention of threats to public security. A "competent authority" is defined in Article 3 (7) as:

*"any public authority competent for the prevention, investigation, detection or prosecution of criminal offences, including the safeguarding against and the prevention of threats to public security".*

Depending on the national authority engaging in ethnic profiling and the context in which ethnic profiling takes place, the Data Protection Directive may offer a basis for legal argumentation. According to Article 10 of the Data Protection Directive, processing of personal data that indicates race or ethnic origin is prohibited unless processing is strictly necessary, in which case appropriate safeguards for the rights and freedoms of the data subject must be observed, and only where the processing is permitted by Union or Member State law.

# 3.3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The International Convention on the Elimination of All Forms of Racial Discrimination is an international human rights treaty that has been concluded under the auspices of the United Nations, which entered into force in 1969. States that have become parties to the Convention ("Member States") have committed themselves, *inter alia*, to eliminate racial discrimination. The implementation of the Convention in each Member State is monitored by the Committee on the Elimination of Racial Discrimination (CERD), a body consisting of independent human rights experts. Parties are required to submit regular reports outlining the legislative, judicial, policy and other measures they have taken to implement to the Convention. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations". The Committee also publishes its interpretation of the content of human[48] It may also be possible to submit an individual complaint about a violation of the Convention to the CERD. The CERD may only consider individual petitions, however, alleging violations by State parties to the ICERD who have made a necessary declaration to this end under Article 14 of the Convention.[49]

The ICERD prohibits every form of discrimination on the basis of race. The Committee on the Elimination of Racial Discrimination has stated that ethnic profiling must be qualified as racial discrimination:

*"States parties should take the necessary steps to prevent questioning, 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".*[50]

Two provisions of the ICERD may be considered of particular relevance when making arguments against ethnic profiling in strategic litigation, insofar as States have ratified the Convention.

## 3.3.1. ARTICLE 2 AND ARTICLE 5 ICERD

Article 2 of the ICERD states that the obligation of Member States to engage in no act or practice of racial discrimination against persons, groups of persons or institutions applies to all public authorities and public institutions, national and local. Thus, under the ICERD, States should ensure that all public authorities comply with the prohibition of discrimination. States should also act and change any laws and regulations which have the effect of creating or perpetuating racial discrimination, and prohibit and bring to an end, by all appropriate means, discrimination by any persons, group or organisation. Additionally, in Article 5, the ICERD also gives contracting States the positive obligation to prevent every form of racial discrimination. This means that parties to this Convention are obliged to take proactive measures in order to eliminate all forms of racial discrimination, including ethnic profiling.

The ICERD hence provides a basis to challenge policies and practices by public authorities or institutions that either directly or indirectly result in ethnic profiling. This applies both to policies in which ethnic profiling makes up an explicit component, such as the use of ethnicity as a component of risk profiles used by the Dutch border police, as to policies that have ethnic profiling as an effect. Additionally, also the lack of having installed policies preventing ethnic profiling may be challenged with an appeal to the ICERD. States must ensure that racial discrimination is not only prohibited in theory, i.e. under the letter of the law, but is actually prevented and eliminated in practice through the exercise of powers like stopping, frisking and checking the identity of persons. Through strategic litigation, States that are a party to the ICERD may be reminded of and be held to comply with these obligations.

**States must ensure that racial discrimination is not only prohibited in theory, i.e. under the letter of the law, but is actually prevented and eliminated in practice through the exercise of powers like stopping, frisking and checking the identity of persons.**

### 3.3.2. DIRECT EFFECT OF ICERD

It should, however, be noted that in many countries, some or all provisions of the ICERD have no direct effect in the national legal order, which means that individuals or organizations cannot directly derive rights from the ICERD and invoke these rights in national legal proceedings. In this respect, the ICERD differs from the European Convention of Human Rights. Whether and under what circumstances the provisions of the ICERD will have direct effect differs per country. For example, in the Netherlands, the content of the provision and the question of whether the result to be achieved is unconditional and described sufficiently precisely in the provision, and can therefore function as objective law, is relevant for determining whether a particular provision in the ICERD can be held to have direct effect. Arguing a case with legal arguments based on the ICERD will hence also involve arguing that the provisions should be understood to have direct effect in that particular case.

Yet, even in countries where these provisions cannot be directly invoked in legal proceedings, the provisions of the ICERD can still be of relevance for a case. For instance, the provisions may be used by national judges to support their interpretation of provisions of national law. Further, in the interpretation of the relevant standards under the European Convention on Human Rights, the obligations under the ICERD must also be considered. The European Court of Human Rights commonly uses provisions from international treaties as a source in the interpretation of the provisions of the ECHR.[51]

# 3.4. International Covenant on Civil and Political Rights (ICCPR)

Adopted under the auspices of the United Nations in 1966 (entry into force in 1976), the ICCPR is a key human rights treaty that provides for a range of protections for civil and political rights, hence protecting the freedom of individuals from state interference. The ICCPR is monitored by the Human Rights Committee, which functions in a similar manner as the CERD described above.[52] The Human Rights Committee may also consider individual complaints that allege a violation of an individual's rights under the ICCPR. This possibility however only applies if the State in question is a party to the First Optional Protocol to the ICCPR, which establishes the complaints mechanism.

## 3.4.1. CHALLENGING ETHNIC PROFILING UNDER ICCPR

When making arguments in court that ethnic profiling violates the human rights obligations of States under the ICCPR, a number of provisions may be relied on. The International Covenant on Civil and Political Rights prohibits discrimination, specifically under Article 26. The case law of the UN Human Rights Committee with regard to Article 26 of the ICCPR is, in terms of content, virtually identical to the European Court of Human Rights' case law in relation to Article 14 of the ECHR. Please proceed to Chapter 4 for a more detailed discussion thereof.

Furthermore, Article 2 of the ICCPR prohibits discrimination with regard to the other rights identified in the ICCPR. This is an accessory right, namely a prohibition that applies to the enjoyment of the rights and freedoms protected by the ICCPR. Ethnic profiling also negatively impacts the enjoyment of a number of other rights. Accordingly, the accessory right in Article 2 may be for instance be invoked to address ethnic profiling practices in combination with the right to freedom of movement (Article 12 ICCPR).

In countries that have ratified the ICCPR, the obligations arising therefrom apply to all government entities and agents, whether national, provincial or local, including to all parts of federal states. It thus does not matter which authority or body is engaged in ethnic profiling for such discriminatory conduct to be covered by the ICCPR.

## 3.4.2. DIRECT EFFECT OF ICCPR

**In some countries the provisions of the ICCPR have direct effect, in other countries not.** For instance, in the United States the ability of litigants to sue in court for direct enforcement of the ICCPR is limited because the US government adopted a "not self-executing" declaration when it ratified the treaty.[53] This means that additional domestic regulation is required to implement the provisions of the treaty, and the treaty provisions cannot directly form the basis for a claim.


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# CHAPTER 4
# INTERNATIONAL STRATEGIC LITIGATION CASES ON ETHNIC PROFILING

**This chapter will introduce the reader to a number of European and international cases on the topic of ethnic profiling.**

**For the purposes of this chapter we will look at the interpretations from the European Court of Human Rights (ECtHR) as well as jurisprudence from the Court of Justice of the European Union (CJEU).**

The chapter intends to serve as a point of reference for litigators and others who are dealing with cases of such nature and need to ascertain whether a specific case will support their arguments.[54] Each case is broken down by identifying, as far as it is possible to do so, the following key factors:

1. **The core matter** that the case revolved around;
2. **The party that initiated the case**, whether it was initiated by an institution, a private individual or a NGO;
3. **The legal arguments** that were used as the foundation for litigating both for and against the accusations;
4. **The relief that the claimant sought** as well as the **judgment** given by the court;
5. **A conclusion** for future reference, following an analysis of the judgment rendered.

# 4.1 *Timishev v. Russia*[55] (ECtHR)

## 1. THE CORE MATTER

The case concerns Mr. Timishev, a lawyer of Chechen ethnicity, who was stopped at a checkpoint at an administrative border in Russia. The decision to stop Mr. Timishev had been based on an instruction from the region's Ministry of the Interior not to admit anyone of Chechen ethnic origin. Mr. Timishev lived close to Nalchik, the capital of the autonomous Russian Kabardino-Balkarian Republic bordering Chechnya. He had been forced to move to the Kabardino-Balkarian Republic due to the war in Chechnya, but continued to travel frequently to and from Nalchik and Grozny (the capital city of Chechnya). He was repeatedly stopped at checkpoints and in certain instances was even forced to abandon his car and complete his journey by hitchhiking. The Russian police were subjecting Chechen ethnic people to excessive searches, while being much more lenient with other travellers. This gave rise to the question whether the applicant's freedom of movement was restricted purely based on his ethnicity.

**The decision to stop Mr. Timishev had been based on an instruction from the region's Ministry of the Interior not to admit anyone of Chechen ethnic origin.**

## 2. THE INITIATORS OF THE CASE

After hearing of the matter, the Open Society Justice Initiative acted as counsel for Mr. Timishev before the European Court of Human Rights. In order to objectively determine whether people of Chechen ethnicity were treated differently from other travellers, the Open Society Justice Initiative conducted scientific testing on the two roads from Nalchik to Grozny. The results were affirmative and a report was drawn up, clearly evidencing that the Russian highway police were practicing ethnic profiling in the execution of their searches.[56]

## 3. THE LEGAL ARGUMENTS OF THE CASE

Mr. Timishev argued that the checkpoint system on the highway, and the manner in which the police were using ethnic profiling in performing the checks, constituted an infringement of the European Convention of Human Rights. Mr. Timishev's lawyers based their argument on Article 2, Protocol 4 of the European Convention – citing an unlawful restriction of movement. They argued that the restrictions were applied arbitrarily and served no legitimate purpose. They also cited Article 14 of the European Convention, arguing that the ethnic profiling of Chechens at these checkpoints was discriminatory in nature.

## 4. THE RELIEF SOUGHT BY THE APPLICANT AND JUDGMENT RENDERED

Mr. Timishev requested the Court to conclude that there had been a violation of Article 2, Protocol 14, and Article 14 of the European Convention. Mr. Timishev held that there was no underlying justification for these checkpoints, and that a situation existed in which travellers where subjected to harassment and unlawful treatment based on ethnicity rather than any other appropriate reason. However, the case was declared inadmissible by the Court in 2013. As the Court is under no obligation to provide reasons for decisions on inadmissibility, none were provided.

Mr. Timishev then brought another case in front of the ECtHR. Mr. Timishev held that there was a difference in treatment between people of Chechen ethnicity and non-Chechen ethnicity. He based his argument on the fact that he was denied entrance at the Urukh checkpoint due to an oral instruction from the Ministry of Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin. This was a violation of his freedom of movement as set out in the Convention. Mr. Timishev successfully showed a difference in treatment in comparison to other individuals at the checkpoints. This shifted the burden of proof to the Russian State, which was asked by the Court to provide justification for the difference in treatment, but was unable to do so. Mr. Timishev successfully showed that there was racial discrimination in this instance but did not succeed in showing that there was a broader use of ethnic profiling as a kind of *"filtering system"* for the entire stop and search action.

**Mr. Timishev successfully showed a difference in treatment in comparison to other individuals at the checkpoints. This shifted the burden of proof to the Russian State, which was asked by the Court to provide justification for the difference in treatment, but was unable to do so.**

## 5. CONCLUSION

The *Timishev* case confirms how difficult it is, even with supporting empirical research, to argue a case on ethnic profiling. Ethnic profiling is often the result of indirect discrimination, where an apparently neutral provision or practice puts a specific ethnic origin at a disadvantage compared to others. It is therefore necessary to demonstrate that a rule, in its application, is actually using ethnic profiling in order to achieve its otherwise legitimate goal.

The *Timishev* case may be of use to litigators since it confirms the principle that if there is evidence of difference in treatment compared to other individuals, at the very least you will be able to show discrimination. Once difference of treatment is established, the burden of proof shifts to the State, and thus it is up to the State to show that there was no discrimination in its application of the rule. In the case at hand this means that as soon as Mr. Timishev proved that people of Chechen ethnicity were being treated differently at the checkpoints, the State needs to justify this treatment. The State needs to give compelling reasons for treating people of Chechen ethnicity different than other people. If the State is not able to do so, the claim may be successful.

# 4.2 *Lingurar v. Romania*[57] (ECtHR)

## 1. THE CORE MATTER

This case concerns a Romani family of four, living in Romania. They were badly beaten by police officers, who forced their way into the family's home. The four family members filed criminal charges against the police but the local prosecutor decided that the State would not prosecute. The local court ordered the prosecutor to reconsider and the prosecutor, after making a second analysis, confirmed its decision not to prosecute, claiming a lack of evidence that the incident happened in the manner that the Romani family said. This decision was accepted by the local court in Romania. The family then filed an application to the ECtHR.

The *Lingurar* case has multiple interesting angles, including from an ethnic profiling point of view. The case does not merely aim to prove a single account of discrimination, but actually hints at a much bigger problem of "*antigypsyism*" as the true underlying problem of racist violence against Roma. Accordingly, the issue of what would constitute "*institutional racism*" came up for discussion.

## 2. THE INITIATORS OF THE CASE

The four Romani family members were represented by Ms. Voinescu as legal counsel in the matter. They also received assistance from *Romano CRISS*, a non-governmental organization based in Romania.[58] Once the case was already being heard by the ECtHR, another human rights organization, the *European Roma Rights Centre* (ERRC), requested the Court to intervene in the case as a "*third party*".[59] The ERRC was allowed to make written submissions to help the Court in determining its judgment. This might prove a valuable method for other organizations to help the Court in building a more clear and structured judgment, and to highlight specific arguments in strategic litigation cases.

The ERRC stressed that the phenomenon of "*antigypsyism*" should be acknowledged as a form of institutional racism. They urged the Court to include this notion in the Court's analysis whether or not there was a violation of Article 14 of the European Convention.

## 3. THE LEGAL ARGUMENTS OF THE CASE

The Romani family argued that there was a violation of Article 14 of the European Convention on Human Rights, read together with Article 2 and Article 3. Article 14 is the prohibition of on discrimination against people in relation to their human rights. Article 2 is the right to life and Article 3 is the right to be free from inhuman and degrading treatment and the prohibition of torture.

## 4. THE RELIEF SOUGHT BY THE APPLICANT AND JUDGMENT RENDERED

The four family members claimed non-pecuniary damages of around EUR 25,000 per person. Furthermore, an additional amount for costs and incurred expenses was requested to be paid into the bank account of Romano CRISS. In addition to the monetary awards, the family requested the Romanian State to implement measures to prevent these kind of instances from happening in the future. The State on the other hand argued that the amounts that the family claimed were excessive.

The ECtHR held that there was a violation of Article 3 of the Convention as well as Article 14 of the Convention. The Court further awarded non-pecuniary damages in the amount of EUR 11,700 to each applicant. The Court held that the applicants were targeted not because of their own actions but rather because they were Roma.

*"The Court did not agree with the States' submission that "considerations other than the applicants' ethnicity played an important role in the manner in which the police raid... had been organized and carried out".*[60]

Article 3 protects an individual against torture, inhumane or degrading treatment or punishment. The police applied their policing power discriminatorily, physically inflicting harm on the applicants. The Court found that the police actions amounted to ethnic profiling, that it was a discriminatory exercise of police powers under the European Convention and therefore a violation of Article 14 taken in conjunction with Article 3.

This judgment is very much in line with the reasoning used in the case of *Timishev v. Russia* where the Court concluded:

*"...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 in a contemporary democratic society built on the principles of pluralism and respect for different cultures".*[61]

The difference between the *Lingurar* judgment and that of *Timishev* was that the Court did not use the term ethnic profiling in the latter to name the underlying issue at hand. In the *Lingurar* case, the Court acknowledged the existence of institutional anti-Roma sentiment in Romanian policing. The ECtHR agreed that the domestic authorities and courts had failed to adequately investigate

*"...what seems to be a discriminatory use of ethnic profiling by the authorities".*[62]

## 5. CONCLUSION

In cases concerning ethnic profiling, **the case of Lingurar may be considered a "landmark case".** The Court acknowledged that ethnic profiling formed the basis for the actions of the local police. The Court for the first time used the words *"ethnic profiling"* to describe the process whereby the police were actually targeting Roma citizens when exercising their otherwise neutral policing powers.

The broad application of police power targeting Roma people was categorized by the Court as institutional anti-Roma sentiment and thus the problem was acknowledged as being of a systemic nature rather than isolated cases of discrimination. The Court warned the authorities that they had automatically connected ethnicity to criminal behaviour and that their actions were discriminatory. This connection of ethnicity to potential criminality has shown up in numerous other cases, and *Lingurar* provides a strong precedent that making such an arbitrary link will be discriminatory.

**The broad application of police power targeting Roma people was categorized by the Court as institutional anti-Roma sentiment and thus the problem was acknowledged as being of a systemic nature rather than isolated cases of discrimination.**

# 4.3 *Williams v. Spain*[63] (HRC)

## 1. THE CORE MATTER

Rosalind Williams was stopped by a police officer on the platform of the station in Valladolid in Spain and asked to produce her identity documents. She was traveling together with her husband and her son at the time, who were not asked to show their documents. When asked why she needed to provide these documents, **the officer replied that individuals "that look like you" need to identify themselves since "many of them are illegal immigrants". The police officer stated that he was working per the instructions from the Ministry of Interior that called upon officers to conduct these checks in particular in respect of "persons of color".** Ms. Williams produced the documents and started legal proceedings the following day.

Ms. Williams submitted a complaint to the Ministry of Interior, challenging the apparent order that persons of colour should be checked. The Ministry rejected this complaint and Williams appealed to the Spanish National Court *(Audiencia Nacional Sala de lo Contencioso-Administrativo)*. The National Court dismissed the appeal on the basis that police needed to check identity documents and that there was a justification for asking her because she belonged to the "black race", and therefore she was more likely to be a foreigner. The use of ethnic profiling was thus justified by the National Court.

Ms. Williams then appealed to the Spanish Constitutional Court alleging a violation of the Spanish Constitution as well as Article 14 of the European Convention on Human Rights. The Spanish Constitutional Court rejected her complaint, stating that a person's ethnicity is a legitimate indicator of nationality, and to refer to the race of a person for a "descriptive" manner is not ***per se*** discriminatory. Following this judgment, together with Open Society Justice Initiative, Ms. Williams filed a complaint to the Human Rights Committee of the United Nations.

This case is of interest as it deals with the very sensitive issue of linking ethnicity or race to a particular nationality. Moreover, the case even goes a step further by collectively stereotyping a group of people of a particular ethnicity with the possible status of illegal residence.

## 2. THE INITIATORS OF THE CASE

The complaint that was filed to the Human Rights Committee of the United Nations was prepared by Open Society Justice Initiative on behalf of Ms. Williams. The Open Society Justice Initiative worked together with Women's Link Worldwide[64] and SOS-Racismo Madrid[65] in preparing the complaint and conducting the necessary research for the case.

## 3. THE LEGAL ARGUMENTS OF THE CASE

The complaint to the Human Rights Committee argued that the manner in which Ms. Williams was treated was an infringement of various provisions of the International Covenant on Civil and Political Rights (ICCPR). One of the core arguments of the complaint focused on the use of ethnic profiling. The argument stated that the law enforcement practice of relying on generalizations about race, ethnicity, or national origin rather than on specific objectively identified evidence that would link perpetrators to a crime is a form of racial discrimination that violates international human rights law.

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## 4. THE RELIEF SOUGHT BY THE APPLICANT AND JUDGMENT RENDERED

Ms. Williams aimed to receive confirmation that the actions by the police were wrongful and that the police had discriminated by selecting only her to perform an identity check. Since the Spanish Court system had not provided this relief, Ms. Williams requested the UN Human Rights Committee to establish that there had been a violation of the ICCPR.

The UN Human Rights Committee concluded that there had been a violation of Article 26, read together with Article 2, paragraph 3 of the ICCPR. The Committee stated that while identity checks are permitted for protecting public safety, preventing crime and controlling illegal immigration,

*"the physical or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal situation in the country. Nor should identity checks 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".*[66]

The Committee moreover concluded that the law should be changed and there should be an apology issued to Ms. Williams, and that Spain must:

*"take all necessary measures to prevent its officials from committing acts as in the present case..."*[67]

## 5. CONCLUSION

This case, similar to the case of *Lingurar*, warns about the dangers of using ethnicity as an indication of someone's propensity to be criminal. Ms. Williams sought relief by relying on international institutions rather than building the case around EU law or institutions. This is interesting since **the case hence creates a precedent for cases that fall outside of the EU and may be relied upon in all Member States of the UN**.

The difficulty that usually follows a verdict from international institutions such as the UN is the manner in which it is enforced within the local jurisdiction. In the case at hand, the Spanish authorities admitted that they were wrong and apologised to Williams. However, they also held that since the case had been initiated many years ago, Spain had by the time of the verdict already undergone significant changes for the better, and that thus there was no need to change local legislation since it had already developed to be on par with the other countries. The Spanish authorities did update their police training to warn new cadets about the dangers of ethnic profiling. NGOs such as Womans Link Worldwide, although acknowledging the efforts by the Spanish authorities in combating ethnic profiling, held that a lot more could be done to prevent ethnic profiling by improving legislation. They are advocating for a stronger stance to be taken against the dangers of ethnic profiling. They argue that there are new laws issued by the Spanish authorities that again make use of ethnic profiling in order to enforce the immigration policies of Spain.[68]

**The *Williams* case reiterates the importance for NGOs and litigators in strategic litigation to make sure that they include forum choice in their strategic decision making**.

# 4.4 *R. v. Immigration Officer at Prague Airport*[69] (UK)

## 1. THE CORE MATTER

This case concerned UK immigration control at Prague airport, in particular an agreement between the Czech authorities and UK immigration control officers to perform checks at the Prague airport before people boarded flights to the UK. People were permitted to go to the UK if the reason for their visit fell within the scope of UK immigration legislation. Seeking asylum in the UK fell outside the scope of these rules, and people that intended to do so or people that the officers believed intended to do so were denied to board the flight. A large percentage of Czech nationals that applied for asylum were Roma. Only about 6% of these applications were successful.

The UK immigration officers considered it their role to prevent asylum seekers from entering the UK. Since most applications for asylum were filed by Roma, they subjected these travellers to much longer and more intensive questioning, leading to a great number of Roma people being refused entry. Statistics showed that they were 400 times more likely than non-Roma to be refused permission to enter the UK.

Although the UK should treat all Czech nationals in a similar manner, in this case it was understood that even though the Roma were also Czech nationals, they were most definitely subjected to different treatment than their non-Roma fellow countrymen. The UK officers made use of ethnic profiling in their assessment of whether people were most likely asylum seekers or not.

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## 2. THE INITIATORS OF THE CASE

This case was initiated on behalf of six Czech Roma individuals by the European Roma Rights Centre (ERRC). The London-based organization Liberty provided legal representation for the six Czech Roma and the ERRC in the UK courts.[70]

## 3. THE LEGAL ARGUMENTS OF THE CASE

The lawyers for the Czech Roma argued that the procedures that had been applied to the individuals at Prague airport were incompatible with the obligations for the UK under the Geneva Convention (1951) and Protocol (1967) relating to the Status of Refugees and customary international law. They argued that there had been unjustifiable discrimination on racial grounds, since the Roma Czech nationals were treated different from other non-Roma Citizens flying to the UK. Due to a process of ethnic profiling, the Roma Czech citizens were subjected to more stringent investigation procedures.

## 4. THE RELIEF SOUGHT BY THE APPLICANT AND JUDGMENT RENDERED

The six Roma individuals argued that they were discriminated against based on the ground that they were Roma. The House of Lords found that this had indeed been the case, and held that there had been direct discrimination against Roma people seeking to travel to the UK and that this was in conflict with UK race discrimination legislation.

**The House of Lords found that this had indeed been the case, and held that there had been direct discrimination against Roma people seeking to travel to the UK and that this was in conflict with UK race discrimination legislation.**

Baroness Hale gave a good explanation of how a court should rule on issues of direct discrimination. She stated:

*"If direct discrimination of this sort is shown, that is that. Save for some very limited exceptions, there is no defense of objective justification. The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify".* [71]

It is a highly relevant assessment that stereotyping people will always constitute a form of direct discrimination, even if the stereotype appears to hold some truth. An individual should never be stereotyped to assume that they hold characteristics associated with the group, but should always be assessed on an individual basis.

## 5. CONCLUSION

This case shows how direct discrimination should be dealt with. Even though ethnic profiling was not the main issue in the case, the same rationale can be applied to governments that justify ethnic profiling for immigration policies by claiming that there are objective reasons to do so.

Any system that, through a process of ethnic profiling, links a certain ethnic group with a likelihood for criminal activity should not be relied upon solely. Each incident should be assessed on a case to case basis. Stating that a person is likely to be more involved in criminal activities based on his ethnic group alone will be a form of direct discrimination. The government needs to be careful that it does not get to a point where stereotyping will only be wrong if it is proven to be untrue, while in fact the actual practice of stereotyping is wrong whether it is proven to be true or not.

# 4.5 *D.H. and others v. Czech Republic*[72] (ECtHR)

## 1. THE CORE MATTER

*D.H. and others v Czech Republic* was one of the first cases of systemic racial segregation in education dealt with by the ECtHR. Racial segregation in education is a challenge that still remains topical in various European countries.

In the case at hand, the eighteen applicants before the ECtHR were all school children from Ostrava (Czech Republic). They were Czech nationals of Roma descent, who, between the years 1996 and 1999, had been placed into *"special schools"* for children with mental disabilities. The choice to place the children in these schools was made by the head teacher, following a psychological examination of each child and consent from the children's' parents. It was quite clear that the quality of the education provided to these students was often inferior to mainstream education in the country.

The ERRC did extensive research on the disparity of treatment between Roma and non-Roma students. Some of the findings of these studies showed that a Roma child was 27 times more likely to be referred to these *"special"* schools than a non-Roma child, and that even if a Roma child avoided being sent to these schools, they were still mostly enrolled in Roma urban ghetto schools.

From these facts it is apparent that even though there was no law that stated explicitly that Roma children should be sent to these *"special"* schools, the reality was that they were being sent to these schools in much higher numbers.

## 2. THE INITIATORS OF THE CASE

The Roma children were represented by a lawyer working for the Open Society Foundation.[73] The Open Society Justice Initiative acted as co-counsel before the second section of the ECtHR and before the Grand Chamber. The ERRC contributed extensive research to indicate that Roma children were systematically assigned to segregated schools based on their racial or ethnic identity rather than their intellectual capacities.

## 3. THE LEGAL ARGUMENTS OF THE CASE

The children's lawyers based their claim on Article 14 of the European Convention, taken together with Article 2 of Protocol 1. They argued that the segregation amounted to a discriminatory denial of the right to education. Furthermore, they argued that there had been a breach of Article 3 of the European Convention because the segregation was so severe that it led to degrading or inhuman treatment.

## 4. THE RELIEF SOUGHT BY THE APPLICANT AND JUDGMENT RENDERED

The applicants aimed to prove indirect discrimination in their access to education. The Grand Chamber of the ECtHR indeed found that there was indirect discrimination against the school children in the provision of education, finding a violation of Article 14 of the European Convention on Human Rights read together with Article 2 of Protocol 1 to the Convention.

The Court stated that the disproportionate assignment of Roma children to special schools without an objective and reasonable justification amounted to unlawful discrimination. The most important aspect from the Courts ruling was that it embraced the principle of indirect discrimination, stating that a *prima facie* allegation of discrimination shifts the burden to the defendant to prove that any difference in treatment is not discriminatory.

## 5. CONCLUSION

It is clear that the Court, as in the judgment in *Timishev v. Russia*, reiterated its interpretation of indirect discrimination. This recognition of indirect discrimination is relevant for challenging ethnic profiling, as ethnic profiling is often not the outcome of racist intent by individual officers, but a pattern of practice that reflects reliance on stereotypes, or the product of geographic focus of these powers in areas of high minority residences.[74]

Policies that appear neutral, seek to address public safety or policy, might prove discriminatory when statistical evidence shows that individuals are treated differently on the basis of their ethnicity or religion.

**Policies that appear neutral, seek to address public safety or policy, might prove discriminatory when statistical evidence shows that individuals are treated differently on the basis of their ethnicity or religion.**

This implies, in practice, that if a national law allows for passports to be checked in order to allow individuals entry into the country, and it can be evidenced by empirical research that in exercising this policing power only a particular group of individuals is consistently targeted due to their ethnicity or religion, there are clear grounds for indirect discrimination. The burden of proof is then shifted to the national government to show that the application of this power does not lead to indirect discrimination. The government will need to show that the power as applied was necessary and that it was applied proportionate to its objective.

# 4.6 *Gillan and Quinton v. UK*[75] (ECtHR)

## 1. THE CORE MATTER

In this case, the ECtHR provided its analysis on the broad use of stop and search powers of the UK police. Although the argumentation did not rely on ethnic profiling in the case at hand, the Court brought up the likelihood that these broad powers, without effective restrictions, will no doubt lead to such practices. This case is of importance for future litigation of ethnic profiling cases that deal with discriminatory stop and searches.

Mr. Gillan and Ms. Quinton were subjected to a stop and search by the UK police under sections 44-47 of the Terrorism Act 2000. This act gave the police broad powers and allowed senior police officers to authorize any uniformed police officer in any area to conduct stop and searches. The purpose of these stops and searches was to find objects that could be used for terrorism, yet the stops and searches did not need to be based upon the suspicion that the person would carry objects of such kind. If a person failed to submit to such a stop and search they were liable to imprisonment, a fine, or both.

In exercising the power to stop and search, the UK police are governed by a Code of Practice.[76] The Code demands that the powers are used

*"fairly, responsibly, with respect to people being searched".*

The Code then goes on to state that:

*"officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities)".*[77]

Mr. Gillan and Ms. Quinton complained that the stops and searches violated Articles 5, 8, 10 and 11 of the European Convention.

## 2. THE INITIATORS OF THE CASE

Mr. Gillan and Ms. Quinton were represented by a lawyer from the human rights organisation Liberty in their application to the ECtHR.[78] She, together with a team of other lawyers, led the case against the UK government.

## 3. THE LEGAL ARGUMENTS OF THE CASE

The lawyers argued that the stop and searches violated Article 5 (right to liberty), Article 8 (right to respect private and family life), Article 10 (freedom of expression) and Article 11 (right to free association) of the European Convention.

## 4. THE RELIEF SOUGHT BY THE APPLICANT AND JUDGMENT RENDERED

The Court first assessed whether there had been a violation under Article 8 of the European Convention and in doing so referred back to its prior analysis in *Foka v Turkey* that:

*"any search effected by the authorities on a person interferes with his or her private life."*[79]

The Court held that the police stop and searches did amount to a clear interference with the right to respect for private life. Due to the public nature of these searches, the Court held that they may also contain an element of humiliation and embarrassment or lead to the exposure of personal information. The Court distinguished between general searches, and searches conducted in certain specific spaces such as airports and public buildings, since it can be implied that visitors have subjected themselves to the possibility of being searched in such spaces, but that the broad policing powers of being subjected to stop and searches

*"anywhere and at any time, without notice and without any choice as to whether or not to submit to a search was too excessive".*[80]

The Court analysed each element of section 44-47 of the Terrorism Act 2000 that gave such broad powers to the police. The Court came to the conclusion that these powers were too broad and therefore was not in accordance with the law, since they did not have adequate legal safeguards against abuse.

As a result of finding a violation under Article 8 the Court decided that it did not need to consider in detail the other violations raised by the applicants above. The Court however did mention that there was a breach of Article 5 (the right to liberty) since during the stop and search, they were

*"entirely deprived of any freedom of movement during that time".*

## 5. CONCLUSION

With this judgment, the Court reiterated that a search of a person, including their clothing and belongings, should be seen as an interference of the person's private life under Article 8 of the European Convention. The Court also stated that conducting these stops and searches in public, as will be the case in many ethnic profiling instances, may be seen as embarrassing and humiliating to those individuals that are subjected to them.

The case clearly indicates that whenever police are awarded broad policing powers without clear criteria for effecting such stops, a consequence will often be that certain individuals (usually the victims of ethnic profiling) are stopped more often than others. This will also be the case when immigration control officers are given broad powers without any limitations. The ECtHR sets a clear precedent in this case that whenever police are given particular powers, these powers should be applied only where necessary and proportionate, with clear restrictions and limitations.

**The case clearly indicates that whenever police are awarded broad policing powers without clear criteria for effecting such stops, a consequence will often be that certain individuals (usually the victims of ethnic profiling) are stopped more often than others.**

# 4.7 *Seydi and others v. France*[81] (ECtHR)

## 1. THE CORE MATTER

The police in France enjoy very broad stop and search powers under the Code of Criminal Procedure (CCP) and there have been **rising concerns that young people of ethnic minorities in France are frequently subjected to stops and searches that seem arbitrarily and stereotypical**. The police have been documented to rely on ethnic profiling in making their decisions to stop and search individuals.

The case, which was first heard in the *Tribunal de Grande Instance* in Paris, was brought by 13 young French men of North African or sub-Saharan origin who were stopped by the police. Amongst these applicants were students in business school, accounting school, and high level athletes. None of the checks resulted in any legal action or fines. The French authorities provided no material evidence to justify the individual stops during the proceedings, nor did they interview any police officers. The *Tribunal de Grande Instance* summarily dismissed all 13 cases.

The case was taken to the Court of Appeals *(Cour d'Appel)*. On appeal, the claimants argued the checks were based on their skin colour and thus constituted discrimination. The Court of Appeals found unlawful discrimination in 5 of the 13 cases. In the other 8 cases the Court ruled that the applicants failed to meet the burden of proof to show discrimination. The 8 unsuccessful claimants went to the *Cour de Cassation*, which only considers points of law.

At the *Cour de Cassation*, the claimants argued that the Court of Appeals had not fully applied non-discrimination norms in their cases. In the cases in which the Court of Appeal had ruled against the applicants, the Court of Cassation also noted that the witness statements did not demonstrate a difference in treatment and thus agreed with the prior judgment. The Court also accepted objective explanations offered by the authorities.

Following this judgment, Open Society Justice Initiative filed an application to the ECtHR.

## 2. THE INITIATORS OF THE CASE

In the original cases brought in the French courts, the 13 young French men were represented by lawyers from the *Syndicat des Avocats de France* and the Paris law-firm Beauquier, Belloy, Gauvain, and at the Court of Cassation the law firm Lyon-Caen &.[82] Throughout this process they were supported by the Open Society Justice Initiative with legal advice.

Focusing on the new application brought to the European Court of Human Rights, the remaining French men are represented by the lawyers from their initial cases together with lawyers from the Open Society Justice Initiative.[83]

## 3. THE LEGAL ARGUMENTS OF THE CASE

In their application to the ECtHR, the lawyers argue that while the French Courts formally recognize the applicability of non-discrimination law, including the shift in the burden of proof, they failed to apply these standards**. They also argue that, in the national courts, the men were required to prove the discriminatory nature of the stops, whereas they should only have needed to show a difference in treatment and did not need to elaborate on the discriminatory nature thereof**. They furthermore argue that reliable statistics should be sufficient to establish that there was a difference in treatment.

The applicants state that Article 78-2 of the French Code of Criminal Procedure (CCP) permits discriminatory stops because it is not sufficiently precise to address discrimination. The vague and general interpretation of Article 78-2 of the CCP is not in line with Article 14 of the European Convention and thus they allege that there had been, in fact, a difference in treatment, and that sufficient statistical evidence was presented to demonstrate that racial minorities are stopped disproportionately and that this is done by using ethnic profiling and stereotyping in the selection process. Once a case of discrimination has been proven, the State needs to demonstrate that that there is a non-discriminatory justification for its action. The burden of proof should thus be shifted. The initiators of the case argue that the police failed to provide an objective or reasonable justification for the stops.

The applicants are also stating that the French authorities should meet their so-called "positive obligations", which refers to the obligation of a State to undertake active steps to safeguard Convention rights (as opposed to the "negative obligation" to refrain from violating these rights). They argue that the French State should implement mechanisms to enable the monitoring of patterns of police discrimination. One suggestion is to enable individuals that are stopped to document these stops by providing them with a "stop form", thereby limiting the arbitrary stops of the police and helping to protect these minorities. If each stop gets documented, it will greatly deter police from performing stops arbitrarily since each stop will now be placed on record.

**One suggestion is to enable individuals that are stopped to document these stops by providing them with a "stop form", thereby limiting the arbitrary stops of the police and helping to protect these minorities.**

## 4. THE RELIEF SOUGHT BY THE APPLICANT AND JUDGMENT RENDERED

**At the time of writing, this case is still in the application phase. Hence, the ECtHR has not yet rendered a judgment.** The applicants ask the Court to acknowledge that there was indeed a difference in treatment, thereby showing a *prima facie* case of discrimination. They also want the French authorities to actively implement strategies and mechanics in order to document these stops.

## 5. CONCLUSION

This case provides an opportunity for the Court to acknowledge that the broad powers of the French police may only be reasonable as long as these powers are not applied on the basis of underlying ethnic profiling practices. Initiating some sort of checks and balances system, such as giving the stop forms proposed by the initiators of the case in their application to the Court, could be a step in the right direction.

# 4.8 *Zeshan Muhammed v. Spain*[84] (ECtHR)

## 1. THE CORE MATTER

The case is brought by a young Pakistani who lived and studied in Spain, holding a long-term residence permit. He and a friend were stopped by national police officers who requested him to show his ID. When asked why they requested his ID, the police referred to the colour of his skin. Taking his case to court in Spain, Mr. Muhammed did not receive any relief. The Spanish Constitutional Court rejected the case, considering it "not relevant".

**The case is brought by a young Pakistani who lived and studied in Spain, holding a long-term residence permit. He and a friend were stopped by national police officers who requested him to show his ID. When asked why they requested his ID, the police referred to the colour of his skin. Taking his case to court in Spain, Mr. Muhammed did not receive any relief. The Spanish Constitutional Court rejected the case, considering it "not relevant".**

Spain has a reputation of law enforcement officers using ethnic profiling, particularly in the context of immigration control. In the well documented case of *Rosalind Williams v. Spain* (see above under 4.3), the UN Human Rights Committee condemned this practice as unlawful discrimination. It seems that although the Spanish authorities apologized to Rosalind Williams and incorporated awareness of ethnic profiling into the police training, this remains a highly topical issue. The fact that the Spanish Constitutional Court rejected the application as not relevant seems to support the discriminatory view that Spanish nationals could only be white.

## 2. THE INITIATORS OF THE CASE

The Open Society Justice Initiative has assisted Mr. Muhammed in the preparation of his application to the ECtHR.[85] SOS Racisme Catalunya, a Barcelona-based NGO, worked jointly with the Open Society Justice Initiative in preparing the application to the ECtHR.[86]

## 3. THE LEGAL ARGUMENTS OF THE CASE

The initiators of the case argued that the police stop of Mr. Muhammad was discriminatory, and a violation of the right not to be subjected to discrimination on grounds of race, colour or ethnic origin. This is a violation of Protocol 12 of the European Convention.

Also, they argued that there had been a violation of his right to private life. The manner in which the identity check was performed, which was done in public and in an undignified manner, humiliated and embarrassed him, and contributed to the stereotyping of his ethnic group. This constitutes a violation of Article 8 of the European Convention.

Furthermore, it was also argued that there was a violation of the right to a fair hearing. Mr. Muhammed encountered numerous irregularities in the national proceedings through which he sought compensation for the mistreatment by State agents. He thus argued that these instances amount to a violation of Article 6 of the European Convention.

## 4. THE RELIEF SOUGHT BY THE APPLICANT AND JUDGMENT RENDERED

Mr. Muhammed asks the ECtHR to acknowledge that the manner in which the stop was conducted amounts to discrimination, and that it also violated his human dignity. The ECtHR communicated the case to the Spanish Government only giving concern to Article 8 and Article 14 of the European Convention. The Court found the claim under article 6 inadmissible. The Court requested the Spanish Government to submit a statement of facts together with their own observations by April 13, 2018.

Upon receiving the communication from the Spanish Government, Mr. Muhammed's lawyers submitted their own comments, and also made a request for just satisfaction and general measures pursuant to Article 41 and 46 of the European Convention. At the time of writing, the case is still pending and a final judgment remains to be rendered by the ECtHR.

## 5. CONCLUSION

The European Court may, in the case of Mr. Muhammed, reaffirm its position on the use of ethnic profiling as a method of screening for police to do identity checks. Given the fact that the Spanish Constitutional Court did not see the matter as relevant, even after the decision in the case of *Rosalind Williams*, the Court may use this opportunity to highlight the importance of the matter and educate the Spanish Supreme Court judges on the importance of this issue.


Koninklijke Marechaussee:
STOP ETNISCH PROFILEREN!
#TrekEenGrens

# CHAPTER 5
# THE DUTCH CASE ON ETHNIC PROFILING

**In this chapter, we will discuss the background, preparation and contents of the legal proceedings against the Dutch Royal Marechaussee, which were initiated in February 2020 by PILP-NJCM together with a coalition of civil society organisations and two individual claimants.**

# 5.1. Ethnic profiling by the police

Over the last ten years, quite some academic research has been in conducted relating to the practice of ethnic profiling in the Netherlands. In 2013, the Dutch section of Amnesty International published a report in which it concluded that ethnic profiling takes place on a structural basis in the country, going beyond the level of isolated incidents. The rapport did not come as a surprise for NGOs, activists and lawyers working in the field.[87] At the press conference of Amnesty International, the municipal police of Amsterdam admitted that ethnic profiling takes place and that this constitutes a problem. However, the national Dutch police, supported by various political parties, declared that it did not consider ethnic profiling to be a structural problem.

When PILP-NJCM started in early 2014, this was one of the first cases we took on. We wanted to support Amnesty International, grass roots organisations, activists , lawyers and legal scholars who were combatting the practice of ethnic profiling, by finding an angle for strategic litigation. We decided to focus on the fact that the government (and the national police) refused to acknowledge that ethnic profiling is a structural problem. The community and experts argued that the (meagre) measures taken by the government and the police to combat ethnic profiling would not suffice as long as the core of the problem would not be addressed. In other words, as long as the issue would be seen as accidental and as being caused by a 'few rotten apples in the police force', no structural change would be possible. Hence, in the legal proceedings envisioned by PILP-NJCM, **the goal was to request the judge to declare that ethnic profiling is a structural problem, which should be addressed by the government and the police as such. Winning such a case could strengthen the broader campaign against ethnic profiling.**

PILP-NJCM spent a year and a half preparing this case, together with 15 young black men who were ethnically profiled, and with other NGOs, lawyers and scholars. Then, because of the fantastic work by the community, NGOs as Amnesty International and Controle Alt Delete and several incidents in the media, the national police shifted its position and declared ethnic profiling was in fact a structural problem that required a structural approach.

Although this was a great first step (at least on paper) in combatting ethnic profiling by the police, it did mean **the tool of strategic litigation, at least the envisioned angle for strategic litigation, was not the best route to take anymore. The campaign continued, but we stopped the preparations for the case.**

# 5.2. Ethnic profiling by the border police

Soon after the police decided to change their approach to ethnic profiling, we were approached by a Dutch citizen of colour, Mr. B., who was familiar with PILP's work on ethnic profiling and who wanted to start a complaint procedure against the Dutch border police.

Mr. B. had given a lecture on human rights in Italy. When he returned to the Netherlands and arrived at the airport in April 2018, he was taken out of the line by the border police, and his passport was checked. Mr. B. observed that only people of colour were being taken out of the line. He inquired with the border police whether they were aware of this fact. The officer responded that the border police must be alert for potential criminals, terrorists and refugees.

Mister B. felt that he was ethnically profiled. PILP-NJCM therefore helped him to file a complaint with the border police. The complaint procedure provided much insight in the manner in which the border checks and the border police operate. In their statements relating to the check of mister B., the officers said:

*"The reason for me to select [claimant 1] was to have my colleague check his nationality, identity and immigration status."*

*"Selection criteria on this flight from Italy were, for me: walking quickly, smartly dressed, person of non-Dutch background, travelling alone or with family. [...] In that instance, [claimant 1] met the criteria, because he was walking quickly, was well-dressed, was travelling alone and, in addition, had the appearance of a non-Dutch person, potentially a foreign national. In our official capacity we are aware that there is significant traffic of Nigerians travelling from Italy with large amounts of cash in hand, which is something that makes screening worthwhile for us."*

At the complaint hearing, the complaint committees chair told Mr. B. that is was true that he did look like a 'non-Dutch person.'

Although the complaint was won, it was not correctly decided in Mr. B.'s favour. The committee considered there was ethnic profiling and that this was wrong, but only because the border police had failed to 'prevent the appearance of ethnic profiling'. The committee also thought it relevant to state that the officers did not have the intention to ethnically profile.[88] **The case did not only show how ethnic profiling works and how biased the border police practices and profiles are, it also proved the official complaint procedures could not lead to real change (and hence that further litigation was necessary).** There was quite some media attention for the incident, even leading to questions being asked in Parliament.

Earlier, in 2017, a similar case had been dealt with by the National Ombudsman. The plaintiff, Mr. G., a man of colour and a Dutch pilot, living in Spain, travelled back quite often to the Netherlands to visit family. He noticed he got taken out of the row by the border police time and time again for no apparent reason. The Ombudsman decided there had indeed been ethnic profiling at the Dutch airport in question.

# 5.3. National case against the State

When a coalition of NGOs, lawyers and activists, coordinated by PILP-NJCM, decided to bring a new case against the State on ethnic profiling at the Dutch borders, we wanted to include the cases of Mr. B. and Mr. G. The men both agreed to become co-plaintiffs. They did not participate in the case to obtain damages or to get justice for what had happened to them in the past. Their goals for joining the case and the campaign were to stop ethnic profiling, for the sake of their future travels and for the travels of all people of colour through Dutch borders.

The case was launched in February 2020. It was written by the lawyers of PILP-NJCM, with help from pro bono lawyers and much input from all partners: the NGOs, activists and citizens that took part in this court case. The legal framework that was relied on, apart from the specifics on the Dutch legal requirements, can be found in chapter 3 of this Guide. Claimants in the case are the two citizens B. and G., together with a number of human rights and anti-discrimination NGOs, who filed the case in the public interest (something that is possible in the Netherlands, but not in all countries).

**The summons in this case aim to convince the judges that ethnic profiling should be condemned as a discriminatory practice that violates human rights, and are written in such a manner that they reflect the campaign of the community and the broader coalition behind the case.** The summons hence discuss the facts of what happened to the two individual citizens that act as claimants in the case, serving as a clear illustration of the practices the case aims to challenge, as well as facts about the broader issues that are at play, based on academic research and (inter) national sources.

The core of the case is about demonstrating both the fact that ethnic profiling takes place on a systemic basis, and the argument that this is explicitly enabled by the Dutch laws and the border police's procedures. The State and the border police have explicitly stated they think ethnicity can be an element of a risk profile on the basis of which someone is stopped, searched or checked. This makes the case quite clear cut: the key issue is whether or not ethnicity may be used as a factor.

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Preparing the summons was an extensive process, in which PILP-NJCM's lawyers participated in multiple international meetings with lawyers and NGOs in other countries that use strategic litigation to combat ethnic profiling. Amongst the coalition behind our case, we had meetings on the merits, as well as on the representation of the case, and about questions such as how to describe and define all victims of ethnic profiling within one category.

The launch of the case was reported on national television and in all major national newspapers. From the general public the coalition received much positive as well as much negative feedback. Our most visible client, Mr. B., personally received support, but also many insults, threats and racist remarks. We expect the verdict of the Court at First Instance at the start of 2021.

To provide the reader with a good sense of the framing we used around the case, we have included our (English) press release below.

# 5.4. Press release

On Wednesday, 26 February 2020, a civil society coalition will summon the Dutch state to appear in court for ethnic profiling by the Royal Netherlands Marechaussee (Dutch border police). The plaintiffs include two private citizens, Amnesty International, Controle Alt Delete, anti-discrimination organisation RADAR and the Public Interest Litigation Project, part of the Dutch section of the International Commission of Jurists (PILP-NJCM). They are demanding that the court draw a line and put an end to discriminatory border control activities. They assert that the Dutch border police is acting in violation of human rights and Dutch law. In recent years, the plaintiffs have put this problem on the agenda and insisted on measures to fight ethnic profiling; sadly, these efforts have been to no avail. This is why they are taking this case to court today.

## DISCRIMINATION BY THE DUTCH BORDER POLICE

During border control operations, the border police select people on the basis of their appearance, skin colour or origin (ethnicity), amongst other things. This determines, in part, whether or not someone is removed from the queue. **The Dutch border police also applies general risk profiles that incorporate ethnicity**, such as "men who walk fast, are well-dressed and who don't 'look Dutch'". This is ethnic profiling, a form of discrimination that violates human rights and Dutch law and is therefore prohibited.

## GOVERNMENT FAILS TO PROTECT CITIZENS FROM DISCRIMINATION

The Minister of Defence and the Minister for Migration are responsible for border controls enforced by the Dutch border police. They allow for the use of ethnicity, in conjunction with other characteristics. In doing so, they are condoning discrimination by the Dutch border police. This is detrimental to the people it affects, contributes to the stigmatisation of ethnic minorities, undermines confidence in the government and ultimately only proves to be ineffective in the fight against crime.

## PLAINTIFFS ASK THE JUDGE TO DRAW A LINE

Amnesty International, Controle Alt Delete, RADAR, PILP-NJCM and the individual plaintiffs involved in the case have made repeated efforts to draw the government's attention to the harmful effects of ethnic profiling. For years, international human rights monitors have also been reminding the Dutch state of its duty to protect citizens from discrimination and to prevent ethnic profiling. The two citizens who are plaintiffs in this case have lodged complaints with the Dutch border police and the National Ombudsman, but this failed to produce any substantial improvements in the situation. In filing this lawsuit, the plaintiffs are asking the court to draw a line and prohibit the state from allowing the Dutch border police to use ethnicity in selection decisions and incorporate it in risk profiles for border controls.

## A CASE OF INTERNATIONAL IMPORTANCE

Ethnic or racial profiling of minorities and immigrant communities has been reported across Europe and the United States, including within the context of immigration control. There have also been many court challenges to discriminatory police stops. In our view, the Dutch case is unique in that it challenges a government's policy and legislation that specifically allows for the use of ethnicity as one of the elements justifying a border stop and check. Still, the court's judgment will be relevant in Europe and globally, as **it relates to the checks of all people travelling within Europe** and, because the plaintiffs are invoking fundamental European rights.


Photo by Thomas de LUZE @thomasdeluze on Unsplash

# Endnotes

## CHAPTER 1

1. European Commission against Racism and Intolerance (ECRI), *General policy recommendation No 11 on combating racism and racial discrimination in policing*, adopted on 29 June 2007, par. 1. Available at: https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.11 It should, however, be noted that multiple definitions are used, even on a European level. According to the European Union Agency for Fundamental Rights for instance, ethnic profiling involves "treating an individual less favourably than others who are in a similar situation (in other words 'discriminating'), for example, by exercising police powers such as stop and search; where a decision to exercise police powers is based only or mainly on that person's race, ethnicity or religion." Report of the European Union Agency for Fundamental Rights (FRA), *Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, 2010, p. 15. Available at: https://fra.europa.eu/en/publication/2010/towards-more-effective-policing-understanding-and-preventing-discriminatory-ethnic; see generally on the issue of defining ethnic profiling: Open Society Justice Initiative, *Reducing Ethnic Profiling in the European Union: A Handbook of Good Practices*, 2013, Chapter 1. Available at: https://www.justiceinitiative.org/publications/reducing-ethnic-profiling-european-union-handbook-good-practices

2. With respect to the drafting of suspect profiles, the UN's Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism has noted that drafting a profile description of terrorist profiles based on race is incompatible with the principles of human rights and that such profiling practices are unsuitable and ineffective methods for identifying potential terrorists. See: UN Assembly, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/4/26, 29 January 2007, p. 83. Available at: https://unispal.un.org/DPA/DPR/unispal.nsf/1ce874ab1832a53e852570bb006dfaf6/813e9af0b820e2e58525730800513beb?OpenDocument

3. Amnesty International Netherlands, *Proactief politieoptreden vormt risico voor mensenrechten* [Proactive police action poses threat to human rights], 2013, p. 9: "Ethnic profiling explicitly arises when police officers make statements in stereotypes or negative terms about migrants or certain ethnic minorities. Or when police officers openly use characteristics linked to a person's skin colour or ethnic background as a reason for stopping or screening. Ethnic profiling is, however, often based on unconscious assumptions and conventional imaginary stereotypes about certain ethnic minorities, at both the organisational and operational levels. If there is no objective justification for unequal treatment, then such treatment must be considered discrimination – regardless of the intent, and regardless of whether those involved were aware of the potentially discriminatory effect." An English summary of the report is available at: https://www.amnesty.nl/actueel/proactief-politieoptreden-leidt-tot-discriminatie-in-nederland

4. European Union Agency for Fundamental Rights, *Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, 2010, p. 42. Available at: https://fra.europa.eu/en/publication/2010/towards-more-effective-policing-understanding-and-preventing-discriminatory-ethnic

5. U. Ikram, *Social Determinants of Ethnic Minority Health in Europe*, University of Amsterdam, 2016, p. 157 et seq. Available at: https://dare.uva.nl/search?identifier=f209d712-f5d2-4d4c-8a6b-4b50d43e891c

6. See interviews by Amnesty International [in Dutch]: https://www.amnesty.nl/wat-we-doen/themas/discriminatie/etnisch-profileren

7. W. Landman & L. Kleijer-Kool, *Boeven vangen. Een onderzoek naar proactief politieoptreden* [Catching bad guys: A study of proactive police action]. Police & Science, Reed Business, 2016, p. 191; see also on how ethnic profiling in identity checks relates to broader experiences of discrimination and exclusion: Human Rights Watch, *The Root of Humiliation. Abusive Identity checks in France*, 2012. Available at: https://www.hrw.org/report/2012/01/26/root-humiliation/abusive-identity-checks-france

8. Amnesty International Netherlands in cooperation with Open Society Justice Initiative, *Equality under pressure: The impact of ethnic profiling*, 2013, p. 5, 14-17. Available at: https://www.justiceinitiative.org/publications/equality-under-pressure-impact-ethnic-profiling-netherlands

9. European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey (EU-MIDIS II): Muslims – Selected findings*, 2017, p. 59. Available at: https://fra.europa.eu/en/publication/2017/second-european-union-minorities-and-discrimination-survey-muslims-selected; see also on the impact on individuals' sense of belonging: Open Society Justice Initiative and Rights International Spain, *Under Suspicion: The Impact of Discriminatory Policing in Spain*, 2019. Available at: https://www.justiceinitiative.org/publications/under-suspicion-the-impact-of-discriminatory-policing-in-spain;

10. *Secondant*, 'Vertrouwen in de politie blijft bij sommige burgers achter' [Trust in the police remains low among some sectors of the public], 30 July 2018.

11. W. Landman & L. Kleijer-Kool, *Boeven vangen. Een onderzoek naar proactief politieoptreden*, p. 180.

12. Amnesty International, *Proactief politieoptreden vormt risico voor mensenrechten*, p. 66 - 67; See also: *De Telegraaf*, 'De kwestie preventief fouilleren: Niet effectief en grote negatieve gevolgen' [The question of preventive frisking: not effective, and high negative impact], 14 September 2019.

13. M.A.H. van der Woude, J. Brouwers & T.J.M. Dekkers, *Beslissen in grensgebieden* [Decisions in border areas], Boom Criminologie, 2016.

## CHAPTER 2

14. Supreme Court of the United States, 17 May 1954, (*Brown v. Board of Education*), 347 U.S. 483 (1954).

15. National Association for the Advancement of Colored People, founded in 1909 in response to the ongoing violence again Black people in the United States of America and the NAACP Legal Defense Fund. See: https://www.naacp.org/ and https://www.naacpldf.org/

16. See: https://www.history.com/topics/black-history/brown-v-board-of-education-of-topeka

17. See: https://www.nps.gov/brvb/learn/historyculture/mythtruth.htm

18. Excerpt from: *Brief for the United States as Amicus Curiae: Oliver Brown, et al. v. Board of Education of Topeka*, 347 U.S. 483 (1954), see: https://edsitement.neh.gov/sites/default/files/2018-08/brief_in_brown_v_board_of_education.pdf

19. See: https://www.oah.org/tah/issues/2017/february/the-troubled-history-of-american-education-after-the-brown-decision/

20. Like *Brown v. Board of Education of Topeka (2)*, See: *Oyez*, https://www.oyez.org/cases/1940-1955/349us294

21. See: https://www.history.com/topics/black-history/central-high-school-integration

22. See: https://www.theguardian.com/world/2014/mar/20/dutch-politician-geert-wilders-moroccans-outrage-pvv-party-anti-islam

23. One of the criticisms that was voiced was that the case would strengthen Wilders and his party, by making him 'a martyr of free speech'. See, for instance (in Dutch): https://wijblijvenhier.nl/28393/wilders-held-martelaar-van-het-vrije-woord/

24. This reflects the personal opinion and experiences of co-author Jelle Klaas, who has been active in the anti-racist movement in the Netherlands since 2000.

25. In some other countries you might not be able to get judges to decide in favour of minorities rights or human rights, but strategic litigation could still be beneficial for the others reasons described in this chapter.

26. An example of this is our 'SyRI case' in which the law was put out of commission by the court. See: https://pilpnjcm.nl/dossiers/profiling-en-syri/

27. See, for instance, cases *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company that ended in a settlement that also benefited the community*: https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al

28. *Elmardy v. Toronto Police Services Board 2017, see:* https://www.lawtimesnews.com/news/focus-on/damages-awarded-in-racial-profiling-case/262703

29. Ibid.

30. Like the claimants in LGBTIQ cases in former Yugoslav countries, see, for instance, United Nations Development Programme, *BEING LGBTI IN EASTERN EUROPE: SERBIA COUNTRY REPORT, A participatory review and analysis of the legal, institutional, policy and socio-economic environment for lesbian, gay, bisexual, transgender and intersex people, and civil society* (2017), p. 35. Available at: https://www.rs.undp.org/content/serbia/en/home/library/poverty/being-lgbti-in-serbia.html

31. *Like one of the leaders of the Dutch anti-racist movement, Jerry Afriye, who dais he lost his job as a security guard because of his activism, which included organising protests and court cases. See (in Dutch):* https://joop.bnnvara.nl/opinies/baan-als-beveiliger-definitief-kwijt

32. Like the claimants in the *Brown v. Board of Education* case, as mentioned above.

**33.** 'An amicus curiae brief is a written submission to a court in which an amicus curiae (literally a "friend of the court": a person or organization who/which is not party to the proceedings) can set out legal arguments and recommendations in a given case.' Description taken from the website of ECCHR, see: https://www.ecchr.eu/en/glossary/amicus-curiae-brief/

**34.** South Africa has a history of activists wearing the same t-shirts to express and strengthen an issue. See, for instance: http://www.saha.org.za/news/2014/April/the_powerful_role_of_t_shirts_in_activism_and_party_politics_in_south_africa.htm

**35.** See: https://tac.org.za/category/about/

## CHAPTER 3

**36.** ECtHR 16 March 2010, no. 42184/05 (*Carson and others v. the United Kingdom*), par. 61; European Court of Human Rights 29 April 2008, no. 13378/05 (*Burden v. the United Kingdom*), par. 60.

**37.** One example of indirect discrimination can be found in European Court of Human Rights 24 May 2016, no. 57325/00, 2007 (*D.H. and others v. the Czech Republic*).

**38.** ECtHR 29 April 2008, no. 13378/05 (*Burden v. the United Kingdom*), par. 60; European Court of Human Rights 22 March 2016, no. 23682/13 (*Guberina v. Croatia*), par. 69.

**39.** The material right to which the Article 14 complaint is linked need not be violated for the invocation of Article 14 to be allowed by the European Court of Human Rights European Court of Human Rights 8 July 2003, no. 31871/96 (*Sommerfeld v. Germany*). Further, the European Court of Human Rights applies a broader scope of application of the material right linked to a complaint under Article 14: it is sufficient if the facts of the case are broadly related to issues that are protected by that material right. See, for example, European Court of Human Rights 17 January 2017 (*A.H. and others v. Russia*), no. 6033/13, par. 380f.

**40.** ECtHR 26 March 1985, series A no. 91 (*X and Y v. the Netherlands*), p. 11, par. 22.

**41.** ECtHR 12 January 2010, no. 415/05 (*Gillan and Quinton v. the United Kingdom*), par. 61-62; see also ECtHR 15 May 2012, no. 49458/06 (*Colon v. the Netherlands*).

**42.** ECtHR 12 January 2010, no. 415/05 (*Gillan and Quinton v. the United Kingdom*), par. 63.

**43.** ECtHR 13 December 2005, no. 55762/00 and 55974/00 (*Timishev v. Russia*).

**44.** CJEU 13 December 1994, C-306/93, (*SMW Winzersekt GmbH v. Land Rheinland-Pfalz*), par. 30.

**45.** Explanatory report to the Charter of Fundamental Rights, OJ 2007, C 303/17.

**46.** CJEU 30 April 2014, C-390/12, ECLI:EU:C:2014:281 (*Pfleger*).

**47.** CJEU 16 July 2005, C-83/14, ECLI:EU:C:2015:480 (*CHEZ Razpredelenie Bulgaria AD/Komisia za zashtita ot diskriminatsia*).

**48.** See: https://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx; for further guidance on the ICERD and the CERD, see for instance Minorities Rights Group International and International Movement Against All Forms of Discrimination and Racism (IMADR), *The International Convention on the Elimination of All Forms of Racial Discrimination: A Guide for NGOs*, 2001. Available at: https://minorityrights.org/publications/icerd-a-guide-for-ngos-january-2001/

**49.** https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx ; See for more information about the individual complaints procedure for instance: United Nations Human Rights Office of the High Commissioner, *Individual Complaint Procedures under the United Nations Human Rights Treaties*, Fact Sheet No. 7/Rev. 2, 2013, Chapter II-C. Available at: https://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx

**50.** UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, paragraph 20.

**51.** ECtHR 22 December 2019, nos. 27996/06 and 34836/06 (*Sejdić and Finci v. Bosnia and Herzegovina*).

**52.** For an overview of jurisprudence and concluding observations by the Human Rights Committee on ethnic profiling, see: Open Society Justice Initiative, Case Digests, International Standards on Ethnic Profiling: Decisions and Comments from the UN System, 2016. Available at: https://www.justiceinitiative.org/publications/case-digests-international-standards-ethnic-profiling-decisions-and-comments-un

**53.** See: https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr

## CHAPTER 4

**54.** A case digest with a similar purpose was published in 2013 by the Open Society Justice Initiative. In order not to be repetitive, this chapter focuses on recent cases dealing with ethnic profiling. For more cases concerning ethnic profiling please see the case digest from Open Society Justice Initiative titled "International Standards on Ethnic Profiling: Standards and Decisions from the European Systems", 2016, available at: https://www.justiceinitiative.org/publications/case-digests-international-standards-ethnic-profiling-standards-and-decisions

**55.** ECtHR 13 December 2005, no. 55762/00, 55974/00 (*Timishev v. Russia*).

**56.** See: https://www.justiceinitiative.org/litigation/timishev-v-russia.

**57.** ECtHR 16 April 2019, no. 48474/14 *(Lingurar v Romania)*.

**58.** Romani CRISS (*Romani Center for Social Intervention and Studies*) is a Romanian non-government organization which seeks to protect the rights of the country's Romani minority and to prevent discrimination against Roma. For more information please visit: www.romanicriss.org.

**59.** The European Roma Rights Centre (ERRC) is a Roma-led international public interest law organization working to combat anti-Romani racism and human rights abuse of Roma through strategic litigation, research and policy development, advocacy and human rights education. For more information please visit: www.errc.org.

**60.** *Lingurar v Romania*, par. 77.

**61.** *Timishev v. Russia*, par. 58.

**62.** *Id.*, par. 80.

**63.** UN Human Rights Committee 27 July 2009, UN Doc CCPR/C/96/D/1493/2006, *Williams Lecraft v Spain*, Merits.

**64.** Women's Link Worldwide (WLW) is an international NGO working to advance women's rights through the implementation of international human rights law, specifically by mainstreaming gender crimes into litigation based on universal jurisdiction. For more information please visit: www.womenslinkworldwide.org.

**65.** SOS Racismo Madrid is a Spanish non-profit organization, established in 1992 with the aim of fighting racism and xenophobia. For more information please visit www.sosracismomadrid.es.

**66.** *Williams Lecraft v Spain*, par. 7.2.

**67.** *Id.*, par. 10.

**68.** Open Society Justice Initiative, "Summary of the case of Rosalind Williams Lecraft v. Spain" (2010) p. 4, available at: https://www.womenslinkworldwide.org/files/1188/resumen-de-la-sentencia-solo-en-ingles.pdf

**69.** United Kingdom: House of Lords (Judicial Committee), 9 December 2004, UKHL 55, *Regina v. Immigration Officer at Prague Airport and Another*, Ex parte European Roma Rights Centre and Others.

**70.** Liberty is an independent membership organisation, that challenges injustice, defends freedom and campaigns to ensure everyone in the UK is treated fairly. For more information please visit www.libertyhumanrights.org.uk.

**71.** *Regina v. Immigration Officer at Prague Airport and Another*, par. 74.

**72.** ECtHR 7 February 2006, no. 57325/00 (*D.H. and Others v. Czech Republic*).

**73.** James A. Goldston is the executive director of the Open Society Justice Initiative and a member of the New York Bar.

**74.** Open Society Justice Initiative, "International Standards on Ethnic Profiling: Standards and Decisions from the European Systems", p. 12.

**75.** ECtHR 12 January 2010, no. 4158/05 (*Gillan and Quinton v. UK*).

**76.** First issued in 2003 but revised and renewed. Police and Criminal Evidence Act 1984 Codes of Practise (order), 2008 (Eng.)

**77.** Police and Criminal Evidence Act 1984 Codes of Practise (order), 2008 (Eng.), par 2.25 of Code A.

**78.** Ms. Corinna Ferguson is a lawyer in London, working with the human rights organisation Liberty.
For more information please visit www.libertyhumanrights.org.uk.

**79.** ECtHR 24 June 2008, no. 28940/95 (*Foka v. Turkey*), par. 74.

**80.** Gillan and Quinton v. UK, par. 64.

**81.** ECtHR 8 May 2017, (*Seydi and others v. France*).

**82.** First, the claimants were represented by Slim Benachour, member of the *Syndicat des Avocats de France* and Felix de Belloy from the Paris law-firm Beauquier, Belloy, Gauvain. At the Court of Cassation the law firm Lyon-Caen & Thiriez represented them.Lyon-Caen & Thiriez is a law firm working in public, private, criminal and international law. For more information please visit: www.lyoncaen-associes.com.

**83.** In the new application, legal representation is provided by Slim Benachour and Felix de Belloy, together with Justice Initiative lawyers Rupert Skilbeck, member of the London Bar, and James Goldston, member of the New York Bar. James A. Goldston is the executive director of the Open Society Justice Initiative and a member of the New York Bar. Rupert Skilbeck is the head of litigation at the Open Society Justice Initiative.

**84.** *Zeshan Muhammed v. Spain* (ECHR, 5 May 2017).

**85.** The case of Mr. Muhammed was litigated by Mercedes Melon, a human rights lawyer conducting litigation as well as legal research and advocacy for the Open Society Justice Initiative.

**86.** SOS Racisme Catalunya is an NGO based in Barcelona, founded in 1989, in defence of human rights from anti-racist action. For more information please visit: www.sosracisme.org.

## CHAPTER 5

**87.** Amnesty International, Dutch section, *Stop and search powers pose a risk to human rights. Acknowledging and tackling ethnic profiling in the Netherlands* (2013). English summary available at: https://www.amnesty.nl/content/uploads/2016/11/amnesty_stopandsearchpowersposearisktohumanrights.pdf?x45368

**88.** To conclude whether or not someone was discriminated *intention* is not relevant. The effect is what counts.

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