DOI:10.1017/ilm.2023.39

INTRODUCTORY NOTE TO BASU V. GER. AND MUHAMMAD V. SPAIN (EUR. CT. H.R.)

BY STEPHANIE FARRIOR*

[October 18, 2022]

In two cases decided on October 18, 2022, the European Court of Human Rights issued judgments for the first time in complaints alleging racial profiling in police identity checks. The applicants in both cases alleged that the police had selected them for a check due to racial discrimination, and both argued that the state had failed to conduct an effective investigation in response to their complaints. In one case, a unanimous court found a violation of the European Convention on Human Rights,[1] but in the other case, a sharply divided court decided 4–3 that there was no violation.[2] The cases raise serious questions about proof and evidence in racial profiling cases, as well as what policies and procedures would meet the state obligation to ensure an adequate legal framework to protect against racial discrimination.

Background

Racial profiling by police[3] has been recognized by numerous human rights bodies as a serious and pervasive problem that constitutes unlawful discrimination.[4] The Council of Europe's European Commission Against Racism and Intolerance (ECRI) has emphasized the "considerably negative effects" on the targets of racial profiling, as it "generates a feeling of humiliation and injustice . . . and results in their stigmatization and alienation."[5] The European Court of Human Rights has observed that racial profiling also contributes to "the spread of xenophobic attitudes in the public at large," and therefore hinders "an effective policy aimed at combating racial discrimination."[6]

The Complaints

The applicant in *Basu v. Germany* was a German national of Indian origin who was traveling with his daughter on a train that had just crossed the border from the Czech Republic into Germany when the police told him to produce their identity documents. When he asked for the reason, the police said it was just a random check. He filed a complaint alleging racial discrimination, saying he and his daughter were the only passengers in the train carriage with dark skin color, and the only passengers whose identity was checked. The domestic courts dismissed his complaint, saying he had no legitimate interest in a decision on the lawfulness of the check, hence there was no need to decide whether the check was prompted by racial discrimination.

The applicant in *Muhammad v. Spain* was a Pakistani national with long-term residency in Spain. He and the police conveyed conflicting accounts of what happened, agreeing only that the police stopped him on a public street for an identity check. The applicant asserted that when he asked whether he had been stopped because of his skin color, the police replied, "Yes, because you are black, and that's all." He said that when he protested, the police got out of their car, slapped him, put him into the car, and called him "monkey."[7] When he declined to produce his identity document, the police took him to the police station, at which point he produced his identification.

For their part, the police said they only stopped him to check his identity after he laughed at them and used "disrespectful slang" about them as they passed by. They said his "lack of respect toward authority" and "insolent attitude" were what had prompted the identity check.[8] The domestic courts found his complaint to be without merit, concluding that it was not the applicant's ethnicity, but his attitude, that led the police to conduct the check.

The Court's Judgments

The two cases raised the issue of whether the police identity checks in question violated Article14 (right to nondiscrimination in enjoying convention rights) in conjunction with Article 8 (right to respect for private life) of the European Convention on Human Rights.[9]

The Court in *Basu* found a procedural violation of Article 14, determining that the state had failed to conduct an effective investigation of the applicant's allegation of racial discrimination. The investigation was ineffective because those carrying it out were not "independent" of those being investigated,[10] but instead were their superiors. In addition, although the police said it was just a "random check," they did not give any "objective grounds for targeting the applicant."[11]An additional deficiency was that the respondents failed to hear the witnesses who were

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present during the identity check, which the Court considered "necessary evidence."[12] Because the state failed to conduct an effective investigation, the majority of the Court said it was "unable" to determine whether there had also been a substantive violation.[13]

Although he agreed that there was a procedural violation of the applicant's rights, Judge Pavli filed a partial dissent strongly disagreeing with the majority's conclusion that the state's failure to conduct an effective investigation precluded the Court from determining whether there had also been a substantive violation of the Convention. Given the Court's jurisprudence, which shifts the burden of proof to the state once an applicant has presented an arguable claim of racial discrimination, "why did the majority not shift the burden of proof onto the respondent to prove that the differentiated treatment was in fact in compliance with Article 14?" Allowing the ineffectiveness of a state's investigation to prevent the Court from deciding whether there was a substantive violation could "provide perverse incentives" to the authorities not to conduct effective investigations.[14]

Judge Pavli also criticized the majority for not including any information on the many statistical reports documenting racially motivated conduct by police in the state, and for failing to address the applicant's allegations that a weak legislative and regulatory framework actually facilitated racial profiling by police "by granting too much discretion."[15]

In *Muhammad*, a 5–4 majority of the Court found no violation because it saw no reason to depart from the domestic courts' conclusion that it was the applicant's attitude, and not his ethnicity, that caused the police to stop him for an identity check.[16] The Court thereby appears to condone Spain's reason for the identity check as legitimate, without having analyzed whether displaying a cocky attitude toward police is sufficient to make a coercive identity check serve a "legitimate purpose" as required in the limitations clause of Article 8 of the European Convention.

In both cases, the domestic courts rejected the complainants' request that they hear testimony from witnesses and the police present at the identity check. In *Basu*, the Court viewed this as a deficiency in the investigation, but in *Muhammad*, the Court accepted the domestic court's refusal to call the witnesses and its assertion that written statements would suffice, even though it can be especially important to examine witnesses in person when there are conflicting accounts of what happened.

Significance

The *Basu* and *Muhammad* cases are significant not only for being the first judgments of the European Court of Human Rights to address allegations of racial profiling in police identity checks, but also for the significant questions the Court's judgments left unanswered. These include the following.

1. *What are the legal requirements for identity checks by police that would safeguard against arbitrary checks due to racial discrimination? As the partial dissent in Basu put it: "What exactly is it that Article 14 prohibits when it comes to profiling by State agents?"*[17]

The Court did not address this question in *Basu* because it stopped its analysis upon finding a procedural violation. The Court in *Muhammad* also leaves this question somewhat open, as the applicant had asked the Court to find that the legal framework for protecting against racial discrimination was inadequate specifically because the law did not require a sufficiently well-founded reason to carry out identity checks, thus allowing for arbitrary and discriminatory checks. The majority simply concluded that the state's legal framework on racial discrimination was sufficient, without addressing the issue raised by the applicant.

When setting out the relevant international legal framework for examining a racial profiling allegation, the Court in *Muhammad* quoted the UN Human Rights Committee's approach, which asks whether the applicant "was singled out … solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct."[18] However, the Court then applied a different approach, asking whether the police "were motivated by animosity" against persons of the applicant's ethnicity, or were "motivated by racism." This animus requirement would exclude many cases that would meet the definition of racial profiling in policing articulated by ECRI.[19]

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2. *Does displaying a disrespectful attitude toward police, without more, make a police identity check legitimate under the Convention? Given its decision in Muhammad, the Court appears to think so. The Court did not, however, analyze the facts under the limitations requirements of Article 8.*

The Court considers that "the use of coercive powers . . . to require a person to submit to an identity check" amounts to an interference with Article 8 rights.[20] Such an interference can be permissible under the Convention if it meets the limitation requirements that the interference be "necessary" in the interest of a legitimate purpose, listed in Article 8 as including national security, public safety, and prevention of disorder or crime. Applying this standard, a court might well conclude that an identity check based on someone's disrespectful attitude is not "necessary," as persons who threaten one of those interests would likely want to avoid calling the attention of police to themselves, rather than overtly display a disrespectful attitude toward them.

3. *Are random checks, with no reason to suspect any wrongdoing by the individual targeted, consistent with the rights in the European Convention? If so, under what circumstances, and what protections must be in place to protect against unconscious bias from influencing who is selected for an identity check? Or should reasonable suspicion of illegal conduct be required for a check, so that the check would be based on conduct?*

As emphasized by Judge Pavli in his partial dissent, even if random checks are deemed permissible in limited contexts such as "border controls, mass crowd events, anti-terrorism preventive operations or other situations involving a large number of people," it is essential to put measures in place to prevent these situations "from turning into a legal loophole that grants police officers the power to stop people at a whim, whether in law or in practice." A possible approach to guard against arbitrary use of that power, he suggested, could be to set specific guidelines, such as checking individuals on every fifth car of a train, for example, in order to limit individual officer discretion. An assessment of what can constitute "reasonable suspicion" of illegal conduct would also be useful. In a case currently pending before the Court,[21] the police said the applicant aroused suspicion because he looked away from them. Although their report also made note of his dark skin color, the domestic courts refused to accept that racial discrimination played a role in his being selected for a police check simply for looking away from them.

4. *What evidentiary weight is carried by reliable statistical reports that document racial profiling by police as a widespread problem in the locale in question?*

The Court has in other cases given great weight to statistics to establish a difference in treatment: "[W]hen it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce."[22] The majority in *Muhammad*, though, appears to have agreed with the domestic court's assertion that the statistical evidence of widespread racial profiling by police in the respondent state lacked any probative value.

Conclusion

As of this writing, two additional cases alleging racial profiling in identity checks are pending before the European Court of Human Rights: *Wa Baile v. Switzerland*[23] and *Seydi and Others v. France*.[24] These cases offer the Court an opportunity to clarify its position on these unanswered questions and thereby provide needed protections against the widespread and insidious practice of racial and ethnic profiling by police.

ENDNOTES

1 Basu v. Germany, App. No. 215/19 (Oct. 18, 2022) [hereinafter, Basu].

2 Muhammad v. Spain, App. No. 34085/17 (Oct. 18, 2022) [hereinafter, Muhammad].

3 Racial profiling in policing is defined by the Council of Europe's European Commission against Racism and Intolerance (ECRI) as: "The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities."

4 *See, e.g.*, Open Society Justice Initiative, *International Standards on Ethnic Profiling: Decisions and Comments from*

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the UN System (July 2016) (providing a compilation of standards relevant to racial profiling from the ICCPR, CERD, and CRC, and the jurisprudence and recommendations on racial profiling of the UN human rights treaty bodies, UN Special Procedures, and the Universal Periodic Review).

5 Quoted in Basu, ¶ 14.

6 Muhammad, ¶ 38, quoting UN Human Rights Committee, Williams Lecraft v. Spain (CCPR/C/96/D/1493/2006).

7 Muhammad, ¶¶ 6–7.

8 Muhammad, ¶¶ 9–10.

9 Applicant Basu also alleged a violation of Article 1 of Protocol No. 12 (general prohibition of discrimination), but the Court decided not to address it since the facts alleged fell within Articles 8 and 14 (see ¶ 43).

10 Basu, ¶ 33.

11 Basu, ¶¶ 26, 29.

12 Basu, ¶ 37.

13 Basu, ¶ 38.

14 Partial dissent in Basu, ¶ 4.

15 Partial dissent in Basu, ¶¶ 9–10, 12.

16 Muhammad, ¶ 99.

17 Partial dissent in Basu, ¶ 15.

18 U.N.H.R.C., Williams Lecraft v. Spain (U.N. Doc. CCPR/C/96/D/1493/2006).

19 *See* ECRI definition of racial profiling in policing, *supra* note 3.

20 *See* Basu, ¶ 22.

21 Wa Baile v. Switzerland, App. No. 25883/21 (communicated to the Swiss Government on Aug. 28, 2020).

22 D.H. and Others v. Czech Republic, App. No. 57325/00, 47 Eur. H.R. Rep. 3 (2008), ¶ 188.

23 Wa Baile, *supra* note 21.

24 App. No. 35844/17 (communicated to the French Government on Oct. 25, 2021).

https://doi.org/10.1017/ilm.2023.39 Published online by Cambridge University Press

DOI:10.1017/ilm.2023.39

BASU V. GER (EUR. CT. H.R.)*
[October 18, 2022]

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BASU v. GERMANY

(Application no. 215/19)

JUDGMENT

Art 14 (+ Art 8) • Discrimination • Private life • Lack of independent effective investigation into arguable allegations of racial profiling by police during identity check on a train • Necessary threshold of severity attained for the check to fall within the ambit of Art 8 • Duty to investigate in order to protect from stigmatisation the persons concerned and to prevent the spread of xenophobic attitudes

STRASBOURG

18 October 2022

FINAL

18/01/2023

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

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In the case of Basu v. Germany,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georges Ravarani, *President,*

Georgios A. Serghides,

María Elósegui,

Darian Pavli

Anja Seibert-Fohr,

Andreas Zünd,

Frédéric Krenc, *judges,*

and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 215/19) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Biplab Basu ("the applicant"), on 19 December 2018;

the decision to give notice of the application to the German Government ("the Government");

the parties' observations;

Having deliberated in private on 20 September 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns a check of the applicant's identity by the police on a train. The applicant claimed that the identity check had been carried out because of his dark skin colour, and thus in a discriminatory manner, and that the authorities had failed to investigate sufficiently his allegations of racial profiling. The case raises an issue under Article 14 taken in conjunction with Article 8 and Article 13 of the Convention.

THE FACTS

2. The applicant was born in 1955 and lives in Berlin. He was represented by Ms M.J. Burkhardt, a lawyer practising in Berlin.

3. The Government were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 26 July 2012 two police officers carried out an identity check on the applicant, a German national of Indian origin, and his daughter, on a train which had just passed the border from the Czech Republic to Germany.

6. On 19 July 2013 the applicant brought an action with the Dresden Administrative Court for a declaration that the identity check had been unlawful. He submitted that section 23(1)(3) of the Federal Police Act (*Bundespolizeigesetz*; see paragraph 10 below) was not a valid legal basis for the interference with his right to self-determination in the sphere of information, as there had not been a valid reason for carrying out the identity check on him. Among the persons present in different compartments of the train carriage, the two police officers had only checked his identity papers and those of his daughter. When he had asked for the reasons for the identity check, one of the officers had explained to him that they were carrying out a random check. He had later added that cigarettes were frequently smuggled on that train, but confirmed that there had not been any specific suspicion in respect of the applicant in this regard. The applicant argued, however, that he and his daughter had been singled out as they were the only

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persons with a dark skin colour, and this was discriminatory. The defendant State considered the identity check to be lawful under section 23(1)(3) of the Federal Police Act and submitted that the applicant and his daughter had not been the only persons whose identity had been checked by the police on the train.

7. On 20 May 2015 the Dresden Administrative Court, having heard only the applicant (and not the applicant's daughter or the police officer who had carried out the check, who had been present as witnesses), dismissed the action as inadmissible. It found that the applicant did not have a legitimate interest in a judgment on the lawfulness of the identity check under section 23(1)(3) of the Federal Police Act after the act in question had ended.

8. On 17 November 2015 the Saxony Administrative Court of Appeal, endorsing the reasons given by the Administrative Court, refused to grant the applicant leave to appeal. It confirmed that the applicant did not have the necessary legitimate interest in a finding of the unlawfulness of the act in question after its termination. The identity check, without any data being stored, constituted only a minor interference with the applicant's right to self-determination in the sphere of information. Nor did the applicant have any interest with respect to rehabilitation. Such a check, in particular close to borders, was not unusual or stigmatising. The check had lasted only a few minutes and had been carried out by the police in an objective manner. The explanations which the police, in the applicant's own submission, had given for the check had not disclosed any discriminatory practice either. It did not appear that the act had even been noticed by anyone other than the applicant's daughter. There were no lasting consequences as the applicant, who had stated that he had stopped travelling by train after the incident, had started travelling by train again. The applicant – who had argued that numerous similar actions in the past years showed that German citizens with a dark skin colour were subjected to checks more often by the police than citizens with a white skin colour – had further not substantiated his allegation that he risked being subjected to an identity check in similar circumstances again. As the action was inadmissible for lack of a legitimate interest in a decision on the lawfulness of the identity check, the court did not need to decide whether the applicant had been treated in a discriminatory manner by that check.

9. On 19 June 2018 the Federal Constitutional Court declined to consider a constitutional complaint by the applicant (file no. 1 BvR 3196/15), in which the applicant had alleged a breach of his right to effective judicial protection, taken together with his right to self-determination in the sphere of information, his right to freedom of movement and the prohibition on discrimination.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LEGAL FRAMEWORK

10. Section 23 of the Federal Police Act, in so far as relevant, reads as follows:

> "Establishment of identity . . .
>
> (1) The Federal Police may establish the identity of a person
>
> . . .
>
> 3. within the border area, up to thirty kilometres behind the border, to prevent or stop unlawful entry into the federal territory or for the prevention of the offences specified in section . . ."
>
> . . .
>
> (3) The Federal Police may take the measures necessary to establish the identity of a person. In particular, they may stop the person concerned, ask for his or her personal data and request that the person concerned hand over identity documents for the purposes of identity checks . . ."

II. INTERNATIONAL LEGAL FRAMEWORK AND PRACTICE

A. United Nations Human Rights Committee

11. The United Nations (UN) Human Rights Committee dealt with alleged discrimination resulting from an identity check in its Views of 27 July 2009 on Communication No. 1493/2006 submitted by Rosalind Williams Lecraft against Spain (CCPR/C/96/D/1493/2006). Finding a breach of the prohibition of discrimination under Article 26,

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read in conjunction with Article 2, paragraph 3, of the International Covenant on Civil and Political Rights in the circumstances of the case, the Committee stated the following:

> "7.2 The Committee must decide whether being subjected to an identity check by the police means that the author suffered racial discrimination. The Committee considers that identity checks carried out for public security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.
>
> . . .
>
> 7.4 In the present case, it can be inferred from the file that the identity check in question was of a general nature. The author alleges that no one else in her immediate vicinity had their identity checked and that the police officer who stopped and questioned her referred to her physical features in order to explain why she, and no one else in the vicinity, was being asked to show her identity papers. These claims were not refuted by the administrative and judicial bodies before which the author submitted her case, or in the proceedings before the Committee. In the circumstances, the Committee can only conclude that the author was singled out for the identity check in question solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct. Furthermore, the Committee recalls its jurisprudence that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. In the case under consideration, the Committee is of the view that the criteria of reasonableness and objectivity were not met . . ."

B. European Commission against Racism and Intolerance

12. The Council of Europe's European Commission against Racism and Intolerance (ECRI) adopted General Policy Recommendation No. 11 on combating racism and racial discrimination in policing on 29 June 2007 (CRI (2007)39). It defines racial profiling as follows:

> "1. . . . For the purposes of this Recommendation, racial profiling shall mean:
>
> The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities;"

13. The ECRI recommends to the governments of Member States, *inter alia*:

> "9. To ensure effective investigations into alleged cases of racial discrimination or racially-motivated misconduct by the police and ensure as necessary that the perpetrators of these acts are adequately punished;
>
> 10. To provide for a body, independent of the police and prosecution authorities, entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police; . . ."

14. The Explanatory Memorandum to the Recommendation, regarding paragraph 1 of the Recommendation, provides, in so far as relevant:

> "34. iii) . . . Research has shown that racial profiling has considerably negative effects. Racial profiling generates a feeling of humiliation and injustice among certain groups of persons and results in

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> their stigmatisation and alienation as well as in the deterioration of relations between these groups and the police, due to loss of trust in the latter . . . "

15. Paragraph 11 of ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002, in the version applicable at the relevant time, reads as follows:

> "The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination."

III. EUROPEAN UNION LAW

16. The European Union Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in so far as relevant, provides:

Recital 21

> "The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought."

Article 8

Burden of proof

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

17. The applicant complained that he had been subjected to an identity check only because of his skin colour, and that the domestic courts had refused to investigate that breach of the prohibition on discrimination. He relied on Article 14 of the Convention, which provides:

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

18. The Court, having the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles of the Convention that are different from those relied upon by the applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018), considers that the applicant's complaint falls to be examined under Article 14 read in conjunction with Article 8 of the Convention. The latter provision reads as follows:

> "1. Everyone has the right to respect for his private . . . life, . . .
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national

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security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. The parties' submissions

19. The Government argued that a mere identity check did not fall within the ambit of the right to respect for private life under Article 8, which was thus inapplicable. They argued that there were no indications that the applicant had been the victim of racial profiling when the identity check was carried out by the police.

20. The applicant submitted that he had been subjected to an identity check only because of his dark skin colour. That discriminatory treatment had amounted to a serious breach of his rights. In order to avoid similar stigmatisation, he had stopped travelling by train for several months.

2. The Court's assessment

21. The Court reiterates that Article 8 protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see, *inter alia*, *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 61, ECHR 2010 (extracts)).

22. As to whether an identity check by the police falls within the scope of the private life of the person subjected to that check, the former Commission considered that the obligation to carry an identity card and to show it to the police whenever requested to do so did not as such, in the absence of any special circumstances, constitute an interference in a person's private life (see *Reyntjens v. Belgium*, no. 16810/90, Commission decision of 9 September 1992, Decisions and Reports 73, p. 152). The Court has found that the use of coercive powers conferred by legislation to require an individual to submit to an identity check and a detailed search of his person, his clothing and his personal belongings amounted to an interference with the right to respect for private life (see *Gillan and Quinton*, cited above, § 63, and *Vig v. Hungary*, no. 59648/13, § 49, 14 January 2021). The public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment (see *Gillan and Quinton*, cited above, § 63).

23. In certain contexts, the Court has considered it necessary to specifically examine whether the effects of the act in question attained a threshold of severity – that is, had serious negative effects on the individual's private life – in order for Article 8 to be applicable (see, in particular, *Denisov v. Ukraine* [GC], no. 76639/11, §§ 110-13, 25 September 2018). It has ruled, for instance, that an attack on a person's reputation must attain a certain level of seriousness and be carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life in order for Article 8 to come into play (see, *inter alia*, *Bédat v. Switzerland* [GC], no. 56925/08, § 72, 29 March 2016, and *Denisov*, cited above, § 112, with further references). In such circumstances, the Court considered that it was for an applicant to submit convincing evidence showing that the threshold of severity was attained. Applicants had to identify and explain the concrete repercussions on their private life and the nature and extent of their suffering, and to substantiate such allegations in a proper way (see *Denisov*, cited above, § 114).

24. The Court further reiterates that racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction (see, in the context of Article 14, *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII, and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 43, ECHR 2009).

25. Having regard to these principles, the Court considers that not every identity check of a person belonging to an ethnic minority attains the necessary threshold of severity so as to fall within the ambit of the right to respect for that person's private life. That threshold is only attained if the person concerned has an arguable claim that he or she may have been targeted on account of specific physical or ethnic characteristics. Such an arguable claim may notably exist where the person concerned submitted that he or she (or persons having the same characteristics) had been the

only person(s) subjected to a check and where no other grounds for the check were apparent or where any explanations of the officers carrying out the check disclose specific physical or ethnic motives for the check. The Court further observes in this regard that the public nature of the check may have an effect on a person's reputation (see paragraph 23 above) and self-respect.

26. The Court notes that the applicant had been subjected to an identity check by the police in public, on a train. In the applicant's submission, that check had only been carried out because of his dark skin colour and thus on racial grounds. He substantiated that allegation by his observation that of the persons present in different compartments of the train carriage, he and his daughter had been the only persons with a dark skin colour and the only persons who had been subjected to the check. Furthermore, the explanations given by the police officer who had carried out the check had not disclosed any other objective grounds for targeting the applicant. The Court therefore cannot agree with the Government's argument that in these circumstances, there was no arguable claim that the applicant had been targeted on account of specific physical or ethnic characteristics. The applicant further argued that the identity check under these conditions had had serious negative effects on his private life as he had felt so stigmatised and humiliated that he had stopped travelling by train for several months.

27. The Court considers that the applicant substantiated his argument that the identity check by the police under these special circumstances had had sufficiently serious consequences for his right to respect for his private life. The identity check in question therefore falls within the ambit of Article 8. Accordingly, Article 14 is applicable.

28. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

29. In the applicant's submission, the fact that he had been subjected to a check by the police only because of his skin colour amounted to a breach of Article 14. He argued that he and his daughter had been the only passengers with a dark skin colour and the only persons whose identity had been checked on the train. The police officers had explained that they were carrying out a random check, without being able to explain the criteria for choosing the persons to undergo the check. Despite the fact that he had substantiated his claim that the identity check amounted to discrimination and thus a serious breach of his rights, the domestic courts had failed to examine his complaint on the merits and had refused to establish the relevant facts, in particular by hearing his daughter and the two police officers who had carried out the check, as witnesses.

30. The Government accepted that, assuming that there had been an interference with Article 8, the State had been under a duty to investigate the allegations of racial profiling in view of the serious consequences for the persons concerned and the fact that only the State had the ability to establish the relevant facts. However, this duty had been complied with by the Federal Police. The Government submitted that the Pirna Office of the Federal Police, that is the superior police authority to the Dresden Office of the Federal Police, for which the police officer P., who had conducted the checks, worked, had carried out internal investigations into the applicant's allegations. P. had stated in the context of those investigations that the applicant had not been the only person whose identity had been checked during the police's randomised identity check of several passengers on the train. Furthermore, having questioned P. and having investigated all the police operations between January 2011 and June 2013 in which P. had participated, and the training courses he had followed, the investigations had not found any indications of racist motivation on the part of P. An examination by an independent authority, the courts, had not been carried out, but the administrative courts had given sufficient reasons for considering the applicant's action inadmissible for lack of a legitimate interest.

2. The Court's assessment

31. As to whether States are under an obligation to investigate possible racist motives of a State agent's act in the context of an alleged violation of Article 14 taken in conjunction with Article 8, the Court observes at the outset that this duty was not contested by the Government.

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32. The Court reiterates that generally, duties to investigate serve to ensure accountability through appropriate criminal, civil, administrative and professional avenues. In this context, it is important to reiterate that the State enjoys a margin of appreciation in determining the manner in which to organise its system to ensure compliance with the Convention (compare, *mutatis mutandis*, *F.O. v. Croatia*, no. 29555/13, § 91, 22 April 2021). It has previously recognised a duty to investigate in the context of Article 8 in certain circumstances in respect of acts of private individuals. In relation to a disclosure of personal data by non-State actors, for instance, it has found that the positive obligation inherent in the effective respect for private life under Article 8 implies an obligation to carry out effective inquiries in order to rectify the matter to the extent possible (compare *Craxi v. Italy (no. 2)*, no. 25337/94, §§ 74-75, 17 July 2003). Moreover, the Court has not excluded the possibility that the State's positive obligation under Article 8 to safeguard an individual's integrity may extend to questions relating to the effectiveness of an investigation (compare *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, § 96, ECHR 2005-VII (extracts), and *Burlya and Others v. Ukraine*, no. 3289/10, §§ 161 and 169-70, 6 November 2018). It finds that an obligation to investigate should even less be excluded in the context of Article 8 in relation to acts of State agents if the applicant makes an arguable claim that he has been targeted on account of specific physical or ethnic characteristics.

33. The Court reiterates that it has recognised that a duty of the authorities to investigate possible racist attitudes may be implicit in their responsibilities under Article 14 of the Convention in certain circumstances. It has notably found in the context of alleged violations of Article 14 taken in conjunction with Article 3 that State authorities have an obligation to take all reasonable measures to identify whether there were racist motives and to establish whether or not ethnic hatred or prejudice may have played a role in the events. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence (see *B.S. v. Spain*, no. 47159/08, § 58, 24 July 2012; *Boacă and Others v. Romania*, no. 40355/11, §§ 105-06, 12 January 2016; *Burlya and Others*, cited above, § 128; and *Sabalić v. Croatia*, no. 50231/13, §§ 94 and 98, 14 January 2021, with further references). For an investigation to be effective, the institutions and persons responsible for carrying it out must be independent of those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence (see *Burlya and Others*, cited above, § 127). The authorities' responsibilities under Article 14 to secure respect without discrimination for a fundamental value may also come into play when possible racist attitudes resulting in the stigmatisation of the person concerned are at issue in the context of Article 8.

34. In the context of an arguable claim of racial discrimination, the Court further reiterates that racial discrimination as prohibited by Article 14 is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction (see the case-law cited in paragraph 22 above). It refers in this context also to the ECRI's finding that racial profiling, in particular, results in the stigmatisation and alienation of the persons concerned by it (see paragraph 14 above). The ECRI accordingly stressed the importance for the States to ensure effective investigations into alleged cases of racial discrimination by the police (see paragraph 13 above). Moreover, as revealed by the UN Human Rights Committee, targeting only persons with specific physical or ethnic characteristics in identity checks negatively affects the dignity of the persons concerned and also contributes to the spread of xenophobic attitudes (see paragraph 11 above).

35. In the light of the above elements, the Court considers that once there is an arguable claim that the person concerned may have been targeted on account of racial characteristics and such acts, under the threshold conditions set out above (see paragraphs 21 et seq. above), fall into the ambit of Article 8, the authorities' duty to investigate the existence of a possible link between racist attitudes and a State agent's act is to be considered as implicit in their responsibilities under Article 14 of the Convention also when examined in conjunction with Article 8. This is essential in order for the protection against racial discrimination not to become theoretical and illusory in the context of non-violent acts falling to be examined under Article 8, to ensure protection from stigmatisation of the persons concerned and to prevent the spread of xenophobic attitudes.

36. In determining whether, in the present case, the State authorities complied with their obligation to take all reasonable measures to identify whether there were racist motives for the identity check, the Court observes that in the Government's submission, the superior police authority to the Dresden Office of the Federal Police, for

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which the police officer P., who had conducted the check, worked, had carried out an internal investigation into the incident. However, in view of the hierarchical and institutional connections between the investigating authority and the State agent which carried out the act in question, the investigations in this regard cannot be considered as independent (compare paragraph 33 above).

37. As for the proceedings before the administrative courts, the Court notes that those courts declined to examine the merits of the applicant's complaint about having been treated in a discriminatory manner by the identity check. Despite an arguable claim that the applicant may have been the victim of racial profiling, they failed to take the necessary evidence and, in particular, failed to hear the witnesses who were present during the identity check (see paragraph 7 above). They dismissed the applicant's action on formal grounds, considering that the applicant did not have a legitimate interest in a decision on the lawfulness of his identity check (see paragraphs 7 and 8 above).

38. In these circumstances, the Court must conclude that the State authorities failed to comply with their duty to take all reasonable measures to ascertain through an independent body whether or not a discriminatory attitude had played a role in the identity check, and thus failed to carry out an effective investigation in this regard. Therefore, the Court is unable to make a finding as to whether the applicant was subjected to the identity check on account of his ethnic origin.

39. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 8.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

40. The applicant further complained under Article 13 of the Convention that the domestic courts had refused to decide the merits of his complaint about the identity check, which he considered discriminatory and in breach of his right to freedom of movement. Article 13 provides:

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

41. The Court, having regard to its findings under Article 14 taken in conjunction with Article 8 above, considers that the applicant had an arguable complaint under these provisions of the Convention and that Article 13 of the Convention is thus applicable. It further notes that the applicant's complaint under Article 13 is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

42. The Court observes that it has found a breach of Article 14 taken in conjunction with Article 8 essentially because the administrative courts declined to examine the merits of the applicant's complaint about having been treated in a discriminatory manner by the identity check, which is also the gist of the applicant's complaint under Article 13. It therefore considers that the latter complaint does not raise a separate issue to be examined in addition to its findings under Article 14 taken in conjunction with Article 8 in the circumstances of the present case.

III. OTHER ALLEGED VIOLATION OF THE CONVENTION

43. Lastly, the applicant complained that his right to freedom of movement under Article 2 of Protocol No. 4 to the Convention had been violated in that there had not been a sufficient legal basis for the identity check.

44. In the light of all the material in its possession and in so far as the matter complained of is within its competence, the Court finds no appearance of a violation of Article 2 of Protocol No. 4 arising from this complaint. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

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> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

46. The applicant did not submit any claims for just satisfaction under Article 41 of the Convention. The Court therefore does not make an award in this respect.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 14 taken in conjunction with Article 8 of the Convention and under Article 13 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;
3. *Holds* that there is no need to examine the complaint under Article 13 of the Convention.

Done in English, and notified in writing on 18 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško — Registrar

Georges Ravarani — President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pavli is annexed to this judgment.

G.R.

M.B.

PARTLY DISSENTING OPINION OF JUDGE PAVLI

1. I have voted in support of the unanimous holdings that Article 14, taken in conjunction with Article 8 of the Convention, is applicable in this case; and that there has been a procedural violation of that provision on account of the flawed investigation into the applicant's allegations of racial discrimination. I also wish to recognise the groundbreaking nature of this judgment as, together with the judgment in *Muhammad v. Spain* (no. 34085/17, 18 October 2022, not final) adopted on the same day, these are the first cases in which the Court has considered allegations of racial profiling in police identity checks in a public space.

2. I am writing separately, however, as I do not concur with the majority's summary conclusion in the last sentence of paragraph 38 of the judgment that, owing to the respondent State's failure to conduct an effective investigation, "the Court is unable to find" whether there has been a substantive violation of Article 14. As the judgment includes a single operative provision (the second) on the merits of the Article 14 claims, without specifying whether the violation found is of a procedural or a substantive nature, I have been unable to formally vote against the effective finding of no substantive violation of that provision, this being the object of my partial dissent.

A. Direct discrimination and the reversal of the burden of proof: general principles

3. The Court has concluded under its admissibility analysis that the applicant put forward, at both the national level and in the Strasbourg proceedings, "an arguable claim that [he] had been targeted on account of specific physical[1] or ethnic characteristics". It reached this conclusion by relying on the uncontested allegation that the applicant and his daughter, being of dark skin, were the only individuals who had been subjected to the identity check in their part of the train; and that the police officer who had performed the check "had not disclosed any other objective grounds for targeting the applicant" (see paragraph 26 of the judgment).

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4. This conclusion begs the following question: in the presence of an arguable claim of *direct* discrimination on racial or ethnic grounds by a State agent, why did the majority not shift the burden onto the respondent to prove that the differentiated treatment was in fact in compliance with Article 14? I find that the judgment provides no persuasive answer to this question in effectively dismissing the applicant's claim that there has been a substantive violation of the anti-discrimination provision, in addition to the procedural violation. After all, it is a central tenet of our Article 14 jurisprudence that, as a rule, it is for the applicant to show a difference in treatment and for the Government to show that it was justified (see *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 57, 13 December 2015; *D.H. and Others v. the Czech Republic*, no. 57325/00, § 177, 13 November 2007; and *Di Trizio v. Switzerland*, no. 7186/09, § 84, 2 February 2016). It is the very function and purpose of rules on the allocation of the burden of proof to allow the Court to reach substantive conclusions in the absence of complete certainty about the facts of the case or other relevant considerations. Even the respondent Government have conceded that "only the State had the ability to establish the relevant facts" (see paragraph 30 of the judgment). It is therefore not necessary or appropriate to regard the investigative failures at the national level as a factor that would objectively prevent the Court from reaching conclusions on the substantive component. Among other reasons, this may provide perverse incentives to any national authorities which may not be inclined to "lift the lid" on either isolated or, worse still, systemic incidents of racial profiling by State agents. It also makes it nigh impossible for victims of racial profiling to succeed in a claim of a substantive violation in such circumstances.

5. In addition to our own jurisprudence, principles on the reversal of the burden of proof in the discrimination context are also firmly established in European law more generally, including European Union legislation and the standards of the Council of Europe's own European Commission against Racism and Intolerance (ECRI). These standards are cited in paragraphs 15-16 of the judgment, but it is not clear to what purpose. They state the relevant requirements in almost identical terms: when individuals establish "*facts from which it may be presumed that there has been direct or indirect discrimination*, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment" (see Article 8 of EU Directive 2000/43/EC, emphasis added; see also ECRI's General Policy Recommendation No. 7, paragraph 11).

6. Our jurisprudence to date has for the most part looked at conduct of State agents potentially motivated by racist or other discriminatory animus in the context of Article 3 of the Convention, involving, for example, acts of police brutality (see paragraph 33 of the judgment and the cases cited therein). It is true that in some of these cases the Court has chosen not to shift the burden of proof onto the respondents despite the failure of the national authorities to carry out an effective investigation into the allegations of discrimination – on the basis that such an approach would amount to requiring the respondent Government to prove the *absence* of a particular subjective attitude (see *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 157, 6 July 2005).

7. The present case, however, sits in a very different context. Firstly, unlike unjustified police violence, which is illegal and can be motivated by many different factors, an identity check of train passengers is presumably legal and ought to be based on sound and objective law-enforcement standards. Secondly, discrimination in this context may not be driven necessarily by a police officer's *individual and conscious* attitude or hostility against a particular racial or ethnic group; it may also be the result of biased (or at least permissive) internal police guidelines, practices or attitudes, whether formalised or merely tolerated by the hierarchy. To put it simply, it is not too much to ask of the Government in this context to merely show that the identity check had an objective and reasonable basis, not triggered exclusively or primarily by the person's race or the fact of belonging to another group. For similar reasons, it would place an unfair and often impossible burden on the applicants to require them to prove the State agent's discriminatory attitude. This would limit their chances to situations where a police officer would, say, be reckless enough to express his or her discriminatory motives and the future applicant would be lucky enough to have witnesses available. As such, it would hardly be fit to deter pernicious practices of racial discrimination by State agents.

8. Finally, the refusal to shift the burden of proof in cases of an arguable claim of *direct* discrimination by State agents would create some rather paradoxical effects – considering that the Court has often agreed to do so in situations where applicants have put forward a presumption of *indirect* discrimination, e.g. by providing evidence of an apparently neutral practice that has produced disproportionately harmful effects on a particular group of people (see

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Hoogendijk v. the Netherlands (dec.), no. 58641/00, 6 January 2005; *D.H. and Others*, cited above; and *Di Trizio*, cited above). In such circumstances, the Government are invited to rebut that presumption by pointing to objective factors underlying the practice or policy. I cannot see why applicants such as Mr Basu, claiming to be victims of direct discrimination in a police check, ought to be placed in a less favourable position.

B. The general national context and legal framework

9. Various international bodies have published findings regarding the degree of prevalence of problematic profiling practices by German law enforcement. The present judgment does not, however, include any information about the general national context. ECRI has addressed the issue in its last two reports on Germany; in the most recent one, from December 2019, it expressed concerns about allegations of racially motivated conduct by police forces and referred, for example, to a study in which 34 percent of respondents of sub-Saharan African background reported having been stopped by the police at least once within the past five years[2].

10. Another ECRI critique is more directly relevant to this case as it involved the same legal provision that was invoked as the basis for Mr Basu's identity check in the present case – section 23(1)(3) of the Federal Police Act (the "FPA", see paragraph 10 of the judgment) – as well as the internal police guidelines on identity checks, which are not publicly available. With respect to the latter, ECRI noted in its above-cited 2019 report (paragraph 107) that "even though a [national] higher administrative court considered the practical guidelines of the police as too vague to protect individuals against their abusive use, ECRI did not receive any information about any attempt to render them more precise". These were presumably the same laws and guidelines that were in force at the time when the present applicant was stopped during his train ride, on 26 July 2012.

11. German courts have also been critical of section 23 of the FPA and its application in certain contexts. The Baden-Württemberg Higher Administrative Court held in 2018 that section 23 did not provide a sufficient legal basis for an identity check involving a train passenger close to a border crossing; whereas a second court found that the police had misused their powers when carrying out an identity check at a train station where skin colour had been the decisive factor for the police officer in choosing to check the individual concerned[3]. Finally, section 23 of the German FPA has also been subject to review by the Court of Justice of the European Union in a 2017 case involving an individual who had been ID checked by the German police while crossing on foot the Europa bridge between Strasbourg and Kehl. The CJEU found that section 23 was incompatible with the Schengen Borders Code (on internal Schengen checks), considering that the checks were authorised irrespective of the behaviour of the person concerned and with no limitations as to the intensity and frequency of checks[4].

12. To be clear, these rulings did not hold that German legislation or secondary regulations directly authorised racial profiling by the police. They do strongly suggest, however, that they may facilitate, or are poorly crafted to prevent or deter, such practices by granting too much discretion to the police in making so-called randomised stops and too little objective guidance or restrictions against profiling based on racial or ethnic characteristics.

C. A substantive violation in the present case

13. In view of the above submissions, it is my position that the Court should have proceeded to consider whether there had been a substantive violation of Article 14, read in conjunction with Article 8, by assessing whether the respondent Government had been able to rebut the presumption that the applicant had been subjected to discriminatory treatment due to his skin colour. Before turning to the Government's arguments in this regard, it is necessary to make two preliminary points.

14. The first positive obligation of a State Party in this context is to establish a legislative and regulatory framework that is capable of effectively preventing and deterring police profiling on racial or other prohibited grounds (see, *mutatis mutandis*, on positive obligations under Article 14, *Volodina v. Russia*, no. 41261/17, 9 July 2019; *Budinova and Chaprazov v. Bulgaria*, no. 12567/13, 16 February 2021; and *Behar and Gutman v. Bulgaria*, no. 29335/13, 16 February 2021)[5]. The judgment's failure to address these questions is a significant omission in my opinion. In view of the international and national criticism discussed in the second part of this separate opinion, it is rather questionable whether the German legal framework on police checks can be considered compatible with the positive requirements of Article 14. Only a legal system that takes seriously the pernicious effects of racial discrimination,

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including in the form of improper police profiling of individuals, can be deemed to be in compliance with Article 14. Furthermore, the latest ECRI report includes no information as to whether German anti-discrimination legislation has properly incorporated the EU and ECRI standards on the distribution or reversal of the burden of proof in this field.

15. The next preliminary question relates to the substantive standard to be applied in this context – in other words, what exactly is it that Article 14 prohibits when it comes to profiling by State agents? This question has also remained without a clear answer, as the majority declined to address the claim of a substantive violation. I would argue that to some extent this is true also for the twin case of *Muhammad v. Spain* (cited above), which did consider the allegations of a substantive violation on the merits. The *Muhammad* judgment phrases the relevant question as to whether the police were "motivated by animosity against citizens who shared the applicant's ethnicity" (ibid., paragraph 100) or "motivated by racism" (ibid., paragraph 101) – thus placing a strong emphasis on the police officer's subjective attitude or animus as the sole basis for a finding of discriminatory treatment. In my view, the approach adopted by the UN Human Rights Committee in *Rosalind Williams Lecraft v. Spain* (CCPR/C/96/D/1493/2006) is more appropriate in this context, the key question being whether the complaining individual "was singled out ... solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct" (see paragraph 11 of the present judgment, citing paragraph 7.4 of the HRC Views).

16. Turning now to the facts of the present case, I have already noted the unanimous finding that the applicant submitted an arguable claim that he had been singled out on the basis of his skin colour – relying on facts from which an instance of direct discrimination by a State agent can be presumed. To rebut this presumption the respondent Government put forward two main lines of argument: (i) that the applicant and his daughter were not the only persons checked on the same train; and (ii) that an internal police investigation did not find any evidence of racist attitudes on the part of the police officer who conducted the search (see paragraph 30 of the judgment).

17. I find that neither of these arguments, taken alone or together, are capable of meeting the respondent's burden of proof. The fact that other passengers were also checked, perhaps in other parts of the train, does not prove much in the absence of any data on the racial or ethnic affiliation or appearance of those other checked passengers, or the reasons for checking their identity. Likewise, the previous history of the police officer may be of some relevance, but not decisive on its own. The respondent Government's arguments still leave us in the dark regarding two crucial considerations: (i) on what basis did the police officer make the specific decision to conduct an identity check of the applicant and his daughter on that train; and (ii) on what basis are such checks generally conducted by German border police under section 23(1)(3) of the FPA. These questions were not answered either at the national level or before the Court. To merely argue that the checks were randomised does not answer the question (and I return to the randomisation aspect below), especially considering the existence of internal guidelines of the German police, whose content remains unknown to the Court, on these issues.

18. The respondent Government have therefore been unable to rebut the presumption of direct discrimination on grounds of skin colour, by pointing to any objective, reasonable and colour-blind grounds for the differentiated treatment. If the Government's burden was made heavier due to the shortcomings of the investigation by the national authorities, I see no reason why this should work to the Government's favour or to the applicant's disadvantage (he would otherwise suffer twice from the poor domestic investigation). As a result, I would have found that there had been a substantive violation of the applicant's rights under Article 14, read together with Article 8, of the Convention.

D. The not-so-hidden costs of procedural minimalism

19. Today's cases have only begun to scratch the surface of the complex legal and policy questions surrounding (potentially) discriminatory profiling in Europe. By adopting a highly proceduralist approach and opting not to engage with these difficult questions of substance, the majority have done no favours to the cause of equality of individuals, the development of our jurisprudence, or even the goal of better policing around the continent at a time of great geopolitical turmoil and cross-border challenges.

20. Without seeking in any way to provide an exhaustive analysis or complete answers, the following key questions can be identified:

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(i) It has been argued that in order to prevent discriminatory profiling by the police or other related encroachments on individual liberty, national laws should require that identity checks be carried out only on the basis of a reasonable suspicion of illegality (see, for example, the submissions of the applicant in *Muhammad v. Spain*, cited above), or at least on objective grounds related to the *conduct* of the individual being stopped and/or police intelligence pointing to such grounds (including physical characteristics of a suspect, e.g. as identified by witnesses to a crime). This option would allow little or no room for so-called randomised checks or checks that are not based on individualised suspicion.

(ii) Conversely, should randomised or sample-based identity checks be permissible in some contexts, such as border controls, mass crowd events, anti-terrorism preventive operations or other situations involving a large number of people? If so, how can this carve-out be prevented from turning into a legal loophole that grants police officers the power to stop people at a whim, whether in law or in practice? If computer programs can perhaps be truly random, human beings are less likely to be so in the absence of previously agreed randomisation methods (e.g. to check every fifth car) that limit the discretion of individual officers. It is worth noting that in the present case the Government's claims of a random checking of the applicant and his daughter appear to fall in the former category, at least in the absence of any information about the internal guidelines followed by German border police.

(iii) And is there room for a standard that falls somewhere in between reasonable suspicion and randomised checks? For example, some domestic courts have taken the position that identity checks based on a person's racial or ethnic appearance – however reliable those assumptions might be in the first place[6] – are generally not permissible, unless the police meet the higher burden of demonstrating, through reliable statistics, "an increased delinquency of certain target [racially or ethnically defined] groups on the basis of situational pictures related to the location or situation"[7]. From the perspective of the individual being stopped, would such a standard be considered a reasonable law enforcement policy or one that essentially legalises discrimination by affiliation or association? (On the latter topic, see *Molla Sali v. Greece* [GC], no. 20452/14, 19 December 2018; and *Škorjanec v. Croatia*, no. 25536/14, § 55, 28 March 2017).

(iv) As a legal and practical challenge, in many countries the collection of statistics or operational police records on racial or ethnic grounds is prohibited by anti-discrimination law. Paradoxically, however, that may make it much harder for both public bodies and potential victims of profiling to assess and demonstrate the possible existence of indirect discrimination through entrenched or informal practices in law enforcement and other domains[8]. Likewise, internal police guidelines on identity checks are public in some countries (such as Spain), but not in others (like Germany).

(v) Finally, as a broader policy question, does racial or ethnic profiling make for good policing? There is a great deal of research that answers that question in the negative, considering that discriminatory profiling can be seen as an "easy" and ineffective substitute for sound crime-fighting methods; and not least because it tends to alienate entire communities whose cooperation with the police is ever more important in our increasingly multi-ethnic societies[9].

21. It is of course not possible, or wise, for one or two ground-breaking judgments of this Court to seek to address all facets of a complex phenomenon such as discriminatory profiling in policing. But one has to start somewhere. The facts of the present case, as well as the applicant's specific submissions, invited the Court to begin to delineate the substantive standards to be applied in this field, beyond the preliminary (albeit essential) requirements of an effective domestic investigation. The majority have declined that invitation by stopping at a finding of a procedural violation. While minimalism may have its fans, both as a legal doctrine and as a school of architecture and design, it is not necessarily the best way to ensure equality for all in our diverse societies; which are here to stay.

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ENDNOTES

1 I take "physical characteristics" in this sense to mean racial or similar features of a person's appearance; conversely, one may have physical characteristics (such as blue eyes or being very tall) that do not give rise to discrimination on any prohibited ground.

2 ECRI, Report on Germany (sixth monitoring cycle), 10 December 2019 (published on 17 March 2020), paragraph 104; referencing EU Fundamental Rights Agency, Second European Union Minorities and Discrimination Survey, 5 December 2017, p. 69.

3 See, respectively, Higher Administrative Court Baden-Württemberg, 1 S 1469/17, 13 February 2018; and Higher Administrative Court Nordrhein-Westfalen, 5 A 294/16, 7 August 2018, § 74-75.

4 Court of Justice of the European Union, C-9/16, 21 June 2017 (EU:C:2017:483).

5 See also, in this respect, *Muhammad v. Spain* (cited above), Dissenting Opinion of Judge Krenc, §§ 9-13.

6 For example, the Spanish police collects statistics and categorises identity checks carried out at police stations on the basis of someone's (apparent) provenance from a certain continent. How does that account for the sometimes widely varying appearance of people coming from the same continent?

7 Higher Administrative Court Nordrhein-Westfalen, cited above, § 73 (unofficial translation).

8 See on this point the ECRI recommendations in the most recent country report on Germany (cited above, paragraph 108).

9 See among others, EU Fundamental Rights Agency, *Towards More Effective Policing: Understanding and Preventing Discriminatory Ethnic Profiling*, October 2010, pp. 33-44; Council of Europe Parliamentary Assembly, "Ethnic profiling in Europe: a matter of great concern" (Resolution 2364, adopted on 28 January 2021), Explanatory memorandum by Mr Cilevičs, Rapporteur, pp. 10-11; UN High Commissioner for Human Rights, "Preventing and countering racial profiling of people of African descent: Good Practices and Challenges", January 2019, pp. 9-10; and Open Society Justice Initiative, *Profiling Minorities: A Study of Stop-and-Search Practices in Paris*, June 2009.

https://doi.org/10.1017/ilm.2023.39 Published online by Cambridge University Press

DOI:10.1017/ilm.2023.39

MUHAMMAD V. SPAIN (EUR. CT. H.R.)*
[October 18, 2022]

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION
CASE OF MUHAMMAD v. SPAIN

(Application no. 34085/17)

JUDGMENT

Art 14 (+ Art 8) • Discrimination • Private life • Allegations of racial profiling by police during identity check on a street duly examined and found unsubstantiated by administrative courts • Identity check within the ambit of Art 8 • Obligation to investigate not absolute, meaning obligation to use best endeavours • Domestic courts' decisions sufficiently reasoned • Existence of adequate legal framework to seek remedy against discrimination

STRASBOURG

18 October 2022

FINAL

06/03/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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In the case of Muhammad v. Spain,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georges Ravarani, *President,*

Georgios A. Serghides,

María Elósegui,

Anja Seibert-Fohr,

Peeter Roosma,

Andreas Zünd,

Frédéric Krenc, *judges,*

and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 34085/17) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Pakistani national, Mr Zeshan Muhammad ("the applicant"), on 6 May 2017;

the decision to give notice to the Spanish Government ("the Government") of the complaints concerning Article 14 of the Convention taken together with Article 8 and Article 1 of Protocol No. 12, and to declare the remainder of the application inadmissible;

the observations submitted by the Government and the observations in reply submitted by the applicant;

the comments submitted by Human Rights Centre of Ghent University, the Défenseur des Droits de la République Française, Rights International Spain and Plataforma por la Gestión Policial de la Diversidad, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 20 September 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. This case concerns a check of the applicant's identity by the police on the street. The applicant claimed that the identity check had been carried out because of his dark skin colour, and thus in a discriminatory manner, and that the authorities had failed to investigate sufficiently his allegations of racial profiling. The case raises an issue under Article 14 taken in conjunction with Article 8 of the Convention.

THE FACTS

2. The applicant, Mr Zeshan Muhammad, was born in 1992 and lives in Santa Coloma de Gramanet (Barcelona). He was represented before the Court by Mr J. Goldston and Ms M. Melon Ballesteros, lawyers practising in New York and London respectively.

3. The Government were represented by their Agent, Mr A. Brezmes Martínez Villareal, State Attorney.

THE CIRCUMSTANCES OF THE CASE

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Identity check and arrest of the applicant

5. The applicant has lived in Spain since 2005 and holds a long-term residence permit that allows him to live and work in Spain indefinitely.

https://doi.org/10.1017/ilm.2023.39 Published online by Cambridge University Press

6. On 29 May 2013 the applicant and his friend K.A., both Pakistani nationals of the same ethnicity, were stopped by two National Police officers while walking on a street in Barcelona in which pickpocketing and thievery are relatively frequent. According to the applicant, he was talking to his friend when the officers asked them for their identity documents, after which the applicant allegedly asked the reason for the identity check and the conversation went as follows:

Applicant: "Is it because of the colour of my skin?"

Police officer: "Yes, because you are black, and that's all. I am not going to stop a German citizen."

7. Reportedly, the applicant protested against the officer's racially motivated reasons, which prompted the police officer to get out of his car, softly slap the applicant, and put him into the car. According to the applicant, the police officer proceeded to inform him of his arrest while threatening him about potentially negative consequences concerning the renewal of his residence permit and called him "monkey". The applicant was arrested and taken to a police station. The arrest did not take place in the presence of family members or in his neighbourhood. Only his friend K.A. was present. According to the applicant, K.A. was also requested by the police to produce identification, and he showed his documents.

8. Those facts were contested by the police. In the police registry of detentions, it is reflected that the applicant was requested to identify himself on the street at 4.15 p.m., which he refused to do, and that the police officers took him to the police premises, where at 4.40 p.m. he showed his ID, following which he was released and accompanied on his way out at 4.43 p.m. A report of the events signed on the same day by the two police officers involved reflects that, at around 4:05 pm, the police officers were patrolling in a police car through a busy street in Barcelona. They only approached the applicant after he had laughed at the police officers and referred to them using disrespectful slang as they passed by. After being requested to show his identity card, the applicant had answered "Why? Because I'm black? No way!" After being informed by the police that his refusal to be identified could result in an administrative fine or even constitute a criminal offence under Spanish law, the applicant had answered: "I refuse to identify myself. What are you going to do?"

9. According to the police report, it was only then that he was transferred to the police premises in order to be properly identified. There, he gave his NIE (number for identifying regular foreign residents in Spain) and, with an angry attitude, threw it onto a table and said: "I'm giving it to you now because I want to, not because you requested it." In contrast, the police report of the day of the events does not mention the applicant's friend, and there is no record concerning him. The Government submitted that the applicant's friend K.A. was not asked to show his identity documents since he had not made any comments to the police.

10. It is undisputed that, after being identified at the police station, the applicant received a minor administrative notice (*denuncia de infracción administrativa*) for having refused to identify himself, displaying "a lack of respect towards authority" and "showing an insolent attitude". The police officers then accompanied him to the nearest bus stop.

B. Domestic criminal proceedings for unlawful detention

11. On the day of his arrest, the applicant allegedly tried to lodge a criminal complaint against the police officers in two police stations, but he was informed that they would not accept any complaints against other officers.

12. The next day, on 30 May 2013, the applicant lodged a handwritten criminal complaint with the Barcelona investigating court no. 3. The court initiated criminal proceedings, and immediately discontinued them.

13. The applicant, assisted by the human rights non-governmental organisation (NGO) SOS Racisme Catalunya, lodged an appeal against the discontinuation of the proceedings. The public prosecutor endorsed the appeal and observed that further evidence was required in order to clarify the facts. The investigating judge upheld the appeal and, in a decision of 24 March 2014, agreed to obtain a statement from the two police officers (as persons under investigation in the criminal proceedings), a statement from the applicant as a victim and his friend K.A. as a witness, video-recordings of any surveillance cameras in the area of the alleged events at the relevant time, and the file on the applicant's administrative offence.

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14. In the meantime, on 15 July 2013 SOS Racisme Catalunya lodged a new criminal complaint on the applicant's behalf with the two Catalan police stations mentioned above, challenging their refusal to register his complaint of misconduct against the National Police. The police acknowledged receipt of the complaint but declined to address the specific facts contained therein until the judicial criminal proceedings had finished.

15. The criminal proceedings were instituted only on the basis of the applicant's allegations of defamation (based on the alleged insults), bodily harm (based on the alleged slapping), unlawful detention, unlawful humiliation committed by a civil servant when lawfully searching documents of a person, intimidation, and forgery of official documents (see paragraph 36 below), and not in relation to the allegedly discriminatory identity check. The two police officers were questioned as persons under investigation. They held that the applicant had only been taken to the police station in order to verify his identity, as he had refused to show his documents (which he was legally required to do) when requested to do so on the street. They also emphasised the fact that his friend K.A. had not been asked to identify himself because he had not made any comments. The testimony of K.A. could not be heard because it proved impossible to notify him within the proceedings, although the applicant submitted a sworn statement of his friend's testimony, given as an affidavit before a notary on 2 December 2013, in which he had confirmed the applicant's account of the facts. No relevant video footage could be found despite the investigating court's request.

16. In April 2015 the public prosecutor requested the discontinuation of the proceedings. The investigating court ordered the discontinuation in a decision of 2 June 2015. The applicant lodged an appeal with the same court, to no avail. He then lodged another appeal with the *Audiencia Provincial*, which was dismissed in a decision of 4 February 2016 upholding the discontinuation of the criminal proceedings for lack of evidence of the commission of any criminal offence.

17. The applicant did not lodge any further appeals, and the decision to discontinue the criminal proceedings became final. The applicant has not complained before the Court in respect of this matter.

C. Domestic administrative proceedings for racial discrimination

18. On 7 April 2014, while the criminal proceedings were still pending, the applicant initiated administrative proceedings in the form of a State liability claim (*reclamación por responsabilidad patrimonial del Estado*) with the Ministry of the Interior, complaining that the identity check carried out by the police had been discriminatory. He submitted that it had caused him deep feelings of humiliation, unfair persecution, exclusion and marginalisation, all of which had infringed his personal dignity. He sought an acknowledgment that the police's behaviour had been unlawful, a public apology from the State, 3,000 Euros (EUR) in respect of non-pecuniary damage and the publication of the judgment in the media.

19. To substantiate his complaint, the applicant submitted the same sworn statement from his friend as an eyewitness to the identity check as had been submitted in the criminal proceedings (see paragraph 15 above). He also submitted documents substantiating his attempts to lodge a complaint at the police stations; his judicial criminal complaint; the file on the criminal proceedings; statistical expert reports (including an analysis of statistical data conducted by the Human Rights Institute of the University of Valencia and Oxford University, and a report from the Spanish Ombudsperson); news articles concerning widespread discrimination by the police forces; other reports from international, regional and national human rights bodies (including the Council of Europe's European Commission against Racism and Intolerance (ECRI) and the United Nations Committee on the Elimination of Racial Discrimination (CERD)) concluding that Spanish police identity checks amounting to racial profiling were a pervasive and widespread practice; and reports by NGOs (including Amnesty International) corroborating the statistical conclusions. The applicant requested that the two police officers be heard and that the Ministry of the Interior again try to obtain video footage from the surveillance cameras in the area.

20. The applicant also argued that the Spanish Law on the protection of public safety, as in force at the time of the incident (see paragraph 33 below), did not provide adequate safeguards to prevent racial or ethnic profiling and other discriminatory conduct by the police forces. In particular, he asserted that the law did not establish a requirement for a sufficiently well-founded reason to carry out identity checks, among other flaws, which allowed room for arbitrary and discriminatory behaviour.

https://doi.org/10.1017/ilm.2023.39 Published online by Cambridge University Press

21. The police authorities submitted a report, drafted by the police's legal department, which stated, on the basis of the submissions of the two police officers involved in the applicant's identification, that there had not been any racial motives behind the identity check, and that it had been motivated by his defiant attitude and conduct and not by his appearance. The report commended the police officers' conduct. They also submitted a report by the Head of the Police in Catalonia dated 30 April 2014 (report no. 1895), which incorporated the record of the administrative proceedings against the applicant for his refusal to identify himself, as drafted by the two police officers involved.

22. The administrative authorities initially decided to stay the administrative proceedings until a final decision in the criminal proceedings had been given, but eventually decided to continue them because the two sets of proceedings were based on different grounds: the applicant maintained that the criminal proceedings were based on forgery, insults and threats allegedly committed by the police officers during and after his arrest, whereas the administrative proceedings were based on the allegedly discriminatory identity check.

23. By a decision of 16 July 2014, the administrative authorities informed the applicant that there was no need to hear the police officers since the record of their statement following the incident had already been included in the file, and that the video footage would not be a relevant piece of evidence in the administrative proceedings. The administrative authorities considered that they had agreed to proceed at the request of the applicant, even though there were judicial criminal proceedings pending, but clarified that some of the evidence proposed by the applicant was only relevant to the criminal proceedings.

24. By a decision of 6 November 2014, the administrative proceedings were discontinued for lack of evidence of the allegedly discriminatory treatment. The authorities found that, in order to find the State liable for acts or omissions committed by the public authorities, the claimant had the burden of supporting his claims with sufficient evidence. In the present case, despite the applicant's statement that he had suffered a discriminatory identity check and that this had caused him non-pecuniary damage, there was no supporting evidence. They also observed that his version of the facts was radically different from the one presented by the police. As a result of the above, they concluded that a causal link between the State's liability and the alleged harm suffered by the applicant had not been established, and the claim had to be dismissed.

25. In January 2015 the applicant instituted judicial administrative proceedings against the administrative decision of 6 November 2014 with Central Administrative Court no. 11 (*Juzgado Central de lo Contencioso-administrativo*). He asserted that nobody else of white ethnicity had been stopped and asked to provide identification, and that the only reason for his being stopped had been his appearance. In his appeal, the applicant also argued that there was a pervasive practice of ethnic/racial profiling in the Spanish police forces, facilitated in part by the relevant legislation. He relied on multiple statistical expert reports and news articles concerning widespread discrimination by the police forces; reports by other international, regional and national human rights bodies concluding that Spanish police identity checks amounting to racial profiling were a pervasive and widespread practice; and NGO reports corroborating the statistical conclusions (he submitted the same documents as in the administrative proceedings – see paragraph 19 above). He also reiterated his request for an award of EUR 3,000 in respect of non-pecuniary damage, a public apology from the State and the publication of the apology and the judgment in a national newspaper. The applicant also requested the domestic court to ask the Court of Justice of the European Union for a preliminary ruling on the compatibility of police racial profiling to identify irregular migrants with Article 21 of the Charter of Fundamental Rights and Articles 4, 5, 6 and 21 of the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals[1].

26. In order to substantiate his allegations, the applicant asked to have summoned and examined at the hearing his friend K.A., the police officers involved in his identity check and arrest, and an expert witness to explain a report on racial profiling statistics attached to the administrative file. During a preliminary hearing, the evidence proposed by the applicant was rejected by the central administrative court. The applicant appealed orally against that decision (*recurso de reposición*), but his appeal was immediately dismissed. The administrative court held that the written statement of the police officers was already in the administrative file, his friend's witness statement was also included in a notarised document attached to the administrative file and it was not necessary to hear the expert proposed by the applicant to clarify or explain the statistical report already submitted, as the report could be examined and assessed by the judge himself.

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27. By a judgment of 14 September 2015, the applicant's appeal was dismissed. Firstly, the central administrative court pointed out that the administrative proceedings could only result in an award of compensation to the applicant for damage caused by the functioning of the public authorities, and on no account could it result in a public apology from the State or the publication of the judgment and apology in a national newspaper. The judge also found that a direct or indirect link between the allegedly discriminatory conduct by the police officers and the harm allegedly suffered by the applicant had not been established. The judge further found that the evidence provided by the parties (the applicant and the police) was essentially contradictory, and that the documents provided by the police stated that there had not been any wrongdoing in the request for the identification of the applicant, which had been caused by his defiant attitude. According to the judge, the applicant had not provided any support for his version of the facts. There was therefore no causal link between the harm he had allegedly suffered (which was also not established) and the functioning of the public authorities.

28. On 20 October 2015 the applicant lodged an application with the same court to have the above-mentioned judgment declared void, which was dismissed on 17 May 2016 on the grounds that what the applicant was actually requesting was a new assessment of the evidence and, ultimately, a favourable decision. The domestic court held that the complaints about the inadmissibility of the evidence had already been dealt with during the hearing by way of an oral appeal that had also been reasonably dismissed, so there had been no violation of any fundamental right. With regard to the request for a preliminary ruling from the Court of Justice, it considered that it was not warranted, given that European Union legislation was not necessary to resolve the applicant's administrative claim in the case at hand.

29. Lastly, the applicant lodged an *amparo* appeal with the Constitutional Court, which was declared inadmissible on 3 November 2016 for lack of constitutional relevance. The decision was served on 8 November 2016.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LEGAL FRAMEWORK

30. The relevant provisions of the Spanish Constitution read as follows:

Article 13

> "Foreign citizens shall enjoy the rights and freedoms guaranteed by the present Title, under the terms to be laid down by treaties and the law."

Article 14

> "All Spanish citizens are equal before the law and they may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance."

Article 18

> "1. The right to respect for honour, for private and family life and for one's own image shall be guaranteed."

31. The provision concerning State liability of Law no. 30/1992 of 26 November 1992 on the legal regime applicable to public authorities and the common administrative procedure, which was in force at the time of the events, provided as follows:

Article 139. Principles of liability

> "1. Individuals shall have the right to be compensated by the relevant public authority for any harm caused to any of their property or rights, except in cases of *force majeure*, provided that the harm is the result of the normal or abnormal functioning of public services.
>
> 2. In any event, the alleged harm must be actually incurred, economically measurable and related to a specific person or group of persons.
>
> . . ."

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32. The relevant part of Section 2 of Law no. 62/2003 of 30 December 2003[2], regarding equality of treatment and non-discrimination on grounds of racial or ethnic origin, reads as follows:

> **Article 32. Burden of proof relating to racial or ethnic origin**
>
> "In civil and administrative proceedings where the claimant establishes facts from which it may be presumed that there has been direct or indirect discrimination on grounds of racial or ethnic origin, it shall be for the respondent to provide an objective and reasonable justification, duly proved, of the measures adopted and of their proportionality."

33. The relevant provisions of Institutional Law no. 1/1992 of 21 February 1992 on protection of public safety, as applicable at the relevant time (subsequently amended), read as follows:

> **Article 20**
>
> "1. The police may, in the exercise of their functions of investigation or prevention, require individuals to identify themselves and carry out any checks which they deem appropriate on the street or in the place where the requirement has been issued, provided that the knowledge of the identity of such individuals is necessary for the exercise of the public-safety functions entrusted to the police by this Law and by the Institutional Law on the security forces and corps.
>
> 2. If personal identification cannot be achieved by any means, and when it is necessary for the same purposes as in the previous paragraph, the police, in order to prevent the commission of a crime or minor offence, or in order to punish an administrative offence, may require anyone who cannot be identified to accompany them to nearby premises that have appropriate means to carry out identification procedures, for these purposes alone and for the minimum amount of time required.
>
> 3. At the premises referred to in the previous paragraph, a register shall be kept to record the identification procedures carried out there, as well as the reasons for and duration of such procedures, and shall be available at all times to the competent judicial authority and the public prosecutor's office. Notwithstanding the above, the Ministry of the Interior shall periodically send a summary record of the identification procedures to the public prosecutor's office.
>
> 4. In the event of unjustified resistance or refusal to identify oneself or to voluntarily undergo checks or identification procedures, the provisions of the Criminal Code and the Law on Criminal Procedure shall apply."
>
> **Article 26**
>
> "[The following] shall be considered minor administrative offences under the [present] Law on protection of public safety:
>
> . . .
>
> (h) Disobeying the orders of an authority or its officers, issued in direct application of the provisions of this Law, when this does not constitute a criminal offence."

34. A new Institutional Law on protection of public safety (Institutional Law no. 4/2015 of 30 March 2015) came into force on 1 July 2015. Its relevant parts read as follows:

> **Article 16. Identification of individuals**
>
> "1. In the fulfilment of their tasks of investigation and prevention of crime, and for the punishment of administrative and criminal offences, the officers of the security forces may require individuals to identify themselves in the following situations:

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(a) where there is circumstantial evidence that the individual may have taken part in an offence;

(b) where, given the specific circumstances, it is considered reasonably necessary to prove the individual's identity to prevent a crime.

In such situations, the officers may carry out the necessary checks on the street or in the place where the requirement was issued, including the identification of people whose face is not visible, whether completely or partially, owing to the use of clothes or objects that cover it, preventing or hindering identification in cases where it is necessary.

During the identification, the principles of proportionality, equal treatment and non-discrimination on the grounds of birth, race, ethnic origin, sex, religion or belief, age, incapacity, sexual identity or orientation, opinion or any other personal or social condition or circumstance, shall be respected."

35. The relevant parts of Institutional Law no. 4/2010 of 20 May 2010 on disciplinary rules for State police forces read as follows:

Article 7. Very serious offences

"The following shall be considered to be very serious offences:

. . .

(n) Any action that represents discrimination on the grounds of race or ethnic origin, religion or belief, incapacity, age, sexual orientation, sex, language, opinion, place of birth or residence, or any other condition or personal or social circumstance."

36. The relevant parts of circular letter no. 2/2012, issued by the General Directorate of the Police, on the identification of citizens read as follows:

Second instruction: on the identification of citizens

"The identification of individuals in respect of whom suspicion arises is to be carried out in a respectful and courteous manner and in such a way that only the necessary interference is involved; therefore, unnecessary, arbitrary, abusive and *ultra vires* practices are to be avoided.

The transfer of individuals to a police station for identification can only take place in the circumstances provided in Article 20 § 2 of Institutional Law 1/1992 [cited above], that is, when there are unidentified individuals whose identification is not possible and about whom there is reasonable and justified suspicion that they are about to commit a criminal offence, or any individuals, likewise unidentified, who have committed an administrative offence.

. . ."

Third instruction: specific aspects deriving from Institutional Law no. 4/2000 on the rights and freedoms of aliens in Spain and their social integration

"During the identification of foreign citizens, officers are to act in accordance with the previous instruction. In relation to the second paragraph, officers are reminded that it is unacceptable to take such individuals to a police station upon the mere discovery, during the check, of the irregularity of their stay in Spain, as long as their identity has been proven through an official or valid and sufficient document and the person provides a verifiable residence (or one that can be verified during identification). In that event, the citizen is to be informed that the authorities will be notified in order to enforce, if needed, the third part of Institutional Law no. 4/2000, concerning administrative offences relating to alien law and its rules on sanctions.

. . ."

37. The relevant parts of the Criminal Code concerning the offences for which the two policemen were investigated are Article 147 (on bodily harm), Article 208 (on defamation), Article 171 (on intimidation), Article 534 (on criminal offences committed by civil servants against the inviolability of the home and other guarantees of privacy),

https://doi.org/10.1017/ilm.2023.39 Published online by Cambridge University Press

Article 390 (on forgery of public documents), Articles 163 and 167 (on unlawful detention). The Spanish Criminal Code also stipulates in Article 22 § 4 an aggravating circumstance when criminal offences are committed for discriminatory reasons based on ethnicity or race.

II. INTERNATIONAL LEGAL FRAMEWORK AND PRACTICE

38. The United Nations (UN) Human Rights Committee dealt with alleged discrimination resulting from an identity check in its Views of 27 July 2009 on Communication No. 1493/2006 submitted by Rosalind Williams Lecraft against Spain (CCPR/C/96/D/1493/2006). Finding a breach of the prohibition of discrimination under Article 26, read in conjunction with Article 2, paragraph 3, of the International Covenant on Civil and Political Rights in the circumstances of the case, the Committee stated the following:

> "7.2 The Committee must decide whether being subjected to an identity check by the police means that the author suffered racial discrimination. The Committee considers that identity checks carried out for public security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination."
>
> . . .
>
> 7.4 In the present case, it can be inferred from the file that the identity check in question was of a general nature. The author alleges that no one else in her immediate vicinity had their identity checked and that the police officer who stopped and questioned her referred to her physical features in order to explain why she, and no one else in the vicinity, was being asked to show her identity papers. These claims were not refuted by the administrative and judicial bodies before which the author submitted her case, or in the proceedings before the Committee. In the circumstances, the Committee can only conclude that the author was singled out for the identity check in question solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct. Furthermore, the Committee recalls its jurisprudence that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. In the case under consideration, the Committee is of the view that the criteria of reasonableness and objectivity were not met . . ."

39. ECRI's report on Spain (fifth monitoring cycle), adopted on 5 December 2017 and published on 27 February 2018, set out the following recommendations in respect of Spanish civil and administrative law:

> ". . .
>
> 12. The existing anti-discrimination provisions are contained in the Constitution as well as in Articles 27 to 43 of Law 62/2003, which transposed the EU equality directives 2000/43 and 2000/78 and amended over 50 existing laws. Already in its last report on Spain, ECRI noted that practically no cases have been brought to court under these provisions, as a result of the law's relative obscurity and a general lack of awareness about it.
>
> 13. Article 28 § 1 of Law 62/2003 defines and prohibits . . . direct and indirect discrimination. While, according to Article 14 of the Constitution and the case law of the Constitutional Court, discrimination based on all personal or social circumstances and conditions is prohibited, the grounds of race, colour, language, citizenship, national origin and gender identity are however missing from this and other legal provisions.
>
> . . .

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> 17. According to § 10 of GPR [General Policy Recommendation] No. 7, the law should ensure that all victims of discrimination have ready access to judicial and/or administrative proceedings, including conciliation procedures. ECRI considers that the Spanish system is not fully in line with this recommendation. Victims of discrimination face serious difficulties in bringing cases to court, as representation by two different types of lawyers is mandatory and as court proceedings are often long and complex. The number of discrimination cases brought before the courts seem to be very low.
>
> . . .
>
> 18. Article 32 of Law 62/2003 is in line with § 11 of ECRI General Policy Recommendation No. 7 on the sharing of the burden of proof in discrimination cases. The existing legislation does however not appear to be in line with § 12 of GPR No. 7 according to which the law should provide for effective, proportionate and dissuasive sanctions for all discrimination cases including the payment of compensation for material and moral damages.
>
> . . .
>
> 81. Fighting discrimination is an important part of successful integration policies. The statistical data referred to in this report shows considerable levels of actual and perceived discrimination towards migrants and other vulnerable groups. Racial profiling by law enforcement authorities for example is an on-going issue.
>
> . . ."

40. Paragraph 11 of ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002, reads as follows:

> "The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination."

41. The European Union Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in so far as relevant, provides:

Recital 21

> "The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought."

Article 8

Burden of proof

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

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THE LAW

ALLEGED VIOLATION OF ARTICLES 8 AND 14 OF THE CONVENTION

42. Relying on Articles 8 and 14 of the Convention and Article 1 of Protocol No. 12, the applicant complained that he had been requested to identify himself on a public street on the sole grounds of his race, and that this had amounted to racial discrimination and a violation of his right to respect for his private life. He also asserted that his complaints had not been effectively examined by the domestic courts.

43. The Court's case-law has clarified that, whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law". It thus introduces a general prohibition of discrimination. Notwithstanding the difference in scope between the two provisions, the meaning of the term "discrimination" is identical in both (see paragraph 18 of the Explanatory Report to Protocol No. 12). The applicant raises the question of a discriminating treatment in the context of an identity check and the existence of an obligation to investigate potential racist motives for this control, which is therefore framed also as an interference with his private life under Article 8 of the Convention. In the light of the above, the Court, having the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles of the Convention that are different from those relied upon by the applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018), considers that the applicant's complaints fall to be examined only under Article 14 read in conjunction with Article 8 of the Convention.

44. The above-mentioned provisions read as follows:

Article 8 of the Convention

> "1. Everyone has the right to respect for his private and family life . . .
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 of the Convention

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as . . . race, colour . . ."

A. Admissibility

45. The Government submitted that the applicant had failed to exhaust the available domestic remedies. He had instituted two separate and independent sets of proceedings in the national criminal and administrative courts based on different substantive issues and entailing the use of different remedies. The criminal proceedings had been concluded by means of a discontinuation decision and the applicant had not lodged an *amparo* appeal against that decision.

46. The applicant submitted that his complaints before the Court concerned exclusively the administrative proceedings, since the identity check, even if racially motivated, did not constitute a crime *per se*. He further argued that he had duly exhausted domestic remedies in the administrative proceedings, in that he had lodged an *amparo* appeal with the Constitutional Court.

47. The Court observes that, after his administrative complaint based on racial and ethnic profiling by the police was rejected by the administrative authorities, the applicant unsuccessfully brought his claim before Central Administrative Court no. 11 and later lodged an *amparo* appeal with the Constitutional Court, which was declared inadmissible for lack of constitutional relevance.

48. The applicant's complaints before the Court refer to the administrative proceedings only. Consequently, the Government's objection must be dismissed.

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49. The Court also notes that an identity check by the police can fall within the scope of the private life of the person subjected to that check, and therefore, constitute an interference in that person's private life as protected by Article 8 of the Convention. In particular, the Court has found that the use of coercive powers conferred by legislation to require an individual to submit to an identity check and a detailed search of his person, his clothing and his personal belongings amounted to an interference with the right to respect for private life (see *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 63, ECHR 2010 (extracts), and *Vig v. Hungary*, no. 59648/13, § 49, 14 January 2021). The public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment (see *Gillan and Quinton*, cited above, § 63).

50. However, not every identity check of a person belonging to an ethnic minority attains the necessary threshold of severity so as to fall within the ambit of the right to respect for that person's private life. That threshold is only attained if the person concerned has an arguable claim that he or she may have been targeted on account of specific physical or ethnic characteristics. Such an arguable claim may notably exist where the person concerned submitted that he or she (or persons having the same characteristics) had been the only person(s) subjected to a check and where no other grounds for the check were apparent or where any explanations of the officers carrying out the check disclose specific physical or ethnic motives for the check. The Court further observes in this regard that the public nature of the check may have an effect on a person's reputation (see, *inter alia*, *Bédat v. Switzerland* [GC], no. 56925/08, § 72, 29 March 2016, and *Denisov v. Ukraine* [GC], no. 76639/11, § 112, 25 September 2018, with further references) and self-respect.

51. The Court notes that the applicant had been subjected to an identity check by the police in public, on the street. According to his submission, that check had only been carried out because of his dark skin colour and thus on racial grounds. The identity check necessarily affected the applicant's private life, and would have been sufficient to affect his psychological integrity and ethnic identity, for the purposes of Article 8 of the Convention (see *Király and Dömötör v. Hungary*, no. 10851/13, § 43, 17 January 2017). Therefore, the Court considers that the identity check in question falls within the ambit of Article 8. Accordingly, Article 14 is applicable.

52. The Court further notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. As regards the complaint concerning the domestic authorities' failure to carry out an effective investigation

(a) The parties' submissions

53. The applicant submitted that the Spanish authorities had plainly failed to take all reasonable steps to uncover any possible racist motives or practices behind the alleged incident.

54. He argued that his allegation of discrimination was supported by clear evidence, which had not been taken into account by the domestic authorities. The presumption of discrimination had therefore not been rebutted. In addition, he asserted that, according to the Court's case-law, once an applicant had shown that there had been a difference in treatment, the burden of proof was on the respondent Government to show that the difference in treatment could be justified.

55. More specifically, the applicant submitted that (i) the authorities had made no attempt to gather any evidence or to interview witnesses; (ii) the domestic courts had refused his request to have the expert witness on statistics examined regarding the disproportionate number of members of racial minorities being stopped by the police; (iii) the investigation had lacked impartiality; (iv) the domestic courts had failed to apply the burden-shifting standard required in discrimination cases; and (v) Spanish law and the courts generally gave undue weight to police officers' testimony compared with that of victims.

56. In sum, according to the applicant, the respondent State had failed to secure and properly test the relevant evidence concerning the incident and to explore all practical means of discovering the truth.

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57. In the Government's view, the applicant had been unable to prove any of his assertions regarding discriminatory treatment. They reasserted the domestic courts' findings that the evidence presented by the applicant had not been convincing. In their view, his statement and the sworn statement by his friend clearly clashed with that of the police officers involved. To accept that there had been discriminatory behaviour on the part of the police officers in this case merely on the basis of the applicant's statement, after both the criminal and the administrative investigations at the domestic level had been discontinued, would breach the police officers' right to a fair trial under Article 6 of the Convention.

58. The Government argued that the fact that discrimination had not been proved in the criminal proceedings had also carried significant weight in the administrative proceedings. In both sets of proceedings, the applicant had had the burden of submitting evidence to show that he had suffered a prima facie case of discrimination. However, no evidence in support of that argument had been submitted, other than his own statement and that of his friend, which, according to the Government, was to be treated as unreliable on account of the friendship between the two of them.

59. The Government argued that in order to hold the State liable and award damages, there had to be evidence that the alleged harm suffered by the claimant had been caused by the functioning of the State authorities. Without at least evidence that the facts had occurred as the applicant contended, the domestic courts could not have found any State liability.

60. As a result, the burden of proof could not be shifted to the authorities. Doing so would, in the Government's opinion, transform the burden of proof into a "devil's proof", given that in the present case, the police officers could not have proved, other than by their word, that they had not engaged in racial discrimination in their conduct.

(b) The third parties' submissions

61. The Human Rights Centre of Ghent University referred to the case-law of the Court and argued not only that in certain cases the burden of proof should be reversed, but also that States had a positive procedural obligation to investigate allegations of ethnic profiling (citing *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII). Moreover, under Article 1 of Protocol No. 12 and in accordance with the Explanatory Report to that Protocol, "any justification to be provided by the State should be subjected to the strictest scrutiny".

62. The Défenseur des droits de la République française added that, according to the Court's case-law, an effective independent investigation into police behaviour was required, without any institutional links with the security forces or the domestic courts, when racial or ethnic profiling was alleged (citing *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 184, ECHR 2012).

(c) The Court's assessment

(i) Whether the State was under an obligation to investigate possible racist motives

63. The Government did not contest that States are under an obligation to investigate possible racist motives of a State agent's act in the context of an alleged violation of Article 14 taken in conjunction with Article 8.

64. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference; in addition to this negative undertaking there may be positive obligations inherent in effective respect for private life. The Court reiterates that it has previously recognised a duty to investigate in the context of Article 8 in certain circumstances in respect of acts of private individuals. It has also not excluded the possibility that the State's positive obligation under Article 8 to safeguard an individual's integrity may extend to questions relating to the effectiveness of an investigation (compare *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, § 96, ECHR 2005-VII (extracts), and *Burlya and Others v. Ukraine*, no. 3289/10, §§ 161 and 169-70, 6 November 2018). It finds that an obligation to investigate should even less be excluded in the context of Article 8 in relation to acts of State agents if the applicant makes an arguable claim that he has been targeted on account of specific physical or ethnic characteristics.

65. In cases where discrimination on the grounds of race is alleged, a special duty of investigation arises. The Court reiterates that racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous

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consequences, requires from the authorities special vigilance and a vigorous reaction (see, in the context of Article 14, *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII, and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 43, ECHR 2009).

66. The Court has established that, where the State authorities investigate violent incidents, there is an additional obligation to identify whether ethnic prejudice may have played a role. It has also admitted that, even in those cases, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute (see *B.S. v. Spain*, no. 47159/08, § 58, 24 July 2012). The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence (see, *mutatis mutandis*, *B.S. v. Spain*, cited above, § 58, and *Nachova and Others*, cited above, § 160).

67. The authorities' responsibilities under Article 14 to secure respect without discrimination for a fundamental value may also come into play when possible racist attitudes resulting in the stigmatisation of the person concerned are at issue in the context of Article 8. It is even more so when the said attitudes are displayed not by private individuals but by State agents.

68. In the light of the above elements, the Court considers that once there is an arguable claim that the person concerned may have been targeted on account of racial characteristics and such acts, under the threshold conditions set out above (see paragraph 50 above), fall into the ambit of Article 8, the authorities' duty to investigate the existence of a possible link between racist attitudes and a State agent's act is to be considered as implicit in their responsibilities under Article 14 of the Convention also when examined in conjunction with Article 8.

(ii) Whether the obligation to investigate was complied with

69. Turning to the facts of the present case, the Court notes in particular that the applicant instituted proceedings for State liability because of the allegedly racially discriminatory behaviour of the police during an identity check carried out on him as he was walking on a street in a tourist area. More specifically, the applicant held that the police officers had only asked for his identification on the basis of his skin colour. The Government, on the other hand, held that the police officers had requested his identification following the applicant's provocative and defiant attitude towards them.

70. The Court observes at the outset that the context in the present case is significantly different from that in *R.B. v. Hungary*, no. 64602/12, 12 April 2016, where the acts at issue formed part of a generally hostile attitude against the Roma community in a municipality during a period in which rallies had been organised against them, and the perpetrators (who in any event were private individuals and not State agents) were never identified. While the Court is concerned about any manifestation of racial discrimination on the part of the public authorities, and has repeatedly stressed the importance of conducting an investigation with vigour and impartiality where there is a suspicion that racial attitudes induced violent acts, it cannot accept that the applicant's situation amounted to an act of violence; he was merely requested to show his identity documents – something which he was, like anyone else in Spain, required to do under the law (see paragraphs 33 and 34 above).

71. In the present case, the police officers were identified, they did not deny having asked the applicant to show his documents (see paragraphs 8 and 15 above), and their testimony was taken into account in both the criminal and the administrative proceedings. The Court notes that criminal proceedings were initiated to investigate whether the facts constituted any offence, and the police officers involved were heard orally as persons under investigation. Following the discontinuation of the criminal proceedings (against which the applicant did not appeal), the written testimony of the police officers was also taken into account in the administrative proceedings. Their report of the events was used as evidence in order to ascertain whether there was a causal link between the alleged conduct of the public authorities and the harm suffered by the applicant.

72. The administrative proceedings were discontinued because the central administrative court concluded, after assessing the evidence presented, that the applicant had not properly substantiated his allegation that the identity check had been motivated by racial discrimination on the part of the police officers. It should be noted that the

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applicant initially submitted evidence in writing, and afterwards a preliminary hearing was held during which he requested that oral testimonies be heard as part of the administrative proceedings (see paragraph 25 above). As the administrative judge found at the hearing, however, not all the evidence which had been relevant in the criminal proceedings was pertinent to the administrative proceedings, where the subject of the complaint was different. The Court has held that in criminal proceedings which are aimed at investigating whether there was discriminatory behaviour on the part of police officers, the mere submission of the incident reports from the police may not be sufficient under the procedural limb of Article 3 of the Convention (see *B.S. v. Spain*, cited above, § 42). In the present case, however, the application concerns only the administrative proceedings, which are different in nature from criminal proceedings.

73. The legal provisions in force at the material time provided an appropriate legal avenue for the applicant to seek a remedy for the racial discrimination he had allegedly suffered: both criminal and administrative proceedings. In fact, there were domestic criminal proceedings where the two police officers were interrogated by the investigating judge (see paragraph 15 above). However, the applicant did not lodge any further appeals, and the decisions to discontinue the criminal proceedings became final. Moreover, the applicant did not complain before the Court in respect of this matter (see paragraphs 16-17 above). He chose to have recourse only to administrative proceedings, and therefore, the complaint and the effects of his complaint before the Court have to be assessed within that legal framework.

74. The domestic courts assessed the evidence before them and concluded that no liability could be established on the part of the public authorities under Article 139 of the Spanish Law on administrative procedure or under Article 32 of Law no. 62/2003 (see paragraph 31 above).

75. Moreover, the applicant had the opportunity to appeal against the central administrative court's decision concerning the admissibility of the evidence, as well as the ensuing decision to dismiss the State liability claim. The substantive aspect of the applicant's complaint will be analysed in the next section of this judgment. From a procedural aspect, the applicant was able to challenge the domestic courts' decisions, which were sufficiently reasoned and motivated.

76. It follows that there has been no violation of Article 14 read in conjunction with Article 8 of the Convention in this respect.

2. As regards the complaint concerning the allegedly discriminatory grounds for the police check and the arrest of the applicant

(a) The parties' submissions

77. The applicant asserted that his being singled out by the police for an identity check because of his race and skin colour had constituted direct discrimination. He argued that his appearance had been the only reason given by the police officer for stopping him, as no light-skinned person nearby had been stopped at the same time. He noted the hostile attitude of the police officers, who had allegedly insulted him using racial slurs and slapped him. This attitude had left him in no doubt about the discrimination of which he claimed to be a victim.

78. The applicant also submitted that he had received less favourable treatment than that which other people in an analogous or relevantly similar situation would have received. He felt that the identity check that he had had to endure, compounded by the fact that it had been conducted in public view and in an undignified manner, had humiliated and embarrassed him and had contributed to the stereotyping of his ethnic group, thus constituting a violation of his right to respect for his private life.

79. The applicant argued that his racial profiling and public humiliation by the National Police had not been isolated events. In his view, they were part of a consistent pattern of ethnic profiling and racially discriminatory law enforcement in Spain, enabled by inadequate legal protections and flawed constitutional case-law.

80. The applicant relied on the findings of ECRI (see paragraphs 39-40 above) and the Spanish Ombudsperson regarding the pervasive racial discrimination in police identity checks. In his view, those bodies, among others, had pointed to the legislative anti-discrimination framework as being inadequate, and in any event, what was more relevant was the State's practice. He also pointed out that the statistics provided by the Government were unconvincing,

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because they only showed the data concerning the identity checks carried out in police stations (which he asserted only amounted to 0.5% of the total) and the data had been aggregated at the continental level, which masked disparities that existed at the national level, and ignored other relevant attributes such as race/ethnicity, as well as the experience of naturalised immigrants.

81. As to the Government's allegation that the finding of a violation of the Convention on the grounds of discrimination would violate the police officers' presumption of innocence, the applicant asserted that individual criminal liability could not be conflated with State liability for violations of the Convention. In the applicant's view, the police officers' conviction or acquittal in the domestic criminal proceedings could not exempt the respondent State from its responsibility under the Convention.

82. The Government argued that it had been irrelevant that the applicant had been stopped while other light-skinned citizens had not, arguing that the incident had been caused by the applicant's behaviour and refusal to identify himself and not by his race, bearing in mind that his friend, also of Pakistani origin, had not only not been taken to the police station, but had not even been requested to show his identification.

83. The Government submitted that the taking of the applicant to the police station had been justified under the applicable law, given that he had refused to hand over his identification documents, which he had in fact had with him. They asserted that the attitude of the police officers had been professional, as they had not gone beyond what was required and they had even taken the applicant to the bus station when the identification had been completed.

84. In the Government's view, State liability proceedings were only aimed at obtaining financial compensation from the authorities. The appropriate proceedings to prove alleged discrimination were criminal proceedings. Moreover, the Government pointed out that Spanish criminal law specifically provided that hate crimes on the grounds of racial or ethnic discrimination were criminal offences, but that the criminal proceedings in the present case had been discontinued because no signs of racial discrimination had been found by the judge. They stated that a finding that the applicant had suffered discrimination at the hands of the two police officers, when the criminal proceedings in which they had been investigated had already been discontinued, would violate the officers' presumption of innocence.

85. Lastly, the Government expressed their concern that the present individual application was, in fact, a means of lodging a more general complaint about allegedly systemic discrimination in the Spanish police forces, which was unsubstantiated. They presented statistics in order to rebut that general statement. An *ad hoc* report drafted by the General Directorate of the Police stated that, according to the available data gathered between January 2012 and March 2018, of the people whose identification had been requested by national police officers and who had been taken to a police station for the purpose of full identification, 65.94% were of European origin (whereas 17.02% were of African origin, 9.59% were of Latin American origin and 7.38% were of Asian origin). The report also showed that the number of identity checks carried out in police stations had significantly decreased over that period. No specific data about identity checks outside of police stations were provided.

86. In that connection, the Government also commended the protection against racial discrimination provided by the Spanish legislation (including provisions concerning specifically the conduct of the police) and case-law. In the Government's view, the Spanish legal system provided sufficient legal protection against discrimination on the grounds of race and ethnic origin, not only in administrative law, but also in the Criminal Code, punishing hate crime and establishing a special aggravating circumstance if an offence was committed for racist or ethnic reasons.

87. The Government noted that since the ratification of the European Convention on Human Rights by Spain in 1977, there had only been one finding against Spain of a violation on the grounds of discrimination by police officers, which was a further indication that the allegedly pervasive discrimination in police conduct in Spain was unsubstantiated. They pointed to the existence of several legislative and institutional mechanisms which had been put in place in order to prevent, detect and punish any discrimination in police activities.

(b) The third parties' submissions

88. The Human Rights Centre of Ghent University described the harmful effects of ethnic profiling as an offence against human dignity, drawing heavily on the Views of the United Nations Human Rights Committee in the case of *Rosalind Williams Lecraft v. Spain* of 27 July 2009 (Communication no. 1493/2006) (see paragraph 38 above).

89. The NGOs Rights International Spain and Plataforma por la Gestión Policial de la Diversidad, in a joint intervention, presented different comments by national and international institutions on ethnic profiling by the Spanish police. They stated that five Spanish local police headquarters had successfully implemented measures to prevent these situations, such as so-called "stop forms": every time a police officer identified a person, he or she had to complete a form with the person's data, the reason for the identification and the result of the process. The identified person received a copy of the form and was informed about the possibility of submitting a complaint.

90. The Défenseur des droits de la République française submitted information about the illegality of ethnic profiling in identity checks carried out by the police as a common issue in European countries, especially in Spain, as had been pointed out by the ECRI report on Spain of 5 December 2017 (see paragraph 38 above), the United Nations and even the Spanish Ombudsperson.

(c) The Court's assessment

(i) Relevant principles

91. Concerning the notions of "private life" and personal autonomy, including ethnic identity, within the meaning of Article 8 of the Convention, the Court refers to the general principles set out in *R.B. v. Hungary* (cited above, §§ 78-79). Although that case referred to obligations concerning investigations of allegedly discriminatory treatment by private individuals, *a fortiori*, the principles are also applicable in the present case where the alleged discriminatory acts were performed by State agents.

92. With regard to Article 14 of the Convention, the Court reiterates that discrimination is treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *Nachova and Others*, cited above, § 145; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV; and *Soare and Others v. Romania*, no. 24329/02, § 201, 22 February 2011) – "direct discrimination".

93. A difference in treatment may also take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. Such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent (see *D.H. and Others v. the Czech Republic*, cited above, §§ 175 and 184, and *Biao v. Denmark* [GC], no. 38590/10, §§ 91 and 103, 24 May 2016).

94. The Court has repeatedly stated that, when examining the cases before it in terms of evidence, it usually applies the principle *affirmanti incumbit probatio* (the applicant has to prove his or her allegation). It is only once an applicant has shown a difference in treatment that the burden of proof shifts to the Government to show that it was justified (see *D.H. and Others v. the Czech Republic*, cited above, § 177, and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 57, ECHR 2005-XII). According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (see *D.H. and Others v. the Czech Republic*, cited above, § 178).

95. The Court has also recognised that, when it is alleged that a certain act of discrimination (in particular, a violent act) was motivated by racial prejudice, the Government cannot be required to prove the absence of a particular subjective attitude on the part of the person/persons concerned (see *Nachova and Others*, cited above, § 157).

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(ii) Application of these principles to the present case

96. Turning to the circumstances of the present case, the Court notes that the applicant stated that he had felt humiliated and embarrassed because of the identity check to which he had been subjected on 29 May 2013, allegedly because of his race and skin colour.

97. The Court observes that the applicant was requested to identify himself and later arrested in a street where pickpocketing and thievery were frequent, but that the only other person present at the time was his friend K.A. Neither the identity check nor the arrest took take place in the presence of family members or in his neighbourhood. His friend, also Pakistani, was not arrested (see paragraph 7 above). The applicant claimed that his friend was also requested to identify himself, but the police and Government deny it.

98. The applicant brought State liability proceedings, complaining that the identity check carried out on him had been discriminatory (see paragraph 18 above), and seeking an acknowledgment that the police's behaviour had been unlawful, a public apology from the State and damages.

99. The applicant relied heavily on the fact that nobody else belonging to the "majority Caucasian population" had been stopped on the same street immediately before, during or after his identity check. The Court observes, however, that this cannot be taken as an indication *per se* of any racial motivation behind the request for him to show his identity document. The applicant has not succeeded in showing any surrounding circumstances which could suggest that the police were carrying out identity checks motivated by animosity against citizens who shared the applicant's ethnicity, or which could give rise to the presumption required to reverse the burden of proof at the domestic level as to the existence of any racial or ethnic profiling. The Court sees no reason to depart from the domestic courts' conclusion that the applicant's attitude, and not his ethnicity, was what caused the police officers to stop him and to identify him. It was only his refusal to show proof of his identity that caused his detention in order to be identified at the police premises, as provided by the applicable law (see paragraph 33 above).

100. The applicant's complaint was also accompanied by reports aimed at proving that racially motivated identity checks were a pervasive practice of the Spanish police forces. As the Court has already held, statistics need to appear to be reliable and significant on critical examination in order to be considered sufficient to constitute the prima facie evidence the applicant is required to produce (see *D.H. and Others v. the Czech Republic*, cited above, § 188). It is true that a number of organisations, including intergovernmental bodies, have expressed concern regarding the occurrence of racially motivated police identity checks (see paragraphs 61-62 and 88-90 above). However, the Court cannot lose sight of the fact that its sole concern in the case at hand is to ascertain whether the fact that the applicant was required to identify himself on the street was motivated by racism. As was also mentioned by the central administrative court, the issue at stake is limited to finding out whether the applicant suffered harm which he was not obliged to suffer, caused by the normal or abnormal functioning of the public authorities (in this instance, the police), and in that case, to award him compensation (see paragraph 31 above).

101. The domestic judicial authorities also noted that the same facts had been assessed by a criminal court in criminal proceedings which were discontinued for lack of evidence of a racially motivated offence. The Court notes that the Spanish legal framework does include measures against discrimination on the basis of race or ethnicity (including rules for the reversal of the burden of the proof) and administrative and criminal sanctions for acts that constitute or promote racism. However, in the framework of administrative proceedings, neither the alleged harm suffered by the applicant nor the existence of a causal link with the functioning of the police forces could be established.

102. In sum, having assessed all the relevant elements, the Court does not consider that it has been established that racist attitudes played a role in the applicant's identity check by the police and his arrest in that context.

103. It thus finds that there has been no violation of Article 14 read in conjunction with Article 8 of the Convention in this respect.

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FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by four votes to three, that there has been no violation of Article 14 read in conjunction with Article 8 of the Convention as regards the complaint concerning the domestic authorities' failure to carry out an effective investigation;
3. *Holds*, by four votes to three, that there has been no violation of Article 14 read in conjunction with Article 8 of the Convention as regards the complaint concerning the allegedly discriminatory grounds for the police check and arrest of the applicant.

Done in English, and notified in writing on 18 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Georges Ravarani
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Elósegui and Serghides;

(b) dissenting opinion of Judge Zünd;

(c) dissenting opinion of Judge Krenc.

G.R.
M.B.

JOINT CONCURRING OPINION OF JUDGES ELÓSEGUI AND SERGHIDES

I. CASE-LAW OF THE COURT ON THE BURDEN OF PROOF IN CASES OF ALLEGED RACIAL DISCRIMINATION: THE SPANISH LEGAL FRAMEWORK IS IN ACCORDANCE WITH THE CASE-LAW OF THE COURT, THE EU DIRECTIVES, AND ECRI'S RECOMMENDATIONS

1. We completely agree with the entire judgment, its reasoning and its conclusions. This separate concurring opinion aims to provide details of some additional information available to the Court in this case, and especially the reasoning of the Spanish domestic authorities, including the action taken by the courts dealing with the different sets of proceedings.

2. The two cases which the Chamber of the Third Section has decided on the same day – *Muhammad v. Spain* (no. 34085/17) and *Basu v. Germany* (no. 215/19) – followed the Court's case-law as set out in *Nachova and Others v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII), *Stoica v. Romania* (no. 42722/02 § 126, 4 March 2008), and the more recent cases quoted in both judgments delivered today (see *Basu*, cited above, §§ 38-41, and paragraphs 91-95 of the present judgment). This has confirmed the view that the reversal of the burden of proof requires the applicant to provide prima facie evidence of the discrimination (see paragraph 94 of the present judgment).

3. In both judgments it has been clear that the current case-law of the Court is in line with ECRI's General Policy Recommendations nos. 7, 11, 15 and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("the EU Race Equality Directive"), Recital 21 of which provides:

> "The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought" (see paragraph 41 of the judgment)

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4. It is still necessary for there to be prima facie evidence of such discrimination. Even in criminal cases of gender-based violence or in the context of domestic violence, the criteria have been the same. The shifting of the burden of the proof requires first that the alleged victim should provide some evidence (see *Volodina v. Russia*, no. 41261/17, § 117, 9 July 2019). In *Volodina*, we were both members of the Chamber and we voted in favour of finding a violation of Article 3 in conjunction with Articles 13 and 14. In that case, the police refused to open a criminal investigation in connection with the applicant's allegations. In the present case, *Muhammad v. Spain*, the authorities did not display a passive attitude. The judges and prosecutors opened the respective proceedings. Furthermore, the applicant's complaint to the Court referred to Article 8, and not Article 3. Moreover, under Spanish law, criminal proceedings can be instituted not only by the State, but also by the victim as a private prosecution. If a criminal remedy is required, it may be initiated by the victim (contrary to some other criminal legal systems; see *Sabalić v. Croatia*, no. 50231/13, § 105, 14 January 2021), and then the State pursues the matter through the investigating judge and the prosecutor.

5. In relation to police checks and facts creating a presumption of racial/ethnic discrimination, it is very important to distinguish, as the EU Race Equality Directive and ECRI do, between criminal liability and administrative or disciplinary sanctions. The criminal law does not allow the burden of proof to be shifted to the defendant. The presumption of innocence prevents the use of such a technique.

6. This point is extremely important. As we can see in the present case, there were two different sets of judicial proceedings, one criminal against the two police officers, where the racial intent of the police was not proven, and the other administrative, in which the applicant was unable to provide any prima facie evidence of racial discrimination.

7. According to ECRI's General Policy Recommendation no. 7, the sharing of the burden of proof is applied in relation to administrative proceedings and disciplinary sanctions, but never in criminal matters. When the Recommendation speaks about "presumed discrimination", it means that the complainant has to present some evidence of prima facie discrimination in administrative or disciplinary proceedings, and the shifting of the burden to the defendant does not apply in criminal proceedings. The text of ECRI's recommendation is very clear (see paragraph 29 of the Explanatory Memorandum to ECRI General Policy Recommendation no. 7):

> "A shared burden of proof means that the complainant should establish facts allowing for the presumption of discrimination, where upon the onus shifts to the respondent to prove that discrimination did not take place. Thus, in case of alleged direct racial discrimination, the respondent must prove that the differential treatment has an objective and reasonable justification."

8. The EU Race Equality Directive provides in Article 8 (Burden of proof):

> "1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
>
> 2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
>
> 3. Paragraph 1 shall not apply to criminal procedures.
>
> 4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).
>
> 5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case." (see paragraph 41 of the judgment)

9. The case-law of the Court is in line with these recommendations and it is necessary to show some prima facie evidence before shifting the burden of proof to the State.

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II. AN EFFECTIVE INVESTIGATION BY THE AUTHORITIES

10. The conclusion of the judgment is that the Spanish State has complied with all its positive and negative obligations, and that the investigation was impartial and was carried out in two sets of proceedings, one criminal and the other administrative, and not only internally by the police themselves, but by the investigating judge, with the intervention of the public prosecutor, and by the administrative court (unlike in the *Basu v. Germany* case, decided by the same Section on the same day, and in which we both voted in favour of finding a violation of Article 8 in conjunction with Article 14). In the present case, the Court "sees no reason to depart from the domestic courts' conclusion that the applicant's attitude, and not his ethnicity, was what caused the police him to stop him and to identify him" (see paragraph 99 of the judgment). Therefore, it has remained proven that the basis of the identity check was the applicant's provocative behaviour and that the police put forward a reason for carrying out a check on that particular person (ibid.).

11. It is important to emphasise that the two police officers who requested the documentation from the applicant on 29 May 2013 immediately completed a complaint record for the administrative offence under Article 26 (h) of Institutional Law no. 1/1992 of 21 February 1992 on protection of public safety, which was delivered to the Sub-directorate General for Internal Security (Barcelona) that same day (see paragraphs 8 and 21 of the judgment), as noted in the report by the Technical Office of the Catalonia Police Headquarters, in which it was already stated that the reason for the request for the identity document had been the applicant's own conduct. In reality, the context in which the applicant was asked for his identity card was not even a situation in which documentation would normally be requested (such as at a border crossing, an airport or a train or bus station).

12. In that connection, although the applicant had lodged a handwritten criminal complaint with the Barcelona investigating court no. 3, he instituted domestic administrative proceedings almost one year after the events, on 7 April 2014 (see paragraph 18 of the judgment). The fact that the administrative proceedings started one year after the events is therefore not attributable to the authorities, but to the applicant himself.

13. The two police officers acted in a transparent way from a legal point of view, filing a written record of the report on the same day of the events. In contrast, the applicant refused to sign both the register of identification procedures and the complaint record. The Directorate General of Police and the Civil Guard responded to the request for information regarding the State liability claim, in connection with the actions of officers of the National Police Corps, within three days from the filing of that claim (see paragraph 21 of the judgment). The Directorate General of Police made available to the authorities: a photocopy of the register of identification procedures; the record drafted at the time, giving an account of the facts; and a copy of complaint record no. 837683, delivered to the Sub-directorate General for Internal Security.

14. It should also be noted that the applicant was heard on several occasions: orally in the criminal proceedings and in writing through his lawyer in the administrative proceedings. During the criminal proceedings, the investigating judge (see paragraph 13 of the judgment) agreed to take a statement from the applicant as a victim and his friend as a witness, plus the two police officers as defendants. His friend's testimony was taken into account in both the criminal and the administrative proceedings because in both sets of proceedings the statements the friend had given to a Barcelona notary as a witness to the events were provided. In the criminal proceedings, the friend was summoned by the investigating judge, but because the address provided was incorrect, he did not receive the summons (see paragraph 15 of the judgment), a fact which is also not attributable to the judicial authorities. The investigating judge, having examined the evidence, was not convinced that the events had taken place in accordance with the applicant's account. The Barcelona *Audiencia Provincial* examined the preliminary investigation conducted by the investigating judge, deciding that the provisional decision in the proceedings was entirely lawful and declaring the appeal inadmissible (see paragraph 16 of the judgment).

15. It is also important to note the arguments of the public prosecutor in requesting, on 23 April 2015 (see paragraph 16 of the judgment), the discontinuation of the proceedings in relation to the applicant's complaint against the two national police officers for an alleged crime of abuse of authority in the exercise of their duties, after the investigating judge had carried out the preliminary investigations. Once the evidence presented had been examined, the prosecutor submitted as follows: "(i) . . . there is no medical report (about any harm or injury); (ii) the investigation

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has been completed and no corroborating evidence has been obtained from the complainant's version; (iii) steps have been taken to determine whether there were cameras that could have recorded the events and the result has been unsuccessful; (iv) the complainant was accompanied by another foreign person of Pakistani origin, who, however, has not alleged any discriminatory treatment or abuse of authority by the police; (v) Mr K.A, apparently an eyewitness to the facts, has not been able to be located in order to give evidence; and (vi) there are contradictory versions that do not allow us to determine the reality of the facts; by this, we are not saying that the complainant is lying but that his testimony is not endorsed by relevant supporting evidence that complements it" (submissions by the Barcelona Provincial Prosecutor to the Barcelona investigating court no. 3, 23 April 2015; document in the case file).

16. The prosecutor concluded by submitting as follows:

> "All testimonial statements must meet the requirements demanded by the case-law in order to be taken into account: absence of subjective lack of credibility derived from a spurious motive; verisimilitude corroborated by peripheral circumstances; and persistence in the allegation of the offence. In short, and applying the case-law of the European Court of Human Rights, which requires an in-depth and effective investigation of all incidents that may have a racist, xenophobic or other discriminatory motive (ECHR, *[B.S.] v. Spain*, no. 47159/08, 24 July 2012, or *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, [ECHR 2005-VII], all lines of inquiry have been exhausted to try to clarify the facts without it having been possible to obtain sufficient incriminating evidence to be able to bring criminal charges against the persons against whom the complaint was directed." (ibid.)

III. STATE LIABILITY IN ADMINISTRATIVE PROCEEDINGS

17. The applicant applied to the Ministry of the Interior to establish liability on the part of the State authorities. Thus, he brought a State liability claim, seeking compensation for the damage he had needlessly suffered as a result of what he considered the abnormal functioning of the public services.

18. In the administrative proceedings, the applicant was given a hearing and also the opportunity to present further allegations and evidence. Nevertheless, in administrative proceedings to establish possible State liability, it is for the claimants to produce evidence of the alleged violation. In many countries, such as France, Spain, Luxembourg or Switzerland among others, in administrative proceedings for State liability, the judges rely on written documents and evidence. The claimants are represented by their lawyers and it is not usual to call them as witnesses at an oral hearing.

19. According to the administrative record, the applicant complained that the police had asked only him for identification, and not the white people who were walking down the same street as him (see paragraph 18 of the judgment). However, throughout the domestic proceedings it was proven that his friend, who was also Pakistani and dark-skinned, had not been asked for identification. This evidence confirms the police officers' account that the request for documentation was made only to him because of his provocative behaviour and not because of the colour of his skin. In the present case, unlike in *Basu* (cited above), in which the police requested the passport of both a father and his daughter on a train, there is an important element that allows us to conclude that, as was stated by the domestic authorities, "the applicant's friend K.A. was not asked to show his identity documents since he had not made any comments to the police" (see paragraphs 9 and 21 of the judgment).

20. Although the criminal proceedings were already open, the applicant argued in the administrative proceedings that the object of the latter proceedings was different because the administrative claim related to the discriminatory nature of the identity check performed on him. In short, in the administrative proceedings, the applicant sought an acknowledgment that the police check had been based solely on his race and was discriminatory and illegal, and as a consequence, an award of 3,000 euros in compensation, a public apology and publication of the judgment and the consequent apology in national newspapers. The administrative authorities agreed to open the administrative proceedings for State liability (see paragraph 22 of the judgment).

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21. Since criminal proceedings were ongoing before the Barcelona investigating court no. 3 in relation to the same facts, and considering that the result of those proceedings could be of interest for the determination of the State liability claim, the administrative authorities initially requested that the relevant department be provided with the judgment once it was delivered, indicating that the administrative proceedings should be put on hold in the meantime. However, the applicant argued that it was not necessary to wait for the completion of the preliminary investigation being conducted by the Barcelona investigating court no. 3, since the investigation concerned different facts, which were irrelevant for the determination of his claim (ibid.).

22. The Investigative Service of the administrative authorities then decided to continue with the processing of the file. The investigating officer requested the reports issued by the police from the Legal Department of the Barcelona Police Headquarters.

23. As has been established in the proceedings before the domestic courts and before the Court, the police officers were patrolling inside a vehicle on a tourist street where there are frequent robberies (see paragraphs 6 and 8 of the judgment). The applicant stared at the police car, and through the open driver's window said "Look, the police busybodies!" and started laughing as he was walking away. For this reason the police patrol proceeded to stop him and ask him to identify himself, which the applicant refused to do, answering: "Why? Because I'm black? No way!" Therefore, as provided by the Institutional Law on Public Safety, he was transferred to the police headquarters and recorded under number 4 in the register of identification procedures. Throughout the police action, he maintained a provocative, defiant and cocky attitude, taking out a national identification document for foreign residents (NIE) from his clothes and saying: "I'm giving it to you now because I want to, not because you requested it" (see paragraphs 8-9 of the judgment).

24. There is another official report dated 28 May 2014 from the Directorate General of Police addressed to the Chief of Police of Catalonia, in which it is stated:

> "The officers involved in the events (a deputy inspector and a police officer) have already given a statement in their capacity as accused, being assisted by [a] lawyer. After the statement, which was also given in the presence of the prosecutor, the impression is that the dismissal of the proceedings will be agreed again. On the face of it and subject, naturally, to the results of the judicial investigation, the actions of the National Police officers must be characterised as correct, adhering at all times to the legal and ethical standards that govern police action. Indeed, as the aforementioned officers point out, the identification of Mr Muhammad was not based on his physical or ethnic characteristics, quite the contrary, but was motivated by his cocky and disrespectful attitude as the police vehicle passed by. In any case, the alleged police abuse that is complained of stands in contradiction with the fact that it was the officers against whom the complaint was brought who themselves transferred him to the area where he had to take the bus." (see paragraph 10 of the judgment)

25. In the administrative proceedings, in view of that report and the rest of the documentation in the file, considering the procedure to have been initiated and before proceeding with the drafting of the proposed decision, the court granted a hearing so that within a period of fifteen days the applicant could raise any allegations that he considered appropriate or submit new documents and supporting evidence that he considered relevant. The applicant requested the documents relating to the report, which were provided to him. In a new hearing procedure, the applicant was informed of what had been requested in his written pleadings and reference was made to the evidence adduced. Within the period granted for submitting his allegations, the applicant submitted a document confirming his claim for compensation, although he did not present any new evidence or arguments of legal relevance capable of casting doubt on the criterion for discontinuance already set out in the administrative file.

IV. THE SPANISH LEGISLATION ON FINANCIAL LIABILITY OF THE ADMINISTRATIVE AUTHORITIES AND THE LEGAL ARGUMENTS IN THE ADMINISTRATIVE PROCEEDINGS REGARDING THE LACK OF EVIDENCE OF RACIST ACTION BY THE POLICE

26. Article 139 of the Spanish Law no. 30/1992, and Royal Decree no. 429/1993 of 26 March 1993, which approves the Regulations on proceedings before the public authorities in relation to financial liability, proclaim

https://doi.org/10.1017/ilm.2023.39 Published online by Cambridge University Press

the right of individuals to be compensated by the relevant public authority for "any harm caused to any of their property or rights, except in cases of *force majeure*, provided that the harm is the result of the . . . functioning of public services" (paragraph 2 of Article 106 of the Constitution).

27. The following requirements must be met for an action of this kind to succeed:

(a) proof of the reality of the harmful result: "in any event, the alleged harm must be actually incurred, economically measurable and related to a specific person or group of persons";

(b) the unlawfulness of the harm caused, in that the person affected does not have a legal duty to incur the pecuniary damage produced;

(c) imputability of the activity to the defendant authority, the reference to the "functioning of public services" being understood as covering all kinds of public activity – and also the existence of a direct and actual causal link, it being necessary to specify that for the assessment of liability, the lawful or unlawful nature of the administrative act that causes the damage, or the element of personal fault on the part of the authority or official that causes it, are immaterial; and

(d) absence of the exception applicable in cases of *force majeure*.

28. According to the Technical Secretary General, who was the author of the administrative decision issued on 6 November 2014 in the present case: "Regarding the burden of proof, it rests on the claimant in accordance with the old aphorisms '*semper necessitas probandi incumbit illi qui agit*', '*onus probandi incumbit actori*', . . . applying Article 217 § 2 of Law no. 1/2000 of 7 January 2000 on Civil Procedure to administrative proceedings. . . . The burden of proving the damage or loss and the causal relationship between these and the authorities' actions falls to the injured party." The same decision adds: "Although it must be recognised that on occasions, the specific circumstances are difficult to prove, it must also be acknowledged that since the legal system makes it a necessity to protect public interests, an attitude of caution is required in order to prevent indiscriminate claims based on mere statements by a party, the consequences of which would have to be borne by the public treasury and, ultimately, by the taxpayers." (All this is consistent with the case-law criteria established by the Court; see paragraph 94 of the judgment.)

29. To find the administrative authorities liable for the damage caused to individuals as a consequence of the normal or abnormal functioning of public services, it is necessary, as has already been stated, that this be established and proven by the claimant. Therefore, among the requirements, it was necessary in the present case for there to be proof that the events occurred as stated by the applicant, but as has been said, the burden of proof fell to the claimant in accordance with the aphorisms already mentioned and in accordance with the general rules on the burden of proof in Article 217 of the Law on Civil Procedure, which provides: "It shall be for the claimant and for the defendant in the counterclaim to discharge the burden of proving the certainty of the facts from which, in accordance with the legal rules applicable to them, the legal effect of the causes of action of the claim and counterclaim are ordinarily inferred."

30. But the truth is that in the proceedings in the present case, the detriments and damage that the applicant claimed to have suffered were only supported by his word, with which the police clearly disagreed. In summary, the administrative department dealing with the case considered that the applicant had not proven that an identity check had been carried out on the basis of his physical or ethnic characteristics, as stated in his claim, and found that the failure to discharge the burden of proof could only be attributed to the relevant party – in this case, him. This meant that strict liability could not be attributed to the authorities, which would have entailed an obligation to pay compensation, given that the applicant had not satisfied the aforementioned requirement of the existence of a direct, immediate and exclusive relationship of cause and effect between the alleged damage and the functioning of the corresponding service, and the claim therefore had to be dismissed.

V. JUDGMENT OF THE ADMINISTRATIVE COURT IN THE ABBREVIATED PROCEDURE

31. The applicant, in his statement of claim before the administrative court, stated the facts and legal grounds he considered applicable, in order to have the contested decision annulled. Once the application for evidence to be taken had been received, the evidence admitted was assessed. In the judicial administrative proceedings, the applicant

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alleged that a National Police officer had requested his documentation from the window of a patrol car (the first legal ground) and claimed that he had shown it to the officer, which contradicts, in our opinion, the proven fact that the police officers took him to the police station for identification, as was accepted by both parties in the proceedings before the Court and recorded in the police document included in the file before the Court (see paragraph 10 of the judgment).

32. The applicant argued that the police identity check was based exclusively on his racial appearance, against the background of a generalised police practice of using ethnic profiles for identity checks, in support of which he submitted, together with his claim, numerous reports from national and international human rights institutions, NGOs and civil-society organisations. The applicant reiterated the claims that he had made before the administrative authorities, seeking 3,000 euros among other things. The administrative court reiterated the applicable rule: that is, that the harm must be a consequence of the functioning of public services, of an objective nature. It was necessary to prove a causal link between the damage caused and the functioning of public services (see paragraph 27 of the judgment).

33. A notable procedural law issue is that in judicial administrative proceedings to establish liability on the part of the administrative authorities, no steps are taken in order to assess the subjective character of the conduct causing the damage, that is, whether there was fraud or negligence in the performance of public services (see paragraph 72 of the judgment).

34. In its decision of 14 September 2015 the administrative court held:

> "Thus, with regard to the case that concerns us, first of all it is evident that the success of the State liability claim cannot be based on reports from international and national institutions for the protection of human rights, the Ombudsman or the United Police Union or on statistical data on the pattern of police detentions, as the appellant insistently claimed both in his application and at the oral hearing, without prejudice to the value [such information] may have in other instances or institutions, since a finding of liability must be based on specific facts that demonstrate that the functioning of public services has caused economically measurable damage that the interested party does not have a legal obligation to bear, proof of which must be fully established by whoever has the burden of proof, namely the person who brings the action, and not by a pattern or objective statistics about the number of people arrested, since the only thing this would offer is a probability and not established proof." (see also the opinion of the Court on the use of statistics in paragraph 100 of the judgment)

35. The administrative court further held:

> "Limiting ourselves, therefore, to the evidence in the records and in the administrative file, the conclusion must be that the administrative appeal is to be dismissed, since we are faced with contradictory versions of the circumstances that motivated the police detention of the appellant, whose version cannot prevail without sufficient evidence for the purposes of assessing his claim. Indeed, in the first place, it must be taken into account that in relation to the same facts, criminal proceedings are being conducted in a Barcelona investigating court, the conclusion of which is not known, at least to us; secondly, an examination of the administrative file (page 91) reveals the report by the deputy inspector of the National Police Corps, in which a very different version is found from the one put forward here by the appellant. Thus, according to the report on page 86 of the file, relating to the identification, it is stated that the individual in question, looking cockily at the police vehicle, said through the driver's window: . . ."

36. It went on to find:

> "In turn, on page 89 of the file there is a copy of the register of identification procedures, which shows a refusal to be identified, signed by two police officers, and a note by one of those police officers and a third officer, the senior duty officer, in which it is stated that the person being identified showed the NIE once at the police station. The appeal must be dismissed because the facts on which

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the appellant based his claim, in view of the evidence that this court has at its disposal, are far from being proven, and therefore the requirements for State liability, as provided in Articles 139 et seq. of Law no. 30/92, are not met."

VI. THE RELEVANT EVIDENTIAL RULE AND THE PRINCIPLE OF EFFECTIVENESS

37. It is our submission that the relevant evidential rule which is adopted in the judgment, namely that the burden of proof can be shifted to the authorities *only* when there is a prima facie case of discrimination brought by the applicant, is an aspect of the principle of effectiveness, and this acknowledgment explains why the rule is a constructive one. The principle of effectiveness, which applies not only in interpreting the Convention provisions safeguarding human rights in such a way as to render the rights practical and effective and not theoretical and illusory, should, in our view, also apply in making the evidential rules concerning these rights practical and effective. Otherwise, there will be a risk that the right concerned might not in the final analysis be practical and effective. One aspect of the principle of effectiveness as a method of interpretation is that any interpretation leading to absurdity should be rejected (see also Article 32 (b) of the Vienna Convention on the Law of Treaties). The same aspect of the principle of effectiveness is also important when formulating or adopting evidential rules concerning human rights. Fortunately, the relevant evidential rule is based on logic and common sense and is an aspect of the principle of effectiveness, which rejects any absurdity. Without the existence of the requirement for the applicant to make a prima facie case of discrimination before the burden of proof is shifted to the authorities, the task of the authorities in performing their duties would become excessively difficult, because they would have to prove in every case that every step or action on their part was taken without any discrimination.

VII. CONCLUSION

38. As we have concluded, in the present case there was an effective investigation and the applicant's allegation of racial profiling was not substantiated, this omission being attributable to the applicant and not to any failures in the investigation (contrast *Basu*, cited above, § 43). The police offered a reason for asking for the applicant's identity document. Moreover, Spain has a comprehensive framework for dealing with situations of racial discrimination in general, and in particular those caused by police officers (see paragraphs 30-37 of the judgment).

DISSENTING OPINION OF JUDGE ZÜND

1. While I am in full agreement with the applicability of Article 14 in conjunction with Article 8 to the case at hand, I am unable to share the majority's view that there has been no violation of those provisions.

2. The Court has found that the use of coercive measures to require an individual to submit to an identity check and detailed search of his person amounts to an interference with the right to respect for private life (see *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 63, ECHR 2010). Such a measure therefore falls within the scope of Article 8. It is not necessary to decide whether a simple check of a person's identification papers also falls within the scope of Article 8. For Article 14 to be applicable it is enough for the facts of the case to fall within the wider ambit of private life (see *Konstantin Markin v. Russia*, no. 30078/06 § 129, ECHR 2012; *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV; *E.B. v. France*, no. 43546/02, §§ 47-48, 22 January 2008; and *Fretté v. France*, no. 36515/97, § 31, ECHR 2002-I). This threshold is met for an identity check. Article 14 is therefore applicable.

3. The judgment correctly states that there is a duty to investigate an allegation that an identity check had been motivated not by objective reasons but by reasons linked to racial characteristics of the targeted person. I do not deny that in the present case the authorities did investigate the allegations of racial discrimination. There were, however, significant shortcomings in the way the investigations were conducted.

4. First, the administrative and judicial authorities did not allow the individuals present at the scene (the applicant's friend K.A. and the police officers) to be heard orally (see paragraphs 23 and 26 of the judgment), nor did they consider that seeking video footage of the event was relevant to establish the factual pattern (see paragraph 23 of the judgment). Besides the applicant's statements, the authorities only admitted written statements from K.A. – before dismissing them – and the police to establish the events of the case (see paragraph 26 of the judgment). The fact that in the parallel criminal proceedings, the police officers were put on trial as defendants and attempts were

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made, without success, to hear K.A. orally does not rectify that shortcoming: the criminal proceedings were instituted only on the basis of the applicant's allegations of insults, slapping and forgery, and not in relation to the allegedly discriminatory identity check (see paragraph 15 of the judgment). The allegations of discrimination were therefore not within the scope of the information to be ascertained by the criminal court. The fact that K.A. had provided an incorrect address and could not be summoned to provide oral testimony in the criminal proceedings is therefore immaterial to the failure to hear him in the administrative proceedings, which were conducted precisely for the purpose of ascertaining whether there had been racial discrimination.

5. Secondly, the administrative authorities found that the applicant's version of the event was "radically different" from the one presented by the police (see paragraph 24 of the judgment). Because the evidence provided by the parties was "essentially contradictory", and the applicant could not provide any further evidence to support his version of events, the administrative court, in dismissing his appeal, relied on the police's statements of a lack of wrongdoing on their part (see paragraph 27 of the judgment). The proceedings were therefore insufficiently thorough or effective to satisfy the procedural positive obligations to investigate required of States by Article 14 in conjunction with Article 8. The judicial authorities rejected any evidence which might have helped clear up the "essentially contradictory" nature of the parties' statements as to whether the identity check had been discriminatory. In rejecting the applicant's evidence, they also denied him the opportunity to support his version of events, and then dismissed the case for lack of evidence (see paragraphs 24 and 27 of the judgment). The State authorities therefore failed to sufficiently investigate the allegations of racial discrimination.

6. It is for these reasons that I have voted to find a violation of Article 14 in conjunction with Article 8 as regards the complaint concerning the domestic authorities' failure to carry out an effective investigation.

7. Once a seriously conducted, thorough and effective investigation shows that there was no other plausible reason for the identity check at the time it was carried out, then it can be assumed that the person subjected to the identity check was targeted on account of race, ethnicity, skin colour or any other specific physical or ethnic characteristics. Such a discriminatory identity check would constitute in itself a violation of Article 14 in conjunction with Article 8.

DISSENTING OPINION OF JUDGE KRENC

1. With regret, I must dissent from the majority's findings that Article 14 read in conjunction with Article 8 of the Convention has not been violated in the present case.

2. The present judgment rightly emphasises the importance of combating racial discrimination, which "is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction" (see *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII).

3. In parallel, it cannot be contested that identity checks for preserving public safety pursue a legitimate aim as regards the Convention. However, when the authorities carry out such checks, people cannot be targeted on the sole grounds of ethnic characteristics (see, *mutatis mutandis*, *Timishev*, cited above, §§ 54-59).

I. Positive obligation to carry out an effective investigation

4. As regards the State's obligation under Article 14 of the Convention read in conjunction with Article 8, the majority highlight the "special duty of investigation" by the authorities in cases where racial discrimination is alleged (see paragraph 65 of the judgment). They consider, nevertheless, that in the present case the respondent State complied with this obligation (see paragraphs 69-76 of the judgment). I am unable to share this conclusion for the following main reasons.

5. First, the majority point out that criminal proceedings were initiated to investigate the facts and that the police officers were heard, and they observe further that the written testimony of the police officers was taken into account in the administrative proceedings (see paragraph 71 of the judgment). However, the criminal proceedings and the

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administrative proceedings were based on different grounds. As mentioned in the present judgment, the criminal proceedings were not in relation to the allegedly discriminatory identity check (see paragraph 15 of the judgment)[3].

6. Secondly, the applicant requested that the central administrative court hear K.A., the police officers involved in the impugned identity check and arrest, and an expert witness to explain a report on racial profiling statistics. However, all those requests were dismissed by the central administrative court (see paragraph 26 of the judgment). I also note that the administrative authorities did not consider that seeking video footage would be a relevant piece of evidence (see paragraph 23 of the judgment). The applicant was therefore deprived of a concrete opportunity to support his version of events.

7. Thirdly, the central administrative court ruled that the evidence provided by the parties (namely the applicant and the police) was "essentially contradictory" and that the documents provided by the police stated that there had not been any wrongdoing in the request for the identification of the applicant (see paragraph 27 of the judgment). Actually, a contradiction of this kind appears in many discrimination cases concerning identity checks: the statement of the person who claims to be a victim of racial discrimination is in contradiction with the testimony of the police officers. In these circumstances, it is of the utmost importance to carry out an effective investigation. As the Court has repeatedly said, for an investigation to be effective, the institutions and persons responsible for carrying it out must be independent from those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence (see, among other authorities, *Bouyid v. Belgium* [GC], no. 23380/09, § 118, ECHR 2015). In that regard, it is difficult to find that an independent investigation has been conducted in the present case.

8. Therefore, although the State enjoys a margin of appreciation in determining the manner in which to organise its system to ensure compliance with the Convention, I am not really convinced that the national authorities did what was reasonable in the present circumstances to investigate the existence of a possible racist attitude (see, regarding the principles, paragraphs 65-68 of the judgment).

II. Positive obligation to set up an adequate legal framework

9. Furthermore, I regret that the majority do not address the obligation for the Contracting States to set up an adequate legal framework affording effective safeguards against arbitrariness and preventing discrimination in cases of identity checks carried out by State agents. In my opinion, this important issue should have been examined by the Court in order to verify whether the Spanish legal system provides an adequate level of protection.

10. This obligation on States would be fully in line with the principle of subsidiarity, which implies that the national authorities have the primary task of implementing and enforcing the rights and freedoms guaranteed by the Convention.

11. I note in this connection that the applicant expressly argued before the national authorities that the Spanish Law on the protection of public safety, as in force at the time of the incident, did not provide adequate safeguards. In particular, he asserted that the law did not establish a requirement for a sufficiently well-founded reason to carry out identity checks, among other flaws, which allowed room for arbitrary and discriminatory behaviour (see paragraph 20 of the judgment).

12. In its case-law, the Court has already held in many cases that the authorities' positive obligations under the Convention may include a duty to establish an adequate legal framework affording protection of vulnerable people (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 89, ECHR 2004-XII, concerning Article 2 of the Convention; *Volodina v. Russia*, no. 41261/17, §§ 77 and 85, 9 July 2019, and *O'Keeffe v. Ireland* [GC], no. 35810/09, § 148, ECHR 2014 (extracts), relating to Article 3 of the Convention; *Rantsev v. Cyprus and Russia*, no. 25965/04, § 285, ECHR 2010 (extracts), as regards Article 4 of the Convention; and *Söderman v. Sweden* [GC], no. 5786/08, §§ 80 and 89, ECHR 2013, and *F.O. v. Croatia*, no. 29555/13, § 91, 22 April 2021, regarding Article 8 of the Convention) or providing effective safeguards against arbitrariness by State agents (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 209, ECHR 2011 (extracts)).

13. In particular, in *Giuliani and Gaggio*, concerning the use of force and firearms by police officers, the Court stated: "Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that policing operations must be sufficiently regulated by national law, within the framework of a system of

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adequate and effective safeguards against arbitrariness and abuse of force" (ibid., § 249). In my view, those considerations are also relevant to the present issue.

III. Negative obligation: not to discriminate

14. In discrimination cases, the issue of evidence is crucial but also particularly tricky. Applicants are often faced with difficulties in proving discriminatory treatment (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 186, ECHR 2007-IV). In other contexts, the Court has already pointed out some kinds of prima facie evidence which can shift the burden of proof on to the respondent State, such as reports by non-governmental organisations or international observers, or statistical data from the authorities or academic institutions (see, as a recent example, *Y and Others v. Bulgaria*, no.9077/18, § 122, 22 March 2022).

15. In the present case, as I consider that the respondent State did not comply with its obligation to carry out an effective investigation into possible racist motives, I am unable to take a position on whether racist attitudes played a role in the applicant's identity check by the police and his arrest (see paragraph 102 of the judgment).

ENDNOTES

1 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

2 Law no. 62/2003 transposed the EU Equality Directives 2000/43/EC of 29 June 2000 and 2000/78/EC of 27 November 2000.

3 The applicant argued that discriminatory identity checks were not a criminal offence under Spanish law. See in this regard ECRI, Fifth Report on Spain, adopted on 5 December 2017 and published on 28 February 2018, which recommended that the Spanish authorities criminalise racial profiling by the police (see paragraph 8 of the report and recommendation no. 1).

https://doi.org/10.1017/ilm.2023.39 Published online by Cambridge University Press