[ Editorial ]

This issue of ENARgy focuses on strategic litigation in the context of tackling racial discrimination. ENAR has been interested in strategic litigation for several years. It is involved as a core partner in the SOLID project, has recently organised a conference on the topic, and is further exploring some of the issues involved, from various angles and perspectives, in this newsletter.

Although its importance should not be overstated, good quality strategic litigation can result in several benefits. First, it can encourage greater numbers of victims of racial discrimination to present their cases to the courts. Second, it can support the development of existing anti-discrimination legislation in national contexts. Third, it can help change social attitudes towards discrimination, and this can result in important changes in employment and service delivery practices. Furthermore, strategic litigation can assist in developing equalities jurisprudence in neighbouring countries.

There is some experience of strategic litigation in the area of equality in the EU Member States. This newsletter highlights some of the experiences by ENAR members. Since the enactment of the Anti-Discrimination Act in Slovakia, the Center for Civil and Human Rights has brought ten Roma cases on grounds of discrimination by ethnic origin – all of which are still ongoing. In Estonia, there is the case of the retired military officers of the former Soviet Union and their families who have been residing in Estonia but have been refused permanent residence permits. The UK NGO Liberty has successfully represented six Roma individuals who had been refused entry clearance into the UK at Prague Airport. And the Latvian Centre for Human Rights describes a precedent-setting court case on discrimination in employment on the ground of gender.

It can fairly be said, however, that much more strategic litigation is needed, particularly in the area of racial discrimination. NGOs, in particular, have not yet exploited this tool as fully as they could. A few of the articles here highlight some of the challenges involved in strategic litigation cases. Looking back at the Natchova v Bulgaria case, for example, Dimitrina Petrova suggests that the concept of discrimination is still very much linked to subjective aspects related to intent.

The problem of proving an act of discrimination has, no doubt, been a significant hurdle to bringing cases to the courts. The shift in the burden of proof, however, introduced by the Race Equality Directive, aims to make it easier for victims to start proceedings and succeed. An ENAR research study will assess how the shift in the burden of proof has been implemented in six EU countries. Related to the issue of proving discrimination is the sensitive quest of data collection. The EUMC, of course, has extensive experience in this field. But we also include here an article on the experience of ‘situational testing’ in Belgium, which provides an interesting insight into the use of alternative creative tools in this area.

Challenges that impede the use of strategic litigation, then, are not insurmountable. Of course, all tools in the fight against racial discrimination will have their own limitations. However, the law remains a vital instrument to address racial discrimination, and strategic litigation can be highly effective and must continue to play a crucial role – at least until better instruments can be found.

Mohamed Aziz
Member of ENAR’s Bureau and Board Member for the UK
ENAR conference: Strategic litigation – a tool for strengthening anti-discrimination legislation

Since 2003, European Union Member States are required to have implemented the Race Equality Directive (2000/43) adopted in 2000. Whilst in some States national anti-discrimination legislation was already in place, a number of countries did not have any such laws to tackle racial discrimination and some have yet to introduce adequate legislation. The European Commission has undertaken court proceedings against those countries. However, anti-racist NGOs also have a crucial role in monitoring and ensuring that adequate legal standards are in place. And, more importantly, that they are used in order to obtain comparable legal protection from racial discrimination throughout the EU.

ENAR has monitored and influenced the transposition of the Race Equality Directive at national level since 2000 and decided to focus on the issue of strategic litigation during its 2005-2006 Work Programme. It is in this framework that the ENAR conference on strategic litigation was organised in London on 17-18 December 2005.

The objective of strategic litigation

Good quality strategic litigation can encourage greater numbers of victims of racial discrimination to present their cases to the courts as well as the development of existing anti-discrimination legislation in national contexts. It can test and develop the existing anti-discrimination legislation against the requirements of EU legislation and encourage the further development of EU legislation against racial discrimination and other forms of discrimination.

Existing experiences with strategic litigation

There is only a handful of NGOs and legal practitioners in Europe using strategic litigation in the context of ethnic discrimination. Litigation is known to need extensive legal experience and sufficient time and resources to be successful before the courts. Legal instruments, not only at State and EU level, but also within the Council of Europe and, to a limited extent, the UN, offer the possibility to litigate. Concrete examples show that European Court of Human Rights sentences can clarify provisions in international conventions or laws. The more cases considered in court, the more guidance is provided.

Historically, NGOs have not made extensive use of laws in enforcing justice. Legislation appears in most cases to be far removed from the activities of NGOs. A proper understanding is needed of how laws and international conventions can support the fight against racism and, in the long run, change perceptions of ethnic discrimination in society.

Why this conference?

The ENAR conference on strategic litigation aimed to raise awareness of the purpose and importance of strategic litigation and provided information on how to take strategic litigation at different levels – national, European and international. It allowed for a sharing of experience of litigation at national, supra-national and international levels, particularly by active NGOs and explained the support role NGOs can play, encouraging ENAR members to work with organisations and legal practitioners to support victims of racism and racial discrimination in casework, leading to increased use of anti-racism legislation.

It is hoped that the conference helped to bridge the gap between anti-racism NGOs and relevant organisations and legal practitioners undertaking casework and where possible concrete options for NGOs to pursue were outlined.

For more information:
The agenda of the conference, as well a summary of proceedings and some of the presentations are now posted on ENAR’s website:
The law is a vital instrument to address racial discrimination, and strategic litigation has been highly effective and continues to play a crucial role. However, there are limitations to what the law can achieve. It needs to be underpinned and driven by cultural and attitudinal changes. For this reason, the CRE is pursuing the ‘integration agenda’, which comprises three interdependent components: equality, participation and interaction.

The current phenomenon of globalisation challenges us in many ways. For one, there is a tremendous increase in the movement of people – some 200 million people presently live outside their countries of birth. This has provided a spur to economic activity in host countries as well as in countries of origin. However, exclusion and discrimination often follow the arrival of large numbers of newcomers, and friction because of migration is true across the EU. Racism particularly throws into relief the huge social challenges posed by globalisation and migration. There is no single, transferable answer – each country needs to find its own response according to its culture and history.

The effect of the law and strategic litigation

In the UK, the 1976 Race Relations Act (RRA), as amended through the Race Equality Duty, provides the grounds to investigate systemic or institutional racism. The Race Equality Duty requires most public authorities to promote race equality in their work. This consists of having ‘due regard’ to the need to eliminate unlawful discrimination and promote equality of opportunity and good race relations. The two largest formal investigations conducted by the CRE under this legislation concerned the prison service and police force. Both of these have led to action plans, monitored by the CRE.

Individual cases can also be strategic. The following two examples are cases in point:

Wong v. Igen Ltd and others [2005] 3 All ER 812
This case raised the issue of how ‘burden of proof’ provisions should be interpreted following the UK implementation of the EU Race Directive in 2003, which introduced a new test concerning the burden of proof.

The case concerned burden of proof with regard to the employment code. It was important as it recognised that the new test applied and was necessary as most claims of discrimination are very difficult to prove. The decision had implications on all types of discrimination claims brought in UK courts and was welcomed by the UK Equality Bodies.

This case dealt with discrimination against British citizens of foreign birth. A former civilian internee imprisoned by the Japanese in Hong Kong during World War II claimed that she had been unlawfully discriminated against based on her national origins (being of British nationality but not having her parents or grandparents born in the UK), as she did not receive a payment from the Ministry of Defence for British civilian internees. The CRE intervened in support of the claim of discrimination, and charged that the Ministry of Defence had breached its Race Equality Duty under the Race Relations Act to have ‘due regard’ to the need to eliminate unlawful discrimination and promote good race relations.

The court held that there was indirect discrimination and breach of the Race Equality Duty. This ruling was important, as it was the first case to test and provide guidance on what is required by public authorities in fulfilling their Race Equality Duty, which applies to some 40,000 public authorities in the UK. It also ensured that compensation claims will be dealt with carefully in the future.
Some quiet victories for human rights

By James A. Goldston, Executive director of the Open Society Justice Initiative

In a world beset by terrorist violence, natural disasters and war, small signs of progress are often overlooked. So it’s no surprise that even as Western donors spend millions to foster the “rule of law” from Baghdad to Bolivia, recent advances across three continents have attracted little notice.

In each instance, ordinary people, with extraordinary courage, have gone to court to rectify a government injustice. And each time, the judiciary – in Africa, Europe, and Latin America – has responded just as the civics textbooks prescribe: with wisdom, reason and a touch of humanity. The results – landmark judgments vindicating fundamental human rights – demonstrate that independent courts rendering impartial justice are more than a pipe dream.
The first case comes from the Dominican Republic, where the government has for decades denied citizenship—and all the public benefits that flow from it—to tens of thousands of Dominican-born (and often darker-skinned) ethnic Haitians, despite the Constitution’s promise of citizenship to all native-born residents. Several years ago, 2 girls of Haitian descent denied Dominican birth certificates and the right to attend public school brought a legal challenge. On October 7, the Inter-American Court of Human Rights, a regional tribunal with jurisdiction throughout the Americas, ruled for the first time that governments may not discriminate on the basis of race in granting citizenship. The court held that the government’s discriminatory policies left the girls—and thousands of others like them—effectively stateless, in breach of international law. The court ordered the government to reform its birth registration system; to open school doors to all children, including those of Haitian descent; and to pay monetary damages.

Three weeks later, across the Atlantic, a district court in Bulgaria’s capital, Sofia, made history. Echoing the U.S. Supreme Court decision of Brown v. Board of Education, the Bulgarian court affirmed that racial segregation in education is unlawful. The case concerned School 103, located in the Roma ghetto of Filipovtsi. Like many other ghetto schools in Bulgaria, School 103 is attended only by Roma students and suffers from substandard material conditions and educational performance. The court found that racially discriminatory patterns of school assignment violated Bulgaria’s newly enacted antidiscrimination legislation, which faithfully incorporates European Union requirements. As Bulgaria prepares for EU accession, the decision is significant not only for the children at School 103, but for the thousands of Roma across Europe shunted into second-class schools and denied equal educational opportunities.

Finally, just this week, a federal high court judge in Nigeria authorized a ground-breaking lawsuit that seeks to lift the asylum status of the former Liberian ruler and warlord Charles Taylor. In March 2003, Taylor was indicted by the UN-mandated Special Court for Sierra Leone for his contribution to crimes of murder, rape and mutilation during that country’s decade-long civil war. Shortly thereafter, Taylor was granted asylum by Nigeria’s president, Olusegun Obasanjo, and he has since resided in a private compound in the Nigerian city of Calabar.

In May 2004, two Nigerian nationals petitioned Nigeria’s high court to overturn the grant of asylum. The men had had their arms chopped off in Freetown by soldiers of the Taylor-supported Revolutionary United Front. Rather than shelter Taylor, they argued, Nigeria must prosecute him or send him to the special court to face trial. In rejecting the government’s objections, the high court held that the claimants had a right to sue for redress so long as Taylor enjoyed asylum. The government has said it will appeal. Whatever the outcome, the decision stands as a powerful example of an independent court standing up to strong political currents.

What do these cases teach?
First, in an era marred by the resort to force as an arbiter of disputes, the law as applied by capable judges still counts.

Second, don’t underestimate the power of civil society. Each of these cases was made possible by the determined persistence of victims, private aid groups and lawyers working for little pay and at great risk.

Third, now comes the real test. These rulings have articulated—with the full legal authority that only courts possess—basic principles that governments may not breach. But the challenge is to enforce them.

Will Bulgaria desegregate its school system? Will the Dominican Republic grant citizenship to its ethnic Haitian minority? Will Nigeria turn Charles Taylor over to the Special Court for Sierra Leone? Supporters of the rule of law will be watching.

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The Open Society Justice Initiative pursues rights-based law reform and builds legal capacity worldwide. For more information: http://www.justiceinitiative.org
You can contact James Goldston at: JGoldston@justiceinitiative.org
Has it become easier to prove discrimination?

The problem of proving an act of discrimination has in most countries been an important hurdle to bringing cases to court. The Race Equality Directive has introduced a shift in the burden of proof, with the aim of making it easier for victims to start proceedings. Now that the implementation of these EC rules in most Member States has been completed, it is time to examine if the new rules have made a difference. Dick Houtzager introduces ENAR’s forthcoming publication on shifting the burden of proof.

It is generally recognized that proving discrimination is a daunting task. Many people who have been confronted by racist or discriminatory incidents at work, in schools or other places, do not bring forward cases because they feel they cannot prove the incidents. There may be no witnesses or witnesses do not want to testify, there is no information on hiring policies by the employer or, especially where it concerns indirect discrimination, the victim can not produce data to substantiate his/her claim of unequal treatment.

A research study, commissioned by ENAR and carried out by the author of this article, will be conducted in six Member States in order to assess how the shift in the burden of proof, which was introduced by the Race Equality Directive, has been implemented. The easing of the rules with regard to proving discrimination has first been introduced with regard to sex discrimination, through the Burden of Proof Directive of 1997. The purpose of this Directive was to improve clarity in sex discrimination cases and to promote fairness between the parties involved. It recognised that complainants (often employees) face difficulties in successfully bringing a sex discrimination claim. In many cases, victims do not have access to sufficient information about their employers’ actions.

With the adoption of the Race Equality Directive in 2000, the concept of shifting the burden of proof to the party which has more data, knowledge and information, has been introduced to race discrimination. The Directive states that the person who has been confronted with racial discrimination has to establish facts “from which it may be presumed that there has been direct or indirect discrimination.” This means that a simple accusation of discrimination before a court of competent authority is not enough to shift the burden of proof to the other party. The complainant has to put forward facts. What the content of these ‘facts’ are is still unclear in many Member States, and may differ from country to country and from situation to situation. NGOs and legal practitioners often do not know how to apply the new rules with regard to proof of discrimination.

ENAR’s research study aims at filling that gap. It will look into legal provisions in the selected Member States and will assess if these are compatible with the Directive. If there is case law in which the shift in the burden of proof is applied, this will be analysed and a possible impact on the position of the victims of discrimination in legal proceedings will be described.

The publication, which will be the outcome of the research project, will discuss whether issues such as the willingness of the judiciary to apply the shift in the burden of proof and the awareness of legal professionals, stand in the way of an effective use of the provision. The concluding chapter will include recommendations on strategies for NGOs in promoting the implementation of the shift in the burden of proof, including identification of good practices by NGOs.

The results of the study will be available in April 2006.

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SOLID – Strategies on Litigation Tackling Discrimination in EU Countries

SOLID is a trans-national project funded by the European Commission which aims to train groups of NGO representatives from each of the EU25 in the strategic use of litigation at the national level. The project partners include organisations based in the UK, Belgium, Hungary, Denmark and the Netherlands, and the project also draws on the expertise of advisory panel members in each country.* We train both activists and lawyers, not only on the legal standards and use of litigation, but crucially we facilitate the development by each national group of longer-term strategies at the national level. The training relies on interactive methods, including workshops in the national language, facilitated by a national expert.

The project started two years ago as a response to the fact that many European governments, especially those from the ‘old’ 15, were slow in transposing the Race Equality Directive into national law. Even those that had on the face of it fully transposed, placed (or allowed to remain in place) significant obstacles in the way of victims’ access to their new legal rights. Many of those involved in these initial discussions, and who went on to become the project’s partners, had previously been part of the Starting Line group, lobbying for the EU legislation and with a keen interest in seeing it properly implemented. Thus the idea of a training project on strategic litigation was born.

Over the last two years the project has developed significantly from these early stages: we now have a fully fledged training manual; we have been building on and using existing material and training in a way that we hope has produced a unique training programme. We have moved beyond looking at the technical details of how to litigate strategically, to considering why and how to use litigation as part of a strategy. This is what gives the SOLID project its uniqueness – we don’t just train lawyers on how to litigate, or activists on how to collect evidence: we train both these groups to work together with a common strategy and strategic aim to build and use the crucial connection between the legal and activist approaches in the longer term. Our training manual will be published on the SOLID website for all to download and use.

We have now carried out two pilot trainings, and both the need for the training and the need for this strategic approach have been reinforced. A prime example has been Belgium, where the transposition of the Directives into national law was not the main issue; rather it was the ability of victims to prove before the national court that discrimination had taken place:

“The opinion of the national working group was that sufficient time and effort are devoted to amend the Discriminations Act, including working groups acting for the government. What is really lacking at present is to make a better use of the tools provided by the law. In particular, given the importance of the proof issue, it is now urgent to have situation testings widely accepted. Therefore, the national working group decided to focus on one specific goal: make situation testings accepted in court.” (Extract from the report of the Belgium advisory panel member) (also see the article on page 16)

We also considered whether we were happy with strategies that do not include actual litigation, and concluded that we were. National groups have to be able to decide for themselves what their priorities are, and how to achieve them at the national level. For example, the UK and Italian groups chose to focus on the potential for single equality legislation and lobbying efforts rather than legal action, as the main difficulties were not necessarily the laws themselves (although there are gaps), but the fact that they are fragmented and inaccessible.
Another interesting dimension that has begun to emerge relates to the common themes across the countries on the transposition and access to justice. The most obvious and predictable is that of resources. The lack of adequate legal aid in many countries leads to a lack of access to justice for victims, as well as a barrier to bringing strategic test cases before the courts. Additionally, a lack of resources for civil society led to the sustainability of some of the action plans being questioned.

However, there are some positive themes as well, the main one being people seeing the huge value in coming together and learning from each other, within and across national groups, as well as bringing the legal and activist approaches together, to share experiences and consider the issues of transposition, building new networks and strengthening existing ones.

Now that the pilots are completed, we are in the process of rolling out the training across the rest of the EU. Most of the trainings will take place in Budapest (including the first full training at the end of January 2006), although we are holding one in Tallinn in May 2006. Recruitment is currently taking place. You don’t need to be a lawyer to take part; we are looking for people and organisations with a wide variety of backgrounds.

We are currently accepting applications from France, Spain, Malta, Portugal and Luxembourg for the second of the full trainings to be held in Budapest from 23-26 March 2006. Finland, Estonia, Lithuania, Latvia and Denmark will be in the third training in Tallinn from 12-14 May 2006.

Greece, Cyprus, Slovenia, Ireland and the Netherlands will be in the fourth and final training held in Budapest from 29 September to 1 October 2006.

If your work involves offering support to victims of racial discrimination, whether this is legal, advocacy, educational or any other form of activism that empowers victims, we would like to encourage you to apply for this unique training programme and get involved in strategies to see the law being used in a way that really makes a difference.

Notes
* The Core partners of the SOLID project are the Northern Ireland Council for Ethnic Minorities (NICEM, also Lead Partner) and the European Network Against Racism (ENAR). The other project partners are the Public Interest Law Initiative (PILI), the European Roma Rights Centre (ERRC), Interights, the National Bureau against Racial Discrimination (LBR), and the Documentation and Advisory Centre on Racial Discrimination (DRC/DACoRD).

Tansy Hutchinson, Project Coordinator of the SOLID project and Coordinator of Policy and Research at the Northern Ireland Council for Ethnic Minorities (NICEM)

Full details of the SOLID project, the training programme and an application form are available on the SOLID website at www.solid-eu.org
The European Network of Legal Experts in the non-discrimination field was established in 2004 at the request and with the support of the European Commission. The Network, composed of some thirty anti-discrimination experts from across the European Union, monitors and advises on the further development of European anti-discrimination and equality law. This single network dealing with discrimination on the basis of five grounds – race and ethnic origin, religion or belief, age, sexual orientation and disability – builds upon the work of the three previous networks which were ground-specific networks (on religion and race, sexual orientation, and disability) and which operated between 2002 and 2004.

The Network produces reports on developments in the Member States, thematic reports on cross-cutting issues and a bi-annual law review: the European Anti-discrimination Law Review. The Network is managed by a consortium consisting of the Migration Policy Group and human european consultancy, and is supervised by a Scientific Board of Directors and Ground-coordinators for each discrimination ground. For each Member State there is a national expert whose responsibility it is to report on all five grounds of discrimination. This article briefly describes the network’s first year of activities and products, all of which can be found on the section of the Commission website dedicated to the work of the Network:

The Network’s first year of operation was a busy year as for the first time national reports for 25 Member States were produced and a new law review was launched. National experts prepared comprehensive national reports describing in detail how the Racial Equality Directive and the Employment Equality Directive have been transposed in each of the 25 Member States. They are an invaluable source of information on national anti-discrimination law and are available on the Commission’s website [see above reference]. A comparative analysis of the comprehensive reports entitled “Developing Anti-discrimination Law in Europe: The 25 EU Member States compared” was published in September 2005 in English, French and German.

The Network kept track of changes in national anti-discrimination law as well as of developing case law by regularly informing the Commission. This information was reproduced in the new European Anti-discrimination Law Review (published in English, French and German). The first edition appeared in April 2005 and the most recent edition, published in October 2005, contains articles on: multiple discrimination and EU law; the implications of the case law of the European Court of Justice on discrimination on the grounds of nationality and sex for the interpretation of the Racial and Employment Equality Directives by the Court; and the importance of the preliminary reference procedure to the European Court of Justice for employment lawyers representing victims of discrimination before their national courts. Each edition contains updates on legal and policy developments at the European level in the regular sections on EU Policy, European Court of Justice Case Law, and European Court of Human Rights Case Law which includes important complaints that have been brought before the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the countries that make up the European Union can be found in the section on News from the EU Member States. The next edition will appear in April.

Three thematic reports were prepared and published by the European Commission in English, French and German and the publications appear electronically on the Commission’s website. The first offers an overview of the protection from discrimination under the 1950 European Convention on Human Rights and the 1961 European Social Charter as well as the 1996 Revised European Social Charter. It seeks to identify aspects of that protection which could influence outstanding questions of interpretation of
the two anti-discrimination Directives. The second report deals with age discrimination and explores how this form of discrimination is being combated in policy and law, focusing in particular on the extent to which the exceptions in the Employment Equality Directive are interpreted. The third report examines what the concept of ‘effective, proportionate and dissuasive sanctions’ requires EU Member States to do in the implementation of the two Directives. The report discusses the development and the meaning of the concept of effective, proportionate and dissuasive remedies in EC sex equality law and in general EU law. It also looks at remedies under international human rights law and deals with the issue of upper limits on compensation.

This year, the Network has been joined by a new Roma Expert. The Network is updating the national reports and preparing thematic reports dealing with the issues of the independence of equality bodies, positive action, segregation of Roma children at school, religion, data collection and minority rights. The Network will continue to regularly update the Commission and produce bi-annual editions of the European Anti-discrimination Law Review.

Fiona Palmer, Legal Analyst, Migration Policy Group (MPG)

Notes
2 Colm O’Cinneide, “Age Discrimination and European Law”.
3 “Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensations to victims of discrimination.” In Christa Tobler, “Remedies and Sanctions in EC Non-discrimination Law”.

Information on the Network’s activities can also be found on MPG’s website at: http://www.migpolgroup.com/topics/20077.html

Towards more effective data collection on racism, xenophobia and anti-Semitism

By Ioannis N. Dimitrakopoulos, Head of Unit Research and Data Collection, European Monitoring Centre on Racism and Xenophobia (EUMC)

The case for effective and accurate national data collection systems on racism, xenophobia and anti-Semitism in the European Union Member States has been made repeatedly by the EUMC, the independent agency of the European Union established in 1997 in Vienna and tasked with providing the Community and its Member States “with objective, reliable and comparable data at European level on the phenomena of racism and xenophobia in order to help them take measures or formulate courses of action within their respective spheres of competence”. In order to accomplish this task the EUMC developed in 2000 the European Racism and Xenophobia Network (RAXEN), now consisting of 25 National Focal Points (NFPs), one in each Member State, as its main means of information and data collection. RAXEN NFPs consist of consortia, which typically include bodies such as anti-racist NGOs, national specialised bodies for equal opportunities or anti-racism, institutes for human rights, or university research centres on related issues.

Data and information are collected by the NFPs according to common guidelines provided by the EUMC covering five key areas: employment; education; housing; legislation and case law; and racist violence and crimes. In each area the central remit
of the NFPs is to collect all quantitative and qualitative data available from both official and NGO sources: for example, statistical data; descriptive and analytical information, such as from research activities, opinion polls, etc; information on particular events, such as racist incidents, court cases, conferences and campaigns; and case studies and information on ‘good practice’ policies, measures and initiatives against racism and discrimination.

The EUMC’s five years of experience of data collection by the RAXEN network shows that, despite shortcomings in data availability across Member States, NFPs have been able to bring together a large and unique body of data on racist discrimination and on policies, measures and initiatives combating it. These data have been used to analyse the situation, highlight particular issues and develop comparative thematic and other reports in order to support Member States in developing their policy responses. RAXEN data collection has also been instrumental in pointing out gaps and other problems that exist in official statistics and has provided the EUMC with the necessary background information to develop concrete policy proposals regarding the development of more effective data collection systems in the Member States.

The RAXEN experience shows that there is a real need for official data and statistics on racism, xenophobia and anti-Semitism at national level collected regularly and recording ethnic and national origin. This will not only support the analysis of the situation regarding racist discrimination and crime, but will also facilitate the assessment of current anti-discrimination policies and initiatives and the identification of specific issues regarding direct and indirect discrimination in the Member States. Official statistics can provide important insights on long-term trends and changes in the conditions of life of migrant and minority ethnic groups in key areas such as employment, housing and education, and thus enhance monitoring of key integration indicators. At the same time there is also a need for convergence in data collection procedures and indicators across the different Member States to improve data comparability and allow a comparative assessment of the actual impact of EU policies and initiatives in the different Member States. The EUMC is taking steps in this direction by elaborating draft guidelines for data collection and working definitions, for example on anti-Semitism, in close cooperation with other international organisations, experts, and representative civil society organisations.

The RAXEN experience, however, also shows that statistical data alone are not sufficient for understanding the underlying causes or the multiple dimensions of the operation of racist discrimination. Commonly used statistical indicators, such as unemployment rates or attainment rates in education can only indirectly show possible patterns of racist discrimination: for example, significantly higher unemployment rates among immigrants and ethnic minorities or persistently higher dropout rates in education could be interpreted as evidence of direct racist discrimination, but could also be attributable to other factors, such as differences in cultural capital, qualifications, experiences, age, gender, regional differences, etc. Therefore, the qualitative data provided by the NFPs in the form of evidence from complaints, court cases, reports by national and international bodies and research findings supplement and illuminate the information provided by the “proxy indicators” contained in the official statistics.

The absence of directly relevant statistics and effective data collection mechanisms in Member States can be attributed to a variety of factors, for example whether the government prioritises racism as a key social problem or whether the state has a data collection ‘culture’. Some Member States are concerned that ‘ethnic monitoring’ could serve to distinguish between citizens reinforcing ‘difference’ rather than promote ‘equality’. Others raise concerns based on its use in the past for the persecution of ethnic groups. The EUMC acknowledges these concerns, but also stresses that today ethnically differentiated statistical data can be anonymous and collected with the necessary legal and technical safeguards that will protect individual identity. Such data record anonymously victims’ and offenders’ ethnicity for statistical purposes.
and can be used effectively to compare the different ethnic minorities’ experiences of racist discrimination and racist crime. This will facilitate the accurate assessment of the actual impact of anti-discrimination policies and measures, as well as the impact of police and criminal justice responses.

Other bodies working against racism and discrimination, such as the Council of Europe, have also argued in favour of including ethnic categories in data collection. Furthermore, the recent deliberations of the European Commission’s Working Group on Data Collection to Measure the Extent and Impact of Discrimination identify this as a key issue for developing indicators of discrimination, assessing anti-discrimination policies and measuring the impact of anti-discrimination legislation. The Data Protection Directive (95/46/EC) provides a legal platform for the promotion of “ethnic” data collection: while the Directive prohibits the use of personal data where individuals can be identified, it also clearly allows it in Article 13 (g) subject to adequate legal safeguards, “when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics.”

Whilst the production of reliable, European-wide comparable, statistical data is obviously essential as a basic prerequisite for policy formation, it is strategically important to recognise that a variety of research methods may also be appropriate for understanding the ways that discrimination occurs, the processes and relationships involved, and the range of motives, pressures and structures that underlie it. One example of such research activity is the ‘victims’ survey’, measuring actual levels of victim experience of racially motivated crime. Another example is discrimination testing, such as that already carried out by the International Labour Organization (ILO), providing highly reliable indicators of discrimination. Research at national and at European level has thus a particular value in identifying and understanding manifestations of direct and indirect discrimination, but also, most importantly, in raising public awareness on the existence and impact of racist discrimination, and in encouraging appropriate policy responses at both national and EU level.

The EUMC will continue to intensify its efforts to promote the case for effective data collection systems and common indicators across Member States on racism, xenophobia and anti-Semitism, but clear political direction is also essential. Civil society has a significant part to play as well: a strong NGO culture that is proactive in collecting incidents or complaints and highlighting the experiences of victims, can influence policy responses and further encourage the development of data collection by governments. With better statistics and the expansion of research in and across Member States, a more sophisticated insight into processes of discrimination can be achieved to enable more appropriate and targeted anti-discrimination policies to be developed.

Notes
1 Disclaimer: The views expressed here are those of the author and do not necessarily reflect the views of the EUMC.
3 Available at www.eumc.eu.int

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The direct and indirect effects of non-transposed Directives

This article by Florian Stork (legal intern at the DG EMPL Anti-discrimination unit) argues that even in cases where the Directives 2000/43 and 2000/78 have not been (fully) transposed into national law, individuals may rely on them before court.

If an individual considers that national law in his/her country does not comply with these two Directives and thus violates his or her rights, he or she may want to take the case to a national court and ask the judge for a preliminary reference to the European Court of Justice. The legal dispute before the national court will thus be postponed until the European Court of Justice decides. This can be done in all cases where the interpretation of the Directives is disputed. Although it may be a lengthy procedure this is the only way of obtaining a definitive interpretation of the Directives. Most importantly, the effects of a ruling of the European Court of Justice can be very dramatic which is illustrated by the recent Mangold judgment of the European Court of Justice.

Provisions of the Directives which are clear, precise and unconditional can be directly invoked before national courts even when the Member State has failed to transpose the Directives on time, or has transposed them incorrectly. Such provisions are defined as having "vertical direct effect". The alleged discriminator must be the State or a public body, e.g. local authorities, the police force or even private companies, as long as they provide public services under the control of the state (this could be the case, for example, for a state-owned gas monopoly or a privatised telecoms enterprise).

According to case law there is no "direct horizontal effect" of Directives when the alleged discriminator is not the state or a public body. In other words, the provisions of the Directives cannot be invoked directly against an individual or a private entity. Strategic litigation will have to consider this and rather address cases in court where the alleged discriminator is the State or a public body.

Case 144/4 Mangold - available at http://www.curia.eu.int

On 22 Nov. 2005, the European Court of Justice (ECJ) held that a national law which disadvantaged older workers was null and void because it was contrary to the prohibition of age discrimination in Directive 2000/78 and to the general principle of non-discrimination in Community law.

The law provided that an employer could employ a worker aged 52 or over on a fixed-term contract much more easily than would be the case for a younger worker. A German Labour Court asked the ECJ by the means of a preliminary reference (see above) whether this was compatible with community law.

Through Mangold the principle of non-discrimination has gained much sharpened contours as the ECJ clearly wanted to reject discriminatory attitudes. It must be assumed that all other characteristics listed in Artikel 13 of the EC-Treaty, such as race, ethnic origin and religion enjoy the same protection as age.

Claimants who want to enforce their rights against other individuals may only rely on the concept of "indirect effect". It states that national courts must do everything possible to interpret national law to comply with the Directives. This means they must, so far as possible, interpret national law in the light of the wording and purpose of the Directives in order to achieve the result intended by them. It is irrelevant whether the national legislation was adopted before or after the Directives. Indirect effect becomes very important in cases where there exist national blanket provisions that leave vast room for interpretation. For example, the national rules on the burden of proof must be interpreted in the light of the Directives which provide for a shift of the burden of proof in discrimination cases. Since the judge will usually have to integrate this idea of the Directives into national law, it may greatly facilitate the legal reasoning for the claimant.
There may be cases in which the individual cannot rely upon the doctrines of direct and indirect effect: when Directives are not sufficiently precise, the defendant is a private employer, or there is no relevant national legislation to be interpreted in the light of the Directives. In this instance, the State liability principle provides a third potential remedy to the individual and helps to ensure that Member States properly implement the Directives. State liability means that where, by the transposition deadline, there is no national law implementing the Directives, or national law is contrary to EC law, the Member State must compensate for loss resulting from this failure to implement the Directives.

For the State to be liable, certain conditions must be satisfied: firstly, the aim of the Community provision which has been breached must be to grant rights to the individual; secondly, the breach must be sufficiently serious (fulfilled in cases involving the total non-transposition of a Directive); thirdly, there must be a causal link between the State’s failure and the damage suffered by the persons affected. National courts can be asked to decide whether the Member State has wrongly implemented the Directives, and if the court finds it has and these conditions are met, the complainant may be entitled to monetary compensation.

Where the transposition period prescribed has not yet expired, an individual may generally not rely on the Directives before court. However, Member States may not adopt measures that seriously compromise the attainment of the result prescribed by the Directives. That means, if they change an already discriminatory law or introduce new discriminatory provisions contrary to the Directives, the courts may well rule on this.

Nachova and the syncretic stage in interpreting discrimination in Strasbourg jurisprudence

Dr Dimitrina Petrova, Executive Director, European Roma Rights Centre (ERRC)

The purpose of this article is to formulate just one of the lessons to be drawn from the landmark case Nachova and Others v. Bulgaria which the ERRC won in February 2004 in the Chamber and in July 2005 in the Grand Chamber of the European Court of Human Rights (ECtHR).

The Chamber judgment was greeted as a giant step forward in the anti-discrimination struggle, as the Court, for the first time in its history, found a violation of the guarantee against racial discrimination contained in Article 14 of the European Convention on Human Rights (ECHR). The finding brought back from legal anabiosis the Convention’s prohibition of discrimination on grounds of race and ethnicity and opened a new stage for anti-discrimination litigation.

While this victory vindicated the small company of ERRC and associated enthusiasts pressing for resurrection of Article 14, I would suggest seeing the Nachova case in a somewhat longer-term perspective. At this stage, the ECtHR concept of discrimination has not yet extricated itself from its association with subjective aspects related to intent. Nachova is a crossroads case in that it reveals this syncretism starkly, and thus creates the basis for overcoming it and moving toward an interpretation according to which proving discrimination would not depend on the examination of the perpetrator’s state of mind.

On 7 July 2005, the Grand Chamber, which heard the case on request of the respondent government, while finding unanimously that Bulgaria had violated Article 2 and the procedural aspect of Article 14 taken in conjunction with Article
2, voted, with a majority of 11 to 6 votes, that there had been no violation of the substantive aspect of Article 14 in relation to Article 2. The crucial argument is contained in §157 of the judgment:

“[…] The Grand Chamber cannot exclude the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis. However, where it is alleged – as here – that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated.”

By the end of 2005, three further ECtHR cases (including two litigated by the ERRC) found a violation of Article 14. In Bekos v. Greece (December 13, 2005) the Court applied the above logic from Nachova, dividing the protection contained in Article 14 into a substantive and procedural aspect, finding a violation of the procedural aspect and no violation of the substantive aspect, as no reversal of the onus could be allowed when the issue was the presence or absence of racial animus. However, in Moldovan and Others v. Romania (July 12, 2005) and then in Timishev v. Russia (December 13, 2005), the Court found violation of Article 14 without differentiating between a substantive and a procedural aspect.

In all four cases decided in the second half of 2005, the Strasbourg Court apparently applied a notion of discrimination that is a mixture of two preceding interpretations: one that depends on the presence of a certain subjective attitude motivating conduct, and another one that is irrespective of any mental state. The two interpretations are mixed up in all four judgments, irrespective of whether the related issue was racist violence or not.

Whereas in all four cases discrimination is defined, with reference to Willis v. the United Kingdom, as “treating differently, without an objective and reasonable justification, persons in relevantly similar situations” (i.e. in the spirit of the EU anti-discrimination Directives), this definition was not understood as making intent irrelevant. In each of the judgments, and despite the different Convention rights at stake in each case (Art. 2 in Nachova, Art. 6 and 8 in Moldovan, Art. 2 of Protocol 4 in Timishev, and Art. 3 in Bekos), the motivation of the perpetrator was invoked in phrases such as “racial motivation”, “racially motivated act”, “attitude”, etc. Nor is there a clear differentiation between the concepts of racial discrimination and racism:

“[…] the Court’s task is to establish whether or not racism was a causal factor in the shooting that led to the deaths of Mr Angelov and Mr Petkov so as to give rise to a breach of Article 14 of the Convention taken in conjunction with Article 2.” (Nachova GC, §146).

In Moldovan and Timishev, where discrimination is not related to racist violence, the Court, despite the conceptual and/or verbal syncretism, was not deterred from shifting the burden of proof and in the end leaned toward the Willis definition when deciding that, as the respondent government had failed to provide an objective and reasonable justification of the different treatment, discrimination had occurred.

When we were building the arguments for Nachova in the late 1990s, we were not yet “prepared” (historically, as it were, and certainly while still litigating at the domestic level) to apply consistently the definition of discrimination that became better established only at a later stage, through the adoption of Directives 2000/43/EC and 2000/78/EC, that had shed any reliance on intent, motivation, or any other subjective reality and relied entirely on the objective characteristics of unequal treatment. The main evidence we put forward to support our claim that Article 14 had been violated was that racial bias had played a part in the unlawful killing: for example, the perpetrator, Major G., had addressed a racist remark to a Romani bystander immediately after he
had fatally shot the Romani fugitives Mr Angelov and Mr Petkov.

One lesson then for cases involving violence against disadvantaged groups is obvious. Since the general historic direction of interpreting discrimination is hopefully the one in which the intent is irrelevant, and since in any case the ECtHR is not a criminal court seeking to establish individual guilt, we should construe discrimination as an aspect of violent conduct solely by demonstrating that different treatment has occurred in relevantly similar situations and arguing that the different treatment was not objectively and reasonably justified. Thus, the strategy of substantiating a discrimination claim in Nachova for example would have been to argue that if the fugitives had not been Roma, the use of force would not have been as “excessive” as to result in a killing. Statistical and other objective evidence could be tabled to support this claim. The government to which the responsibility to disprove this allegation would then be shifted, in the absence of the barrier of non-falsifiability (as identified in §157 cited above), would have the realistic option to prove the opposite: for example, that Major G. had acted throughout his career in identical ways in similar cases no matter what the ethnicity of his shooting victims was; or, at the institutional level, that the use of fatal force had been endemic and indiscriminate and resulted in proportionate numbers of killings of Roma and non-Roma. This strategy moves us toward a more consistent concept of discrimination applied in the different contexts of violent crime, employment, and access to services, which in its turn should result in stronger legal protection against discrimination.

1 Syncretism: the combination of different forms of belief or practice.

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Situational tests: myths and reality

The law of 25 February 2003 gives Belgium a substantial legal arsenal for fighting discrimination, but the thorny question of evidence is undermining its effectiveness.

In the large majority of discrimination cases, the problem of evidence arises. How can it be established that someone was excluded from a job or renting accommodation because of their nationality or sexual orientation? What employer or landlord will admit that their behaviour is discriminatory? Most of the time, a victim of discrimination will be unable to provide proof.

Situational tests or ‘testing’ are important tools which could partially remedy this lack. As a reminder, testing consists of setting up real situations which tend to demonstrate the existence of discrimination in areas as varied as recruitment, renting accommodation and entrance to entertainment venues. Two groups of testers, who differ from each other only in the grounds for the supposed discrimination, are put in the same situation (for example, entering a disco or renting a property). The reactions they meet are then studied and possibly used to prove differential treatment. This type of evidence, which was invented in the 1970s by black American soldiers stationed in the Netherlands who were faced with the racism of bar and dance hall owners, is now recognised in law or in case law and used in several countries.

In Belgian law, it is expressly covered by the civil component of the law of 25 February 2003, which aims to combat discrimination. However, in the absence of a decree implementing the law (a Royal
Outcry

A draft Royal Decree was proposed at the beginning of 2005. It has been subjected to manifold criticism from employers' organisations and landlords' associations, and also divided the Federal Government. The arguments advanced were not in the least convincing.

The first criticism regards the creation of “anti-discrimination special brigades”. The terms “teams of spies” and “Big Brother” were regularly bandied about by the press, and the Prime Minister himself did not shrink from calling the testers “infiltrators and informers”. This alarmist language revealed fears that situational tests would infringe privacy. However, a special brigade of the federal police will not be set up for combating discrimination. The people in charge of the tests will be specialists, such as bailiffs and specially trained NGO workers, and the risk is greater that there will not be enough of them, rather than that they will be omnipresent. Those responsible for the tests, concerned for the results to be used in the legal process, will be careful to respect the right to privacy and other basic freedoms of the people or organisations being tested. Moreover, any result obtained by spying or provocation will be dismissed by the judge, who, it should be recalled, is free to weigh the fairness of the evidence with which s/he is presented.

The second issue raised by the detractors of testing is that of a reversal of the burden of proof and a resulting attack on the presumption of innocence. For example, it has been written that the decree “leaves very little opportunity for employers to prove their good faith” and establishes “a veritable presumption of guilt”. Should this be seen as an error in legal analysis or manipulation? Apart from the fact that the Royal Decree only deals with civil issues and excludes criminal proceedings, it should also be made clear that neither the law nor the decree implementing it mention a reversal of the burden of proof, but instead an adaptation (more precisely, a sharing) of the burden of proof. This sharing, as stipulated by the European directives, is divided into two distinct stages.

Firstly, the victim of discrimination is required to provide evidence, drawn from testing or other sources, of presumable discrimination. Secondly, and on the condition that the judge holds this prima facie evidence to be sufficiently convincing, the defendant then has to prove the absence of discrimination on his/her count. This sharing of the burden of proof aims to resolve the proven lack of effectiveness of anti-discrimination legislation. Moreover, opposing the adaptation of the burden of proof as introduced by the law of February 2003 is tantamount to contending that this law is remarkable, as long as it isn’t actually applied...

The principle of contractual freedom has also been cited – it would be deemed unacceptable that a judge can force people to hire a certain worker, or let a property to a certain tenant. It is obvious that a certain amount of subjectivity is involved in choosing a co-contracting party, particularly when it comes to labour relations. The right to freedom of choice does not, however, give the right to infringe laws banning discrimination. There is no practical obstacle to respecting both of these freedoms. Moreover, this worrying argument misses its target. It is not actually within the scope of the Royal Decree in question to lay down detailed rules about how the judgements pronounced will be carried out. Besides, it is doubtful whether a victim of discrimination would want to enter into a contractual relationship with a landlord or employer who had been found guilty of discriminatory practices.

More generally, employers’ organisations accuse the decree regulating situational tests of creating a climate of suspicion and present it as “a textbook case of unacceptable insinuation and distrust of business.” Recent studies analysing discrimination in the labour market unfortunately show that this distrust is not unfounded. Attitudes in the world of business need to change further, and simple codes of conduct and other symbolic commitments will prove insufficient.

What now?

During the debates which surrounded the proposed Royal Decree, certain lobbies (supported by political parties in the
government majority] expressed their lack of willingness to fight discrimination and their fear of a mode of proof which has already shown its effectiveness abroad. Since then, the question seems to have been forgotten.

This situation obliges NGOs who are active in combating discrimination to adopt a suitable strategy. The reaction of those opposed to situational testing arouses the fear of a new, more restrictive, draft Royal Decree. The adoption of a long and expensive procedure would have the effect of making it almost impossible to use this potentially effective legal instrument.

How should we react to this blockage? This question is currently being discussed and several lines of enquiry should be explored. One consists of purely and simply dropping any reference to a Royal Decree from the text of the law. As everyone knows, the judge reviews the evidence and can discard any s/he considers to have been obtained in an improper manner or in a manner which undermines basic rights. It is high time to introduce this fact into the sterile arguments about how situational tests should be regulated and to put the judge back at the centre of the debate. Maybe it will be realised that there is no need for a Royal Decree if only the legislator places a little trust in judges. If this idea was implemented, the validity criteria for situational testing would be set by judicial precedent. In this respect, NGOs should not neglect the importance of collecting examples of good practice developed in other Member States and of implementing the principles of strategic litigation.

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Strategic litigation: the Slovak experience

This article presents the issue of strategic litigation of racial discrimination in the Slovak Republic. It is based on the experiences of the Center for Civil and Human Rights, more specifically its project “Let’s Say NO to Discrimination”, which aims to fight the discrimination of Roma in different aspects of everyday life. The Roma are and have for a long time been the ethnic minority which is most discriminated against in Slovakia. Strategic litigation is an important tool in this fight.

The Center for Civil and Human Rights is an NGO based in Košice. Its activities focus on the protection of human rights of minorities and their protection from racial discrimination. Since 2002, the Center has been working on fighting racial discrimination in the health care system, and has been trying to eradicate the practice of forced sterilization of Romani women in Slovakia and to obtain compensations for victims of this unlawful practice. In 2004 the Center extended its activities to the issue of discrimination in general, in particular discrimination on the ground of ethnic origin in access to public services, employment and housing.

New legislation, new possibilities...

On 1 July 2004 the Antidiscrimination Act No. 365/2004 Coll. came into effect. In general, the new law brought the principle of equal treatment into practice. Even before adopting this antidiscrimination law the victims of discriminatory practices were able to litigate their cases before the court, but not as cases based on the breach of the principle of equal treatment. The new Antidiscrimination Act provides all victims of discrimination, whatever the ground, the chance to take their cases to court when the provisions of equal treatment were violated.
The Center for Civil and Human Rights took advantage of this new piece of legislation and through the “Let’s Say NO to Discrimination” project identified ten cases of discrimination on the ground of ethnic origin. It provided the victims with legal representation in the court proceedings initiated under the provision of the Antidiscrimination Act. The cases concern the discrimination of Roma in access to public services and employment. They are still pending at the courts of first instance and the first hearings are scheduled in the coming weeks. As court proceedings in Slovakia are very slow, the decisions of these courts are only expected towards the end of this year.

As far as the Center knows, these ten cases are the very first of their kind to be ruled by the Slovak courts under the provisions of the new antidiscrimination law. The clients are requesting non-pecuniary damages and apology (moral satisfaction). All legal expenses are covered by the Center.

The Center identified these discrimination cases based on ethnic origin through research, legal counselling and testing experiments. The “Tavern Koštovka” case, described below, was first identified through research, then the ‘testing experiment’ methodology was used to gather evidence of the discriminatory treatment. It is a good example of the experiences and obstacles met by the Center in the field of strategic litigation in Slovakia.

Other avenues to fight discrimination

Strategic litigation is not only implemented through court cases. A person who was discriminated against can also initiate administrative proceedings in front of an administrative body. This type of administrative decision is also a very important tool in fighting discrimination. The Center initiated several administrative proceedings on behalf of its clients before the Slovak Trade Inspection. This administrative body has the competency to impose a fine on the discriminator.

Another tool used in the fight against discrimination is to request expert statements from the Slovak National Center for Human Rights. This is a specialized body which was established by the

The Koštovka Tavern case

This case concerns the discriminatory treatment of Roma by the owner of a tavern called Koštovka in a small town in eastern Slovakia. The owner refused to serve Romani customers on equal conditions as non-Romani, as Roma were only served drinks in plastic cups. The owner claimed that she adopted this policy because non-Roma clients would refuse to use glasses and utensils after they were used by Roma (even though obviously they were washed after use). To gather the necessary evidence, the Center conducted a ‘testing experiment’ in the tavern, during which the discrimination was documented.

At first, the Center’s client hesitated to file a claim in court. He is employed as a community worker of the municipality and was afraid of some kind of revenge. He therefore wanted to initiate an administrative proceeding only, and the Center initiated this on his behalf before the Slovak Trade Inspection. The results of the inspection were that discriminatory practices against Roma in the tavern were not proven. The Center contacted the Slovak Trade Inspection and discovered that the investigation had consisted only of an interview with the owner, during which she was asked whether she was serving Roma on the same basis as non-Roma, to which she had responded that she treated Roma equally. No Roma testers were used during the inspection. It is clear that it is impossible to reveal discriminatory practices simply by asking the alleged discriminator...

The Center’s client was disappointed with this result and changed his mind. After several visits by the Center, during which the staff tried to answer all his questions regarding the court proceedings, he decided to go ahead and filed a claim to the local District Court. The case is still pending.

This court case is one of the first in Slovakia supported by evidence secured during a testing experiment. It will be interesting to see how the court will judge the evidence gathered in this way, as there are different points of view among Slovak judges on the legality of using recording devices for securing evidence. The Antidiscrimination Act established the principle of a shift of burden in proof in court proceedings on discrimination cases. This means that once a plaintiff brings evidence that he or she was discriminated against, the respondent must bring evidence that his or her practice did not create a breach of the Antidiscrimination Act. It is a rather new element in civil proceeding in Slovakia and it will be compelling to see how the courts will get on with it.
Antidiscrimination Act and plays an important role in promoting equal treatment and combating all forms of discrimination. It has a duty to state, upon request, whether different treatment in a certain case happened or not. Another task is to provide free legal counselling to victims of discrimination and to represent them in court. The Center has submitted several requests for expert statements to this body. One of the first of these expert statements followed such a submission, and could be used as supportive evidences in the court proceedings of the case.

Conclusion

By supporting and engaging in litigation in domestic (and eventually international) courts, the Center for Civil and Human Rights aims to achieve concrete legal advances and to contribute more broadly to the use of public interest litigation as a tool for reform. Building strategies of well-focused litigation — grounded in international and comparative jurisprudence — will produce benefits, not only for Roma, but for all victims of unfair and arbitrary discrimination.

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Estonia: the Meroshnichenko case

This article describes the case of retired military officers of the former Soviet Union and members of their families, who were residing in Estonia and were refused permanent residence permits by the Estonian Parliament. The problem applies to approximately 8 000 persons.

The issue first surfaced at the end of 1997, when the Estonian Parliament amended the essence of Article 20, section 1 of the Aliens Act. Before the amendment, this Article guaranteed the right to a (permanent) residence permit to all those who had been permanently residing on the territory of Estonia on grounds of registration in the Estonian Soviet Socialist Republic before 1 July 1990. No particular clause existed with regard to former military officers and their families.

As the content of the Article did not correspond to the visions of the Estonian government, they decided to change it, hence the amendment enforced in September 1997. This amendment concerned all non-citizens residing in Estonia mentioned in Article 12 of the Aliens Act, and deprived former military officers as well as those who had been punished for criminal offences, former KGB staff (officers and technical personnel, even cleaning ladies), as well as those who had submitted fake data about themselves, of the right to a residence permit in Estonia. Later on the spouses of the former military officers were added to the list, and thus also deprived of a guaranteed permanent residency.

Not all the victims of the amendment accepted the news as their fate. Sergei Miroshnichenko was the first and most stubborn to turn to court to fight for a solution. His lawsuits formed a perfect basis for the legal analysis of the problem by the Legal Information Centre for Human Rights (LICHR), which up until now is providing legal aid and representation (if and when needed) to this particular group of people in the courts.

One of the results of this work was the decision of the Estonian State Court on 27 October 2002, which entitled retired military officers of the former Soviet Union
to a permanent residence permit. It was specified in this decision that Mr. Miroshnichenko had the right to receive a permanent residence permit.

The ground for this decision is to be found in a) the Constitution of the Republic of Estonia and b) the International Agreement between the Estonian Republic and the Russian Federation that had been signed back in 1994:

Article 2, section 1 of the “Agreement on Matters Related to the Social Guarantees for Military Pensioners of the Russian Federation on the Territory of the Republic of Estonia” guarantees military pensioners, members of their families and dependants, residence permits in Estonia provided that they apply in person and excluding those whom the Government of Estonia refuses for reasons of state security. It is important to highlight that Art. 123(2) of the Estonian Constitution provides that in case national law is in breach with a ratified international agreement, the provisions of the international document should be enforced. Therefore in this case the international agreement should be enacted.

In November 2002, following the Estonian State Court decision, Sergei Miroshnichenko applied for a permanent residence permit. Another 300 permanent residents who according to the amended Aliens Act had previously no right to a permanent residence did the same. On 21 January 2003 Sergei Miroshnichenko received the decision to his application: he was again refused a permit! The government argued that there is no clarity as to what type of residence permit (temporary or permanent) is being guaranteed by the above-mentioned Agreement. In Estonian legislation the definition for “residence permit” is always followed by the adjective “temporary” or “permanent”, whereas in Russian Federal legislation a “residence permit is a document issued to a citizen of a foreign country or a person without a citizenship of any country in order to confirm his right to permanent residence on the territory of the Russian Federation.” In other words, the concept of a “temporary residence permit” does not exist - instead the term “authorization for temporary stay” is used.

Although this may be the case, Article 13 of the Agreement requires all matters of difficulties in interpretation, uncertainties, etc. to be negotiated by the diplomats. The Estonian government authorities deciding on Mr. Miroshnichenko’s application never turned to the Russian authorities for clarification...

In addition, the rights and freedoms of the former military personal are clearly being violated, as Art. 11 of the Constitution of Estonia states that “rights and freedoms can be restricted only in cases provided in the Constitution. These restrictions should be required for democratic reasons only and should not distort the essence of the rights and freedoms limited.”

It is clear that in the case under discussion, no public benefit would be endangered by the residing in Estonia of military pensioners and members of their families. Hence the restriction of the rights of this category of people is not motivated and, secondly, is also discriminatory on the basis of social origin (former belonging to the military forces of the foreign state or having a marital status with such a person). There are also no grounds for a threat to the security of the state by members of this group, as in most cases they are elderly people who have tight relations with the Estonian Republic and are loyal to its political system. Moreover, the collective violation of rights is prohibited by international law.

Mr. Miroshnichenko again filed a complaint to the court, together with 30 other applicants, and won at the first and second instance. The courts argued that the government, when refusing to issue the permanent residence permits, had violated the main principle of the constitutional state (principle of separation of powers). The case once again reached the Estonian State Court, as the Government appealed.

The court of primary jurisdiction and the court of appeal decided that the government did not have a right to revoke the first decision of the State Court, whose decision should be final and irrevocable. The government was therefore obliged to implement the decision of the court. However, it did not... In fact a very dangerous precedent, threatening the whole democracy in Estonia, was set by the government when it refused to
implement the decision of the highest Court. The representative of the OSCE in Estonia and member of the Governmental Commission on the issues of the military retirees, Uve Marenholts, agrees with this assessment.

And the case is not yet over... Despite the two decisions by the State Court, which clearly indicated which direction to take, the State initiated new amendments to the Aliens Act and introduced even a stronger prohibition for new applicants. Another strategic litigation case is therefore to follow...

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UK/CZ: the Prague Airport case

R v Immigration Officer at Prague Airport & another (Respondents) ex parte European Roma Rights Centre & others (Appellants) [2004] UKHL 55.

In response to an increase in asylum applicants to the UK from the Czech Republic, in February 2001 the UK government reached an agreement with the Czech government to set up an entry clearance system at Prague airport. Most if not all asylum applicants from the Czech Republic were of Roma origin and the overwhelming majority of applications were refused. Of 1800 asylum decisions made in respect of Czech applicants during the year 2000, only 20 were initially favourable and only 6% of appeals were successful.

The entry clearance system at Prague airport commenced in July 2001. Passengers seeking to travel to the UK were ‘pre-cleared’ by UK immigration officials before boarding and those who admitted or were suspected of planning to claim asylum on arrival in the UK were refused entry clearance. Once refused, no airline would carry them to the UK so they were effectively prevented from travelling.

The ‘pre-clearance’ system dramatically reduced the number of asylum applicants from the Czech Republic. In the three weeks prior to the operation of the scheme, 200 asylum claims were made at entry points in the UK. During the three weeks following the commencement of the scheme, this figure dropped to 20.

The European Roma Rights Centre (ERRC) began monitoring the implementation of the scheme at Prague airport. It found that 87% of Roma screened during its observations were refused entry clearance, compared with only 0.2% of Czech nationals of non-Roma origin. Any individual Roma was therefore 400 times more likely to be refused than a non-Roma.

The ERRC also observed that questioning of Roma lasted longer than that of non-Roma and that 80% of Roma were taken to a secondary interview area compared with less than 1% of non-Roma.

The UK human rights group Liberty represented the ERRC and six individuals who had been refused entry clearance in a challenge to the system at Prague airport. The case failed before the Administrative Court and the Court of Appeal. On appeal to the House of Lords, the Appellants argued that the implementation of the pre-clearance system breached the 1951 Refugee Convention and customary international law, and that it unlawfully discriminated against people of Roma origin.

The Lords were not persuaded that preventing people from travelling to the
UK in order to claim asylum breached either the 1951 Convention or customary international law. Lord Bingham noted that the Convention is focused on the treatment of refugees outside their country of origin, and that the term ‘refugee’ is defined in the Convention as a person who is outside the country of his nationality. Although the Lords were prepared to accept that there is a general rule of customary international law which prevents states from turning applicants for asylum away from their frontiers without considering their claims of persecution, the court would not accept that Prague airport had become a UK ‘frontier’ except ‘in a highly metaphorical sense’. The court drew an analogy between the Prague airport system and the obligation for nationals of many countries to apply for a visa before travelling to the UK. This obligation, coupled with the fines imposed on carriers for giving passage to those without valid visas, had (they said) precisely the same effect as the pre-clearance system at Prague airport. Accordingly, the obligations under the Refugee Convention and customary international law simply did not arise because those seeking to travel were not ‘refugees’.

Further, the Lords did not agree that the UK government’s operation of the system at Prague airport could constitute the assumption of jurisdiction over another state so as to engage extra-territorially the operation of the European Convention on Human Rights (ECHR). Even if it did, there is no applicable provision in the ECHR relating to rights connected with immigration and asylum and conditions for those seeking to travel to the UK did not engage Articles 2 or 3 (right to life and right not to be subjected to torture or inhuman or degrading treatment). The scheme did not fall within the ambit of any Article of the ECHR so as to bring Article 14 (the prohibition on discrimination) into play.

Unlawful discrimination

Fortunately, the Prague airport system was considered by the Lords to discriminate unlawfully against people of Roma origin. The court made a declaration that the UK government had discriminated against Roma seeking to travel from Prague airport to the UK by treating them less favourably on racial grounds than they treated others. Baroness Hale said “All the evidence before us, other than that of the intentions of those in charge of the operation, which intentions were not conveyed to officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma... The inevitable conclusion is that the operation was inherently and systematically discriminatory and unlawful.” Such discrimination breached s1(1)(a) of the Race Relations Act 1976 as well as international customary law.

Baroness Hale expressly overruled the majority view of the Court of Appeal, which had found that whilst Roma were treated less favourably, this was not due to their status as Roma but because they were objectively more likely to claim asylum than non-Roma and indeed had more reason to do so. Baroness Hale found that this constituted the unlawful application of a stereotype. Even if it is true that some members of a racial group would be more likely to claim asylum, this may not be true of a significant number of the group. The purpose of the Race Relations Act 1976 is to ensure that each person is treated as an individual and not assumed to be like other members of the group.

The House of Lords did not accept that the prohibition on discrimination contained within Article 3 of the 1951 Refugee Convention applied in this case although it did confirm that the Convention had been incorporated into UK domestic law. Article 3 did not apply because the non-discrimination provision is limited to the application of ‘the provisions of this Convention’ (rather like Article 14 ECHR which only applies in relation to another convention right) and the Convention itself did not apply because the appellants had not left their country of origin.

The Lords did however find breaches of non-discrimination provisions in the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (Article 2) and the 1966 International Covenant on Civil and Political Rights (Article 26). Finally, the Court confirmed that discrimination on grounds of race was so universally
condemned as to have become a rule of customary international law, which was also breached by the operation of the Prague airport scheme.

Anna Fairclough, solicitor for the human rights group Liberty

A precedent-setting court case in Latvia: gender discrimination in employment

The Decision in Case No C11019405, Cesu Regional Court, 5 July 2005

Facts of the case
A retired woman had been employed by the municipality for seven years (1997-2004) as a stoker during heating seasons. Every heating season (usually from October to April) she entered into a new labour contract with the municipality. During these years she had been attending several vocational trainings paid for by the municipality, and had obtained a certificate of qualification as a stoker. The municipality had admitted that her job performance was of good quality.

At the beginning of the heating season 2004, the applicant and another five candidates applied for the vacancy of stoker in the municipality, after the vacancy was announced in a local newspaper. However, the municipality did not evaluate the candidates’ qualifications, but hired a man who did not apply for the job but already worked as a driver of a fire engine in the municipality. The plaintiff was orally informed that henceforth no women would be employed for this job. This statement was made orally also to another woman who applied for the same vacancy.

During the court hearing the defendant pointed out that the plaintiff was receiving a retirement pension and already had means of subsistence, and that the municipality has the right to decide who needs more material support in the form of a salary.

Legal grounds
A prohibition to discriminate on the ground of gender (as well as on the ground of a person’s race, skin colour, age, disability, religious, political or other conviction, ethnic or social origin, property or marital status or other circumstances) in employment relations is explicitly laid down in the Latvian Labour Law, which defines and prohibits direct and indirect discrimination, harassment and instruction to discriminate, as well as victimisation. Differential treatment is prohibited throughout employment legal relationships in particular when establishing such a relationship, when promoting an employee, when determining working conditions, work remuneration or occupational training, as well as when giving notice of termination.

The Labour Law provides that in cases of violation of the prohibition of differential treatment and in cases of victimisation, an employee or potential employee can bring a case to a court, asking to redress damages, as well as compensation for non-pecuniary damages (moral harm). In case of dispute, the court may determine the amount of compensation for moral harm. The Labour Law also provides for the shifting of the burden of proof in cases of alleged discrimination.

Under Administrative Procedure Law and Civil Procedure Law, individuals can authorize any physical person to represent them (but, pending amendments, not an NGO). In practice, this means that victims of discrimination can authorize a representative of an NGO to defend their rights in a court case, but not the NGO itself.
The outcome of the case

The plaintiff turned to the NGO Latvian Centre for Human Rights, whose staff lawyer represented her in all court hearings during the case. When reviewing the case, the court established that the qualifications and experience of the applicants to the vacancy of stoker were not objectively evaluated, and as the municipality could not prove that the different treatment of the plaintiff and the person hired to the post of stoker was based to objective reasons, discrimination on the ground of gender was found. Moreover, the court on its own initiative also found discrimination on the ground of property status, as the other reason why the plaintiff did not get a job was the fact that she already had an income. The court awarded the plaintiff compensation for non-pecuniary damage of 1000 Lats (approx. 1400 Euro), as well as compensation for lost income of 585 Lats (approx. 810 Euro).³

Lessons learned

Several lessons can be drawn from this case, which are of relevance to future discrimination cases, including for cases on race/ethnicity and other grounds:

1) In a situation where there is little case law and relatively new anti-discrimination legislation, it may not be easy for a victim of discrimination to find qualified representation in court. In the case of Latvia, this is compounded by the fact that trade unions are still weak, and the National Human Rights Office – the designed equality body – only acquired the right to represent clients at court at the end of 2005. This points to the importance of access to legal assistance provided by NGOs.

2) To initiate a discrimination case on any ground, the gathering of initial facts is of great importance. The shift of burden of proof to the defendant can take place only if the plaintiff can show a prima facie case, i.e. evidence of possible discrimination (e.g. better qualification in labour cases, or misuse of the procedures). The fact that the person who alleges the discrimination belongs to the particular group itself does not constitute the ground for the case.

3) However, although the shifting of the burden of proof is applicable in cases of alleged discrimination, its application by courts may vary. When not explicitly referring to it, a court may follow the general procedure and use the shift of burden of proof mainly as a concept when making a decision. For practical purposes, it entails that the plaintiff has to be prepared not only to show the initial facts but also to actively defend his/her position during the court hearing.

4) An interesting twist in this particular case was the court’s finding of discrimination on multiple (two) grounds, which took place at the initiative of the court. It is an encouraging sign for future discrimination case law, as it serves as a precedent both for multiple grounds ruling as well as the active role of the court in analyzing the case at hand.

5) In many cases of discrimination, the occurrences which can be perceived as proof of discrimination take place in informal circumstances, as during private conversations or even phone calls. For instance, in this case the plaintiff was informed by phone that in the future no women would be employed for this job. The evidence by witnesses and other people who have experienced a similar attitude are of great importance for putting the defendant’s denial of the allegations under reasonable doubt, especially if there is no possibility to use statistical evidence or conduct situation testing.

Notes

2 Ibid., Section 29.

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ENAR’s National Information Leaflets

In the face of the increasing phenomenon of racism across Europe, making ENAR and its National Coordinations more visible is one of the tasks of the current ENAR work plan. For this reason, the Coordinations have embarked on an ambitious plan to cooperate with the ENAR Secretariat in the drafting of National Information Leaflets for each country within the EU, highlighting the role of NGOs and the importance of litigation by placing it in the context of responding to racism in the national context.

These leaflets will briefly present the situation regarding racism and the actions undertaken to fight it in each country, as well as the role of NGOs in each case. The leaflet also provides the rationale for developing litigation, thus promoting the possibilities and necessity of litigation to strengthen the fight against racism.

By highlighting the work of the ENAR National Coordinations, the leaflet provides access to the know how and experience of NGOs across Europe and beyond, complementing other existing documents such as the European Commission’s For Diversity Against Discrimination campaign which has recently produced national leaflets that give an overview of the national legal context: http://web20.s112.typo3server.com/4584.0.html

A further objective of the leaflets is to provide a rationale for why it is important for NGOs to engage at the EU level and therefore to highlight the work of ENAR and its National Coordinations.

The leaflets will start with an overview of racism in the national context, key activities of the National Coordination, as well as an overview of ENAR at European level. Moving to the national context, there will be a description of who is experiencing racism, the national legislation available to counter this and the importance of the civil society infrastructure. The importance of strategic litigation is presented together with a rationale for NGOs to engage in this activity. Reflecting information at the grassroots level, drafted by or on behalf of the Coordinations, the leaflet will also provide information on existing services available for the victims of racial discrimination, in the public or private sector, including racism crime and racist violence. A section on ‘EU and anti-racism’ highlights the emergence of an anti-racism infrastructure at EU level as well as key recent developments.

Key links and sources of further information at national and European level will complete the leaflets, which will be printed in the language of the country concerned. An English version of each leaflet will also be available on-line, in electronic format. To maximise the impact at national and European level, ENAR plans to coordinate the launch of the leaflets simultaneously across all EU countries on 21 March, to mark European Week against Racism.

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