

# Equinet Training: Use of Equality Data in Non-Discrimination Legal Casework

## ***Case Study No. 1 ECtHR: Trainer Feedback<sup>1</sup>***

Below follow sample (non-exhaustive) guidelines on factual and domestic law research to develop the possible litigation premise in terms of the rule's context and implications, as well as (evidence of) its repercussions.

The rule, in itself, is neutral and not necessarily generative of abuse, or indirectly discriminatory. It has no component that is intrinsically conducive to arbitrariness or to disadvantaging minorities – unlike *stricto sensu* indirectly discriminatory rules (see *Biao* above, p. 3). Theoretically, there possibly are legal and institutional safeguards in place to control potential risks of arbitrary arrests resulting from arrest incentivisation under the rule. Furthermore, even if there are not (adequate) safeguards, potential arbitrary arrests stemming from the incentivisation in question possibly, in theory, affect ethnic/ social groups proportionately. While a general argument could be made that (particular) minorities are, by reason of their very vulnerability, inherently exposed to higher risks of abuse in any situation permitting police arbitrariness, this would arguably be insufficient for Article 14 (A14) purposes in litigation before the Court. Evidence of minority profiling – targeting or indirect disadvantaging – would be required, *both* as a general context and in specific cases to be litigated.

In specific cases, anti-minority verbal abuse accompanying the impugned conduct is relevant both to substantiation of treatment severity level (under Article 3) and to establishing bias for purposes of a (substantive) violation of A14 (see [B.S. v. Spain](#); [Abdu v. Bulgaria](#), §38). As a general context, the more prevalent/ institutionalized negative stereotyping of minorities is evidenced to be, the stronger an A14 claim. Required evidence of disproportionate impact on, or targeting of, minorities by law enforcement includes reliable official or unofficial statistics, credible domestic and international human rights reports, and other reputable materials and representative data reflecting systemic issues (patterns).

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<sup>1</sup> This litigation strategy was first developed by the author as an advisor to EHRAC.

Research in domestic law and facts is required, in particular:

1. Commentary assessing the body of domestic law (primary and secondary legislation, case law) and official policies governing police powers of arrest. How are these powers governed as a system, providing institutional context to the rule; what safeguards (if any) are in place to prevent arbitrariness possibly resulting from the rule. In particular, are, in practice, arrests based on ‘reasonable suspicion’/ other comparable standards, or are they discretionary; is such discretion unfettered or are there effectively criteria and limits for its exercise.

Relevance: The ability to demonstrate that the rule produces arbitrariness likely to lead to minority profiling depends on an overall assessment of the system of applicable norms, including any safeguards, which the Court would be likely to review as an entire framework in light of the State’s wide margin of appreciation regarding ‘general mode of operation of law-enforcement authorities when combatting crime [and] operational choices’, as well as police administration and matters of socio-economic policy (see *Antayev* and *Beeckman*).

The relevance of systemic safeguards to discrimination findings is well-established by the Court: ‘[T]he aims indicated by the Governments to justify differential treatment may be considered legitimate only if certain safeguards are put in place, and it is the Court’s task to examine whether such safeguards exist at each stage of the implementation of the measures and whether they are effective. For example, the temporary placement of children in a separate class on the ground that they lacked adequate command of the language of instruction in school is not, as such, automatically contrary to Article 14 of the Convention. Indeed, in certain circumstances such placement may pursue the legitimate aim of adapting the education system to the specific needs of the children. However, when such a measure disproportionately or even exclusively affects members of a specific ethnic group, then appropriate safeguards have to be put in place.’ (*Oršuš and Others v. Croatia* [GC], §157)

The Court’s established requirement that powers affecting fundamental rights must define the criteria for exercising discretion, and discretion may not be unfettered is relevant insofar as the incentivisation rule will be capable of generating ethnic profiling to the extent that the police are granted unlimited discretion about who/ when to arrest. If the legislation affords overly broad discretion, this is likely to be seen as ‘a clear risk of arbitrariness’ by the Court (*Gillan and Quinton v. the United Kingdom*, §77, 85; summary above, p. 6). For the relevance of safeguards embedded in the normative framework of executive powers, see also *S. and Marper*, p. 7.

2. Is there (official) data regarding the effectiveness of the rule? Whether police interferences are necessary under the Convention depends, inter alia, on the extent to which they are actually helpful, i.e. their effectiveness (*see Ferdinand Jozef Colon v. the Netherlands*). Evaluation reports or a lack thereof would be relevant evidence.

3. Is police profiling defined/ regulated under domestic law/ policy? What are the norms (scope, criteria), including any safeguards? Reports on their practical implementation?
4. Are there currently any explicit minority profiling law enforcement policies in place, whether written or oral (see, for examples of such policies, *Timishev v. Russia* and *Antayev v. Russia*)? How are they documented (evidenced)? Is there information on the manner and scope of their implementation?
5. Are any databases kept by the authorities for law enforcement purposes, including possible profiling? How are they governed/ organized? What safeguards, if any, are in place against disproportionate encroachment on A8 rights and discrimination (see *S. and Marper*)?
6. Are there statistical data showing a correlation between yearly police officers' reviews under the rule and peaking/ arbitrary arrest practices, such as timing or other patterns allowing for inferences of causality? Is there other evidence of such a correlation, such as investigative journalistic materials, or reports by human rights bodies (ex.: domestic and international Ombuds/ Commissioners, NGOs)?
7. Are there statistics on arrests showing overrepresentation of minority groups? Representative, reliable, preferably official data would help corroborate that the risk of being subjected to unjustified arrest (due to the rule) is significantly higher for (certain) minorities. Additionally, evidence of the (mental) impact of such arrests on the targeted group(s), including specific individuals on whose behalf litigation is brought, would be useful. Arguably, stereotyped identities render individuals not only more susceptible to being targeted by the police but equally more vulnerable during arrest (or stops/ searches). The Court recognizes that conducting such measures in public may involve humiliation capable of compounding the seriousness of the implied A8 interference (see *Gillan* above, p. 6). This humiliation would be exacerbated in cases of arrest based on minority negative stereotyping as it legitimizes such stereotyping.

The question of minority overrepresentation amongst arbitrary arrest targets/ victims requires determining the geographical scope for litigation and, accordingly, for fact finding: in Chechnya/ the N. Caucasus, or in Russia, or in other parts of RF where Chechens/ N. Caucasians live as a minority. Spatial delineation is needed to premise any disparate impact hypotheses and, accordingly, information gathering and argument strategies, by establishing victim (target) and comparator group(s). As the rule is pan-RF (not only applicable in Chechnya/ N. Caucasus), it does not automatically lead to Chechens/ N. Caucasians being disproportionately victimized, even if it does render minorities prone to particular disadvantaging through practices engendered by the rule. Whether Chechens are a

(vulnerable) minority depends on the locality. In terms of disparity hypotheses, Chechens/ N. Caucasians are (likely) targeted for arrests in Russia and other comparable socio-geographic spaces – outside of Chechnya/ N. Caucasus. Or, theoretically, Chechnya residents might suffer more arbitrary arrests as a result of the incentivisation rule compared to residents of other RF republics. This would require uncovering the causes for such a possible disparity. If the Chechnya police force's ethnic makeup is different to that of the residents, ethnic grounds could be argued/ evidenced, depending on the facts. Conversely, if the Chechen police is composed of ethnic Chechens who carry out more arbitrary arrests than the police in other RF republics, or in Russia, that might be harder to address through a discrimination litigation framework.

If, on the other hand, LGBT/ other minorities (people with mental disabilities) rather than ethnic/ religious groups are hypothesized as targets of arbitrary arrests generated by the incentivisation rule, then, evidence-gathering and argument focuses would be still different.

8. Based on selected hypothetical target and comparator groups, are there possibilities (EHRAC partner capacity) to conduct situational testing on the ground to document possible disparate arrest practices and produce evidence?

9. Are there media sources documenting statements by officials/ authority figures relevant to the police (capable of influencing officers in the exercise of their powers) that negatively stereotype minorities (ranging from hate speech to 'matter-of-fact' comments that particular minorities require enhanced law enforcement)? Any references to minority identities/ protected grounds on the part of police-relevant officials/ leadership figures are relevant to establishing possible official bias resulting in (a risk of) institutionalized prejudice producing (conscious or unconscious) police minority profiling practices/ incidents.

10. Are there surveys documenting the prevalence of anti-minority prejudice in the police force and/or in the general population (in the selected RF region)?

11. Anecdotal evidence (NGO/ media reports) of anti-minority bias expressions by police in the context of particular arrests of minority people? For example, racist/ homophobic comments by officers or relevant others showing a perception of minority identity as being relevant to law enforcement decision-making.

12. Reports on minorities being overly victimized/ at risk by RF police produced by supranational bodies, such as ECRI, the CoE Human Rights Commissioner, the Advisory Committee under the Framework Convention on National Minorities (FCNM), CERD, and by domestic institutions, such as the RF Ombudsman/ HR Commissioner, as well as by domestic and international NGOs, such as HRW.

13. RF reports to international supervisory bodies under human rights instruments, containing relevant admissions.

14. Materials documenting the levels of humiliation and stigmatization vulnerable individuals/ groups experience as a result of arrests linked to the rule? As mentioned above, the Court takes into account the level of ‘subjective’ disadvantage experienced by individuals subjected to police interventions ([see Ferdinand Jozef Colon](#)). A policy/ practice of police profiling of a minority would be capable of damaging the group’s sense of identity, to the detriment of its members’ sense of self-worth, in the way other forms of negative stereotyping (hate speech) do (see [Behar and Gutman](#)). Equally relevant would be information on adverse consequences for minority victims of arbitrary arrests linked to the rule in terms of abusive conduct by third parties (private individuals) as a reaction to the negative stereotyping that such police profiling represents (such as verbal or other attacks on stigmatized individuals/ communities).

Examples of relevant equality data:

- i. *International engagement on (RF) police profiling of minorities – examples*

Below follow illustrative findings on the linkage between arbitrariness in the exercise of police powers and patterns of resulting minority victimization. This selection is not comprehensive.

[The CoE HR Commissioner](#): “[A]rbitrary identity checks of persons from the North Caucasus are reportedly common in the Russian Federation.”

The Commissioner has consistently [condemned](#) the practice of ethnic profiling, stating that stops and searches on ethnic or religious grounds are ineffective, counter-productive and violate human rights. The Commissioner has called for the establishment of a ‘reasonable suspicion’ standard as the basis of a stop and search. S/he has recommended that stop and searches be ‘taken within a comprehensive approach based on clear legislation; rules on accountability; available complaints mechanisms; and active support from high level police leadership to implement rights-based procedures’. The Commissioner has [flagged](#) the profiling of Muslims in the fight against terrorism, the underlying assumption of such terrorist profiling – that the targets are more prone to commit acts of terrorism – and the large number of innocent people harassed as a result.

Sample ECRI stands on police profiling can be found [here](#) and [here](#).

In its [Fourth Opinion on the RF \(2018\)](#), the FCNM Advisory Committee stated that ethnic profiling and arbitrary identity checks, in particular of persons from the N. Caucasus, are reportedly common, as is (other) discrimination and ill-treatment of national minorities (‘visible minorities’) and persons from the N. Caucasus by law enforcement. The Committee

linked these practices to 2013 mass riots against migrants in Moscow following the killing of an ethnic Russian by a Caucasian. In the aftermath, in 2013-2014, police conducted a number of raids in Moscow, massive detentions based on ethnic profiling, and deportation of migrants from the N. Caucasus and Central Asia. The Committee referred to reports by, *inter alia*: the RF High Commissioner for HR, *Activity Report 2016*, p. 52; Memorial Anti-Discrimination Centre (2016), *Violations of the rights of stateless persons and foreign citizens in light of the ECHR judgement in Kim v. Russia*; the Civic Assistance Committee (2014), *Report on the situation of Chechen Republic and Republic of Ingushetia residents in the Russian penal system*.

The European Parliament (EP), in '[Profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control](#)', has referred to the European Code of Police Ethics to the effect that 'police investigations shall as a minimum be based upon reasonable suspicion of an actual or possible offence or crime'. The EP has reiterated that a likelihood of a breach of human rights arises in the absence of such reasonable suspicion, when profiling is based on stereotypes or prejudice. (EP stances might support arguments regarding a 'European consensus')