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The European Court's treatment of ethnic or national discrimination

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Article 14 of the European Convention on Human Rights (ECHR) provides for the prohibition of discrimination on any ground, including race, colour, national origin, and association with a national minority.¹ However, despite their importance, the Court has usually avoided dealing with claims of discrimination on such grounds.

In a number of cases it has found violations of substantive articles of the Convention, but found it unnecessary to consider the issue under Article 14 (see for example, *Cyprus v. Turkey*² in which discriminatory practices of the army were recognised as violating Article 3; *Arslan v. Turkey*³, *Okcuoglu v. Turkey*⁴, and *Ceylan v. Turkey*⁵ concerning violation of Article 10 in respect of the applicants, who were prosecuted on account of their writings).

But the main reason for discrimination claims being rejected as being insufficient, in the Court's view, has been the absence of any evidentiary basis for grounding such allegations (see for example, *Velikova v. Bulgaria*⁶, *Hasan Ilhan v. Turkey*⁷, *Hugh Jordan v. the United Kingdom*⁸, *Tanli v. Turkey*⁹).

This can be explained by the application of the Court's established standard of proof and the objectively justified difficulties in obtaining evidence of the actual occurrence of ethnic or national discrimination. However, an analysis of the Court's recent case-law suggests that it has recognised the specific character of such cases. In *Velikova* and in a similar case, *Anguelova v. Bulgaria*¹⁰, the Court held that, despite the seriousness of the allegations of discrimination, they were not "proved beyond a reasonable doubt". In the *Anguelova* judgment, in his partly dissenting opinion, Judge Bonello argued that the 'beyond reasonable doubt' standard should not be the appropriate standard for proving allegations of discrimination, in particular in respect of cases concerning the deprivation of life or inhuman treatment, and rather that the 'balance of probabilities' standard of proof should be applied. In contrast to *Velikova* and *Anguelova*, in the more recent Grand Chamber judgment of *Nachova v. Bulgaria*¹¹, which also concerned allegedly discriminative treatment on behalf of the police against people of Roma ethnicity in Bulgaria, the Court

used a rather more reassuring formulation:

“In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.”

The question of the standard of proof is closely linked to the distribution of the burden of proof. By invoking Article 14, the onus is on the applicant to establish that he/she has been less favourably treated than others, and that racism was a causal factor of this. The burden then shifts to the government to establish that there was an “objective and reasonable justification” for the discriminatory treatment, i.e. it must show that there was a “legitimate aim” and that the measure in question was “necessary in a democratic society”. In the earlier chamber judgment in *Nachova*, the Court had held that the burden of proof shifts to the respondent Government, where “the authorities made no attempt to investigate whether discriminatory attitudes had played a role, despite having evidence before them that should have prompted them to carry out such an investigation”. Unfortunately, in the later *Nachova* judgment, the Grand Chamber departed from such a principle and stated that “the question of the authorities' compliance with their procedural obligation is a separate issue”. However, the Grand Chamber did not exclude the possibility that in certain cases of alleged discrimination the Court may require the 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. Although ethnic and national discrimination is a very serious problem in Russia, especially in some of its regions, to date, there is only one European Court judgment on this issue and there have been a number of admissibility decisions in which discrimination claims were found admissible, some of them on grounds of ethnicity. On 13 December 2005, the Court found a violation of Article 14 in the case of *Timishev v. Russia*.¹² The applicant, Ilyas Yakubovich Timishev, was a Russian national of Chechen ethnic origin. Since 15 August 1996 he had been living in Nalchik, in the Kabardino-Balkaria Republic of Russia, as a forced migrant. On 19 June 1999 Mr Timishev and his driver were travelling by car from Nazran, in the Ingush Republic, to Nalchik. According to the applicant, their car was stopped at the checkpoint on the administrative border between Ingushetia and Kabardino-Balkaria. Officers from the Kabardino-Balkaria State Inspectorate for Road Safety refused him entry, referring to an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit anyone of Chechen ethnic origin. According to the Government, the applicant attempted to jump the queue of cars waiting to pass through the checkpoint and then left, after being refused priority treatment. The applicant complained to a court

about the actions of the police officers and claimed compensation for non-pecuniary damage. His claim was dismissed and he appealed unsuccessfully. On 1 September 2000 the applicant's nine-year-old son and seven-year-old daughter were refused admission to their school in Nalchik, which they had attended from September 1998 to May 2000, because the applicant could not produce his migrant's card - a document confirming his residence in Nalchik and his status as a forced migrant from Chechnya. The applicant had had to hand in his migrant's card in exchange for compensation for the property he lost in the Chechen Republic. The headmaster agreed to admit the children informally, but advised the applicant that the children would be immediately suspended if the education department discovered the arrangement. The applicant complained unsuccessfully about the refusal to admit his children to the school. The applicant complained to the European Court that he was refused permission to enter Kabardino-Balkaria

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because of his Chechen ethnic origin and about the refusal to admit his children to their school. He relied on Article 2 of Protocol No. 4, Article 14 and Article 2 of Protocol No. 1 to the ECHR. As to Article 2 of Protocol No. 4, the Court noted that the applicant's version of events had been corroborated by independent inquiries carried out by the prosecution and police authorities. It found that the traffic police at the checkpoint prevented the applicant from crossing the administrative border between the two Russian regions, Ingushetia and Kabardino-Balkaria. There had therefore been a restriction on the applicant's right to liberty of movement within Russian territory, within the meaning of Article 2(1) of Protocol No. 4.

The inquiries carried out by the prosecutor's office and by the Kabardino-Balkaria Ministry of the Interior established that the restriction at issue had been imposed by an oral order from the deputy head of the public safety police of the Kabardino-Balkaria Ministry of the Interior. The order was not properly formalised or recorded. Furthermore, in the opinion of the prosecutor's office, the order amounted to a violation of the constitutional right to liberty of movement enshrined in Article 27 of the Russian Constitution. Finding that the restriction on the applicant's liberty of movement was not in accordance with the law, the Court held that there had been a violation of Article 2 of Protocol No. 4. As to Article 14, the Court noted that the senior police officer of Kabardino-Balkaria had ordered traffic police officers not to admit "Chechens". As ethnic origin was not listed anywhere in Russian identity documents, the order barred the passage not only of anyone of Chechen ethnicity, but also those who were merely perceived as belonging to that ethnic group. That was found to represent a clear inequality of treatment regarding the right to liberty of movement on account of one's ethnic origin. Racial discrimination, being a particularly invidious kind of discrimination, required from the authorities special vigilance and a vigorous reaction. The Government did not offer any justification for the difference in treatment between people of Chechen and non-Chechen ethnic origin in the enjoyment of their right to

liberty of movement. In any event, the Court considered that no difference in treatment which was based exclusively or to a decisive extent on a person's ethnic origin was capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures. Thus, the Court concluded that there had been a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 4.

As to Article 2 of Protocol No. 1, the Government confirmed that Russian law did not allow children's right to education to be made conditional on the registration of their parents' residence. The applicant's children were therefore denied the right to education provided for by domestic law. Thus, the Court concluded that there had also been a violation of Article 2 of Protocol No. 1.

In addition to the judgment in *Timishev v. Russia*, the Court has adopted a number of admissibility decisions on cases concerning ethnic discrimination issues in Russia. For example, in *Luluyev v. Russia*¹³, the applicant's mother was detained in Chechnya by a group of federal forces, and, as was usual practice in the region, no information was provided to the relatives as to the grounds for the arrest, identity of those who carried it out, or of the place of intended detention. The applicant had not received any information as to his mother's whereabouts until her body was discovered in a mass grave in close proximity (less than one km) to a large military base in Khankala, access to which was restricted almost exclusively to the Russian federal forces. He alleged, *inter alia*, that the above violations occurred because his family was of Chechen origin and they were residents of Chechnya. The Court declared admissible all the complaints raised by the applicant - under Articles 2, 3, 5, 6, 8, 13 and 14.

There are also a number of applications concerning ethnic discrimination that are still pending with the Court at their pre-admissibility stage. In particular, at the end of 2003, the Memorial Human Rights Centre and EHRAC lodged two applications on behalf of 34 applicants, all of whom are Russian nationals of Meskhetian Turk origin. They complain that the responsible local authorities of Krasnodar Krai, where they all presently live, have refused to issue them with a "propiska" (permanent registration by place of residence), to change or issue them with national passports and subjected them to widespread discriminatory treatment because of their ethnic origin.

Thus, in future we can expect further developments in the Court's practice, and successful decisions on the merits, concerning problems of ethnic or national discrimination that will help to some degree to ensure that there are fewer such incidents of unjustifiable discrimination in Russia.

¹ Article 14 prohibits discrimination in respect of the rights and freedom in the ECHR. Protocol No. 12 to the Convention (which came into force on 1 April 2005) introduces a free-standing prohibition of discrimination. Protocol No. 12 has not, however, been ratified by Russia.

² *Cyprus v. Turkey* (No. 25781/94), 10/05/01

³ *Arslan v. Turkey* (No. 23462/94), 08/07/99

⁴ *Okcuoglu v. Turkey* (No. 24246/94), 08/07/99

⁵ *Ceylan v. Turkey* (No. 23556/94), 08/07/99

⁶ *Velikova v. Bulgaria* (No. 41488/98), 18/05/00

⁷ *Hasan Ilhan v. Turkey* (No. 22494/93), 09/02/04

⁸ *Hugh Jordan v. United Kingdom* (No. 24746/94), 04/05/01

⁹ *Tanli v. Turkey* (No. 26129/95), 10/04/01

¹⁰ *Angelova v. Bulgaria* (No. 38361/97), 13/06/02

¹¹ *Nachova and Others v. Bulgaria* (No. 43577/98 & 43579/98), 06/07/05

¹² *Timishev v. Russia* (No 55762/00 & 55974/00), 13/12/05

¹³ *Luluyev and Others v. Russia* (No. 69480/01), 30/06/05 (Admissibility)