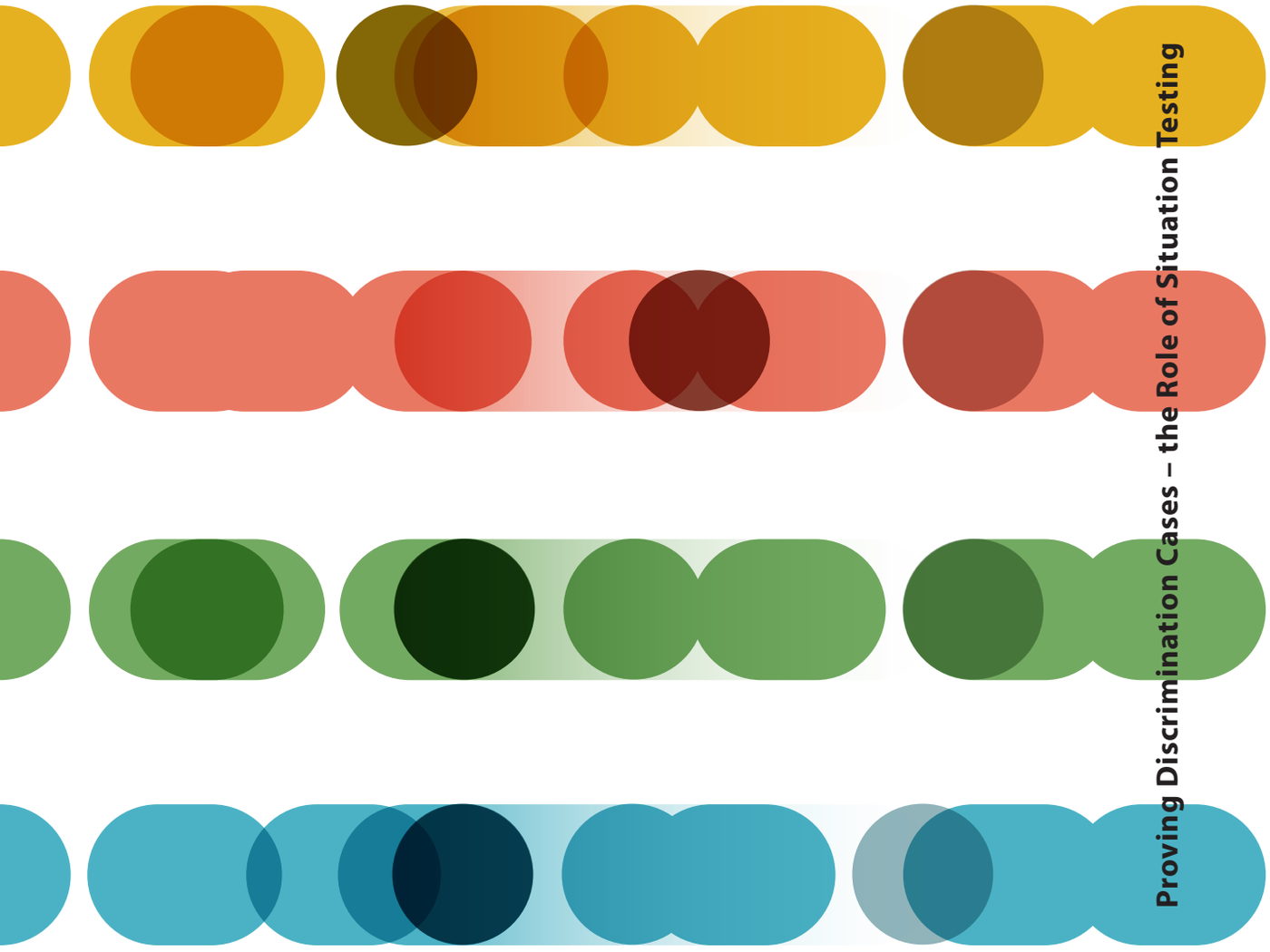
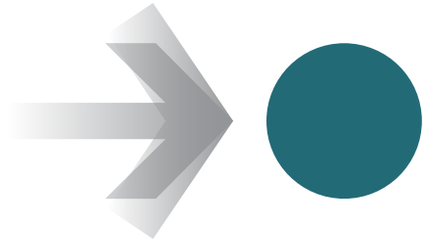
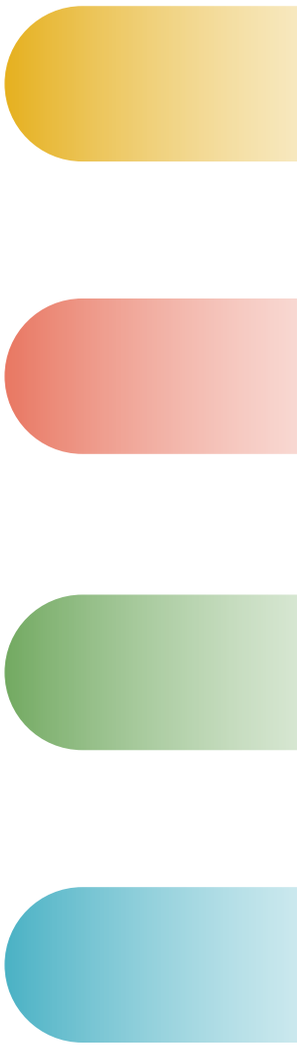


Proving Discrimination Cases – the Role of Situation Testing





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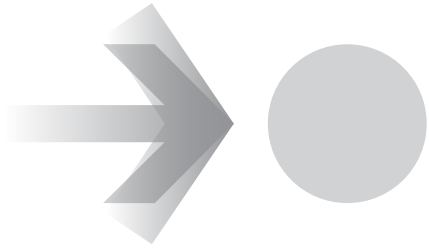
the Role of Situation Testing

by Isabelle Rorive

Centre For Equal Rights

Strategic thinking on equality and mobility



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the Role of Situation Testing

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Strategic thinking on equality and mobility

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Preface

Discrimination is usually hidden and widespread, having deep social, economic, political, historical and cultural causes which are intertwined and interrelated. Proving discrimination in the courts, in the media, in everyday life practices and in society as a whole, is a major challenge, as in many cases there is no clear and unambiguous evidence. The denial of discrimination is often the norm among those stakeholders with power in society. Politicians and public servants, employers and their unions, researchers and journalists, often assume that discriminatory practices simply do not take place. This perception renders it difficult to recognise and accept that it is themselves and their peers that might violate the principle of equal treatment. These categories of stakeholders are empowered to put their prejudices into practice, regardless of their conscious ideology. And at least in part due to the broad denial of discrimination, proving discrimination has, as a rule, been difficult.

But in recent years some progress has been made; this has been possible through the use of situation/discrimination testing. The individual justice model is often problematic for resource against structural and institutional discrimination and situation testing allows discrimination which is frequently hidden behind pretexts to be revealed. One successful example of situation testing is when matched pairs are used to test entrance into nightclubs. The pair consists of a person who is an "immigrant" and a person who is "native-born". The only significant differences between them relate to ethnic markers, such as skin or hair colour. Properly conducted, such tests have provided judges with sufficient insight to be able to hold that discrimination has occurred. These cases have taken place in a number of jurisdictions throughout Europe.

The focus of this book is to provide an overview of the various cases in Europe where this method has been used, and guidelines to those who are conducting situation testings. In this line, comparing European experience with that of the United States is of great value. We wish to reach out in particular to the targets of discrimination, NGOs and equality bodies or human rights agencies in order to explain how cases have been adjudicated by the courts; to examine the difficulties as well as the opportunities related to situation testing and to stress the need for stringent and strategic application of this method.

Adequately used situation testing is a technique that is both legal and effective. It is a means through which the targets of discrimination can empower themselves and test rights already enshrined in law to transform them into reality. Used in a strategic way, situation testing also helps to ensure that the changes are sustainable over time.

The Swedish Centre for Equal Rights, the Migration Policy Group and the authors are convinced that equal rights and opportunities, in words as well as in practice, are the key for establishing, deepening and sustaining human rights in an increasingly diverse and complex European landscape. They are also convinced of the necessity of involving civil society organisations in this process. They have worked and contributed to this book in the hope that it will provide some guidance in the use of situation testing to the work of civil society organisations that share with us these same convictions and goals.

Finally, we would like to extend thanks to Professor Isabelle Rorive and Juris Doctor Paul Lappalainen for their invaluable contributions to this book. In addition we warmly wish to thank Senior Advisor Khaled Assel for his efforts in initiating and following this project, and Migration Policy Group Deputy Director Isabelle Chopin for the support given to the realisation of the book.

Mehmet Kaplan, Director, Swedish Centre for Equal Rights

Jan Niessen, Director, Migration Policy Group

Introduction

EU Anti-Discrimination Law Background

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From the outset, anti-discrimination has been a key element of European integration. On the one hand, discrimination based on nationality is inconsistent with a common market relying on free movement. In line with this, the original EEC Treaty included a number of provisions forbidding discrimination against EU nationals living or working in another Member State[1]. At the same time, application of the principle that men and women should receive equal pay for equal work was considered necessary to avoid distortions of competition between Member States. Over the years, wage discrimination, and more generally discrimination against women, was also recognised as a social problem and a breach of fundamental human rights.

Despite the solitary nature of the provision governing discrimination based on gender in the 1957 Treaty of Rome[2] and its market-oriented background, a body of law on gender equality progressively grew within the EU to amount to a "separate citadel in the fortress of Community law", as Lord Wedderburn put it[3]. The movement started in the early 1970s and over the years, a significant body of European legislation was put in place. At the same time, the European Court of Justice refined and strengthened this legal framework by tackling gender discrimination related to pay, working conditions and social security.

The emerging concept of EU citizenship and the EU's need for more popular legitimacy necessitated broader equal opportunities policies. From the early 1990s, civil society organisations drove the debate forward and pressed the European Community to tackle discrimination on a number of additional grounds, notably ethnicity[4]. The result of this process was the inclusion of article 13 in the EC Treaty, following the entry into force of the 1997 Amsterdam Treaty. This provision was the cornerstone of potentially wide-ranging European anti-discrimination laws as it empowered the Community "to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". The adoption of article 13 suggests a growing recognition of the need to develop an integrated approach towards the fight against discrimination and to benefit from exchanging experiences and good practice across the various grounds.

Although article 13 was a tremendous step forward in the implementation of the principle of equal treatment within Europe, this provision lacked direct effect and as such did not oblige the European institutions to act. In order for appropriate legal measures to be approved, unanimity was required within the Council upon a proposal from the Commission, after consultation with the Parliament. Because of the requirement for unanimity, many believed that nothing would happen for years, if ever. However, two Directives were adopted in 2000, the year following the entry into force of the Amsterdam Treaty : Directive 2000/43/

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1 See M. Bell, *Anti-discrimination law and the European Union*, Oxford, OUP, 2002, p. 33.

2 Article 119, par. 1 of the EEC Treaty (now embodied in article 141.1 of the EC Treaty) states that "Each Member State shall (…) ensure (…) the application of the principle that men and women should receive equal pay for equal work".

3 *Labour law on freedom : Further essays in labour law*, London, Lawrence and Wishart, 1995, p. 265.

4 For instance, the Starting Line Group, a coalition created in 1991 of more than 400 non-governmental actors active in the anti-discrimination field and originating from across Europe. On the Starting Line Group's activities, see, for instance, I. Chopin, "The Starting Line : A harmonised approach to the fight against racism and to promote equal treatment", *European Journal of Migration and Law*, 1999/1.

EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the "Race Equality Directive") and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation with respect to religion or belief, disability, age and sexual orientation (the "Framework Equality Directive"). Such a rapid achievement was the result of years of civil society campaigning which prepared the ground for broad support for these legislative measures. Exceptional political circumstances also played a decisive role. Oddly enough, Jorg Haider, the leader of the FPÖ (an Austrian extremist right wing political party), boosted the process. His participation in the Schüssel government in 2000 caused deep concern in other EU Member States at the time. Implementing concrete measures against racial discrimination was made a priority in Europe. And in the face of potential political isolation, Austria could not afford to vote against anti-discrimination legislation.

The Race Equality and Framework Equality Directives significantly raised the minimum level of legal protection against discrimination across the EU. They ban four forms of unlawful discrimination: direct and indirect discrimination, harassment and instructions to discriminate. Direct discrimination deals with situations where "one person is treated less favourably than another is, has been or would be treated in a comparable situation" on the prohibited ground of discrimination[5]. This is for instance the case when an advertisement for renting a flat bluntly states "foreigners not welcome"[6]. Conversely, indirect discrimination is not necessarily linked to any discriminatory intent[7]. It occurs where "an apparently neutral provision, criterion or practice" would put persons of a particular racial or ethnic origin, religion or belief, age, disability or sexual orientation at a particular disadvantage, unless it can be "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"[8]. A company dress code could constitute indirect discrimination based on religion if it is incompatible with the wearing of the headscarf, the kippa or the turban without proper justification (such as safety requirements in jobs that require a helmet to be worn, hygiene requirements for food production processes, etc.). On the other hand, harassment entails unwanted conduct which lasts for a certain period of time. Behaviour amounts to harassment where it has the purpose or effect of violating the dignity of a person and creates an intimidating, hostile, degrading, humiliating or offensive environment[9]. An employee in a same sex-couple partnership is, for instance, harassed when he has to face recurring homophobic remarks from his boss or colleagues. Finally, the ban on instructions to discriminate means that the mere fact of requiring a third party to discriminate on a prohibited ground equates to unlawful discrimination[10]. Accordingly, an employer instructing

5 Article 2(2)(a) of the Race Equality and Framework Equality Directives.

6 Difference of treatment based on race or ethnicity can never be justified except when it constitutes "a genuine and determining occupational requirement" (article 4 of the Race Equality Directive). The classic example is a film maker hiring an actor to play Martin Luther King or Muhammad Ali.

7 In EU law, the concept of indirect discrimination was originally developed by the European Court of Justice in equal payment cases. See the following landmark decisions: *J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd*, 31 March 1981, Case 96/80; *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, 13 May 1986, Case 170/84.

8 Article 2(2)(b) of the Race Equality and Framework Equality Directives.

9 Article 2(2)(3) of the Race Equality and Framework Equality Directives.

10 Article 2(2)(4) of the Race Equality and Framework Equality Directives.

a temporary employment agency to hire only "white people" violates EU anti-discrimination law. This is in addition to the violation constituted by the actions of the agency itself.

It should be stressed that the Race Equality Directive and the Framework Equality Directive do not have the same material scope. With respect to race and ethnic origin, the areas of employment, training, education, social security, healthcare, housing and access to goods and services are covered. As regards religion or belief, disability, age or sexual orientation, protection is limited to employment and occupation, as well as vocational training[11]. However, EU law lays down minimum standards for levels of protection, thus giving the Member States the option of introducing or maintaining more extensive provisions[12]. This has been the case in a number of Member States which have gone beyond the requirements of the Employment Equality Directive[13].

The Race Equality and Framework Equality Directives were to a large extent developed on the basis of the experiences with gender discrimination legislation and the case law of the European Court of Justice. While the 1976 Gender Equal Treatment Directive[14] mainly focused on forbidding gender discrimination in all aspects of the employment relationship, the 2000 Directives also pay particular attention to remedies and enforcement, mainly enforcement of rights, burden of proof and sanctions. The EU's experience of gender discrimination legislation clearly highlighted the need for an *effective enforcement mechanism*. This is essential for successful litigation and practical implementation of the principle of equal treatment[15]. Recent Directives that strengthen and expand the legal framework implementing the principle of equal treatment between women and men follow this pattern[16].

The focus on the burden of proof in the recent EU Directives is undoubtedly one of the measures designed to improve the implementation of equality norms. In many Member

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11 For further developments in EU law, see *Comparative analyses on national measures to combat discrimination outside employment and occupation: Mapping study*, Human European Consultancy and Migration Policy Group (eds.), December 2006; European Parliament Resolution of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU. Please note that the EU Commission is currently drafting a horizontal Directive proposal on disability (May 2008). Following opposition from some Member States, the Commission abandoned its initial intention to also cover age, religion or conviction, and sexual orientation.

12 Recital 25 of the Preamble to the Race Equality Directive; Recital 28 of the Preamble to the Framework Equality Directive.

13 M. Bell, I. Chopin and F. Palmer, *Developing anti-discrimination law in Europe*, European Commission, December 2007, p. 38.

14 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

15 On the wide range of obstacles women faced to bringing successful litigation, see, for instance, J. Blom, B. Fitzpatrick, J. Gregory, R. Knegt and U. O'Hare, *The utilisation of sex equality litigation in the Member States of the European Community: A comparative study*, Report to the Equal Opportunities Unit of DG V, European Commission, 1995, V/782/96-EN.

16 See Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

States, experience derived from anti-racism and gender discrimination laws has shown that too often these laws exist only on paper while the issue of proof is a key problem in successful implementation. This handbook concentrates on the pitfalls that victims of discrimination have faced in convincing the courts that they have been subjected to illegal adverse treatment. The first part gives a legal account of how shifting the burden of proof aims to tackle the issue and how it has been used in some pivotal cases. It shows that in practice, reversing the burden of proof is not sufficient and that many discrimination cases require special tools to collect evidence from which a court may infer that discrimination has occurred. Situation testing is one of these tools. It is especially suited to exposing direct discrimination that is frequently hidden behind various pretexts. Relying on the US experience, Part II of this handbook presents the strengths and weaknesses of situation testing. It focuses on two key issues that situation testing has had to address, namely conformity with human rights and adherence to strict methodological requirements. Part III of the handbook provides examples of situation testing and litigation in EU Member States and shows the extent to which situation testing has gained ground in Europe over the years. The Swedish situation is explored in Part IV by Paul Lappalainen[17] who in some final comments also highlights the potential uses of testing, not only in litigation (strategic or non strategic), but also to raise awareness and provide quality controls for the private and public sectors in their equality practices and policies.

[17] The author wishes to thank Paul Lappalainen and Laura Gornicioiu for their linguistic assistance.

1

Part I

Burden of Proof

1. **The lack of evidence in discrimination cases – examples from Belgium**
2. **The weight of the burden of proof**
3. **Proving gender discrimination – the answer from the European Court of Justice**
4. **The EC Directives and the shift of the burden of proof**
5. **The European Court of Human Rights and the shift of the burden of proof**
6. **Shifting the burden of proof in practice**
7. **The difficulty of establishing the facts**

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Litigation is one of the essential ways to combat discrimination. Court decisions can provide effective means of redress and to a large extent have a lasting impact beyond an individual's particular situation[18]. In practice, many challenges arise when building successful cases against discrimination, not the least of which is the difficulty in proving such cases. Discrimination is often hidden, if not indirect, and cases are rare where irrefutable evidence of discrimination is available. The struggle for equal treatment of women and men has shown that laws prohibiting direct and indirect discrimination are difficult to implement in practice. The same conclusion can be drawn with respect to laws banning ethnic discrimination as well as discrimination on other grounds.

1. The lack of evidence in discrimination cases – examples from Belgium

In Belgium, the 1981 Moureaux Act was the first piece of legislation to address ethnic discrimination[19], and a legal provision criminalising discrimination in the labour market was adopted in 1994[20]. Since then, no case has been successful in court despite several scientific studies showing a high level of ethnic discrimination in employment[21]. According to the Belgian equality body, the Centre for Equal Opportunities and Opposition to Racism (CECLR)[22], this is due to a large extent to the weight of the burden of proof. It is highly difficult to prove that an employer's decision not to hire or to fire someone is based on considerations of race or ethnic origin. Employers do not have to give reasons for their actions, and other workers are rarely ready to testify against their employer.

Even outside the field of employment, it is rare to find a perpetrator who provides straightforward evidence of discrimination. Cases where a racist landlord places a property advertisement in a newspaper with the statement "Foreigners not welcome" are unusual[23]. In addition, there are very few cases where the perpetrator of discrimination admits the facts openly. An important case decided in 2004 provides a rare example of this. It concerned the purchase of a flat in a chic area of Brussels. After the estate agent had shown the flat to a dark-skinned woman, Mrs Mwamba Kasuba, the latter expressed great interest and put

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18 Anti-discrimination schemes are constructed in phases, "judicialisation" being one of them. See P. Simon, (Medis project coordinator), *Comparative study on the collection of data to measure the extent and impact of discrimination with the United States, Canada, Australia, the United Kingdom and the Netherlands*, Report to the DG for Employment and Social Affairs, European Commission, 1994, pp. 15 & sq.

19 Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, *Moniteur belge*, 8 August 1981 (recently amended by an Act adopted on 10 May 2007, *Moniteur belge*, 30 May 2007).

20 Art. 2*bis* of the Moureaux Act inserted by an Act of 12 April 1994, *Moniteur belge*, 14 May 1994.

21 See, among others, P. Arrijn, S. Feld & A. Nayer, *La discrimination à l'accès à l'emploi en Belgique en raison de l'origine étrangère*, International Labour Office, 1998 ; A. Martens, N. Ouali & al., *Discriminations des étrangers et des personnes d'origine étrangère sur le marché du travail de la Région de Bruxelles-Capitale*, Université Libre de Bruxelles and Katholieke Universiteit Leuven, ORBEM, January 2005.

22 The CECLR was created in 1993 (Act of 15 February 2003 pertaining to the foundation of a Centre for Equal Opportunities and Opposition to Racism, *Moniteur belge*, 19 February 2003, as subsequently amended).

23 Liège First Instance Court (13th Ch., criminal), 28 December 2001 (available on the CECLR's website, www.diversite.be).

in a bid. At the same time, she requested some records concerning the building. When she did not obtain these documents despite several phone calls to the estate agent, she asked a friend, a Belgian native, to visit the flat in order to assess the situation. During the friend's visit, the estate agent completely spontaneously remarked, "A black woman is interested in buying the place but, as a matter of fact, if you want to buy it, it is yours. I do not want to sell a flat to black people. I am the managing agent for the entire building and I know through experience that there are always problems with African people." In official proceedings, the estate agent went so far as to confirm these comments in writing[24].

Lastly, cases where the discriminatory motive is clearly spelled out and recorded are also uncommon. On 17 November 2004, a homosexual couple expressed their interest in renting a house and paid the letting agency the equivalent of one month's rent, normal practice when securing a contract with a landlord. Two days later, the letting agency, acting on the owners' behalf, left a message on their answering machine saying, "We spoke to the owners on the phone and they wish to rent the house to a traditional couple…. Unfortunately… So, you can come and get your money back and maybe we will be able to find another place for you."[25]

This kind of case where discrimination can be established in a straightforward manner is exceptional. They could become even less common as recent anti-discrimination campaigns, mainly launched following the European Commission's implementation of the Race and Framework Equality Directives, have drawn widespread public attention to the reprehensible nature of such practices.

2. The weight of the burden of proof

Proof is often an insurmountable obstacle in cases of discrimination, and the weight of the burden of proof is undoubtedly a key issue.

In the law of evidence, the burden of proof relates to the party's duty to conclusively prove a fact or set of facts in legal proceedings. In other words, the burden of proof relates to which side must establish a point in a lawsuit. The common principle is that the burden of proof lies with the claimant, i.e. the person who brings the case. In the course of litigation, where a given allegation forms an essential element of a party's case, the burden of proving such an allegation generally rests with that party. To be successful in court, the victim of discrimination has to bring sufficient evidence to meet the requisite standard of proof. In practice, discrimination issues occur in such a way that in many instances, the victim is unable to provide sufficient facts so as to give clear and convincing evidence of the discrimination before the court. The reason is that the perpetrator generally has control over the evidence establishing why he or she undertook the actions at issue.

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[24] Brussels First Instance Court (55th Ch., criminal), 31 March 2004 (available on the CECLR's website, www.diversite.be). The facts of the case took place before the entry into force of the Act of 25 February 2003 transposing the Race Equality Directive (now replaced by the Federal Act of 10 May 2007 against certain forms of discrimination, *Moniteur belge*, 30 May 2007).

[25] Nivelles First Instance Court (Summary proceedings, civil), 19 April 2005, decision summarised in the *European Anti-Discrimination Law Review*, 2005, issue 2, p. 47.

› *King v. Great Britain-China Centre before the Court of Appeal of England and Wales (2002)*[26]

In the United Kingdom where non-discrimination legislation was first adopted in 1965 under the Race Relations Act, judges are familiar with the difficulties for the alleged victims of discrimination in meeting the standard of proof. In a 1992 Court of Appeal case, *King v. Great Britain-China Centre*, Lord Justice Neill stated that " it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that 'he or she would not have fitted in' ". The facts of the particular case demonstrate the problems which the complainant faced. The case concerned the failure to appoint an ethnic Chinese woman to the post of deputy Director of the GB-China Centre. The advertisement stated that the essential requirements related to the position were " first hand knowledge of China " and " fluent spoken Chinese ". Despite the fact that the applicant fulfilled both criteria and had been educated to degree standard in Britain, she was not one of the eight applicants shortlisted for an interview. All of them were white graduates with a degree in Chinese studies. None of the five Chinese applicants for the post were offered an interview for the position and indeed no Chinese person has ever been employed by the GB-China Centre. The latter claimed that during the recruitment process, they had decided that the criteria stated in the advertisement were of secondary importance and that " recent experience and knowledge of the bureaucracy and institutions of modern China " were crucial. The Court considered that facts in the case were sufficient to draw an inference of discrimination, even though there was no direct evidence of a discriminatory motive. In other words, Lord Justice Neil suggested a way of mitigating the effects of the burden of proof : " a finding of a difference in treatment and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but (…) 'almost common sense' ". As a result, the Court of Appeal reinstated the Employment Tribunal's decision (previously reversed by the Employment Appeal Tribunal) which did not deem satisfactory the explanation given by the GB-China Centre – that the main criteria for the position had been altered during the process. Indeed, they felt that this explanation was submitted in an attempt to justify illegal discrimination.

Despite the Court of Appeal's mitigation of the burden of proof in *King v. Great Britain-China Centre*, research carried out 10 years later indicated that only 16% of race discrimination cases won at tribunals. Such figures seem to be attributable to the fact that judges are commonly unwilling to draw inferences of race discrimination even where the respondent's explanation for a difference in treatment is rejected[27].

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[26] [1992] ICR 516, precedent approved by the House of Lords in *Glasgow CC v. Zafar* [1998] ICR 12.

[27] *Claims of race bias fall by the wayside*, Labour Research, April 2002. With the transposition of the EC Directives in UK's legislation, judges are today required, not only entitled, to shift the burden of proof when a *prima facie* case is established. See developments by country in Part III of this book and *Igen Ltd & Others v. Wong*, *Chamberlin and another v. Emokpae*, *Webster v. Brunel University* [2005] EWCA Civ 142.

› *The Prague Airport case before the House of Lords (2004)*[28]

A decision by the House of Lords in 2004 also underlines the issue of proof in discrimination cases. It concerned an operation mounted by British immigration officers at Prague Airport operating under the authority of the Home Secretary in 2001 and 2002. British officers were posted to Prague Airport to give or refuse leave to enter the United Kingdom to passengers before they boarded aircraft bound for the United Kingdom. The operation was a response to the influx of Czech Roma into the United Kingdom and its object was to stem the flow of asylum seekers from the Czech Republic. One of the issues subject to the scrutiny of the House of Lords was whether the operation at Prague Airport was carried out in an unlawfully discriminatory manner, in that would-be travellers of Roma origin were treated less favourably than non-Roma were. Baroness Hale of Richmond gave very clear guidelines to resolve this issue :

> " Since 1968, it has been unlawful for providers of employment, education, housing, goods and other services to discriminate against individuals on racial grounds. The current law is contained in the Race Relations Act 1976, which in most respects is parallel to the Sex Discrimination Act 1975. The principles are well known and simple enough to state although they may be difficult to apply in practice. The underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally. Thus it is just as discriminatory to treat men less favourably than women as it is to treat women less favourably than men ; and it is just as discriminatory to treat whites less favourably than blacks as it is to treat blacks less favourably than whites. The ingredients of unlawful discrimination are (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group ; (ii) that the treatment is less favourable to one ; (iii) that their relevant circumstances are the same or not materially different ; and (iv) that the difference in treatment is on sex or racial grounds. *However, because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence.* Once treatment less favourable than that of a comparable person (ingredients (i), (ii) and (iii)) is shown, the court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds : see Glasgow City Council *v* Zafar [1997] 1 WLR 1659, approving King *v* Great Britain-China Centre [1992] ICR 516. If the difference is on racial grounds, the reasons or motive behind it are irrelevant : see, for example, Nagarajan *v* London Regional Transport [2000] 1 AC 501 "[29].

The fact that people are not always aware of their prejudices is nowadays well-documented in social sciences. Unconscious biases do significantly influence race relations[30].

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[28] *Regina v. Immigration Officer at Prague Airport and another, ex parte European Roma Rights Centre and others*, 9 December 2004 [2004] UKHL 55.

[29] *Ibidem*, § 73 (my italics). The other Law Lords concurred with the opinion of Baroness Hale of Richmond on the issue of discrimination. Decision available on the House of Lords website, www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041209/roma.pdf.

[30] See, for instance, J.F. Dovidio, " On the Nature of Contemporary Prejudice : The Third Wave ", *Journal of Social Issues*, Vol. 57, 2001/4, pp. 829-849.

3. Proving gender discrimination – the answer of the European Court of Justice

With respect to gender discrimination, the European Court of Justice (ECJ) has explicitly acknowledged the considerable difficulties experienced by women in successfully bringing sex discrimination cases, particularly in the field of pay discrimination. The major problem identified was the lack of transparency concerning practices and decision making in the employment field. Women were deprived of the opportunity to successfully defend their cases because they were simply unable to have access to the information necessary to establish discrimination.

› *The Danfoss case before the ECJ (1989)*[31]

The European Court of Justice first addressed this issue in the 1989 *Danfoss* case. A trade union brought a case on behalf of female workers working for the company Danfoss A/S. The Employees' Union maintained that Danfoss's practices regarding wages and salaries were discriminatory and therefore violated the provisions of the Danish Law implementing the 1975 Equal Pay Directive[32]. Statistics relating to the wages paid to 157 workers between 1982 and 1986 were produced. They showed that the average wage paid to men was 6.85% higher than that paid to women. Although the basic wages of female and male employees were the same, the employer made pay supplements calculated, *inter alia*, on the basis of mobility, training and seniority. According to the Employee's Union, the employer's practice amounted to indirect discrimination. At issue was the fact that the system of pay supplements was implemented in such a way that a woman was unable to identify the reasons for a difference between her pay and that of a man doing the same work. The Court pointed out that "in a situation where a system of individual pay supplements which is completely lacking in transparency is at issue, female employees can establish differences only so far as average pay is concerned. They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory"[33]. As a result, it decided that "the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men"[34].

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31 *Handels-og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, 17 October 1989, Case 109/88.

32 Council Directive 75/117 of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

33 ECJ, *Danfoss*, 17 October 1989, Case 109/88, § 13. In *Commission v. France* (30 June 1988, Case 318/86, § 27), the Court condemned a system of recruitment characterised by a lack of transparency as being contrary to the principle of equal access to employment on the grounds that the lack of transparency prevented any form of supervision by the national courts and the European Commission.

34 ECJ, *Danfoss*, 17 October 1989, Case 109/88, § 16.

› *The Enderby case before the ECJ (1993)*[35]

Four years later, the European Court of Justice refined its position in the *Enderby* case and supported the shift in the burden of proof even in situations where the employer's system of pay was transparent. Dr Pamela Enderby, a speech therapist employed in the UK's National Health Service (NHS), brought a sex discrimination claim based on the fact that at her level of seniority within the NHS, members of her overwhelmingly female profession were appreciably less well paid than members of comparable professions (clinical psychologists and pharmacists) in which, at an equivalent professional level, there were more men than women. After stating the general principles related to the burden of proof in litigation, the European Court of Justice gave a clear-cut ruling on when and how the burden should shift in gender discrimination cases.

> " 13. It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.
>
> 14. However, *it is clear from the case-law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay*. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 of the Treaty, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex (…). Similarly, where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (Case 109/88 Danfoss [1989] ECR 3199, at paragraph 16).
>
> 15. In this case (…), the circumstances are not exactly the same as in [Danfoss] (…). There can be *no complaint that the employer has applied a system of pay wholly lacking in transparency* since the rates of pay of NHS speech therapists and pharmacists are decided by regular collective bargaining processes in which there is no evidence of discrimination as regards either of those two professions.

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[35] ECJ, *Dr Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, 27 October 1993, Case C-127/92.

> 16. However, if the pay of speech therapists is *significantly* lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, *there is a prima facie case of sex discrimination*, at least where the two jobs in question are of equal value and the statistics describing that situation are valid.
>
> 17. It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant[36].
>
> 18. *Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay*. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory (…)[37]. "

In a speech to the Employment Lawyers Association given on 8 November 2006, Mr Justice Elias, President of the UK's Employment Appeal Tribunal, stressed that the most likely explanation for the difference in pay in the *Enderby* case was historical sexual stereotyping: " There was historically an expectation that women would go into speech therapy and men (or at least predominantly more men) into the other two professions; and that it was reasonable to assume that this must left its mark on the relevant pay. The speech therapists would historically have been paid what would have been perceived as the appropriate female rate, and that historical discrimination had not been eradicated "[38].

› *The Royal Copenhagen case before the ECJ (1995)*[39]

In the *Royal Copenhagen* case, the European Court of Justice confirmed its position and reasserted the paramount importance of not depriving women of effective means of enforcing the principle of equal pay. The question at issue was whether Royal Copenhagen, a ceramics producer employing some 1150 workers, 40% men and 60% women, was infringing equal pay because the average hourly piece-work pay of one group of workers (the blue-pattern painters), all but one of whom were women, was less than that of another group of workers (the automatic-machine operators), all of whom were men. According to the European Court of Justice,

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[36] On this point, see ECJ, *Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, 9 February 1999, Case C-167/97.

[37] ECJ, *Enderby*, 27 October 1993, Case C-127/92 (my italics).

[38] Quoted by J. Galbraith-Marten, *Shifting the burden of proof and access to evidence*, Seminar on the Burden of Proof, Academy of European Law, June 2007, § 25 (available on the Academy's website, www.era.int).

[39] ECJ, *Specialarbejderforbundet i Danmark v. Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, 31 May 1995, Case C-400/93.

"(…) the mere finding that in a piece-work pay scheme the average pay of a group of workers consisting predominantly of women carrying out one type of work is appreciably lower than the average pay of a group of workers consisting predominantly of men carrying out another type of work to which equal value is attributed does not suffice to establish that there is discrimination with regard to pay. *However*, where in a piece-work pay scheme in which individual pay consists of a variable element depending on each worker's output and a fixed element differing according to the group of workers concerned *it is not possible to identify the factors which determined the rates or units of measurement used to calculate the variable element in the pay*, the employer may have to bear the burden of proving that the differences found are not due to sex discrimination "[40].

› *Binderen v. Kaya before the Dutch Supreme Court (1982)*[41]

The case law of the European Court of Justice clearly relies on US precedents[42]. It is also close to the rulings made by the Dutch Supreme Court as early as 1982 in *Binderen v. Kaya*. Mr Kaya, a resident of the Netherlands of Turkish origin, had been waiting years for a suitable house. He was relying on a social housing scheme which was the responsibility of, among others, the social housing corporation known as Binderen. Mr Kaya brought data before the Court showing that among the 157 houses allocated by Binderen, only one had been given to an immigrant family. The proportion of immigrant families in the town was 4.6 %, and 10.2 % of those registered for social housing were of immigrant background. Other corporations had allocated 7.2 % of their housing stock to immigrant families[43]. The Dutch Supreme Court ruled on the admissibility of statistical evidence and decided that a reasonable and fair application of the principle of the burden of proof, as found in the Civil Procedure Code, involved requesting that the housing corporation provide a satisfactory explanation establishing that its policy was not discriminatory against immigrants :

"no rule of law forbids the court to accept numerical, statistical differences as presented here as sufficient proof of discrimination, nor does it forbid the court to conclude that there is a (serious) suspicion of discrimination and to put the burden of proof that the reproached discrimination is based on legally acceptable grounds on the person who is accused of discrimination, solely on the basis of that suspicion "[44].

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40 *Ibidem*, § 28 (my italics).

41 Hoge Raad, 10 December 1982, *N.J.*, 1983, p. 687.

42 See the landmark decision by the US Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). For further developments, see, for instance, *Furnco Constr. Corp.v. Waters*, 438 U.S. 567 (1978) ; *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983) ; *Swierkiewicz v. Sorema n. *, 534 U.S. 506 (2002).

43 Facts of the case as reported in D. Houtzager, *Changing perspectives : Shifting the burden of proof in racial equality cases*, Brussels, ENAR, 2006, p. 20.

44 Reported in M. Zwamborn, "The Netherlands", *Anti-discrimination legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the Council directives*, J. Niessen and I. Chopin for the Migration Policy Group (eds), Vienna, EUMC, 2002, p. 27.

4. The EC Directives and the shift of the burden of proof

European Court of Justice case law on shifting the burden of proof was not uniformly applied in all Member States. National judges were not always aware of the *prima facie*[45] approach and some of them were not at ease with this new way of dealing with facts and evidence. As a result, a Directive was adopted in 1997 on the burden of proof in cases of discrimination based on sex[46]. It codifies the principles put forward by the European Court of Justice and extends the scope of case law from the issue of equal pay to equal treatment more generally. In civil procedures, "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment"[47]. The aim of this Directive is "to ensure that the measures taken by the Member States to implement the principle of equal treatment are made *more effective*, in order to enable those persons who consider themselves wronged because the principle of equal treatment has not been applied to them, to have their rights asserted by judicial process after possible recourse to other competent bodies"[48].

The Race and Framework Equality Directives were established using the experiences with gender equality legislation. They not only prohibit discrimination based on race, ethnic origin, religion and belief, sexual orientation, disability or age, they also provide for a shift in the burden of proof in the same manner as the 1997 Directive[49]. In their preamble, they state that "The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought"[50]. Despite the lack of a specific provision in the EU Directives, the shift of the burden of proof should also apply to victimisation cases, i.e. to individuals who suffer adverse treatment as a reaction to their involvement in legal proceedings aimed at enforcing compliance with the principle of equal treatment[51].

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45 *Prima facie* means at first appearance, or on the face of things.

46 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. This Directive was recast in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

47 Council Directive 97/80/EC of 15 December 1997, art. 4.

48 *Ibidem*, art. 1 (my italics). See also ECJ, *Nikoloudi*, 10 March 2005, Case C-196/02, § 69.

49 Race Equality Directive, art. 8; Framework Equality Directive, art. 10.

50 Race Equality Directive, recital 21 of the Preamble; Framework Equality Directive, recital 31 of the Preamble. The latter also states that "it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation".

51 M. Miguel Sierra, I. Chopin, E. Jenaro Tejada, I. Carles-Berkowitz, *Towards equal treatment. Transposing the Directive – Analysis and proposals*, Brussels, ENAR, March 2002, pp. 38-40; J. Galbraith-Marten, *Shifting the burden of proof and access to evidence*, Seminar on the Burden of Proof, Academy of European Law, June 2007, §§ 30-31 (available on the Academy's website, www.era.int).

In its 2003 Annual Report on Equality and Non-discrimination, the European Commission gave an example showing how "sharing the burden of proof" should work in ethnic discrimination cases:

> "A number of people of non-European origin working in a company in the EU apply for promotion each time a more senior job becomes vacant. Each time they are overlooked and the job goes to someone of European origin. If the people being promoted seem no better qualified than those being rejected all the time, then there is *prima facie* evidence of racial discrimination. But it would be difficult to prove this conclusively without being able to make a detailed comparison of the qualifications of those being promoted and those not being and of their suitability for the job. If, in fact, there are reasons why particular people were promoted which have nothing to do with their ethnic origin, the person best placed to know this is the person making the decision — that is the manager of the company concerned. Indeed, he or she might be the only one who knows what the real reasons are, so it is arguably only right that they should have to demonstrate that they did not behave in a discriminatory way"[52].

The shift of the burden of proof is designed not to be too onerous for the defendant. It does not equate to a complete reversal of the burden of proof and does not amount to the establishment of a "negative fact" (that of not having acted in a discriminatory manner in any respect). The defendant has to prove that s/he is not guilty of the alleged discrimination on the basis of the *specific* facts the claimant has brought before the court. In the example the European Commission gave in its 2003 annual report (quoted above), an employer who is presumed to have discriminated in his/her promotion decisions only has to disclose the facts and reasons on which the decision to allow or refuse promotion was based. All s/he has to establish is that these decisions were not based on the ethnic origin of the member of the staff concerned but on entirely legitimate factors. This is why one sometimes speaks of *sharing* the burden of proof, instead of *reversing it.*

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[52] *Annual report on equality and non-discrimination 2003 – Towards diversity*, European Commission, 2003.

It is also crucial to bear in mind that the shift of the burden of proof is consistent with the requirements of a fair trial. As the European Court of Human Rights put it, in cases concerning criminal charges where the issue is even more apparent[53], the right to a fair hearing "is not (…) absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence"[54].

› *Constitutional Court of the Czech Republic rules that the shift of the burden of proof is consistent with the right to a fair trial (2006)*[55]

In line with this, the Czech Constitutional Court on 26 April 2006 held that the national provision implementing the European provision on the burden of proof was not unconstitutional and did not breach the right to a fair trial. At issue was an allegation of discrimination towards the two plaintiffs of Roma origin who were denied service in a restaurant on the grounds that they did not have the required membership card. When arguing their case before a regional court in Northern Bohemia, they asked for the burden of proof to be shifted as three non Roma customers had been served without being asked for any kind of membership card. The court suspended proceedings in order to file a motion with the Constitutional Court. It was concerned that § 133a of the Code of Civil Procedure placed the entire burden upon the defendant with the plaintiff having no obligation to support an allegation with any evidence, thereby putting the defendant at a serious disadvantage and infringing his/her right to fair trial. The Constitutional Court confirmed the validity of the EU mechanism and stressed that the constitutional principle of fair trial "did not mean absolute mathematical equality, but relative equality which had to reflect the different situations in which the parties found themselves." It further stated that "the shift of burden of proof however is neither complete nor unconditional. The person, who claims to have been discriminated against, has to present facts sufficient for the conclusion that discrimination might have occurred"[56].

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53 It should be stressed that the Race and the Framework Equality Directives rule out the possibility of shifting the burden of proof in criminal proceedings (art. 8(3) and art. 10(3) respectively).

54 ECHR, *Phillips v. United Kingdom*, 5 July 2001, § 40. See also ECHR, *Salabiaku v. France*, 7 October 1988, § 28; ECHR, *Pham Hoang v. France*, 25 September 1992, §§ 34-36; ECHR, *Janosevic v. Sweden*, 23 July 2002, §§ 101-104; ECHR, *Radio France and others v. France*, 30 March 2004, § 24. Nowadays, the Strasbourg Court considers that too broad a conception of the presumption of innocence could remove any likelihood of effectiveness when ethnic discrimination cases are brought to court (ECHR (Grand Chamber), *Nachova and others v. Bulgaria*, 6 July 2005, §§ 128-130, 146, 156-157; ECHR, *Stoica v. Romania*, 4 March 2008). A presumption of liability is valid, providing it can be reversed in criminal matters. On this aspect, see for instance ECHR, *Telfner v. Austria*, 20 March, 2001, §§ 15-16.

55 Pl. US 37/04, 26 April 2006, coll. no. 419/2006, p. 67. Case reported in the *European Anti-Discrimination Law Review*, 2006, issue 4, p. 55.

56 B. Havelkova, "Burden of proof and positive action in decisions of Czech and the Slovak Constitutional Courts – milestones or mill-stones for implementation of EC equality law?", *European Law Review*, 2007, issue 32, p. 701.

5. The European Court of Human Rights and the shift of the burden of proof

The European Court of Human Rights (ECHR) has held on many occasions that the standard of proof it applies is that of "proof beyond reasonable doubt". It has also ruled that proof may follow from "the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact". Stressing that its task is to rule on State responsibility under international law and not on guilt under criminal law, the Court has been keen to show flexibility in consideration of the substantive right at stake and any evidentiary difficulties involved. In doing so, the Court has emphasised that it is a serious matter for a Contracting State to be found in breach of a fundamental right[57].

In addition, the European Court of Human Rights has recognised that Convention proceedings do not "in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation)"[58]. In certain circumstances, "where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities (…) the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation"[59].

In recent years, the European Court of Human Rights has also started to acknowledge that specific approaches to the issue of proof may be needed in cases involving discrimination[60]. EU anti-discrimination law has had a striking impact on the case law of the European Court of Human Rights as exemplified by the latter's explicit references to the former. Although at first reluctant to shift the burden of proof in discrimination cases, the European Court of Human Rights has become aware of the need to adapt the evidentiary requirements imposed on the victim and the need to take into account the specific character of discriminatory motives, which often remain extremely difficult to establish.

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57 With regard to cases of this type, see, among many others, ECHR, *Ireland v. the United Kingdom*, 18 January 1978, § 161 ; ECHR (Grand Chamber), *Ramsahai and Others v. The Netherlands*, 15 May 2007, § 273 ; ECHR (Grand Chamber), *D.H. v. The Czech Republic*, 13 November 2007, § 178.

58 ECHR, *Aktaş v. Turkey*, 24 April 2003, § 272 ; ECHR (Grand Chamber), *D.H. v. The Czech Republic*, 13 November 2007, § 179.

59 ECHR (Grand Chamber), *Salman v. Turkey*, 27 June 2000, § 100 (death of a person in custody). For others instances, see, among others, *Ribitsch v. Austria*, 4 December 1995, §§ 32-34 (physical injuries in police custody) ; ECHR, *Aktaş v. Turkey*, 24 April 2003, § 291 (death of a person by asphyxiation while in an interrogation centre) ; *Anguelova v. Bulgaria*, 13 June 2002, § 111 (death of a Roma person following a skull fracture in custody).

60 In the European Convention on Human Rights, the anti-discrimination provision is embodied in article 14 which states that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Protocol no. 12 to the Convention adopted on 4 November 2000 aims to enforce a general prohibition of discrimination. It provides that "The enjoyment of any right set forth by law shall be secured without discrimination (…)". However, numerous countries across Europe have not ratified it yet.

› *The Nachova case before the ECHR (2004 and 2005)*[61] *and subsequent developments in the Stoica case (2008)*[62]

In the *Nachova* case, the Court was confronted with the killing of two unarmed deserters of Roma origin by a member of the Bulgarian military police and the ensuing lack of effective investigation. The right to life and racial motivation were the main issues. In the ECHR's first ruling in 2004, explicit reference was made to the provisions on proving discrimination in the Race and Framework Equality Directives. According to the Court, " it has become an established view in Europe that effective implementation of the prohibition of discrimination requires the use of specific measures that take into account the difficulties involved in proving discrimination "[63]. Stressing that " 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 "[64], the Court decided that the manner in which the enquiry into the killing was carried out should lead to a shift of the burden of proof. The respondent government had to satisfy the Court, on the basis of additional evidence or a convincing explanation, that the events complained of were not shaped by any prohibited discriminatory attitude on the part of State agents[65]. This line of reasoning was reversed one year later in the Grand Chamber due to the particular facts of the case.

> " 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* "[66].

Recent developments in ECHR case law tend however to show that the Court has returned to its first ruling in the *Nachova* case and decided to provide coherent protection to victims of racial prejudice. In the *Stoica*[67] case decided in March 2008, the Court was again confronted with violent acts against Roma committed by public agents. On 3 April 2001 in Dolhasca, Romania, four police officers and their chief together with six public guards started beating up Roma gathered outside a bar in a village inhabited primarily by Roma at the request of the deputy mayor. Constantin Stoica, a 14-year-old Roma boy, was beaten by a police sergeant

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61 ECHR, *Nachova and others v. Bulgaria*, 26 February 2004, reversed on 6 July 2005 (Grand Chamber).

62 ECHR, *Stoica v. Romania*, 4 March 2008.

63 ECHR, *Nachova and others v. Bulgaria*, 26 February 2004, § 168.

64 *Ibidem*, § 170.

65 *Ibidem*, § 171.

66 ECHR (Grand Chamber), *Nachova and others v. Bulgaria*, 6 July 2005, § 157 (my italics).

67 ECHR, *Stoica v. Romania*, 4 March 2008.

until he lost consciousness, despite his warning to the sergeant that he had recently undergone head surgery. Several people, including the applicant's schoolmates, witnessed the incident while the deputy mayor and police officers were heard shouting racist remarks. The child was diagnosed as suffering from bruises and grazes caused by a blunt instrument and thoracic concussion. On 12 April 2001, the Commission for the Protection of Handicapped Persons established that he had a first-degree disability that required permanent supervision and a personal assistant. The official investigation was marred by serious procedural deficiencies and ended with a decision not to press charges against any police officers as it had not been proved that Constantin Stoica's injuries were caused by them. The Strasbourg Court condemned Romania. In a landmark ruling, it held that the failure to conduct a proper investigation had been motivated by racial prejudice[68]. As to the burden of proof, its reasoning was particularly clear-cut.

" Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment "[69].

" In the present case it is not disputed that the incidents of 3 April 2001 took place between Roma villagers and police forces. The applicant himself is of Roma origin. The police officers stopped in front of a pub owned by C.C., a Roma ethnic, and the dispute that arose, as related by the villagers or, to a certain extent, as reported by the police officers, were not racially neutral. The Court reiterates that the villagers claimed the police officers were asking F.L. whether he was 'Gypsy or Romanian' before beating him, at the deputy mayor's request to teach the Roma 'a lesson' (…).

Likewise, C.C.'s dispute with the deputy mayor that evening, had at its core racist elements.

Furthermore, the Court considers that the remarks from the Suceava Police report describing the villagers' alleged aggressive behaviour as 'pure Gypsy', are clearly stereotypical and prove that the police officers were not racially neutral, either during the incidents or throughout the investigation.

The Court finds thus no reason to consider that the applicant's aggression by the police officers was removed from this racist context.

For all these reasons, the Court considers that *the burden of proof lies on the Government*, regard having had to all the evidence of discrimination ignored by the police and the military prosecutor and the above conclusion of a racially biased investigation into the incidents "[70].

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[68] Breach of article 14 (prohibition of discrimination) in conjunction with article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights.

[69] ECHR, *Stoica v. Romania*, 4 March 2008, § 117.

[70] *Ibidem*, §§ 128-130 (my italics).

From 2005, in cases where specific rules or particular measures have been shown to have a disproportionate impact on women or Roma, the Strasbourg Court has called for the burden of proof to be shifted.

› *The Hoogendijk case before the ECHR (2005)*[71]

The applicant complained that an income requirement in the eligibility criteria for disability benefits amounted to indirect discrimination against women, as it affected many more women than men. The Court considered that "where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination"[72]. It is quite striking to note that the European Court of Human Rights entirely adopts the reasoning developed by the European Court of Justice in the 1990s to more effectively combat pay discrimination against women in the workplace.

› *The D.H. case before the ECHR (2006 and 2007)*[73]

In the important *D.H.* case decided in Grand Chamber on 13 November 2007, the Court reversed its much-criticised previous decision in Chamber and accepted a shift of the burden of proof on the basis of statistics that although not "entirely reliable" revealed "a dominant trend that has been confirmed both by the respondent State and the independent supervisory bodies which have looked into the question"[74]. At issue was the placing of disproportionate numbers of Roma children in "special" primary schools for the learning impaired in the Czech Republic. This practice, widespread across Central and Eastern Europe, amounts in effect to racial segregation and denies Roma children access to a standard of education comparable to their non-Roma peers. Research by the European Roma Rights Centre showed that Roma school children in the city of Ostrava were 27 times more likely than similarly situated non-Roma to be placed in special schools. In its decision, the Court specifically refers to EU law: "The Court observes that Council Directives 97/80/EC and 2000/43/EC stipulate that persons who consider themselves wronged because the principle of equal treatment has not been applied to them may establish, before a domestic authority, by any means, including on the basis of statistical evidence, facts from which it may be presumed that there has been discrimination (…). The recent case-law of the Court of Justice of the European Communities (…) shows that it permits claimants to rely on statistical evidence and the national courts to

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71 ECHR, *Hoogendijk v. the Netherlands*, 6 January 2005 (decision on admissibility).

72 *Ibidem*, p. 13.

73 ECHR, *D.H. v. The Czech Republic*, 7 February 2006, reversed on 13 November 2007 (Grand Chamber).

74 ECHR (Grand Chamber), *D.H. v. The Czech Republic*, 13 November 2007, § 191.

take such evidence into account where it is valid and significant "[75]. Accordingly, it ruled that " where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory (…). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (…), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof "[76].

It took eight years for the applicants to successfully win their case, and the Court in Grand Chamber deliberated on its final ruling for eight months. Its decision is a model of clear thinking that provides guidelines on how the burden of proof can be mitigated in order to effectively address discrimination cases.

6. Shifting the burden of proof in practice

Although several Member States have failed to transpose the provision on the burden of proof in line with the EU Directives[77], there have already been interesting cases where national judges have applied the mechanism for shifting the burden of proof and given guidelines in this respect.

› *Swedish Labour Court on discriminatory language requirements (2005)78*

A person from former Yugoslavia applied for a position as a municipal architect. Following the interview, he was refused the position due to his allegedly poor Swedish language skills. One of the issues was whether the language requirement amounted to indirect discrimination on the ground of ethnicity. According to the Labour Court, the position of municipal architect required the exercise of public authority and, as a result, good (though not perfect) knowledge of spoken and written Swedish was objectively justified, appropriate and necessary. In respect to the burden of proof, the DO (the Swedish Ombudsman against Ethnic Discrimination) argued, contrary to the employer, that in such a case, to have a *prima facie* case of indirect discrimination only requires the establishment that the language requirements are detrimental not only to people of the same ethnic origin as the claimant but of " any person who does not have Swedish as their mother tongue ". The Labour Court concurred with the Ombudsman's reasoning.

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75 *Ibidem*, § 187.

76 *Ibidem*, § 189.

77 See M. Bell, I. Chopin & F. Palmer (for the European network of independent experts in the non-discrimination field), *Developing anti-discrimination law in Europe. The 25 EU Member States compared*, European Communities, July 2007, p. 58.

78 *DO v. the Municipality of Norrköping*, 19 October 2005, Labour Court case 2005 no. 98, reported in the *European Anti-Discrimination Law Review*, 2006, issue 4, pp. 81-82.

› *Swedish Supreme Court on sexual orientation (2006)*[79]

A lesbian couple was required to leave a restaurant because they kissed and hugged each other on the premises. According to the Supreme Court, the factual circumstances leading to *the presumption of discrimination cannot be determined in the abstract*, but must be decided on a case by case basis. In this case, the following facts led to a presumption of discrimination: (1) the women were in the restaurant; (2) they hugged and kissed; (3) they were told to stop; (4) they were subsequently told to leave the premises; (5) the commonly known fact that people are normally not stopped from hugging and kissing in a restaurant nor are they told to leave because of such behaviour. As the restaurant did not prove that there were legitimate reasons that had nothing to do with sexual orientation, damages were awarded.

› *The Miskolc desegregation case before the Hungarian Supreme Court (2006)*[80]

In June 2005 the Chance for Children Foundation brought an *actio popularis* claim against the local council of Miskolc in north Hungary, alleging that the council was indirectly responsible for the segregation of Roma children in primary education. In 2004 the Miskolc local council decided to "administratively and financially" merge a number of local schools which continued to operate in separate buildings and to have separate catchment areas. Under Hungarian law, children who lived in the catchment area of a particular school had an automatic right to enrol at that school. Thus, although the merger was carried out so as to administratively integrate segregated Roma schools with predominantly non-Roma elite schools, the pupils of the former schools did not gain the right to commence or continue their studies in the latter schools.

In its claim, the Chance for Children Foundation argued that by failing to integrate catchment areas the reform contributed to maintaining the segregation of Roma children, and therefore was in violation of the requirement of equal treatment. According to the claimant, the local council committed indirect discrimination as its apparently neutral decision put Roma pupils into a disproportionately disadvantageous situation. In addition, the claimant argued that the local council's failure to take effective measures to make sure that the schools implemented their plan to integrate disadvantaged pupils amounted to direct discrimination.

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[79] *HomO v. Restaurang Fridhem Handelsbolag*, 28 March 2006, Supreme court case T 2100-05, reported in A. Numhauser-Henning, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Sweden, State of affairs up to 8 January 2007, p. 17 (available on the EU Commission's website, http://europa.eu). See also the presentation of the case by M. Bonini-Baraldi, *Burden of proof in discrimination cases: Reversal, shift, adaptation?*, Seminar on the Burden of Proof, Academy of European Law, May 2006 (available on the Academy's website, www.era.int).

[80] Case decided on 9 June 2006 and reported in the *European Anti-Discrimination Law Review*, 2006, issue 3, pp. 68-69, issue 4, p. 64. See also the description of the case on the Chance for Children Foundation's website, www.cfcf.hu/?nelement_id=29&article_id=38.

In its judgment delivered in November 2005, the Borsod-Abaúj-Zemplén County Court acknowledged the fact that Roma children were over-represented in some of the merged schools, but seemingly rejected the claim. As to shifting the burden of proof, the Court considered that this mechanism did not exempt the claimant from proving that there was a causal link between the protected ground (Roma origin) and the disadvantage suffered by the group with that characteristic.

Pursuant to the Chance for Children Foundation's appeal, the Debrecen Court of Appeal partially modified the first instance judgment. It found that through its decision to integrate the schools without simultaneously redrawing the catchment areas, the Miskolc local council upheld the segregation of Roma children, thus violating their right to equal treatment based on ethnic origin. Furthermore, the Court ordered the council to publicise its finding through the Hungarian Press Agency (MTI). The Court agreed with the Chance for Children Foundation that not only active, but also passive conduct could lead to a breach of the obligation of equal treatment, especially of the obligation to accord a similar quality of education to all. The Court noted the council's efforts concerning integration, but found them belated with respect to redrawing the catchment areas.

Based on the judgment of the Supreme Court of 26 April 2006 in a case concerning refusal of service in a discotheque based on the plaintiffs' Roma ethnicity[81], the Court observed that *the legal provision regulating the reversal of the burden of proof in fact created a legal presumption to the effect that once the protected ground (Roma ethnicity) and the disadvantage suffered (separate education of lower quality) had been established, the burden to disprove discrimination automatically fell to the defendant*. Responding to concerns expressed by the Miskolc local council, the Court reiterated that there was ample evidence, including existing sociological studies, to prove discrimination in the given case and that the situation in Miskolc was well known even in Debrecen where the appeal court was located. It emphasised that Roma clearly suffered disadvantages as a result of this discrimination and that evidence offered by the council could not justify it.

[81] Case commented below and reported in the *European Anti-Discrimination Law Review*, 2006, issue 4, p. 55.

› *The Court of Appeal of England and Wales in Igen Ltd & Others v. Wong, Chamberlin and another v. Emokpae, Webster v. Brunel University (2005)*[82]

In three cases of alleged discrimination in the workplace (on the ground of sex for two of them and on the ground of ethnicity for one of them), the Court of Appeal gave important guidelines on the direction to be taken by every employment tribunal (as the fact finding tribunal of first instance) in relation to the burden of proof in a direct discrimination case brought under (seemingly) either the amended Race Relations Act 1976, the Sex Discrimination Act 1975, the Disability Discrimination Act 1995 or the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003. Shifting the burden of proof is pictured as *a two-stage approach*. When the claimant establishes a *prima facie* case of discrimination, the respondent has to establish that a prohibited ground was not any part of the reason(s) for the treatment under scrutiny. If the respondent fails to discharge this burden, the judge must make a finding of unlawful discrimination.

The judicial guidelines stand as an annex to the decisions:

> "(1) (…) it is for the claimant (…) to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant (…). These are referred to below as 'such facts'.
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of (…) discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) (…) At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

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82 [2005] EWCA Civ 142, reported in the *European Anti-Discrimination Law Review*, 2005, issue 2, p. 77 and available online, www.bailii.org/cgibin/markup.cgi?doc=/ew/cases/EWCA/Civ/2005/142.html&query=Igen+Ltd&method=all. See also A. Brown, A. Erskine & D. LittleJohn, "Review of judgments in race discrimination Employment Tribunal cases", in *Employment Relations Research Series*, no. 64, London, DIT, 2006, esp. pp. 33-35.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw (…) from an evasive or equivocal reply to a questionnaire[83] (…).

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant (…). This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably [on a prohibited ground] then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the [prohibited grounds], since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the prohibited ground] was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice ".

Although these guidelines were framed with expert assistance from the Commissions for Equal Opportunities, Racial Equality and Disability Rights[84] and are intended to give a clear picture of the division of the burden of proof between claimants and respondents, it seems that practitioners have not always found the approach easy to apply[85]. In *Madarassy v. Nomura International plc*[86], the burden of proof was considered further by the Court of Appeal. While the Court explicitly approved their decision in *Igen*, it held that the bare facts of a difference in status and treatment only indicate a possibility of discrimination and, alone, are not sufficient to shift the burden of proof to the employer. They also stated that at the first stage in assessing the burden of proof, the tribunal should regard all the evidence, including the

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83 On the use of a particular questionnaire in English discrimination cases, see the website of the Equality and Human Rights Commission, www.equalityhumanrights.com/pages/eocdrccre.aspx.

84 Equality bodies in Great Britain before their merger on 1 October 2007 into the Equality and Human Rights Commission. Note that the Disability Rights Commission intervened because a key point of anti-discrimination law was at stake, although the cases did not concern the ground of disability as such, but gender and ethnicity.

85 J. Galbraith-Marten, *Shifting the burden of proof and access to evidence*, Seminar on the Burden of Proof, Academy of European Law, June 2007 (available on the Academy's website, www.era.int).

86 [2007] EWCA Civ 33, petition to the House of Lords refused on 17 May 2007.

respondent's. This reflects the practical reality that during the hearings, tribunals do not hear evidence and arguments in two stages[87].

There are some authorities in England and Wales, and also in other countries such as the Netherlands, that point to the fact that the burden of proof does not shift simply on proof of a difference in status and a difference in treatment[88]. In other words, it is not enough for a claimant to merely state that he/she is a woman, black, gay, Muslim, etc. and that his/her job application has been rejected. Facts are needed to draw some link between the two and to show that the protected ground influenced the negative outcome of the job application. The question is to what extent the link has to be drawn. Whilst awaiting guidance from the European Court of Justice, it might be suggested that the focus for allowing the burden of proof to be shifted should be on what the claimant is able to prove, based on what ought to be within his/her knowledge[89].

› *The European Court of Justice decision in the Feryn case*[90]

On 6 February 2007, the Brussels Employment Appeal Court lodged a request for a preliminary ruling by the European Court of Justice. At issue is a better understanding of what are the " facts from which it may be presumed that there has been direct discrimination ".

The case started in April 2005 when a journalist contacted the company Feryn about massive advertisements placed along a motorway to find garage door fitters. The head of the company stated publicly that he was not hiring people of Moroccan origin because his clients did not want them. Following mediation with the equality body (the Centre for Equal Opportunities and Opposition to Racism), Feryn agreed to change its discriminatory policy but failed to do so.

In court, issues were raised regarding how strictly national judges should assess facts from which a *prima facie* case of direct discrimination might be inferred, as well as the adequacy of facts that must be established by the respondent to discharge his or her burden of proof.

In relation to the *prima facie* case issue, the following questions were referred to the European Court of Justice :

> " (a) To what extent do *earlier acts of discrimination* (public announcement of directly discriminatory selection criteria in April 2005) constitute 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of (the Race Equality) Directive ?

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87 The *Madarassy* case is considered as " Good news for employers ". See C. Carter, *Ashurst's Employment Update*, February 2007, available on Ashurst's website, www.ashurst.com.

88 J. Galbraith-Marten, *Shifting the burden of proof and access to evidence*, Seminar on the Burden of Proof, Academy of European Law, June 2007, § 16, footnote 7 (available on the Academy's website, www.era.int) ; M. van den Brink, *Accusations of discrimination and the shifting burden of proof*, Seminar on the Burden of Proof, Academy of European Law, October 2007, p. 4 (available on the Academy's website : www.era.int)

89 C. Rayner, *The burden of proof and access to evidence*, Seminar on the Burden of Proof, Academy of European Law, November 2007 (available on the Academy's website, www.era.int).

90 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. NV Firma Feryn*, Case C-54/07.

(b) (…) Having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: 'I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year (…)?

(c) Having regard to the facts in the main proceedings, can a joint press release issued by an employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?

(d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of (…) discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters from ethnic minorities?

(e) Is *one fact sufficient* in order to raise a presumption of discrimination? (…)"[91].

In relation to how the respondent could discharge the burden of proof, the European Court of Justice was requested to clarify several issues:

"Can a presumption of discrimination (…) be rebutted by a simple and unilateral statement by the employer in the press that he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome; and/or by a simple declaration by the employer that his company, excluding the sister company, has filled all vacancies for fitters and/or by the statement that a Tunisian cleaning lady has been taken on and/or, having regard to the facts in the main proceedings, can the presumption be rebutted only by actual recruitment of fitters from ethnic minorities (…)?".

The opinion of Advocate General Maduro mainly focused on the concept of direct discrimination and aimed to convince the Court of Justice that, in themselves, words cannot only hurt, they can also amount to discrimination: "a public statement made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin will be turned down, constitutes direct discrimination"[92]. Based on the values underlying the anti-discrimination Directives, this interesting position removes much of the significance of the issue of proof in resolving the given case. In this respect, the Advocate General considered, as does the Commission, that the burden of proof should shift because there is an array of indications pointing to a discriminatory practice: "in circumstances where it is established that an employer has made the kind of public statements about its own

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91 My italics.

92 Opinion of Advocate General Maduro delivered on 12 March 2008, Case C-57/07, § 19.

recruitment policy that are at issue in the main proceedings, and where, moreover, the actual recruitment practice applied by the employer remains opaque and no persons with the ethnic background in question have been recruited, there will be a presumption of discrimination (…). It falls to the employer to rebut that presumption "[93]. Concerning the matter of how the national court should appraise the evidence in rebuttal submitted by the employer, the Advocate General stated that " the national court should apply the relevant national procedural rules, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not, in practice, render the exercise of rights conferred by Community law impossible or excessively difficult (principle of effectiveness) "[94].

In a clear-cut ruling the European Court of Justice followed the Advocate General Maduro and stated that " The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment (…). The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim "[95]. On the specific issue of proof, the Court considered that " Statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy. It is, thus, for that employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice of the undertaking does not correspond to those statements "[96].

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93 *Ibidem*, § 23.

94 *Ibidem*, § 24.

95 ECJ, *Feryn*, 10 July 2008, Case C-54/07, § 25.

96 *Ibidem*, §§ 31-32.

7. The difficulty of establishing the facts

The onus of proof does not shift as soon as a plaintiff simply claims that s/he was discriminated against but only after s/he establishes facts from which it may be presumed that discrimination has occurred. A *prima facie* case denotes evidence that is sufficient, if not refuted, to raise at least a presumption of the fact in question. In other words, the mechanism for shifting the burden of proof presupposes that people who feel they have been wronged can bring evidence which points to the possibility of discrimination. As a result, traditional means of collecting evidence such as documentary evidence, witness statements and expert opinions, which are often unsatisfactory in discrimination cases, cannot be completely circumvented. And case law on shifting the burden of proof indicates that it remains difficult for claimants to build a *prima facie* case. In those countries where there have been cases of alleged discrimination, very few have been successful. In most cases before the Swedish labour courts, it has been suggested that the failure in court is due to the claimant's inability to gather enough facts to even establish a *prima facie* case of discrimination[97]. And Sweden is not the only country where such problem has been highlighted.

› *Polish District Court dismisses claim of discrimination on the grounds of sexual orientation(2006)*

Take, for instance, the *CZA-TA* case decided in Poland on 16 March 2006[98]. B.K., an employee of CZA-TA Ltd, brought a compensation claim for unlawful termination of an employment contract before a district court. He claimed that his performance at work was negatively assessed because of his sexual orientation. The district court dismissed his claim, finding that he had not proven facts that would render it likely that discrimination on the ground of sexual orientation had occurred. The burden of proof was not shifted to the employer because of the lack of evidence pointing to a breach of the equality principle. The court did not rule out that the claimant may have felt pressure and criticism at work, but it was not clear whether the reason for an unfriendly atmosphere was his sexual orientation or rather his poor professional performance.

› *Czech Republic Supreme Court reverses a finding of discrimination in the provision of goods and services (2004)*

The decision by the Czech Republic Supreme Court on 17 August 2004 is another example. This was the first case where the shift of the burden of proof, as transposed from the Race Equality Directive, was applied. A regional court had found that the Roma plaintiffs had been discriminated against when denied service in a sports restaurant. The plaintiffs had been consistently ignored and when they inquired, the waiter told them that they were not going to be served. After about 20 minutes, a "reserved" sign was placed on their table. Based on

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97 F. Palmer, "Re-dressing the balance of power in discrimination cases: The shift in the burden of proof", *European Anti-Discrimination Law Review*, 2006, issue 4, pp. 27-28.

98 *BK v. "CZA-TA" Ltd in Piotrkow Trybunalski*, Płock District Court, Department IV for Employment and Social Insurance, IV P 353/05, reported in the *European Anti-Discrimination Law Review*, 2006, issue 4, pp. 76-77.

witness statements, the regional court, as the court of first instance, considered that the plaintiffs were exposed to different treatment. The defendant objected that the whole issue was a misunderstanding and that at the given time there was a reservation for football players. His employees gave inconsistent stories about the reservation and the regional court held that the reservation, intended as a justification for the failure to provide the service, was not proved with certainty beyond doubt. The defendant was ordered to pay the equivalent of €640 to each of the three plaintiffs. On appeal, the Supreme Court reversed the regional court's decision, considering that the testimony provided by the plaintiffs was inconsistent and that if there had been some confusion about the reservations, the incident was caused by improper management, not discriminatory behaviour[99].

The Race and Framework Equality Directives state that "[t]he appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a *matter for national judicial or other competent bodies, in accordance with rules of national law or practice*" [100]. It is therefore up to the national legislator to define the types of facts that may lead to a mitigation of the burden of proof, and, in the end, up to the (civil) judge to weigh their evidential value. However, the Directives do give some guidelines to national authorities. They stipulate that discrimination can be "established by *any means* including on the basis of statistical evidence"[101]. Although there is no specific mention of situation testing, this means of proof was discussed during preparatory work on the Directives. There are some instances (although isolated) of national legislators referring explicitly to situation testing[102].

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[99] Case 1 Co 321/2003-196, reported in the *European Anti-Discrimination Law Review*, 2005, issue 1, pp. 43-44.

[100] Recital 15 of the Preamble to the Race and the Framework Equality Directives (my italics).

[101] *Ibidem*.

[102] France and Hungary as well as Belgium to a certain extent. See Part III of this book.

Part II

2

Strengths and weaknesses of situation testing

1. **Research and litigation using situation testing**
2. **The US experience**
3. **Situation testing versus fairness of proof, provocation and private life in Europe**
4. **Methodology and guidelines**

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1. Research and litigation using situation testing

Situation testing is an experimental method aiming to establish discrimination "on the spot"[103]. It has other names such as situation tests, situational tests, testing, auditing, pair-comparison testing or paired testing and, more rarely discrimination testing or practical testing[104]. The aim of this method is to bring to light practices whereby a person who possesses a particular characteristic is treated less favourably than another person who does not possess this characteristic in a comparable situation.

Pairs (of applicants for accommodation or a job vacancy or clients of a restaurant, a nightclub, etc.) are established in such a way that they differ solely on the basis of a single characteristic reflecting the discriminatory ground (ethnicity, sex, age, etc.) under scrutiny. If one of the members of the pair faces different treatment, the distinction points to discriminatory behaviour. In other words, the method of testing means setting up a situation, a sort of role play, where a person is placed in a position where he or she may discriminate without suspecting that s/he is being observed. This person is presented with fictional "candidates", some of whom possess a characteristic which may incite discriminatory behaviour. Observers aim to measure his or her behaviour towards people bearing this characteristic compared to others without it.

Situation testing allows *direct discrimination*, which is frequently hidden behind pretexts (such as the property has already been let, the job vacancy has already been filled, entrance is restricted to members), *to be unmasked*[105]. At present, the most well-known example of situation testing in Europe is that of different people (in couples or groups) arriving at the entrance to a nightclub: if the people or groups of foreign origin are systematically refused entry yet "native" groups who arrive before and after are admitted without difficulty, discrimination can be inferred. Similar experiments have been carried out with estate agencies or even with employers who are suspected of discriminatory recruitment practices[106].

To start with in the 1970s, situation testing was used in Great Britain and the USA to measure the extent of discrimination and create public policy measures to tackle it. It was developed by social scientists under the name of *research testing* (or sometimes *scientific testing* or *audit testing*) and emerged from the work of governmental commissions and from the initiatives

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[103] G. Calvès, "Au service de la connaissance et du droit: le *testing*", *Horizons stratégiques*, 2007, issue 5, p. 9.

[104] In Europe, testing or situation testing are the most common expressions. In the USA, auditing and paired-comparison testing are frequently used. In France, the General Commission for Terminology (*Commission générale de terminologie et de néologie*) in line with the French Academy recommends the use of discrimination testing (*test de discrimination*). See the ministerial instruction from the Ministry of Justice, CRIM 2006-16 E8/26 June 2006, *Bulletin officiel du Ministère de la Justice*, no. 102 (1st April to 30 June 2006).

[105] I. Rorive, "Situation tests in Europe: Myths and realities", *European Anti-Discrimination Law Review*, 2006, issue n° 3, p. 33.

[106] See Part III of this book.

of think tanks dealing with social issues[107]. In the context of employment, Marc Bendick, who has carried on research and policy analysis on problem of discrimination in the USA for more than 30 years, states that "situation testing has unique potential for studying the behaviour of actual employers in real workplaces while maintaining the methodological rigour of a laboratory-like scientific experiment. It is therefore appropriate to define the technique in a way emphasising its links to rigorous empirical research traditions in the social and behavioural sciences. In this spirit, (…) situation testing [is defined] as a systematic research procedure for creating controlled experiments analysing employers' candid responses to employee's personal characteristics "[108]. One famous application of the method in Europe is undoubtedly the extended study of ethnic discrimination in recruitment co-ordinated by the International Labour Organisation in the 1990s[109]. At present, situation testing is well-known in Europe and is considered an essential tool for sociologists in measuring discrimination as a part of fundamental research programmes or in policy-oriented studies.

Beside its use in research, awareness raising and public policy development, situation testing has enormous potential to strengthen evidence in individual cases. *Litigation testing* (or *complaint-based testing*) targets a particular firm, estate agency, nightclub, etc. suspected of discrimination with the purpose of gathering facts pointing to a presumption of unequal treatment and allowing the judge to reverse the burden of proof. It is this type of situation testing, designed for court cases, which is the focus of this handbook.

2. The US experience

Starting in the 1960s, housing was one of the main areas where litigation testing was used. Fair housing tests were developed by public and private fair housing agencies as a method for determining whether a complaint had validity. When a complainant who appeared to be a member of a protected class (most commonly, black or Hispanic) argued that s/he had been unfairly denied access to an apartment or house, the agency sent a white person to inquire about the same unit. When the white person was offered the unit that the complainant was denied, the agency had powerful evidence of discrimination. By the early 1970s, many fair housing groups had experience in bringing such evidence to court, and testing manuals

[107] In employment, see, for instance, the four audit studies described in M. Bendick, *Discrimination against racial/ethnic minorities in access to employment in the United States : empirical findings from situation testing*, ILO, International Migration Papers Series, no. 12, 1996 ; see also the appendix to this paper on "Additional employment studies in the United States using situation testing" (paper available on ILO's website, www.ilo.org/public/english/protection/migrant/download/imp/imp12.pdf).

[108] M. Bendick, "Situation testing for employment discrimination in the United States of America", *Horizons stratégiques*, 2007, issue 5, pp. 17-37.

[109] See the methodologies outlined by Fr. Bovenkerk, *A manual for international comparative research on discrimination on the ground of 'race' and ethnic origin*, Geneva, International Labour Organisation, 1992.

were already available[110]. Fair housing agencies were allocated significant resources. A major step in this respect was the establishment of the "Fair Housing Initiative Program (FHIP)" in 1990. Supported by the Department of Housing and Urban Development (HUD), the FHIP was designed to provide federal funding to private and public fair housing enforcement agencies. Much of this funding has been devoted to testing, both research and complaint-based[111]. In addition, the Housing Section of the Justice Department began a testing programme at the end of 1991 and started using evidence derived from testing in court. Most Justice Department testing has focused on discrimination based on racial and national origin in rental practices, but testing has also been employed in other areas, for instance in connection with access to new construction for people with disabilities. In contrast with the testing carried out by most private groups, Justice Department testing is generally conducted with the aid of audio-tape recording equipment, a type of evidence which has proven extremely powerful in enforcement actions[112]. While housing testing has been broadly accepted for quite some time as a basic and powerful technique for documenting discrimination, employment testing for enforcement purposes mostly started to develop at the beginning of the 1990s. The Urban Institute based in Washington D.C. played a major role in this respect[113]. Apart from the areas of housing and employment, innovative work has been conducted in several other fields, for instance in the taxicab industry and restaurants[114].

Taxicab testing in the District of Columbia in 1989 is an interesting example. The Washington Lawyer's Committee working with the local community and Howard University experts used situation testing to prove discrimination in the provision of services by several taxicab companies in the region. Over the course of two and a half months, the carefully matched and trained teams of black and white testers conducted 292 tests. The results showed that taxis failed to stop for black testers in 20% of the tests, but only in 3% of the tests for white testers. Drivers also often refused to take black and white testers to predominantly black neighbourhoods. Litigation was undertaken against three cab companies whose practices showed especially high levels of discrimination. The suits were settled on the eve of the trial with the payment of nearly $50,000 in damages[115]. In addition, the American Cab Company agreed to create an internal review committee to handle discrimination complaints,

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110 J. Yinger, "Testing for discrimination in housing and related markets", in *A national report card on discrimination in America: The role of testing*, M. Fix and M. Austin Turner (eds), Washington, D.C, The Urban Institute, 1998, p. 28.

111 R. V.O. Boggs, "The future of civil rights testing: Current trends and new directions", in *A national report card on discrimination in America: The role of testing*, M. Fix and M. Austin Turner (eds), Washington, D.C, The Urban Institute, 1998, p. 114.

112 *Ibidem*, p. 115.

113 *Ibidem*, p. 116.

114 *Ibidem*, p. 118.

115 F. Alemu, *Testing to prove racial discrimination: methodology and application in Hungary*, Paper available on the website of the European Roma Rights Centre, www.errc.org/cikk.php?cikk=1016. Fitsum Alemu refers to S.E. Ridley, J.A. Bayton and J.H. Outtz, *Taxi service in the District of Columbia: Is it influenced by the patron's race and destination?*, Paper prepared for the Washington, D.C., Lawyer's Committee for Civil Rights under the Law, June 1989.

expanded the training programme for its drivers, and posted signs in the taxicabs informing passengers of their right to complain to the District Court for the District of Columbia Taxicab Commission[116]. Furthermore, the federal District Court for the District of Columbia held that taxicab companies are prevented, as a matter of law, from trying to avoid liability for the discriminatory actions of drivers of their cabs. Accordingly, if an individual cab driver is found to have discriminated against a prospective passenger, then the taxicab company as well as the driver are to be held legally responsible[117].

One of the significant developments affecting testing is its use for purposes of *monitoring compliance with court-approved settlements*. Two major cases involving restaurants from the famous Denny's chain, one in California and the other in Maryland, concerned allegations that Denny's engaged in a concerted policy of discriminatory service towards African-American customers. In 1994, both cases were settled out of court for total monetary payments of more than $45 million. The consent decrees in these cases called for the creation of an independent civil rights monitor who was authorised to administer hundreds of tests annually for several years in order to keep an eye on Denny's adherence to non-discriminatory customer service[118].

The extensive development of complaint-based testing was made possible after considerable legal challenges were overcome. Opponents to testing brought forward several arguments. They first claimed that testers had no standing as they never intended to rent the accommodation or accept the job and in consequence sustained no injury. Another argument was that testing involved deception and was not a proper way to gather evidence.

› *The US Supreme Court in the Havens case (1982) on the issue of standing*

In a landmark 1982 decision in the *Havens* case[119], the US Supreme Court unanimously recognised the right of testers and fair housing organisations to bring suits on the basis of evidence derived from testing. The facts of the case were quite straightforward. Paul Coles, identified as a black "renter plaintiff", attempted to rent an apartment from Havens Realty Corporation which owned and operated apartment complexes in a suburb of Richmond. Paul Coles was falsely told that no apartments were available. He filed a complaint with "Housing Opportunities Made Equal" (HOME), a non-profit corporation whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area". HOME then

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116 Consent Order and Settlement Agreement, *Floyd-Mayers v. American Cab Co.*, no. 89-1777(CRR), (D.D.C. filed 1 November 1990). See also Keith Harriston, "3 Cab Firms to Monitor for Bias; Suit Over Shunning of Blacks Settled", *The Washington Post*, 3 November 1990, at B1, available at 1990 WL 2100387; The Equal Rights Center, *Service denied: Responding to taxicab discrimination in the District of Columbia*, October 2003 (available on the website of the Equal Rights Center, www.equalrightscenter.org/publications/documents/TaxicabDiscriminationOct2003.pdf).

117 See, for instance, *Floyd-Mayers v. American Cab Co.*, 732 F. Supp. 243, 245 (D.D.C. 1990).

118 R.V.O. Boggs, "The future of civil rights testing: Current trends and new directions", in *A national report card on discrimination in America: The role of testing*, M. Fix and M. Austin Turner (eds), Washington, D.C, The Urban Institute, 1998, p. 118, and the references in footnote 10.

119 *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982).

employed two testers, Coleman (black) and Willis (white), to determine whether Havens practiced racial steering. They made several inquiries to Havens regarding the availability of apartments. On each occasion, Coleman was told that no apartments were available ; Willis was told that there were vacancies. Before the Supreme Court, one of the questions at issue was whether Mrs Coleman had standing to sue in her capacity as a tester. The Supreme Court held that the mere fact " that the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury "[120]. The Supreme Court also decided that HOME had standing in its own right to claim damages. The fair housing organisation complained that it " has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counselling and other referral services ". In addition, it argued that it had " had to devote significant resources to identify and counteract the defendant's [*sic*] racially discriminatory steering practices "[121].

According to the Equal Employment Opportunity Commission, which bases its opinion on significant case law, the same principles apply to testers who file charges in employment discrimination[122]. As to the issue of methodology, the Commission stresses that " while tester pairs in the housing area need only show that they are qualified to pay for the housing, employment tester pairs have the more complicated assignment of appearing qualified for the particular job "[123].

In point of fact, the civil rights movement has a long history of using testers to uncover and illustrate discrimination. In *Evers v. Dwyer* (1958)[124], the Supreme Court granted standing to a black plaintiff who sat in the white section of a Memphis bus and was removed by local authorities. His standing was recognised although he had never before ridden a bus in Memphis and had done so merely for the purpose of testing the legality of the state's segregation law. *Pierson v. Ray* (1967)[125] was decided along the same lines. The Supreme Court held that a group of back clergymen who were removed from a segregated bus terminal in Mississippi had standing to seek redress, despite the fact that their sole purpose was to test the law rather than to use the terminal.

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120 455 U.S. 374.

121 455 U.S. 379.

122 EEOC Notice no. 915.002, 22 May 1996 : " Enforcement Guidance : Whether " testers " can file charges and litigate claims of employment discrimination " (available on the website of the Equal Employment Opportunity Commission, www.eeoc.gov/policy/docs/testers.html).

123 *Ibidem*, § 5.

124 358 U.S. 202 (1958).

125 386 U.S. 547 (1967).

3. Situation testing versus fairness of proof, provocation and private life in Europe

Several legal criticisms have been levelled at situation testing : it does not correspond to the principle of fairness of evidence ; it could amount to provocation to commit a crime and it threatens the right to respect for private life[126]. These criticisms should be put into perspective through an examination of the case law of the European Court of Human Rights.

On several occasions, the European Court in Strasbourg has ruled that using somebody with a fictitious identity for the sole purpose of exposing an individual's illegal actions does not interfere *per se* with his/her private life. For instance, in the *Lüdi* case[127], the Court considered that the use of an undercover agent who had passed himself off as a potential purchaser of cocaine under the assumed name of Toni, did not breach the right to private life of the drug dealer whose criminal activities were hence revealed. As Mr Lüdi's telephone was monitored in accordance with Swiss criminal law, the criminal conviction could be based not only on the undercover agent's reports but also on the recordings of his conversations with " Toni ". It is worth noting that the ruling of the European Court of Human Rights was not in keeping with the Commission of Human Rights in this case. In the Commission's opinion, " the involvement of an undercover agent changed the essentially passive nature of the operation by introducing to the telephone monitoring a new factor ; the words overheard resulted from the relationship which the undercover agent had established with the suspect. Accordingly, there was a separate interference with Mr Lüdi's private life, requiring separate justification from the point of view of paragraph 2 of Article 8 [of the Convention on Human Rights] "[128]. On the contrary, the Court considered that " *the use of an undercover agent did not, either alone or in combination with the telephone interception, affect private life* within the meaning of Article 8 "[129]. Despite the striking developments in the concept of private life since the beginning of the 1990s, case law of the European Court has remained in line with the *Lüdi* ruling[130].

In addition, in cases involving general video surveillance, the Court has specified that " [t]he monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life (…). On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations "[131]. In any

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126 On this issue, see O. De Schutter, " Methods of proof in the context of combating discrimination ", in *Proving discrimination. The Dynamic implementation of EU anti-discrimination law : The role of specialised bodies*, J. Cormack (ed.), Migration Policy Group, 2003, pp. 35-37. (available on the website of the Migration Policy Group, www.migpolgroup.com).

127 ECHR, *Lüdi v. Switzerland*, 15 June 1992.

128 *Ibidem*, § 36.

129 *Ibidem*, § 40 (my italics).

130 See, for instance, European Commission of Human Rights, *R. Müller v. Austria*, 28 June 1995 (inadmissibility decision) ; European Commission of Human Rights, *S.E. v. Switzerland*, 4 March 1998 (inadmissibility decision).

131 See, for instance, *Peck v. The United Kingdom*, 28 January 2003, § 59 ; *Perry v. The United Kingdom*, 17 July, 2003, § 38.

case, there would be no breach of the right to private life providing that the interference was in accordance with national law, pursued a legitimate aim and was necessary in a democratic society.

Apart from the issue of privacy, another fear has at times reinforced the cautious approach of the judiciary – is situation testing a form of incitement? The Belgian Council of State, which has to give an opinion on all bills, shares this fear[132]. Once again, this concern has to be put in perspective through an examination of the case law of the European Court of Human Rights and especially its rulings on the police technique of infiltrating groups of criminals with informers, or in the fight against drug trafficking, staging deals to expose dealers. According to the Court, "[po]lice incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution"[133].

> "In the case of *Teixeira de Castro* (…) the Court found that the two police officers concerned had not confined themselves 'to investigating Mr Teixeira de Castro's criminal activity in an essentially passive manner, but [had] exercised an influence such as to incite the commission of the offence'. It held that their actions had gone beyond those of undercover agents because they had instigated the offence and there was nothing to suggest that without their intervention it would have been committed (…).
>
> In reaching that conclusion the Court laid stress on a number of factors, in particular the fact that the intervention of the two officers had not taken place as part of an anti-drug-trafficking operation ordered and supervised by a judge *and that the national authorities did not appear to have had any good reason to suspect the applicant* of being a drug dealer: he had no criminal record and there was nothing to suggest that he had a predisposition to become involved in drug trafficking until he was approached by the police (…).
>
> More specifically, *the Court found that there were no objective suspicions that the applicant had been involved in any criminal activity*. Nor was there any evidence to support the Government's argument that the applicant was predisposed to commit offences. On the contrary, he was unknown to the police and had not been in possession of any drugs when the police officers had sought them from him; accordingly, he had only been able to supply them through an acquaintance who had obtained them from a dealer whose identity remained unknown. Although Mr Teixeira de Castro had potentially been

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[132] Belgian Council of State, opinion no. 32.967/2 of February 2002, given at the request of the President of the Chamber of Representatives, during an examination of the text which led to the federal Anti-discrimination Act of 25 February 2003 (now replaced by the Federal Act of 10 May 2007 against certain forms of discrimination).

[133] ECHR, *Teixeira de Castro v. Portugal*, 9 June 1998, § 38. On the same line, see ECHR, *Calabro v. Germany and Italy*, 21 March 2002; ECHR, *Sequeira v. Portugal*, 6 May 2003; ECHR, *Eurofinacom v. France*, 7 September 2004; ECHR (Grand Chamber), *Ramanauskas v. Lithuania*, 5 February 2008. See also Dutch case law, which has not recognised situation testing as a form of incitement: Hoge Raad, 24 November 1981, *N.J.*, 1982, p. 177; Hoge Raad, 18 October 1988, *N.J.*, 1989, p. 476; Opinions n° 1997-62, 1997-64, 1997-66, 1997-133, 1998-39, 2005-136 of the Dutch equality body (the Equal Treatment Commission) which are described in Part III.9 of this book.

> predisposed to commit an offence, there was no objective evidence to suggest that he had initiated a criminal act before the police officers' intervention. The Court therefore rejected the distinction made by the Portuguese Government between the creation of a criminal intent that had previously been absent and the exposure of a latent pre-existing criminal intent "[134].

Accordingly, as long as the undercover agents – and by analogy, the testers – do not create criminal intent in the people being tested, the procedure is admissible. In other words, one should distinguish "incitement to disclose evidence" from "incitement to commit an offence"[135]. If the testers limit themselves to setting up the conditions for an offence to be committed, and observe it as passive bystanders, this is not incitement and the procedure is acceptable. Discrimination testers should therefore be given very clear instructions so that they cannot later be accused of encouraging the person under observation to behave in a discriminatory fashion.

The prohibition of incitement to commit an offence is a specific application of a wider requirement: that of fairness of proof and the right to a fair trial, which apply to both criminal and civil proceedings. The French Court of Cassation has on several occasions dealt with the concern that the situation testing in given cases did not meet the requirement of fairness of evidence[136]. In one case, the NGO SOS Racisme had carried out situation tests at the entrance to several nightclubs in the south of France. The doorkeepers accused were acquitted on appeal, and the claim for damages was dismissed on the ground that the proof of the discrimination had not been established through a fair procedure[137]. The Court of Cassation quashed the decision because the Montpellier Court of Appeal failed to apply a provision of the Code of Criminal Procedure which states that any means of providing evidence is admissible in criminal cases. In view of this the judge should "weigh the value of the evidence after having heard both parties "[138]. The results of the situation testing could not be rejected because the technique in itself was assumed to be biased. The evidentiary value of the results must be weighed in each case.

According to Olivier De Schutter, the manner in which the situation tests were carried out in practice may have played a major role in the decision by the Montpellier Court of Appeal.

> "Scrutiny of the reasons for the judgement by the court of appeal suggests that the fairness of the 'testing' process aroused doubts on the part of the court. The basis of these doubts was that, because of their intention to expose an instance of discrimination, which they suspected and wanted to prove, the organisers of these situational tests would have

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134 ECHR, *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 37-39, as quoted in *Ramanauskas v. Lithuania*, 5 February 2005, § 56.

135 L. Collet-Askri, "Testing or not testing? La Chambre criminelle de la Cour de cassation valide ce mode de preuve, serait-il déloyal… (à propos de l'arrêt de la Chambre criminelle du 11 juin 2002)", *Le Dalloz*, 2003, no. 20, Chroniques, p. 1311.

136 These cases are described in Part III.6 of this book.

137 Montpellier Court of Appeal (Correctional Division), 5 June 2001.

138 Court of Cassation (Criminal Division), 11 June 2002, no. 01-85.559, available on the Légifrance website, www.legifrance.gouv.fr.

been able – especially through their behaviour or their clothing – to create conditions for their being refused entry to the establishments in question. Thus the appeal judge notes that, "While the test reveals a difference in attitude on the part of the door staff, there is nothing to confirm that this refusal was motivated by the racial characteristic of the tester. In addition, the evidence given before the criminal court and the statements filed during the proceedings by the accused establish that the clientele of La Nuit and Le Souleil is multiracial. The individuals accused denied having practised racial discrimination. There is nothing to confirm that the accused selected the clientele on the basis of racial criteria, except for the subjective opinion of the parties claiming damages. Moreover, if selection did take place, it is customary in this type of business and is based on commercial and niche market criteria, such as is practised by establishments reserved for 'gays', 'blacks', 'heterosexuals' or the 'jet set' ".

It is the lack of comparability which is penalised here: the appeal court seems to have believed that there could have been reasons other than their ethnic origin for refusing entry to the members of SOS Racisme. According to the Montpellier Court of Appeal, due to a lack of adequate guarantees regarding the conditions in which it was conducted, the situational test could not be considered as a sufficiently fair procedure by means of which to prove the existence of discrimination: "… the 'testing' method used by the organisation, SOS Racisme, which took place without the involvement of a court officer or bailiff, is a method of proof which provides no measure of transparency and does not display the level of fairness necessary for obtaining evidence in criminal procedures, and violates due process" "[139].

It is important to keep in mind that *per se*, the technique of situation testing is neither underhanded nor a breach of human rights. However, this technique establishes an artificial situation that has some drawbacks. Where situation testing involves human interaction, the fictitious candidates could be so willing to detect discrimination that they unintentionally distort the results[140]. In some instances, national courts have questioned the lack of objectivity of testers who prior to carrying out the testing have sought advice from the alleged victims of discrimination[141]. These risks are not imaginary and necessitate the careful monitoring of situation testing and methodological rigour.

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[139] O. De Schutter, "Methods of proof in the context of combating discrimination", in *Proving discrimination. The Dynamic implementation of EU anti-discrimination law: The role of specialised bodies*, J. Cormack (ed.), Migration Policy Group, 2003, p. 37 (my italics, available on the website of the Migration Policy Group, www.migpolgroup.com).

[140] See P.A. Riach and J. Rich, "Field experiment in the market place", *Economic Journal*, 2002, issue 112, pp. 480 and sq.

[141] In France, see L. Collet-Askri, "Testing or not testing? La Chambre criminelle de la Cour de cassation valide ce mode de preuve, serait-il déloyal… (à propos de l'arrêt de la Chambre criminelle du 11 juin 2002)", *Le Dalloz*, 2003, no. 20, Chroniques, p. 1311. For other national instances, see Part III of this book.

4. Methodology and guidelines

The methodology to be used in situation testing should be rigorously specified in order to neutralise variables that could falsify the analysis or discredit the operation. There are essential issues to be aware of while organising situation tests[142].

4.1. Ensuring full comparability

To be convincing, situation testing requires as high a degree of similarity as possible between the group which is likely to be the victim of discrimination and the control group. The control group should resemble the first group in all respects apart from the characteristic to be tested. This means that the person in charge of the testing should draw up a list that is as complete as possible concerning the various elements likely to influence the decision of the person being tested.

For instance, pairs of testers involved in testing ethnic discrimination at the entrance of a nightclub should have the "correct" kind of clothing and hairstyle, and these should be similar in each case; they should be in the same age range and of the same sex (women tend to get more easily than men into nightclubs…); they should not be under the influence of alcohol or drugs; they should adopt a courteous and reasonable manner with the establishment's door keeper; they should try to get in on the same evening and around the same time; none of them should be known by the bouncers; etc.

4.2. Ensuring fairness and credibility

To avoid the appearance of bias in the testing, there should be no emotional link between the testers and the victim of discrimination or the person being tested. This means, for instance, that no tester should be a relative of the victim. Nor should the tester have a pre-existing prejudice against the person being tested. In addition, the testers should carefully monitor their behaviour to avoid any kind of provocation.

Situation testing should generally be used only after an individual has reported discrimination, and ideally should be conducted shortly after the discrimination has taken place. Proactive testing should be considered very carefully as it might give credence to those who raise the spectre of Big Brother to discredit the method. Obviously, this depends on the circumstances. If there are a high number of complaints in one sector, an NGO could decide to launch a situation testing campaign to raise public awareness and to initiate legal action in cases of patent discriminatory practices.

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[142] See, amongst others, "Le Testing: méthode et exemples", a practical guide by GELD (Groupe d'étude et de lutte contre les discriminations). This body stopped its activities on 30 June 2005 and is now part of the French equality body, the High Authority against Discrimination and for Equality (HALDE); B. Bodrogi, *Testing for discrimination. Identifying and prosecuting human rights abuses*, L. Mahony (Notebook Series ed.), Minneapolis, New Tactics Project of the Center for Victims of Torture (publ.), 2003; Kif Kif & Liga voor Mensenrechten, *Handleiding praktijktest discriminatie*, 2007, p. 8 (available on Kif Kif's website, www.site.kifkif.be/pdf/brochurepraktijktest.pdf).

4.3. Ensuring representativeness

The situation testing should ideally be based on a representative sample and, at the very least, on more than one pair of testers. Otherwise, its results should be corroborated by other means of evidence (personal testimony, for instance) in order to lead to a shift of the burden of proof.

To return to the example of situation testing at the entrance of a nightclub, this means that several testers with and without a minority ethnic background should try to enter the night club quite closely after each other. In line with this, the Paris Court of Appeal on 17 March 2008 discharged four night clubs bouncers who had been condemned for racial discrimination by a first instance court. The Court of Appeal considered that the refusal to allow one person or one group of persons to enter was not sufficient to establish the offence[143].

4.4. Ensuring careful planning and documentation

This fourth point is linked to the previous issues as careful planning allows comparability, fairness and representativeness to be monitored. Ideally, planning should follow a five step procedure.

- First, a specific person should be clearly in charge. This person should have some expertise in the discrimination field and be aware of the legal issues at stake. The test organiser should have no conflict of interest in regard to the victim of discrimination or the alleged perpetrator. S/he should also be aware of the fact that testing could lead to a court case lasting several years and that s/he has to be prepared to act as a witness in court. For this reason, it is important that the test organiser's background does not diminish his/her credibility. For field testing, there is no requirement for the test leader to be present at the scene because of the risk that s/he will be recognised.

- Second, the test organiser should draw up a *protocol* describing the purpose of the testing and the procedure to be followed. The protocol should include the various elements to be taken into account in order to ensure full comparability and should be designed in order to guarantee representativeness. The protocol could also address the need to call in an official, such as a bailiff. In addition, the protocol needs to consider the use of third party witnesses and technical instruments. Audio and video recordings have proven to be of great use to support the testing. They should be carefully stipulated in the protocol. As the judicial acceptance of such recordings differs from country to country, the protocol should be discussed in advance with local legal professionals.

- Third, the person responsible for the testing should make sure that the testers are not related to the victim or suspect and are well aware of how they should behave during the testing to avoid any kind of provocation. Unless necessary, the testers should not be minors. Like the test leader, they should also be aware of the fact that testing could lead to a court case lasting for several years and that they might have to act as witnesses in court. In addition, they should be prepared to encounter discrimination and be able to

[143] Case reported in *Le Monde*, 17 March 2007.

react neutrally. The testers should receive a copy of the testing protocol as well as clear guidelines on how to undertake the testing.

- Fourth, soon after the testing (but not in view of the place tested), each tester should fill in and sign a form summing up the operation. In a case of situation testing at the entrance of a night club, it would be relevant to indicate (1) at what time did the tester try to get in ? ; (2) what was the reaction of the bouncer ? ; (3) was there a queue in front of the night club ? ; etc.

- Fifth, finally, the person in charge of the testing should write a *general report* on its results. This person should keep the various documents (protocol, individual reports of the testers, and general report) and make them all available to the court if proceedings are launched on the basis of the situation testing.

4.5. More general issues

As it might be a challenge to find suitable testers, the national equality body or NGOs could cooperate with universities to find students or researchers to act as testers. This raises the issue of remuneration as it might be difficult to mobilise them without payment. At the end of the day, it is a matter of policy to see whether public authorities or NGOs would be willing to provide remuneration for the testers.

Involving journalists in the testing could be problematic as some could be eager for the " right " results to ensure quick publication in the press. Although reporting results is an important part of the testing procedure, publicity should be timed according to the needs of the case rather than journalistic criteria. Arranging publicity at the time of legal proceedings is usually a better strategy.

At all stages of the testing process, the people involved should be aware that it is sometimes a problematic tool. Victims of discrimination stand to lose a great deal if the testers are not stringent in carrying out the tests. As a matter of fact, judges are often suspicious of situation testing even if it is legal. It is therefore of tremendous importance to avoid discrediting the technique and to build confidence in its potential as a tool contributing to the implementation of anti-discrimination law.

The equality body and NGOs willing to use situation testing should consider organising special training for the testers. For instance, NEKI, the Hungarian Legal Defence Bureau for National and Ethnic Minorities, provides two-stage training for testers. After recruiting potential testers, there is a full day of training as a group. Then, when a testing situation arises in response to a complaint, the NGO conducts a preparatory session for the particular case to be attended by the specific testers who will take part in it[144].

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[144] B. Bodrogi, *Testing for discrimination. Identifying and prosecuting human rights abuses*, L. Mahony (Notebook Series ed.), Minneapolis, New Tactics Project of the Center for Victims of Torture (publ.), 2003, pp. 11-12. See also, Part III.7. of this book.

Lastly, it should to kept in mind that situation testing is only one of the tools that can assist victims to establish that discrimination may have occurred[145]. It is particularly useful for exposing direct discrimination hidden behind various pretexts. At the same time, it requires substantial resources and should be confined to cases where there are no other "easier ways" available to prove discrimination (i.e. witnesses, smoking gun statements[146], etc.). It should also be kept in mind that statistics are often much more suited to bringing to light indirect discrimination and/or structural discrimination. Even in cases of direct discrimination, it may be difficult to implement situation testing in some situations. For instance, while it is easy to use situation testing at the stage of initial job selection (i.e. CV testing or phone testing), it is much more difficult to send suitable testers to job interviews. Moreover, apart from situation testing and statistics, one should be aware that other powerful mechanisms are in place in Europe that can shift the burden of proof. In the United Kingdom, the questionnaire procedure appears to be a very efficient instrument[147]. For instance, it enables rejected job-seekers to seek an immediate response from the employer as to the reasons for their rejection. Courts and tribunals in the United Kingdom can draw inferences of discrimination from the answers given to the questionnaire or from the failure of the employer to respond in time or respond at all.

[145] *Combating discrimination. A training manual*, Human European Consultancy and Migration Policy Group (eds), 2007, pp. 23-24.

[146] See ECHR, *Ivanova v. Bulgaria*, 12 April 2007, § 84; ECHR, *Baczkowski v. Poland*, 3 May 2007, §§ 97-100.

[147] On the use of this questionnaire, see the website of the Equality and Human Rights Commission, www.equality-humanrights.com/pages/eocdrccre.aspx.

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Part III

Situation testing in European countries

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1. Overview

Use of situation testing has gained ground in the European Union over the years. The United Kingdom and the Netherlands have been familiar with the technique for quite some time. In countries such as Belgium, Bulgaria[148], the Czech Republic, Denmark, Finland, France, Hungary, Latvia, Slovakia and Sweden[149], cases based on situation testing are currently becoming more common. Hungary is an outstanding example as the systematic use of testing has led to important judicial victories combating widespread discrimination against Roma. NGOs and equality bodies in Austria, Cyprus and Italy are starting to use situation testing but no case has been yet been decided on this basis. Still, 10 European countries seem to remain unfamiliar with the technique : Estonia, Germany, Greece, Ireland, Lithuania, Luxemburg, Malta, Poland, Portugal, Slovenia and Spain. Lack of awareness seems to be the major reason for this. However, in some of these countries (mainly Ireland[150]), the judiciary's expected reluctance appears to be the foremost issue. And in Romania, although NGOS (particularly Roma NGOs) have used testing in the past, the method seems to have been abandoned[151]. Situation testing is established in statutory law only in Hungary, France and, to a certain extent, Belgium[152]. Elsewhere, there are no explicit legal rules and the matter is dealt with on the basis of the general law on evidence.

This chapter describes the experiences of some EU Member States, mostly up to 1 January 2007, without claiming to be exhaustive. It focuses on how situation testing has been used in courts, the questions which judges have had to address and the conditions where testing has been recognised as a legal tool. It also shows how testing is becoming a key element in strategic litigation. My description of cases relies heavily on outstanding work by the European network of legal experts in the non-discrimination field. I am greatly indebted to their national reports and their input to the European Anti-Discrimination Law Review.

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148 Bulgaria is not covered in this book. While cases have been decided on the basis of testing that uncovered failure to provide Roma with access to public places and services, neither the parties' submissions nor the judges' reasoning have specifically addressed the fact that the witnesses and claimants had acted as testers in the public interest. Witness testimonies by testers have been presented and treated as ordinary witness testimonies, and testers' standing as claimants has been recognised based solely on their identity and the less favourable treatment they suffered, with no discussion of their interest as testers in accessing the particular place or service (information provided by Margarita Ilieva, the Bulgarian expert of the European network of legal experts in the non-discrimination field).

149 The use of situation testing in Sweden is explored in Part IV of this book by Paul Lappalainen.

150 See S. Quinlivan, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Ireland, State of affairs up to 8 January 2007, p. 18 (available on the EU Commission's website, http : //europa. eu).

151 Information provided by Romanita Iordache, the Romanian expert of the European network of legal experts in the non-discrimination field.

152 See Part III of this book, developments by country.

2. Belgium

Situation testing has mostly been used by NGOs to reveal discriminatory practices. For instance, the Movement Against Racism, Anti-Semitism and Xenophobia (*Mouvement contre le racisme, l'antisémitisme et la xénophobie*) ran a campaign targeting certain Brussels night clubs called "Management reserves the right to refuse entry" (*La direction se reserve le droit d'entrée*)[153]. Testing has also been used in criminal cases to establish discrimination. In such cases, any means of proof consistent with the principle of fairness of evidence should be allowed. In this respect, situation testing has to a large extent been used on an *ad hoc* basis, by victims acting spontaneously to strengthen their case.

With the transposition of the Race and the Framework Equality Directives, situation testing has become a contentious issue. As an example of facts that may lead to a shift of the burden of proof, the former Federal Anti-discrimination Act of 25 February 2003 referred to "facts, such as statistical evidence or situation testing"[154]. An executive decree (*Arrêté royal*) was proposed that expressly defined the conditions for situation tests to be admissible in the context of discrimination suits. However, the political debates were at times stormy and consultations on the executive decree's content failed. The VLD (the Flemish right-wing party which was part of the coalition government) publicised criticism by employers' organisations and the National Office for Landlords (*Office national des propriétaires*). In a major daily newspaper, the party declared its refusal "to set up a team of spies, send moles to infiltrate companies, open informer hotlines and sanction Big Brother"[155]. The Prime Minister himself did not shrink from calling the testers "infiltrators" and "informers", adding, "you do not send a naked woman to a man to see if he is adulterous"[156]. These consultations also highlighted the difficulty in simultaneously pursuing two partially incompatible objectives. On one hand, situation testing should be codified and its methodology set out in order to prevent abuses by potential victims of discrimination, and also to encourage judges to shift the burden of proof on the basis of testing. On the other hand, to remain functional, it has to be possible to carry out situation tests in a flexible manner[157].

The words "situation testing" became so problematic that they were eliminated in the 2007 legislation replacing the 2003 Federal Anti-discrimination Act. As examples of facts leading to a presumption of direct discrimination, the new statutes list (1) factors revealing a certain recurrence of unequal treatment, among which, repeated isolated complaints to the equality body and (2) factors revealing that the situation of the alleged victim is comparable to that

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153 This campaign took place in 2000 and 2001 (see www.mrax.be/article.php3?id_article=194). For a follow-up, see C. Delanghe, "Encore et toujours", paper published on 26 April 2005 (http://www.mrax.be/article.php3?id_article=67).

154 Act of 25 February 2003 on the opposition to discrimination and modifying the Act of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism, *Moniteur belge*, 17 March 2003, art. 19, § 3.

155 *Le Soir*, 26, 27 and 28 March 2005.

156 *De Standaard*, 25 March 2005.

157 O. De Schutter, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Belgium, State of affairs up to 8 January 2007, p. 33 (available on the EU Commission's website, http://europa.eu).

of a reference individual (a person who does not share the protected characteristic)[158]. These so-called "recurrence tests" (*test de récurrence*) and "comparability tests" (*test de comparabilité*) are not easy to grasp and seem to be the two sides of the coin of the situation test[159]. What is certain is that under current law situation testing remains a legitimate way to reverse the burden of proof as long as it is carried out with proper methodology and does not amount to provocation.

› *Liège Court of Appeal admits the principle of "role play" in obtaining testimony (1988)*[160]

A person of minority origin was denied service in a bar. He came back the next day with a friend, also of non-European appearance. In court, the latter corroborated the fact that the manager had refused to take their order, while serving people of European origin. On this basis, the manager was convicted.

› *President of the Brussels Court of First Instance reverses the burden of proof based on the results of testing (2005)*[161]

A couple consisting of two people of foreign origin asked for information about an apartment advertised for rent. The letting agency requested evidence that they received wages equivalent to at least three times the amount of the monthly rent (a common practice in Belgium). An appointment was set for the next day. However, the same afternoon the agency informed them that the flat had been rented out to an acquaintance of the owner. Since the apartment was still advertised for rent, the couple asked a friend to contact the agency in order to inquire about its availability. After the friend told the agency that he was enquiring on behalf of Belgian nationals, an appointment was made. However, at the sight of the couple, the agency argued that the owner preferred older tenants in order to preserve the tranquillity of the house where she was also living.

Confronted with these facts, the judge considered that the testimony of the couple and their friend were sufficient to establish a presumption of discrimination based on the foreign origin of the plaintiffs. The defendants did not manage to rebut the presumption. In the view of the judge, the asserted preference of the owner for an elderly tenant was not convincing as the tenants who were finally chosen were approximately 40 years old.

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158 Act of 10 May 2007 combating some types of discriminations (art. 28); Act of 10 May 2007 amending the 30 July 1981 Act criminalising certain acts inspired by racism and xenophobia (art. 29); Act of 10 May 2007 fighting against discrimination between women and men (art. 33), *Moniteur belge*, 30 May 2007.

159 V. van der Plancke, "Les tribulations du testing en Belgique : quels enseignements ?", *Horizons stratégiques*, 2007, issue 5, p. 12; I. Rorive and V. van der Plancke, "Quels dispositifs pour prouver les discriminations ?", *Les lois fédérales du 10 mai 2007 luttant contre les discriminations*, Ch. Bayart, S. Sottiaux & S. Van Drooghenbroeck (eds), Brussels, La Charte, 2008, p. 447.

160 Decision passed on 11 March 1988, available on the CECLR's website, www.diversite.be.

161 Decision on emergency proceedings passed on 3 June 2005, published in the *Revue du droit des étrangers*, 2005, issue 133, p. 220, available on the CECLR's website, www.diversite.be.

› *Ghent Court of Appeal rules testing a valid way to prove discrimination (2005)*[162]

While looking for a flat to rent, André D. and his same-sex partner were told by the agency that the owner did not wish to rent her apartment to "two men or two women". A few days afterwards, this statement was repeated in the presence of a bailiff (*huissier de justice*). The Centre for Equal Opportunities and Opposition to Racism and André D. sought a judicial injunction prohibiting the discriminatory practice.

In summary proceedings, the President of the Ghent Court of First Instance turned down the application on 31 December 2003. The judge considered that the shift of the burden of proof permitted under the 2003 Anti-discrimination Act did not apply as the regulation on situation testing had not yet been adopted.

On 30 November 2005, the Ghent Court of Appeal reversed the ruling. Situation testing and statistical evidence were ruled to be only examples of facts on which a reversal of the burden of proof can be based. In addition, the Court held that the fact that the government had not adopted the required regulation on the use of situation testing did not prevent its use in practice.

3. The Czech Republic

In the Czech Republic, NGOs use situation testing in order to prove ethnic discrimination in access to employment, services and housing.

› *Prague Municipal Court holds dignity of testers affected despite expectation of discrimination (2002)*[163]

In a case alleging denial of service based on ethnic origin where situation testing had been used to gather evidence, the respondent argued that the characteristic feature of situation testing is that the plaintiff is prepared in advance to face discriminatory treatment and has voluntarily consented to undergo the testing. In consequence, it could be suggested that his personal dignity could not be affected by discrimination occurring during the situation testing. The Court held that "it does not question the right of the plaintiff to test the reactions of others, and where, during this testing, an illegal act affecting the plaintiff's personality rights may have taken place (for example denial of service because of his racial or ethnic origin), it is not excluded that this might affect his personality rights protected by (…) the Civil Code".

[162] Decision on 30 November 2005, available on the CECLR's website, www.diversite.be.

[163] Case no. 34C 66/2001-42, 7 March 2002, reported in P. Boucková, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Czech Republic, State of affairs up to 8 January 2007, p. 16 (available on the EU Commission's website, http : //europa.eu). See also the decision by the High Court in Prague, Case no. 1 Co 321/2003-196, 17 August 2003.

› *Prague Municipal Court accepts testing on access to employment (2004)*[164]

In 2003, the claimant, a Roma woman, had applied for a job in a pharmacy, part of the international Rossmann chain. The position had been advertised, but she was told that it had already been filled. A woman of the same age acting as a tester and carrying a hidden cassette recorder, was offered an interview only several minutes later, and even though she said that she had neither training nor experience, the deputy manager of the shop indicated that she might be accepted. The claimant informed the Court that she had had problems finding a new job and she had been rejected everywhere, evidently for ethnic reasons. The victim was supported by Czech NGOs. Later, Rossmann withdrew its appeal against the decision of the Prague Municipal Court, apologising for discrimination and paying non-material damages of 50,000 CZK (€1,670) to the Roma woman.

› *The Scorpio Club case before the Prague High Court (2005)*[165]

In 2003, a Roma woman responded to an advertisement for a job as a shop assistant in the Scorpio Club. She was immediately told that the job was already taken. A few minutes after the rejection, a "Czech" female tester was invited to an interview for the same job and was told that the shop manager of their head branch would probably contact her as she might be hired. In June 2004, the Prague City Court ruled that the Scorpio Club should apologise and pay non-material damages of 25,000 CZK (€ 835) to the claimant. This decision was confirmed on appeal before the Prague High Court. The victim was supported by Czech NGOs.

› *Ostrava Regional Court accepts testing on denial of services in the Diablo bar (2005)*[166]

In 2004, the waitress in the Diablo bar in Ostrava told the three claimants of Roma origin to leave because a private event was going to take place. Several minutes afterwards a group of Czech NGO activists were served without any reference to the private event. The Regional Court found that the owner of the bar should apologise for discrimination and pay non-material damages of 90,000 CZK (€ 3,000) to each of the three claimants.

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[164] Case held on 31 March 2004, reported in the *European Anti-Discrimination Law Review*, 2006, issue 2, p. 50.

[165] Case held on 22 March 2005, reported in the *European Anti-Discrimination Law Review*, 2006, issue 2, p. 50.

[166] Case held on 24 March 2005, reported in the *European Anti-Discrimination Law Review*, 2006, issue 2, p. 50.

4. Denmark

In court, situation testing has been mostly used in relation to ethnic discrimination in night life. In January 2005, a television programme using a hidden camera followed two groups of youngsters trying to enter night clubs in Copenhagen. The majority group was allowed to enter while the minority group was refused entry into a number of places. The Criminal City Court of Copenhagen sentenced the doormen from three different night clubs on the basis of evidence from this situation testing. The Court did not show any signs of reluctance to use the results of the testing[167].

Apart from litigation, NGOs and journalists sometimes rely on testing to raise awareness of ethnic discrimination practiced by estate agencies, taxi companies or temporary employment agencies. In this respect the Press Council passed an interesting decision on 6 April 2004. The case concerned a complaint by a taxi company about newspaper articles denouncing the fact that customers could order a taxi and request a "white or Danish driver". The Press Council found that the journalist's conduct was in keeping with the ethics of his profession. He was entitled to test the taxi company on the grounds that it was of significant public interest to shed light on discriminatory practices and that testing the company was the proper way to investigate the issue[168].

5. Finland

In Finland, situation testing has been used as a way to build cases from scratch and not only as a method for gathering evidence to support a claim of discrimination (i.e. as *ex-post-facto* evidence).

› *The Finnish League for Human Rights case (2002)*

In autumn 2002, an NGO, the Finnish League for Human Rights, conducted some situation tests in order to investigate whether restaurants were denying entry to people of minority background. Testers were divided into members of minority ethnic groups (people of foreign origin or Roma) and members of the majority ethnic group. On the basis of this investigation 11 crime reports on discrimination were filed with the police. In six of these cases, discrimination was found and the accused were sentenced to fines. In four cases the public prosecutor decided not to bring charges and one case failed because it was not brought to court within the time limit prescribed by law[169].

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[167] N.-E. Hansen, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Denmark, State of affairs up to 8 January 2007, p. 27 (available on the EU Commission's website, http: //europa.eu).

[168] Press Council no. 2003-6-148, KEN no. 9698.

[169] T. Makkonen, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Finland, State of affairs up to 8 January 2007, p. 15 (available on the EU Commission's website, http: //europa.eu).

› *The Pori case (2006)*

On 3 June 2006, Roma living in Pori, a city of 76,000 inhabitants on the west coast of Finland, decided to attract attention to the extent of intolerance that members of their community faced in daily life. Three Roma men and one Roma woman, together with two witnesses, took part in a testing experiment. The group of Roma did not manage to enter any of the 16 restaurants tested. The events attracted major public attention, with both newspapers and ordinary citizens condemning the apparent practice of discrimination. The Roma who took part in the testing filed crime reports with the police, who launched an investigation[170]. After three days of proceedings in August 2007, only three of the 13 individuals charged were in the end convicted and ordered to pay fines ; the others were acquitted. According to the Pori Court of First Instance, the reason for this was that some members of the test group had previously caused demonstrable trouble in the restaurants that they tried to enter. Hence, they were not discriminated against on the ground of ethnic origin. This case shows that the test group has to be formed with great care[171].

6. **France**

At the end of the 1990s, the NGO SOS Racisme started to carry out situation testing in order to gather evidence of ethnic discrimination relating to entry into night clubs. Since then, famous " testing nights " have been regularly organised. The method was challenged in court and received the recognition of the highest court, the Court of Cassation, on the basis of the principle of complete freedom of evidence in criminal cases. After the crisis that rocked the suburbs in autumn 2005, situation testing was expressly sanctioned in the Penal Code as a measure to strengthen equal opportunities. Today, situation testing is becoming a way to *prove* discrimination (mostly based on ethnicity, but also disability and age) occurring in access to goods and services in general (night clubs, camp sites, housing, etc.) but also in access to employment. These cases are brought under criminal law while situation testing has not yet been used in civil cases. Considering the inadmissibility of evidence obtained illegally in civil cases and the strict requirement of fairness enforced in civil procedure, according to French experts[172] it is doubtful that situation testing would be held admissible under the general rules of evidence. However, one could argue that the requirement for fairness should be higher in criminal law since it involves the power of the state against the individual. This includes both the state's investigatory powers as well as the power to enforce criminal sanctions such as imprisonment and fines. Therefore, a higher procedural standard of fairness applies in most countries in order to protect individuals from the state. Civil law cases, on the other hand, involve individuals and

[170] Reported in the *European Anti-Discrimination Law Review*, 2006, issue 4, p. 57.

[171] Information provided by Timo Makkonen, Finnish expert of the European network of legal experts in the non-discrimination field.

[172] See S. Latraverse, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, France, State of affairs up to 8 January 2007, p. 20 (available on the EU Commission's website, http : //europa. eu).

generally require a lower burden of proof. This should lead to the conclusion that if the legal system allows situation testing in criminal cases, there is little reason for not allowing testing in civil cases.

› *Three decisions by the Court of Cassation (2000, 2002, 2005)*

The first case concerned three managers of night clubs who were declared guilty of ethnic discrimination and sentenced to pay fines of €450 to €1800 in addition to the payment of damages. In line with the decision by the court of first instance, the Court of Appeal[173] established three sets of facts. First, it became clear from the bailiff's report (which included statements by the youths involved in the testing and a journalist's testimony) that the two groups of North Africans were refused entry on the basis that the premises were private, whereas groups of people with an European ethnic background were allowed in without difficulty. Secondly, the journalist and bailiff were allowed in, even though they were not regular customers. Thirdly, the explanations that the entry guards and the managers gave (" they do not fit in with our customers ", " they are not regular customers ", " this group is only made up of men ", " these instructions aim to deal better with possible incidents ") varied. They did not stand up against the *perfectly consistent testimonies* of the bailiff, the journalist and the testers. As a result the Court of Appeal held that this testimony was sufficient to show that ethnic origin was the only ground on which the refusal to allow entry was based. On 12 September 2000[174], the Court of Cassation dismissed the appeal (*pourvoi*) on the ground that the lower court had enough evidence to decide the case. It can be concluded from this decision by the highest French Court that situation testing is not a violation of the law. In each case, it is up to the trial judge to assess the weight given to such tests.

Two years later, a similar case came to the Court of Cassation. This time, SOS Racisme filed an appeal because the Montpellier Court of Appeal had acquitted door guards who were accused of selecting people on the basis of their ethnic origin at the entrance to several night clubs in the region. According to the Court of Appeal, the method of situation testing was, as a matter of principle, biased and non transparent. In the case at issue, it held that it had been implemented " in an one-sided fashion by the NGO, which was appealing to its members only (…) who were duly informed that the aim of the operation was (…) to show that segregation was in force at the entrance to these night clubs ". This Court also ruled that the situation testing had taken place " without any participation from an officer of the court or a court bailiff ", had " no transparency ", did not " bear the hallmark of fairness which is essential when providing evidence in criminal proceedings " and " undermined the rights of the respondents "[175]. The Court of Cassation, however, rejected this point of view. After recalling that offences can be established using any means of proof in criminal cases (under the principle of complete freedom of evidence), the Court emphasised that " there is no legal

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[173] Orléans Court of Appeal (Criminal Division), 2 November 1999, n° 832/99 ; Tribunal of Grand Instance of Tours, 29 April 1999, no. 1284.

[174] Court of Cassation (Criminal Division), 12 September 2000, no. 99-87.251, available on the Légifrance website, www.legifrance.gouv.fr.

[175] Montpellier Court of Appeal (Criminal Division), 5 June 2001 (2 decisions).

provision allowing repressive judges to exclude proof presented by the parties merely because it was obtained in an illicit or unfair manner". The judge should "weigh the value of the evidence after having heard both parties"[176]. According to the case law of the French Court of Cassation, a criminal judge cannot arbitrarily reject the results of situation testing; their value as evidence must be weighed in each case. The Advocate General underlined the fact that the presence of a bailiff was not necessary. He went as far as stating that situation testing should result in the future in a more effective defence of the right of minorities to equal treatment, not only in denial of access cases, but also in housing and in employment.

The third Court of Cassation case relates to "telephone situation testing". On 7 June 2005[177], the Court declared admissible recordings of telephone conversations which established that, at the owner's request, a property agent informed prospective clients about the availability of an apartment depending on whether or not their surnames sounded "French". The phone calls were made from the premises of SOS Racisme after a complaint was brought in. Again, the weight to be attributed to this evidence was a matter for the trial judge, and the Court of Cassation did not provide any commentary or explanation of the methodology to be followed in order to conduct a situation test with decisive evidentiary value. The jurisprudence in this respect results from trial and appellate court decisions. The case law is unclear and depends on the receptiveness of the prosecutor and the judge to situation testing in general.

› *Express legislation in 2006*

After the crisis that rocked the suburbs in autumn 2005, the government introduced measures to strengthen equal opportunities. Among them, article 21 of the Equal Opportunities Bill (no. 2787) presented by the government on 11 January 2006 to the National Assembly provided a legal basis for situation testing (also called "improvised verification" in the Preamble) in criminal law. The provision embodied in article 225-3-1 of the Penal Code reads as follows: "Discriminatory offences listed in this part of the Code are punishable even if they are committed against one or several individuals seeking goods, services or contracts (…) in order to demonstrate the existence of discriminatory behaviour as long as the latter is proved"[178].

In addition to the adoption of article 225-3-1 of the Penal Code, the Ministry of Justice issued a ministerial instruction[179] to public prosecutors and the president of each court of appeal presenting the legislative amendment and providing guidelines for its enforcement. It explains that evidence of discrimination is admissible even when it results from actions

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[176] Court of Cassation (Criminal Division), 11 June 2002, no. 01-85.559, available on the Légifrance website, www.legifrance.gouv.fr. See also L. Collet-Askri, "Testing or not testing? La Chambre criminelle de la Cour de cassation valide ce mode de preuve, serait-il déloyal… (à propos de l'arrêt de la Chambre criminelle du 11 juin 2002)", *Le Dalloz*, 2003, no. 20, Chroniques, pp. 1309-1314.

[177] Court of Cassation, 7 June 2005, no. 04-8735, available on the Légifrance website, www.legifrance.gouv.fr, and reported in the *European Anti-Discrimination Law Review*, 2006, issue 3, pp. 64-65. See also Court of Appeal of Grenoble, 18 April 2001, no. 00/00657 (*Mr Boumaza et SOS Racisme v. Mr Lafay*).

[178] Equal Opportunities Act no. 2006-396 of 31 March 2006, art. 45, *JORF*, 2 April 2006.

[179] CRIM 2006-16 E8/26-06-2006, *Bulletin officiel du Ministère de la Justice*, no. 102 (1st April to 30 June 2006).

perpetrated by the victim with the intention of provoking the differential treatment and with the intention to collect evidence of discriminatory behaviour. The intention of the victim has no bearing on the offence if the discriminator intentionally committed the discriminatory act. However, it cannot be used in the context of a fictitious offer or with persons acting under a false identity pursuing a false scenario. The victim has to act under his or her own identity and thereby be a real person facing unequal treatment. If the refusal is made to a person with a false identity, the Ministry holds that there is no offence and the situation cannot lead to a conviction. The requirement for an identifiable victim could be problematic in some situations and has been criticised. Is it relevant when it is common knowledge that night clubs in the town have discriminatory policies and practices, to reject the results of situation testing on the grounds that there was no identifiable victim to start with ?

The Equal Opportunities Act of 31 March 2006 also gave a new competence to the agents of the French equality body, the High Authority against Discrimination and for Equality (HALDE)[180]. These agents, under a special authorisation from the Prosecutor of the Republic, are entitled to write a report of proceedings, in particular in cases where situation tests have been carried out. In other words, they are provided with a special power to carry out inspections and situation testing as well as issuing sworn statements attesting to the existence of discriminatory situations.

The HALDE's charismatic president Louis Schweitzer, former CEO of Renault, has on several occasions pointed out the value of situation testing in the fight against discrimination, but to our knowledge, the HALDE has commissioned testing only for the purposes of research (scientific tests). For instance, it published the results of two of these on 5 July 2006 : one concerned access to private housing (taking into account ethnicity and single parenthood), the other access to employment (testing using CVs to measure discrimination based on gender, ethnicity, age, handicap and physical appearance)[181]. Among its opinion polls, the HALDE has conducted one related to situation testing, asking whether situation testing can be considered an effective method for fighting discrimination. 73.91 % answered YES (1269 out of 1717 participants) and 26.09 % NO (448 out of 1717 participants)[182].

› *HALDE decision on refusal of access to health care (2006)*[183]

The HALDE received a claim from a group of doctors called the *Collectif des médecins généralistes pour l'accès aux soins* (COMEGAS) who tested the refusal by doctors to give appointments to the inhabitants of six municipalities of the Val-de Marne department (a suburb of Paris) who were on low incomes and hence entitled to have all of their medical

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[180] Equal Opportunities Act no. 2006-396 of 31 March 2006, art. 41, amending art. 2 of the Act no. 2004-1486 of 30 December 2004 creating the Halde, *JORF*, 2 April 2006.

[181] For more details, see the HALDE's website, www.halde.fr/actualit-18/agenda-haute-autorit-38/presentation-resultats-9230.html.

[182] See the results on the HALDE's website, www.halde.fr/sondages-19/test-discrimination-8915.html.

[183] Opinion delivered on 6 November 2006, reported in the *European Anti-Discrimination Law Review*, 2007, issue 5, p. 74, and available on the HALDE's website, www.halde.fr.

expenses covered by the universal health care programme (CMU)[184]. In this programme the patient does not have to pay, and the medical practitioner is reimbursed by the state at a minimal tariff. Many doctors therefore do not treat people covered by the CMU and simply refuse to take appointments. The testing revealed that the rate of failure to grant appointments to people covered by the CMU, viewed as a denial of access to health care, was 4.8% for general practitioners and 41% for specialists.

In its decision, the HALDE called the attention of the College of Doctors and of the Minister of Health to the absence of sanctions for this denial of access to health care, which is contrary to national law. It asked for attention to be given to the fact that this discrimination is illegal and should be publicised. It further requested that the Minister take action to sanction these doctors and that a national inquiry should be carried out by the National Social Inspection authorities (*Inspection Générale des Affaires Sociales)* to identify the doctors concerned.

This decision is not based on legislation transposing the EU Directives. Instead, it is based on paragraph 11 of the preamble to the 1946 Constitution protecting universal access to health care and article 1110-3 of the Public Health Code adopted by Law no. 2002-303 of 4 March 2002 concerning the rights of the sick and the quality of the healthcare system. They both prohibit discrimination in access to health care without listing the protected grounds. The Public Health Code universally prohibits discrimination in access to health care, while Article R 4127-7 states the universal obligation of medical practitioners to provide care.

7. Hungary

For a long time situation testing was a highly debated legal tool in Hungary. NGOs, primarily the Legal Defence Bureau for National and Ethnic Minorities (NEKI) based in Budapest, have long attempted to apply situation testing to prove the cases of individual discrimination victims, in particular Roma. NEKI clearly based its strategy on US anti-discrimination experience. In 1997, a member of the NGO spent a year in the United States gaining practical know-how in human rights. He became familiar with situation testing when working at the Fair Housing Council in Washington D.C. The Council tests the practices of real estate agencies and landlords who refuse to rent flats or sell houses to African Americans and other minorities[185]. NEKI's challenge was to adapt the tool to the Hungarian situation[186].

In the beginning, NEKI's usual practice was that if they received a complaint (usually about the denial of access to goods and services or employment involving discrimination against Roma), they immediately sent well-trained situation testers to the premises. The results of the testing were recorded by the testers on a questionnaire detailing all the steps taken. On this basis, the test coordinator could assess whether differential treatment had taken place and decide to initiate legal action. The results of the testing were used (along with the

184 The CMU was created by Act no. 99-641 of 27 July 1999.

185 See above, Part II.2.

186 B. Bodrogi, *Testing for discrimination. Identifying and prosecuting human rights abuses*, L. Mahony (Notebook Series ed.), Minneapolis, New Tactics Project of the Center for Victims of Torture (publ.), 2003, p. 8.

testimony of the testers) as evidence in civil lawsuits launched on behalf of the original victim. The problem with this approach was that, in the view of many judges, the results of testing performed in this way could not be taken into account as evidence, because only the original, individual violation could be the subject matter of the lawsuit, and the testing was so distant to this that no conclusions could be retrospectively drawn from the results of the testing with regard to the original violation. This forced NEKI to change its testing strategy. The new method is for the original complainant to return accompanied by testers, and if the discriminatory act (e.g. denial of entrance to a bar) is repeated with regard to the complainant and also Roma testers while the non-Roma testers are let in, the lawsuit will not be filed for the first discriminatory act, but for the second, where the testers' testimony can be used as direct, first-hand evidence. However, a 2006 decision by the Equal Treatment Authority (see below) allowed situation testing using a telephone to support an individual complaint where the testers were not direct witnesses of the discriminatory behaviour at issue.

Another criticism voiced by some judges was that testers were agents provocateur paid by the plaintiff (or the NGO representing the plaintiff), thus casting serious doubt on their credibility. This consideration, however, did not prevent the Supreme Court from accepting the testimony given by testers in a number of important discrimination cases (see below, in particular, the *K.L. discotheque* case).

Besides, a government decree adopted in 2004 expressly recognised the Equal Treatment Authority's right to use situation testing in its investigations and, if appropriate, to make use of these findings in court[187]. The statutory definition of testing is as follows: "in relation to the behavior, measure, condition, omission, instruction or practice (…) of the alleged discriminator, the Authority puts into an identical situation persons who are different from the point of view of a characteristic, feature or status (…) but are similar from the point of view of other characteristics, and it examines the action of the alleged discriminator in respect of these persons from the point of view of the respect for equal treatment "[188].

› *Supreme Court decision in the K.L. discotheque case (2002)*[189]

After complaints from the Roma minority self-government, NEKI decided to conduct situation testing at the K.L. discotheque in the village of D.

On 1 April 2000, non-Roma (D.M. and D.B.) and Roma (B.B.) volunteers travelled to the village. At the flat of the minority self-government's president they met several Roma youth, who

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[187] Government Decree 362/2004 on the Equal Treatment Authority and on the Detailed Rules of its Procedure (ETAD), adopted in December 2004.

[188] Art. 13(1) of the ETAD. On these developments, see A. Kadar, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Hungary, State of affairs up to 8 January 2007, p. 16.

[189] This case was published as number EBH 2002.625 in the Supreme Court's official journal (*Complex CD Corpus Iuris*), which details rulings of special importance. Description on the basis of the *White Booklet 2000*, available on NEKI's website under "Discotheque in D", www.neki.hu/indexeng.htm. See also D. Schiek, L. Waddington and M. Bell (eds), *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law*, Hart Publishing, 2006, pp. 255-256.

repeated the claims of discrimination. They recounted that every time they attempted to pay the entrance fee, they were sent away because they were not members. They inquired about how to obtain membership cards and were told that references by two members were needed to acquire the card. Sometimes they were told to submit a CV on the basis of which their applications would be evaluated. At other times, they were asked to pay a certain amount of cash in order to become members.

At 8.30 pm the two non-Roma volunteers left for the discotheque. They later recounted that they purchased two tickets at the entrance without any trouble and went inside. They ordered drinks and sat down at a table. Twenty minutes later an employee approached them to ask whether they had membership cards. He then issued the cards to them and registered their names and addresses in a book. Meanwhile – without being asked – the employee told the non-Roma volunteers that "the cards are necessary because it is the only way to prevent Gypsies from entering. Previously we had problems with the consumer inspection and the parliamentary commissioner". Thirty minutes later B.B., a Roma volunteer, and P.M., a local Roma youth, also set out for the discotheque. They also wanted to buy two tickets at the door but were refused, as they did not have membership cards. They then asked how they could obtain the cards and were told to present a CV and recommendations from two members. B.B. then asked for the book of customers. He was told that it was not a discotheque but a club so they did not have such a book. Fifteen minutes later three local Roma youths tried to get in, with no luck. Following their return, all volunteers filled out a detailed questionnaire and identified two local policemen whom they claimed were guarding the discotheque.

On 10 May 2000, represented by a lawyer paid by NEKI, two of the Roma youths who were not allowed to enter the disco filed a lawsuit against the company operating the venue. Both the courts of first and second instance established the violation of the plaintiffs' inherent right to dignity and non-discrimination, and the company was ordered to pay damages.

The defendant submitted a request for an extraordinary appeal to the Supreme Court. In its decision, the Supreme Court approved of the second instance decision and declared that the court of second instance had established the facts of the case properly on the basis of the available evidence (including the testimony of the testers).

› *Supreme Court decision on denial of service towards Roma (2003)*[190]

Roma plaintiffs filed a lawsuit against a bar where they were denied service. As it was a test case initiated by an NGO, the plaintiffs did not ask for non-pecuniary damages, but requested the Court to impose a so-called public interest fine on the bar's owner (such a fine is possible under the Civil Code if the damages to be paid are insufficient in comparison to the severity of the behaviour causing the damage). The Court established that the fact that the plaintiffs were not asking for damages did not exclude the possibility of imposing a public interest fine. The defendant had to pay HUF 100,000 (€400).

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[190] Appeal decision passed on 25 August 2005, as reported in the *European Anti-Discrimination Law Review*, 2006, issue 3, pp. 67-68.

› *Budapest City Court fines popular club for affront to dignity of Roma (2005)*[191]

On 14 September 2002, two Roma men accompanied by two women tried to enter a popular open air club called Zold Pardon in Budapest. The two women – one of whom was Roma but both of whom had white skin entered the club easily, whereas the two men with dark skin were asked to provide identity documents. The two men asked why they were being refused entrance, as in the meantime they had seen many young people entering without being asked for identity papers. Even after one of the men provided his identity document, the two claimants were not allowed to enter the club and they ultimately left the premises.

On the basis of witness testimony and recorded video evidence, a claim was filed by the European Roma Rights Centre together with local lawyers in which violations of personal rights were alleged, based on the infringement of the right to equal treatment, regulated by the Civil Code (art. 76).

A first instance court rejected the complaint on 16 September 2004. However, on appeal on 25 August 2005, the Budapest City Court held that Zold Pardon Ltd and Doorman-Sec Ltd operating the Zold Pardon Club in Budapest had violated the claimant's right to dignity. The court awarded HUF 100,000 (approximately €400) in damages for non-pecuniary loss to each of the victims. The defendants were further ordered to refrain from further violations and were to send a letter of apology to the two Roma men within 15 days. The decision was final, the damages were paid and the apology made.

The Court did not find an infringement of the requirement of equal treatment based on racial discrimination because it could not be proved beyond doubt that the security guard's behaviour was related to the claimants' Roma origin. The relevant provisions of the 2003 Equal Treatment Act, including the rule on shifting the burden of proof, could not be invoked as the Act was not in force at the time of the violation. The judge however stated that security guards are not entitled to check the identity documents of prospective guests, and that in doing so, they violated the claimants' right to human dignity – a key finding with implications for future cases.

› *Equal Treatment Authority decision on discrimination in employment against Roma (2006)*[192]

The complainant responded to a newspaper advertisement recruiting painters. He met the employer's requirements, but he was rejected when he informed the employer that he was of Roma origin. The complainant turned to the NGO NEKI, which conducted a situation test in order to substantiate the suspicion of discrimination. Two testers called the employer, both of them claiming that they had the required skills and experience. Both of them assured the employer that they did not drink alcohol. The only difference was that one of the testers

[191] As reported in the *European Anti-Discrimination Law Review*, 2006, issue 3, pp. 67-68.

[192] Case 180/2006. Description based on A. Kadar, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Hungary, State of affairs up to 8 January 2007, pp. 18-19. Case reported in the *European Anti-Discrimination Law Review*, 2006, issue 4, p. 63.

introduced himself as Kolompár (a typical Roma name in Hungary), while the other person used a Hungarian name. While the "Roma" tester was not provided with details of the job, the non-Roma tester was informed at length about the task, payment and other relevant circumstances. Based on the result of the testing, NEKI filed a complaint with the Equal Treatment Authority on behalf of the complainant.

In consideration of the result of the testing and other pieces of evidence (such as the itemised list of telephone calls from an institution maintained by the local council, from where the complainant made the telephone calls), the Equal Treatment Authority found the employer guilty of direct discrimination and imposed a fine of HUF 700,000 (€2,800).

This is the first case in which the result of testing was taken into consideration as evidence substantiating an individual complaint that took place beforehand. In judicial practice until then, the testimony of testers had been accepted only if the testers actually witnessed the complainant's rights being violated.

8. Latvia

Situation testing is still at a very early stage in Latvia and NGOs do not seem to use it. The successful Raymond Smagars case has generated a great deal of debate and could change this in the future.

› *The Raymond Smagars case (2005)*

On 12 July 2005, the Riga Regional Court delivered a judgment[193] on the first case dealing with access to services and disability discrimination to be decided in Latvia. In the absence of more specific provisions, it was decided on the basis of the civil law provision on defamation. The claimant, a wheelchair user, was twice denied access to a night club. The first time the security guard informed him that there were no more places in the club, whereas another person who had initially accompanied the claimant was later permitted to enter without any restriction. Two weeks later the claimant accompanied by a television camera crew again attempted to enter the club. This time the reason given for the refusal was that it was a private party that night, but yet again another person was later permitted to enter freely.

After the material was broadcast on television, a representative of the club explained that the claimant should announce his intention to visit the club several days in advance and that the reason for the refusal to let him in was the complicated architecture of the building, namely, a steep staircase and several floors. Later, in the explanation provided to the Court, the club further developed this line of reasoning by explaining that the premises were not suited for people with special needs, which meant that the respondent had to run a greater risk and

[193] *Raimonds Smagars v. SIA "Vernisāžas centrs"*, case no. C04386004, reported in the *European Anti-Discrimination Law Review*, 2006, issue 3, p. 73; G. Feldhune, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Latvia, State of affairs up to 8 January 2007, pp. 5 & 14. See also "Justice achieved in court", *Bullet In*, July 2006, p. 2 (web142.deac.lv/site/pic/docs/konkursudocs/bulletin_engl.pdf).

undertake greater responsibility to ensure the safety of such persons in case of emergency, which therefore required special preparation in advance. The night club's representative also explained at the court hearing that in the first incident, the security guards had thought that the claimant had only one accompanying person and thus would not be able to get into the club, so they referred to the club being full in order to spare the claimant's feelings.

The Court held that the club had acted in a discriminatory manner towards the claimant based on his disability, thus offending his honour and reputation (the wording of the applicable defamation provision), and awarded the claimant moral damages of LVL 3000 (€4,300), considering this sum adequate both to compensate for the suffering caused to the claimant and to fulfil a dissuasive function. The respondent decided not to appeal the judgment.

9. The Netherlands

For many years, courts have accepted situation testing as a valid method to prove discrimination both in civil and criminal litigation. However, testing needs to be prepared very carefully in criminal proceedings to avoid being considered as provocation. In addition, the criminal courts have been reluctant at times to impose sanctions based on the argument that neither the NGO which initiated the testing nor the individual complainant had any real interest in the discriminatory actions carried out by the accused[194].

The Equal Treatment Commission, the Dutch equality body competent to investigate alleged cases of discrimination and to issue non-legally binding opinions, accepts situation testing as evidence of discriminatory behaviour. It has given several opinions in the past about the criteria for situation testing, mostly relating to ethnic discrimination at the entrance to discotheques[195]. The Equal Treatment Commission especially insists on the following requirements: (1) the groups of testers should be comparable in appearance (clothing, hairstyles, etc.), except for race or ethnicity; (2) the groups of testers should try to enter under the same circumstances (for instance, none of them should have the "required" membership card); (3) the groups of testers should try to enter on the same night and around the same time.

Situation testing is also sometimes the result of individual initiative, as seen when the Equal Treatment Commission admitted such a situation test in 2005. A job seeker with a foreign surname applied for an advertised position by email. A few days later, a friend of his (with a Dutch surname) sent a very similar letter of application. While the employer called the latter very quickly to arrange a meeting, the former was not contacted. The respondent argued before the Commission that he had in fact called the first job applicant to inform him that

[194] R. Holtmaat, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, the Netherlands, State of affairs up to 8 January 2007, pp. 22-23.

[195] See, for instance, Opinion 1997-62, Opinion 1997-64, Opinion 1997-133, Opinion 1998-39 (ethnic discrimination in renting a hall for a family celebration). These opinions are available in Dutch on the web site of the *Commissie Gelijke Behandeling* (Equal Treatment Commission) www.cgb.nl.

his training and experience were insufficient. The phone call could not be proved beyond reasonable doubt and in point of fact, it did not explain to what extent the second job applicant, with very similar qualifications to the claimant, could be considered as having the required profile for the job[196].

Situation testing mostly concerns admittance to night clubs, bars and restaurant as well as job applications. There has recently been considerable debate on the need to use this method. In November 2004, the National Bureau against Racial Discrimination and the National Association of Anti-Discrimination Bureaus published a report on discrimination in bars and restaurants (the "horeca" sector). In response, the Labour Party (then in opposition) published a plan to tackle the issue and called on the government to undertake measures. The government replied with a letter to Parliament in which it gave an analysis of the problem and discussed *inter alia* the possibility of situation testing. It was recommended that these tests should be carefully prepared and executed in close co-operation between the Anti-Discrimination Bureaus, the Public Prosecutors Office and the Police[197].

› *President of the Zutphen District Court rules that testing does not amount to provocation (1980)*[198]

Mr A, a member of the NGO Open Doors, and a number of other people of different ethnic backgrounds and skin colour went at different times to discotheque X over the course of an evening, with the goal of testing whether the discotheque had a discriminatory entry policy. The people from ethnic minority backgrounds were refused entrance and were told they were not members of the discotheque. Similar couples of Dutch origin were allowed in and their membership was not checked. The NGO brought the case before the Zutphen Court for a preliminary ruling.

At the request of Mr A and the NGO, the President of the Court in a preliminary decision based on civil law forbade the discotheque to refuse entry to Mr A on the grounds of his race or his skin colour or his adherence to an ethnic minority group.

The defence argued that the NGO and its members had provoked the disco into a criminal offence. The President dismissed this line of reasoning, stating that "it is by no means plausible that the plaintiffs had an interest in the respondent's refusal of services, in the pursuance of his profession, to members of the NGO Open Doors on the grounds of racial discrimination".

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196 Opinion 2005-136, available in Dutch on the Equal Treatment Commission's website, www.cgb.nl.

197 R. Holtmaat, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, the Netherlands, State of affairs up to 8 January 2007, pp. 24-25.

198 26 June 1980, *N.J.*, 1981, no. 29, as reported in R. Holtmaat quoting D. Houtzanger ("Test litigation in the Netherlands"), *ibidem*, p. 23.

› *Amsterdam Local Criminal Court rules that testing does not amount to abetting a punishable offence (1982)*[199]

T and B, both from an ethnic minority background, and H and B, both native Dutch, separately asked to enter Disco Y. T and B were refused on the pretext that they were not members. The other couple, H and B, were allowed in shortly afterwards, although they were not members of the club. T and B reported this as a criminal offence to the police, who investigated the case. The public prosecutor brought the case before the local court. T and B joined in as civil parties and requested damages.

The defence claimed that the plaintiffs had abetted a punishable offence by going to Y in order to see whether Y was discriminating, and to prove that using witnesses.

The court argued, "We reject this defence. Neither T and/or B nor the other witnesses intentionally stimulated the discrimination and in no way has it been made plausible that they had an interest in the defendant's discriminatory behaviour against T and/or B". The defendant was sentenced to a fine of €240. The plaintiffs were awarded symbolic damages of €0.50 each.

› *Amsterdam Criminal District Court validates testing carried out without supervision of the police (1992)*[200]

The Anti-discrimination Agency (ADA) carried out situation testing in a number of discotheques in Hilversum. The defence claimed that the evidence was inadmissible because the test had been carried out as part of an investigation by the ADA without the guidance and supervision of the police or public prosecutor.

The Court dismissed this defence, stating that the police had made a report after the ADA reported the offence. The argument that an investigation by an ADA should be carried out under supervision of the Public Prosecutor was held to have no basis in law.

› *The Equal Treatment Commission accepts situation testing to prove unequal treatment (1997)*[201]

The Anti-discrimination Agency (ADA) in the town of Enschede carried out situation tests at a number of discotheques. The people of ethnic minority background included in the test were denied entry, while the native Dutch were allowed in.

In the complaint submitted to the Equal Treatment Commission, the ADA stated that the groups participating in the test could be assumed to be average discotheque visitors. They

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199 4 January 1982, RR no. 36, as reported in R. Holtmaat quoting D. Houtzanger ("Test litigation in the Netherlands"), *ibidem*, pp. 23-24.

200 20 March 1992, RR no. 287, as reported in R. Holtmaat quoting D. Houtzanger ("Test litigation in the Netherlands"), *ibidem*, p. 24.

201 10 June 1997, no. 1997-65, available in Dutch on the Equal Treatment Commission's website, www.cgb.nl, as reported in R. Holtmaat quoting D. Houtzanger ("Test litigation in the Netherlands"), ibidem, p. 24.

had no relationship with the ADA ; they had no criminal past ; they could not be distinguished from the average discotheque visitor as far as hairstyle, clothing, shoes etc. were concerned ; and the persons participating had sufficient command of the Dutch language to communicate with the doorman.

The Equal Treatment Commission stated that it " is of the opinion that by means of situation testing, depending on the circumstances, proof of unequal treatment can be established ". Subsequent opinions of the Equal Treatment Commission follow the same line of thinking[202].

10. **Slovakia**

The primary consideration when using situation testing in litigation is whether such cases will be deemed admissible. Present case law in the field of access to goods and services shows that courts tend not to dismiss the action case because of " fictive rights ". However, they are inclined to dismiss claims for financial compensation, reasoning that the victims of discrimination in situation testing have to anticipate discrimination and therefore their dignity cannot have been violated.

The second consideration is the admissibility of audio recordings as a means to present evidence provided by situation testing. In civil proceedings, legal opinion concerning the admissibility of recordings of private conversations is divided. The argument against the use of recordings is found in the Civil Code (articles 11 and 12), according to which " natural persons have the right to the protection of personhood, in particular life and health, civil honour and human dignity, as well as privacy, reputation and manifestations of personal nature " (e.g. pictures, drawings, literary output, etc.). Documents of a personal nature, portraits, pictures, and video and audio recordings related to a natural person or a manifestation of their personal nature can be made or used only with that person's consent. The counter-argument is that using an audio recording exclusively in order to document an illegal action by the defendant before a court does not constitute an interference with the right of protection of personhood under article 11 of the Civil Code. Since the adoption of the new Criminal Code, effective since 1 January 2006, the situation in terms of using recordings as evidence has become even more complicated. Under a new provision in article 377, whoever breaches the confidentiality of private conversations or other manifestations of a personal nature by means of illegitimate recording and providing this recording to another person or using it in another way and thereby causing serious detriment to the rights of a person, shall be punished by imprisonment of up to two years. This provision could certainly discourage situation testing concerning recruitment, job interviews etc.

[202] Cf. developments supra. See, for instance, Opinion 1997-62, Opinion 1997-64, Opinion 1997-133, Opinion 1998-39, Opinion 2005-136, available in Dutch on the Equal Treatment Commission's website, www.cgb.nl.

Situation testing has not been used in Slovakia until recently. An NGO which fights against racial discrimination (specifically discrimination against the Roma) through the use of situation testing and lawsuits for discriminatory behaviour is the Center for Civil and Human Rights (*Poradňa pre občianske ľudské práva*) in Eastern Slovakia. Their first court cases related mostly to discrimination against the Roma in access to goods and services. The evidence brought before the courts was testimony by testers and complainants and transcripts of audio recordings made on the spot. The first court proceedings showed that judges do not reject audio recordings acquired by testing, although the defendant usually claims that this kind of evidence is illegal[203].

› *Michalovce District Court issues a timid decision on testing (2006)*[204]

In April 2005, three Roma activists from the NGO New Way (*Nova Cesta*) based in Michalovce, together with an activist from the NGO the Centre for Civil and Human Rights (*Poradňa pre občianske a ľudské práva*) based in Košice, visited a local bar in Michalovce known for its hostile behaviour towards Roma customers. This group of activists decided to test this bar's policies towards customers of Roma ethnic origin. The three Roma activists were refused access to the bar as they were not able to prove " club membership " (they were not in possession of " club cards "). The " white " activists from Poradňa who followed them a few minutes later had no problem entering the bar. The activists made an audio recording of the communication between themselves and the bar personnel. There was therefore no doubt that the incident had happened. The Roma activists lodged a petition with the Michalovce District Court against the owner of the bar in regard to the bar policy and the actions of his employees. They claimed discriminatory treatment on the ground of their ethnicity and requested that the owner of the bar be ordered to issue a written apology and pay financial compensation. As evidence they submitted the recording of the incident. The defendant did not deny that the incident had happened. However, he argued that he did not discriminate against Roma, as he usually served them in his bar. His statement was supported by several Roma witnesses who were heard by the Court.

On 31 August 2006, the Michalovce District Court decided partially in favour of the applicants. It ordered the owner to issue a written apology for discriminating against the applicants. However, the Court failed to state the specific ground of discrimination and did not accept the applicants' argument that they were discriminated against on the ground of their ethnicity. According to the Court, the bar owner was successful in proving that he served Roma guests in his bar and therefore established that he did not generally discriminate against them. It would seem that the Court failed to reverse the burden of proof as it ruled, " Conditions for entering (presentation of club cards) imposed on the customers were not imposed on the other customers. The applicants were therefore refused provision of services in the café and disco. This is a case of direct discrimination (…). The racial motive of the defendant's behaviour

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[203] See Z. Dlugosova, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Slovakia, State of affairs up to 8 January 2007, p. 19.

[204] Judgment no. 12C/139/2005, 31 August 2006, reported in the *European Anti-Discrimination Law Review*, 2007, issue 5, p. 95.

towards the applicants on 14 April 2005 was not proved during the proceeding. The defendant, through the testimony of witnesses proved that he also serves Roma. It is clear from the testimony of the usher that he was not given any order by the defendant concerning refusal of entry to Roma to the restaurant..... This means that direct discrimination has no racial ground "[205].

The Court did not grant the applicants' claim for financial compensation as in the Court's opinion, the use of situation testing could not cause any harm to the applicants as they had expected discriminatory treatment by the bar personnel. This should be viewed in the general context of discrimination cases, where Slovak courts seem reluctant to award effective compensation.

On appeal, the Košice Regional Court ruled in a legally binding opinion that ethnic discrimination had occurred. It quashed the decision and referred the case back to the first instance court.

› *Kežmarok District Court on the expectation of testers not to be served (2006)*[206]

In a testing experiment, two Roma children were denied equal service in a sweet shop. The Court decided that direct discrimination had occurred on the ground of ethnicity but did not grant financial compensation as, according to the Court, the children expected to be refused service and as a result of this expectation, there was no cause to award compensation. The judgment has been appealed.

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[205] Reported in Z. Dlugosova, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, Slovakia, State of affairs up to 8 January 2007, p. 6.

[206] Judgment no. 3C 157/05, 10 November 2006, reported in Z. Dlugosova, *ibidem*, p. 6

11. **United Kingdom**

At present, situation testing is rarely used because direct forms of discrimination that can be effectively identified are now less common. As it would be very unusual for a night club or a bar to maintain a full "colour-ban" or to exclude everyone belonging to a particular group, situation testing seems an inappropriate means to establish a clear case of direct discrimination.

Community groups do periodically use this method to put pressure on bars and night clubs that they feel are restricting entry to ethnic minority groups: often, its use may generate changes in practice that do not require litigation. Disability rights groups use situation testing to some extent to assess compliance with the Disability Discrimination Act 1995, and the Commission for Racial Equality has produced some internal guidance for its staff on the use of situation testing, including examples of where and when it could be used[207].

› *The Prague Airport case in the House of Lords (2004)*

There is little case law on the use of situation testing, and none that establishes any significant precedent. However, in a case decided on 9 December 2004, the House of Lords was willing to accept evidence obtained through situation testing as relevant and admissible testimony, along with other forms of evidence. *Regina v. Immigration Officer at Prague Airport and another, ex parte European Roma Rights Centre and others*[208], a case already mentioned, concerned an operation mounted by immigration officers at Prague Airport and designed as a response to the influx of Czech Roma into the United Kingdom. The House of Lords held that the operation was carried out in an unlawfully discriminatory manner, in that would-be travellers of Roma origin were treated less favourably than non-Roma were. The handling of the testimony and the other situation testing evidence by the Law Lords is well illustrated in Baroness Hale of Richmond's opinion:

> "92. Mr Vasil, a Czech Roma working for the ERRC (European Roma Rights Centre), observed most flights leaving for the UK on 11 days in January, 13 days in February, 14 days in March and 13 days in April 2002. He was able to identify the Roma travellers by their physical appearance, manner of dress and other details which were recognisable to him as a Roma himself. His observations showed that (…) any individual Roma was 400 times more likely to be rejected than any individual non-Roma. (…)
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> 93. Mr Vasil also observed that questioning of Roma travellers went on longer than that of non-Roma and that 80% of Roma were taken back to a secondary interview area compared with less than 1% of non-Roma. The observations of Ms Muhic-Dizdarevic, who was monitoring the operation on behalf of the Czech Helsinki Committee, were to much the same effect. (…)

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[207] B. Cohen, *Country report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC)*, United Kingdom, State of affairs up to 8 January 2007, p. 27.

[208] [2004] UKHL 55, available on the House of Lords website, www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041209/roma.pdf.

94. These general observations are borne out by the experience of the individuals whose stories were before the court. *The ERRC conducted an experiment in which three people tried to travel to the UK for a short visit. Two were young women with similar incomes, intentions and amounts of money with them, one non-Roma, Ms Dedikova, and one Roma, Ms Grundzova ; the third, Ms Polakova, was a mature professional married Roma woman working in the media.* Ms Dedikova was allowed through after only five minutes' questioning, none of which she thought intrusive or irrelevant. Her story that she was going to visit a woman friend who was also a student was accepted without further probing. Ms Grundzova was refused leave after longer questioning which she found intrusive and requests for confirmation of matters which had been taken on trust from Ms Dedikova. Ms Polakova was questioned for what seemed to her like half an hour, was then told to wait in a separate room, and was eventually given leave to enter. She felt that the interview process was very different from that undergone by the non-Roma passengers travelling at the same time as her and that the only reason she was allowed to travel was that she had told them that she was a journalist interested in the rights of the Roma people. *All three of these people were to some extent acting a part, in that their trips had been provoked and financed by the ERRC, but they were genuinely intending to pay a short visit to a friend or relatives living here. Czech television also conducted a similar experiment with a Roma man and a non-Roma woman wishing to pay a short visit to the UK.* The non-Roma was given leave while the Roma was refused after a much longer interview. *Unlike the ERRC test, we have a transcript from which one can see what it was about the Roma's answers which might have made the official suspicious even if he had not been a Roma.* But the question still remains whether a non-Roma who gave similar answers would have been treated the same. The tiny numbers of non-Roma refused may suggest otherwise "[209].

[209] My italics.

4

Part IV

NGOs, situation testing in Sweden and the courts

1. **Situation testing in Sweden – an overview**
2. **Ethnic discrimination – the law student cases**
   Kickis Bar & Café (Stockholm)
   The Honey Night Club (Gothenburg)
   Escape Night Club (Malmö)
   Settlements with night clubs
3. **Other examples of situation testing and discrimination**

Paul Lappalainen *(Swedish jur kand and US juris doctor)*
Former Head of the Swedish Government Inquiry
"The Blue and Yellow Glass House : Structural Discrimination in Sweden"

1. Situation testing in Sweden – an overview

In recent years a number of discrimination cases have been brought to the Swedish courts where situation testing in one form or another has played an important part. They have led to court awards of damages as well as some settlements.

The most well known cases will be called here the "law student cases". A number of law students, tired of what they considered to be systematic discrimination in the nightlife of Sweden's larger cities (Stockholm, Gothenburg and Malmö) and unwilling to accept the government authorities' apparent lack of power or interest in this issue, decided to take matters into their own hands. They resolved to videotape the situation in a series of tests that would clearly demonstrate the occurrence of ethnic discrimination in Sweden's night clubs.

There are other cases where situation testing has been used. In one case, a rental applicant with an immigrant background suspected that he was the target of discrimination. Two Swedish friends agreed to apply to the housing company for apartments as well. They were both given a chance to see the apartment while their "immigrant" friend was denied the same opportunity. Although this test was not decisive, it did help to prove the overall case. The case was decided in favour of the plaintiff and damages were awarded[210].

The important issue here is that the courts have not rejected the use of evidence provided through "testing" set up by individuals whether acting on their own or in groups.

Particularly in the law student cases, the testing has been well planned in advance in order to deal with any possible questions relating to the impartiality and accuracy of the testing.

Sweden has a long history of rejecting the use of "provocation" in regard to the prevention and prosecution of crime, although case law in this respect is fairly limited. A lack of clarity exists particularly because Sweden has a free evidentiary system which, as a general rule, allows the courts to take into account any relevant evidence regardless of the means used to obtain it. As a result, although the police and other authorities are in theory prohibited from using provocation to enforce criminal law, evidence produced through provocation can be accepted by the courts. A theoretical distinction has arisen indicated that while crime provocation is not allowed in Sweden, so-called evidence provocation is permissible[211].

The Ombudsman against Ethnic Discrimination (DO) has stated that it is unclear to what extent the principles and doctrine related to *crime provocation/evidence provocation* would apply to situation testing set up by other government authorities such as the DO in order to enforce laws outside the field of criminal law[212].

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210 Göteborgs tingsrätt, dom meddelad 2007-11-06 (mål nr T13077-05).

211 Hans-Gunnar Axberger, Brottsprovokation s 15, Juridiska fakulteten i Stockholm; Skriftserien nr 25, Stockholm 1989.

212 Ombudsman against ethnic discrimination, Dnr. 419-2005 ab. 13, Diskrimineringstester som bevismedel – Utredning av DO:s möjlighet att använda diskrimineringstester för att säkra bevisning i diskrimineringsärenden (Discrimination tests as evidence – inquiry into the DO's ability to use discrimination tests in order to secure evidence in discrimination cases).

Although the ability of government authorities to use situation testing is uncertain, the fact that the courts have allowed situation testing by individuals and groups as evidence of discrimination is a fairly clear indication that non-governmental organisations can use this tool.

This does not mean that NGOs should approach testing lightly. Testing can be a means to help prove discrimination in cases which at least thus far seem to have been almost impossible to prove. If tests are well planned and executed, they should have substantial value as evidence in the courts. They can also be important for raising awareness in a society where discrimination is usually denied.

The following sections will be used to briefly analyse and summarise a number of Swedish cases.

2. Ethnic discrimination – the law student cases

The most well known cases of situation testing in Sweden were initiated by a group of law students who videotaped their entry into various night clubs and restaurants in Stockholm, Malmö and Gothenburg. They divided themselves into groups of three with one group containing people considered to look typically Swedish and a second group of people assumed to look typically non-Swedish. It is important to note that the tests required the participants to be similar in all other respects: they were similarly well dressed, behaved in a similarly respectful manner, spoke Swedish well and had not been drinking. The idea was that the only distinguishing factor between the groups, as far as possible, was to be assumptions made about their ethnic background based on external factors such as skin, hair and eye colour.

The work of these law students led to a number of complaints being filed, many of which have resulted in a settlement or a court award of damages.

› *Kickis Bar & Café (Stockholm)*

In a judgement issued on 2 March 2007, Huddinge District Court[213] held that the plaintiffs had been discriminated against by the Stockholm night club known as Kickis Bar & Café. A total of SEK 240,000 was awarded in damages. The judgment was appealed by Kickis but the appeal was withdrawn due to a settlement reached with the plaintiffs.

Six men of "foreign" appearance were denied entry to the club while their friends of "Swedish" appearance were allowed in. A complaint was filed with the DO, who sued the night club on behalf of the plaintiffs. In all 12 young men, divided into four groups, participated. There were two "Swedish" groups and two "foreign" groups. All six of the men with lighter skin and hair colour were admitted while the six men with darker skin and hair colour were denied entry.

[213] Huddinge tingsrätt, dom meddelad 2007-03-02 (mål nr T2688-05).

The door guards told the people refused entry that the club was full and that only members were being admitted. The guards said nothing to the others about the club being full or the need for a membership card.

The entire process was videotaped. The videotape was allowed as supporting evidence in regard to discrimination.

In its defence, the night club argued that they were not allowed in as the guard felt that they were behaving in an odd manner. Furthermore, the club asserted that nothing had occurred that should give the plaintiffs the right to damages as they were not trying to enter the club in order to enjoy themselves. Instead the club asserted that they were hoping to be rejected so that they could file a claim for damages. Since their intent was financial, none of them suffered any damage.

The Court determined that discrimination had occurred and pointed out that nothing had been proved in the case concerning the financial intent or any other difficulty relating to the intent of the plaintiffs. The Court also stated that even if this had been proven, it would not have affected the finding of discrimination. Damages were awarded accordingly.

› *The Honey Night Club (Gothenburg)*

In a judgement issued on 14 December 2006[214], Gothenburg District Court held that the plaintiffs had been discriminated against by the Honey night club. The Court awarded a total of SEK 90,000 (€10,000) in damages to the six plaintiffs.

The six young men who were denied entry to Honey were part of the larger group of law students mentioned above who in November 2004 had set out to test whether or not discrimination would occur when they tried to enter various leisure establishments. In this instance, six of their friends who did not look "foreign" were allowed to enter and the incident was videotaped.

Complaints were submitted to the Ombudsman against Ethnic Discrimination (DO), who sued the night club. Shortly before the trial started, the club admitted that the men had been subjected to ethnic discrimination.

› *Escape Night Club (Malmö)*

In a judgment issued on 4 May 2006, Malmö District Court[215] held that the plaintiffs had been discriminated against by the Escape night club. The plaintiffs were awarded SEK 15,000 (€1,600) each.

The facts of this case are similar to those in the Honey and Kickis cases above. The groups of men with a "foreign" appearance were denied entry while the groups containing their friends with a "Swedish" appearance were allowed in without a problem. The reasons given to the

[214] Göteborgs tingsrätt, dom meddelad 2006-12-14 (mål nr T 4658-05).

[215] Malmö tingsrätt, dom meddelad 2006-05-04 (mål nr T 3562-05).

" foreign " groups were that they lacked VIP-cards and/or they were not on the guest list. The events of the night were videotaped. A complaint was filed with the DO, who then sued the club.

Escape argued that the people allowed in were mistakenly thought to be members of a group that was expected. Escape also argued that many of its guests as well as staff had a foreign background. Furthermore, it asserted that the participants in the case were not out for a normal night, but that they had planned this discrimination testing in advance, they wanted to test their theory and were thus mentally prepared to be denied entry. This in turn meant that they had not suffered any personal injury.

The Court pointed out in its judgment that the fact that the case was a result of discrimination testing was not a reason to assume that no discrimination or injury had occurred. The club was therefore ordered to pay a total of SEK 60,000 (€6,500) to the four people who were denied entry.

The judgment was appealed by both the DO and Escape. The Court of Appeal confirmed the judgment of the District Court[216].

Both the DO and Escape have appealed the case to the Swedish Supreme Court.

› *Settlements with night clubs*

In a number of other cases, the situation testing set up by the law students has led to settlements with a variety of night clubs in Stockholm, Gothenburg and Malmö. Settlements have usually consisted of an admission that ethnic discrimination has taken place, an apology, damages and an agreement to actively work to counteract discrimination[217].

It should also be pointed out that there are a number of similar cases still pending.

3. Other examples of situation testing and discrimination

In a judgement issued on 4 May 2006[218], Gothenburg District Court held that the plaintiff had been discriminated against by the Västerstaden AB housing company. Västerstaden was ordered to pay SEK 40, 000 (€4,000) in damages.

A man with an immigrant background was refused the opportunity to see several apartments that were advertised as vacant. After a while he asked two of his Swedish colleagues to apply for the apartments in order to see if they were still available. Both Swedish colleagues were

[216] Hovrätten över Skåne och Blekinge, dom meddelad 2007-04-24 (mål nr 1358-06).

[217] See e.g. DO Dnr 1167-2004 (settlement with Berzelii Bar in Stockholm), Dnr 800-2005, 801-2005, 802-2004, 803-2005, 804-2005 (settlement with the Crown Night Club in Malmö), Dnr 1105-2004 (settlement with the Étage restaurant in Malmö) and Dnr 1135-2004 (settlement with the Lounge restaurant in Gothenburg).

[218] Göteborgs tingsrätt, dom meddelad 2007-11-06 (mål nr T13077-05).

offered a viewing. A complaint was thereafter submitted to the DO, who took the case to the District Court on behalf of the complainant.

The use of the test with the colleagues was not by itself, according to the Court, sufficient to shift the burden of proof. However, it can be assumed that this evidence combined with other factors, particularly the fact that the company said it wanted a "suitable" mix of tenants, was helpful.

Concluding comments on situation testing

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"The Blue and Yellow Glass House : Structural Discrimination in Sweden"

The importance of the role that targets of discrimination themselves play in promoting greater equality of rights and opportunities cannot be sufficiently emphasised. They have to be part of the process of change, if the change is to be sustainable. This is regardless of whether the issue at hand involves race or ethnicity, gender, disability or sexual orientation. When there is only a top down perspective, the measures will only work to the extent that policymakers choose to pay attention. The use of situation testing can in various ways contribute to the empowerment of the targets of discrimination. Sufficiently empowered, they can in turn help to ensure that the promises of policymakers are actually turned into action. My hope is that this book will contribute to this process.

A few years ago I headed a Swedish government inquiry entitled The Blue and Yellow Glass House: Structural Discrimination in Sweden[219], the purpose of which was to examine structural discrimination/institutional racism relating to ethnicity and religion. Beyond that, I was to propose anti-discrimination measures to the government. One of the inquiry's overriding conclusions was that there was deep denial of ethnic discrimination among those with power in society, whether in politics, among employers, within unions or within the research community.

I proposed situation testing as at least a partial answer to this situation, suggesting it be used in three basic ways.

Situation testing was needed as a research method. This method does little to actually explain the reasons behind discrimination but it is one of the few methods which makes it hard for policymakers to hide behind the usual assertion that racism and discrimination are problems elsewhere but not in Sweden.

Situation testing was needed for quality control. The idea here was that testing could be used to assess the need for anti-discrimination policies as well the effectiveness of the policies in place. The aim was to improve the proactive work being done. As a rule public bodies at least assume that they act and function in a non-discriminatory manner, and many have specific policies. However, they seldom take the time to test those policies. I thought they could test themselves, possibly through the use of outside consultants and/or NGOs. The objective was not to point the finger at individuals, but to ensure greater insight about both problem areas and solutions available.

Situation testing was needed as a means for proving discrimination cases in court, and various anti-discrimination bodies around Europe had been using it. I pointed out that enforcement of anti-discrimination laws could and should be improved through the use of this method. It was difficult proving discrimination cases to the satisfaction of the courts so this method would provide, if not irrefutable evidence, at least evidence that would make it harder for courts to refuse to shift the burden of proof.

When examining the potential of testing it was interesting to note the history of situation testing as a research method in Sweden. At the same time as the ILO was carrying out situation testing concerning working life in a number of other European countries in the

[219] Title in Swedish, *Det blågula glashuset: strukturell diskriminering i Sverige* (SOU 2005: 56).

1990s, Swedish experts and government officials concluded its use would be unethical. Enormously creative legal and social arguments were put forward concerning the potential liability of the researchers and the damage that could be suffered by the testers involved. These pronouncements in effect conveyed the message that such research would be considered unethical, thus in practice preventing it for over 10 years. It should be pointed out that none of the research done in other parts of Europe has run into the kinds of problems discussed in Sweden.

I concluded that it was simply easier to prevent such research rather than face the idea that ethnic discrimination was a problem even in Sweden. If policymakers had to face the fact that discrimination was a problem, they would have to act to change the actions and patterns of behaviour common to employers and unions. In most countries, these groups constitute enormously powerful interests. This is particularly true in Sweden, especially when they are acting with a common goal, such as preventing or delaying the adoption of legislation.

In parallel but separately to my inquiry, a group of young men took matters into their own hands regarding racism and discrimination in night life, one of the fields where young people are first faced with exclusion.

Since the 1970s when the ban on unlawful discrimination by merchants was introduced into the criminal code, very few convictions had been obtained. Essentially, the only way to obtain a conviction was if the accused confessed in one form or another – in other words if they stated that "I hate those people (Africans, Muslims, Roma…) and that is why I did not let them in."

In 2003 a new civil law covering ethnic discrimination by merchants was introduced. At least initially, not many cases were brought.

The law students mentioned above decided to take action after a night out when they had wanted to test discrimination at one particular club. After being denied entry there, they moved on to another place where entry was again denied. After this night out, they decided to test whether or not ethnicity mattered in Swedish nightlife generally. This in turn resulted in a series of complaints and cases that put the issue in full public view where it became very difficult for those involved to deny the occurrence of discrimination. In other words, this was also a way of testing the acceptance of ethnic discrimination as part of Swedish society.

They set up Swedish-looking teams and non-Swedish-looking teams. They were sent into restaurants and night clubs in Malmö, Stockholm and Gothenburg. The teams, other than in their hair and skin colour, were to resemble each other as closely as possible in regard to language, clothing etc. They were also careful not to move through town in large groups as that by itself can arouse suspicion. Another important factor was that the tests were videotaped so that the actual occurrences could later be both seen and heard. People who were not part of the test groups carried out the videotaping.

These young men have been hailed as heroes by many, especially the targets of discrimination. Many others, particularly the restaurants and night clubs, have tried to claim that they were only seeking personal gain.

While I think it is important that testing is used with care, as was done in this case, the path paved by these young men is important in many ways.

They did not accept, as many eventually do, that ethnic discrimination exists and there is little that can be done about it. While Sweden has for a long time denied that discrimination is a problem, immigrants and their children (particularly those with hair and skin colour that differs from the norm) have known of the problem and have either decided that nothing can be done or even worse blamed themselves. Many develop a distrust of (for example) the legal system as it is seen to work for the Swedes, and not for "us"[220].

Instead, these young men decided to take the system at its word. They helped to implement the law and helped courts and policymakers to live up to its standards. They helped ensure that national and local politicians could no longer deny the problem in larger cities. And who knows, maybe they can help to convince others that the system can work, at least when the targets of discrimination are part of the process of change.

If civil society actors representing the targets of discrimination become involved in various types of situation testing, it can be a means for them to develop their own expertise. This need not be limited to bringing and helping to win or settle cases, it could also open opportunities for situation testing to be used in research and awareness raising. Ways could also be found for civil society actors to assist employers, businesses and the public sector by providing quality controls for their equality practices and policies.

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[220] The reaction to discrimination was described by one of the key law students behind the testing, Homan Hamzeh, in his Master's thesis entitled *Praktikprövning: Tre ljusa killar är ett sällskap – tre mörka killar ett gäng* (Situation testing: Three blonde guys are a group – three darker guys a gang), Stockholms universitet HT 2005. More generally, ethnic discrimination as a part of the legal system was found to be a major issue in a report recently produced, at the request of the government, by the Swedish National Council for the Prevention of Crime (Brå) – Brå report No 2008: 4 *Diskriminering i rättsprocessen: Om missgynnande av personer med utländsk bakgrund* (English translation: Discrimination in the criminal justice process in Sweden).

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Migration Policy Group (MPG)

The Migration Policy Group is an independent European organisation committed to contributing to lasting and positive change resulting in open and inclusive societies in which all members have equal rights, responsibilities and opportunities in developing the economic, social and civic life of Europe's diverse societies.

MPG stimulates and shapes the terms of well-informed European policy debate, cooperation and action to achieve this goal in the three programme areas of Migration & Mobility; Anti-discrimination & Equality; and Diversity & Integration.

MPG's main activities include: the setting of high equality standards for European and national policies and law; the monitoring of their implementation through exchange of information and analysis; the capacity building of governmental and non-governmental actors through trainings and the production of manuals; the establishment and management of networks of experts, policy-makers and practitioners in the public and private sector, with examples including the network of legal experts on anti-discrimination; the business forum on supplier diversity and the migration dialogue.

www.migpolgroup.org

The Centre for Equal Rights

The Centre for Equal Rights in Stockholm is a non-governmental organisation founded in 2003. The objective of the organisation is to prevent all forms of discrimination in society based on ethnic origin, religion or other belief, sex, disability, sexual orientation and age. The Centre's work focuses on improving the understanding of issues related to discrimination, exerting influence towards the development of appropriate and effective anti-discrimination legislation and policies, as well as promoting the values underlying the fight against discrimination.

The Centre for Equal Rights is managed by a legal entity, the Forum for Equal Rights, which represents several various non-governmental organisations in Sweden.

The Centre's core activities include offering legal consultations free of charge to individuals regarding issues of discrimination, co-operating with the Equality Ombudsman in Sweden in individual discrimination cases, as well as raising awareness about discrimination through seminars, lectures and courses.

www.likarattigheter.nu