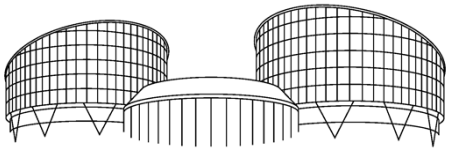

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BASU v. GERMANY

(Application no. 215/19)

JUDGMENT

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

STRASBOURG

18 October 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Basu v. Germany,

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

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Darian Pavli
Anja Seibert-Fohr,
Andreas Zünd,
Frédéric Krenc, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

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

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

the parties' observations;

Having deliberated in private on 20 September 2022,

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

INTRODUCTION

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

THE FACTS

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

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

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

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

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

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

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

action was inadmissible for lack of a legitimate interest in a decision on the lawfulness of the identity check, the court did not need to decide whether the applicant had been treated in a discriminatory manner by that check.

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

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LEGAL FRAMEWORK

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

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

II. INTERNATIONAL LEGAL FRAMEWORK AND PRACTICE

A. United Nations Human Rights Committee

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

> "7.2 The Committee must decide whether being subjected to an identity check by the police means that the author suffered racial discrimination. The Committee considers that identity checks carried out for public security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the

persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.

...

7.4 In the present case, it can be inferred from the file that the identity check in question was of a general nature. The author alleges that no one else in her immediate vicinity had their identity checked and that the police officer who stopped and questioned her referred to her physical features in order to explain why she, and no one else in the vicinity, was being asked to show her identity papers. These claims were not refuted by the administrative and judicial bodies before which the author submitted her case, or in the proceedings before the Committee. In the circumstances, the Committee can only conclude that the author was singled out for the identity check in question solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct. Furthermore, the Committee recalls its jurisprudence that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. In the case under consideration, the Committee is of the view that the criteria of reasonableness and objectivity were not met ..."

B. European Commission against Racism and Intolerance

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

"1. ... For the purposes of this Recommendation, racial profiling shall mean:

The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities;"

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

"9. To ensure effective investigations into alleged cases of racial discrimination or racially-motivated misconduct by the police and ensure as necessary that the perpetrators of these acts are adequately punished;

10. To provide for a body, independent of the police and prosecution authorities, entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police; ..."

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

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

deterioration of relations between these groups and the police, due to loss of trust in the latter ..."

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

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

III. EUROPEAN UNION LAW

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

Recital 21

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

Article 8
Burden of proof

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

(...)"

THE LAW

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

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

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

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

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

A. Admissibility

1. The parties' submissions

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

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

2. The Court's assessment

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

22. As to whether an identity check by the police falls within the scope of the private life of the person subjected to that check, the former Commission considered that the obligation to carry an identity card and to show it to the police whenever requested to do so did not as such, in the absence of any special circumstances, constitute an interference in a person's private life (see *Reyntjens v. Belgium*, no. 16810/90, Commission decision of 9 September 1992, Decisions and Reports 73, p. 152). The Court has found that the use of coercive powers conferred by legislation to require an individual to submit to an identity check and a detailed search of his person,

his clothing and his personal belongings amounted to an interference with the right to respect for private life (see *Gillan and Quinton*, cited above, § 63, and *Vig v. Hungary*, no. 59648/13, § 49, 14 January 2021). The public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment (see *Gillan and Quinton*, cited above, § 63).

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

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

25. Having regard to these principles, the Court considers that not every identity check of a person belonging to an ethnic minority attains the necessary threshold of severity so as to fall within the ambit of the right to respect for that person's private life. That threshold is only attained if the person concerned has an arguable claim that he or she may have been targeted on account of specific physical or ethnic characteristics. Such an arguable claim may notably exist where the person concerned submitted that he or she (or persons having the same characteristics) had been the only person(s) subjected to a check and where no other grounds for the check were apparent or where any explanations of the officers carrying out the check disclose specific physical or ethnic motives for the check. The Court further observes in this regard that the public nature of the check may have an effect on a person's reputation (see paragraph 23 above) and self-respect.

26. The Court notes that the applicant had been subjected to an identity check by the police in public, on a train. In the applicant's submission, that check had only been carried out because of his dark skin colour and thus on

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

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

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

B. Merits

1. The parties' submissions

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

30. The Government accepted that, assuming that there had been an interference with Article 8, the State had been under a duty to investigate the allegations of racial profiling in view of the serious consequences for the persons concerned and the fact that only the State had the ability to establish the relevant facts. However, this duty had been complied with by the Federal Police. The Government submitted that the Pirna Office of the Federal Police, that is the superior police authority to the Dresden Office of the Federal Police, for which the police officer P., who had conducted the checks,

worked, had carried out internal investigations into the applicant's allegations. P. had stated in the context of those investigations that the applicant had not been the only person whose identity had been checked during the police's randomised identity check of several passengers on the train. Furthermore, having questioned P. and having investigated all the police operations between January 2011 and June 2013 in which P. had participated, and the training courses he had followed, the investigations had not found any indications of racist motivation on the part of P. An examination by an independent authority, the courts, had not been carried out, but the administrative courts had given sufficient reasons for considering the applicant's action inadmissible for lack of a legitimate interest.

2. The Court's assessment

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

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

33. The Court reiterates that it has recognised that a duty of the authorities to investigate possible racist attitudes may be implicit in their responsibilities under Article 14 of the Convention in certain circumstances. It has notably found in the context of alleged violations of Article 14 taken in conjunction with Article 3 that State authorities have an obligation to take all reasonable

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

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

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

36. In determining whether, in the present case, the State authorities complied with their obligation to take all reasonable measures to identify whether there were racist motives for the identity check, the Court observes that in the Government's submission, the superior police authority to the Dresden Office of the Federal Police, for which the police officer P., who had conducted the check, worked, had carried out an internal investigation into the incident. However, in view of the hierarchical and institutional connections between the investigating authority and the State agent which carried out the act in question, the investigations in this regard cannot be considered as independent (compare paragraph 33 above).

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

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

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

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

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

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

other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

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

III. OTHER ALLEGED VIOLATION OF THE CONVENTION

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

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

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

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 14 taken in conjunction with Article 8 of the Convention and under Article 13 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 13 of the Convention.

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

Milan Blaško Registrar	Georges Ravarani President

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

G.R.
M.B.

PARTLY DISSENTING OPINION OF JUDGE PAVLI

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

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

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

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

4. This conclusion begs the following question: in the presence of an arguable claim of *direct* discrimination on racial or ethnic grounds by a State agent, why did the majority not shift the burden onto the respondent to prove that the differentiated treatment was in fact in compliance with Article 14? I find that the judgment provides no persuasive answer to this question in effectively dismissing the applicant's claim that there has been a substantive violation of the anti-discrimination provision, in addition to the procedural violation. After all, it is a central tenet of our Article 14 jurisprudence that, as

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

a rule, it is for the applicant to show a difference in treatment and for the Government to show that it was justified (see *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 57, 13 December 2015; *D.H. and Others v. the Czech Republic*, no. 57325/00, § 177, 13 November 2007; and *Di Trizio v. Switzerland*, no. 7186/09, § 84, 2 February 2016). It is the very function and purpose of rules on the allocation of the burden of proof to allow the Court to reach substantive conclusions in the absence of complete certainty about the facts of the case or other relevant considerations. Even the respondent Government have conceded that "only the State had the ability to establish the relevant facts" (see paragraph 30 of the judgment). It is therefore not necessary or appropriate to regard the investigative failures at the national level as a factor that would objectively prevent the Court from reaching conclusions on the substantive component. Among other reasons, this may provide perverse incentives to any national authorities which may not be inclined to "lift the lid" on either isolated or, worse still, systemic incidents of racial profiling by State agents. It also makes it nigh impossible for victims of racial profiling to succeed in a claim of a substantive violation in such circumstances.

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

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

7. The present case, however, sits in a very different context. Firstly, unlike unjustified police violence, which is illegal and can be motivated by many different factors, an identity check of train passengers is presumably

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

8. Finally, the refusal to shift the burden of proof in cases of an arguable claim of *direct* discrimination by State agents would create some rather paradoxical effects – considering that the Court has often agreed to do so in situations where applicants have put forward a presumption of *indirect* discrimination, e.g. by providing evidence of an apparently neutral practice that has produced disproportionately harmful effects on a particular group of people (see *Hoogendijk v. the Netherlands* (dec.), no. 58641/00, 6 January 2005; *D.H. and Others*, cited above; and *Di Trizio*, cited above). In such circumstances, the Government are invited to rebut that presumption by pointing to objective factors underlying the practice or policy. I cannot see why applicants such as Mr Basu, claiming to be victims of direct discrimination in a police check, ought to be placed in a less favourable position.

B. The general national context and legal framework

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

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

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

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

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

C. A substantive violation in the present case

13. In view of the above submissions, it is my position that the Court should have proceeded to consider whether there had been a substantive violation of Article 14, read in conjunction with Article 8, by assessing whether the respondent Government had been able to rebut the presumption

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

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

that the applicant had been subjected to discriminatory treatment due to his skin colour. Before turning to the Government's arguments in this regard, it is necessary to make two preliminary points.

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

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

16. Turning now to the facts of the present case, I have already noted the unanimous finding that the applicant submitted an arguable claim that he had

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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