

EU ANTI-DISCRIMINATION LAW IN PRACTICE

1. **BURDEN-SHIFTING IN THE FACE OF THE PRESUMPTION OF DISCRIMINATION AND THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE**
2. **ACCESS TO EVIDENCE AND DISCLOSURE OF INFORMATION**

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Structure of the session

- **THE REVERSAL OF THE *BURDEN OF PROOF (BURDEN-SHIFTING)* IN THE FACE OF THE PRESUMPTION OF DISCRIMINATION AND CASE LAW OF THE EUROPEAN COURT OF JUSTICE**
- **ACCESS TO EVIDENCE AND DISCLOSURE OF INFORMATION**



1.1 REVERSAL OF THE BURDEN OF PROOF

i) European legislation

- Paragraph 11 of General Policy Recommendation No. 7 on National Legislation to Combat Racism and Discrimination: *Legislation should provide that, in cases where persons who consider that they have been aggrieved submit, before a court or other competent authority, facts suggesting the existence of acts of direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination.*

- Articles 8 and 21 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin:

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 by failure to apply the principle of equal treatment 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.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to claimants.

3. Paragraph 1 shall not apply to criminal proceedings.

4. Paragraphs 1, 2 and 3 shall also apply to proceedings initiated pursuant to Article 7(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case. (see paragraph 41 of the judgment)

ii) Recently consolidated case law, among others:

A) **D.H and Others v. Czech Republic No. 57325/00 (§ 177) Timishev v. Russia Nos. 55762/00 and 5597/00 § 57: AFFIRMATI INCUMBIT PROBATIO** as a general rule which is only raised when a difference in treatment has been demonstrated so that the negative test then falls on the Government.

1.2 REVERSAL OF THE BURDEN OF PROOF

B) REQUIREMENT OF A PRIOR INFERENCE JUDGMENT: the presumption of discrimination. According to **D.H. and Others v. the Czech Republic (§ 178)** *Existence of sufficiently strong, clear and concordant unrefuted inferences.* According to the case law **Muhammad v. Spain (no. 34085/17) and Basu v. Germany (no. 215/19) following the doctrine established in Nachova and Others v. Bulgaria ([GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII), Stoica v. Romania (no. 42722/02 § 126, 4 March 2008).**

C) The doctrine is confirmed by the decisions **Mohammad v. Spain (n° 34085/15) and Basu v. Germany (215/19)** which is the same as the one followed in cases of domestic violence (Istanbul Convention): **THE REVERSE OF THE BURDEN OF PROOF REQUIRES A MINIMUM PRIOR PROVING ACTIVITY ON THE PART OF THE VICTIM (vid Volodina v. Russia n° 4126/17, párag. 177, of 9 July 2019).**

D) The reversal of the burden of proof only upon proof of the presumption of discrimination is considered to be an aspect of the **principle of effectiveness** which is a principle of application also for the interpretation of the ECHR. In the words of the Court, it is a matter of converting the rules on practical and effective evidence. Otherwise, the illusory and theoretical interpretation could lead to absurdity: without the requirement of proof of the presumption of discrimination, the task of the authorities would become extremely difficult as it would mean that at every step the absence of discrimination would have to be proved.

1.3 REVERSAL OF THE BURDEN OF PROOF

In particular, the recent ECHR judgment in Muhammad v. Spain (no. 34085/17) of 06/03/2023:

I.- Facts:

- Stopped in the streets of Barcelona and asked to identify themselves because of their skin colour. They are arrested. The police report states that the arrest took place simply to take them to the police station for a better identification (foreseen in article 33 of the Law on Citizen Security).
- Initiation of proceedings for illegal detention, which were shelved and later reopened after SOS Racisme Catalunya (NGO) joined the proceedings. After a series of investigative measures, the proceedings were finally closed and finalised without further appeals being lodged.
- At the same time, the corresponding administrative procedure for a *State liability claim* was initiated, which was finally closed due to **lack of evidence, as it was considered that it was the claimant who was responsible for proving the facts**. Also, due to the fact that his statement was completely different from the one given by the police (**lack of proof of direct or indirect discrimination**). The administrative decision was challenged in court, with the same result: dismissal.

1.3 REVERSAL OF THE BURDEN OF PROOF

I.- Legal foundations:

- The presumption of discrimination was not rebutted and it was therefore the Government's burden to prove that there had been NO discrimination.
- The fact that the criminal proceedings were closed was decisive evidence for the administrative proceedings. The only evidence of the presumption of discrimination was his own statement and that of his friend which was not considered credible.
- The possibility of the burden of proof becoming a devil's proof. Difficulty of proving negative facts
- The Court considers that the fact that no one else belonging to the majority Caucasian population was stopped for identification cannot, per se, be regarded as a presumption necessary to reverse the burden of proof. There is no evidence that the police were carrying out identity checks motivated by animosity against citizens who shared the applicant's ethnicity. It was his attitude that led to his arrest for identification at the police station.
- It cannot be considered that non-binding reports on generalised State practices against HR cannot be considered prima facie evidence of the presumption of discrimination if they are not substantiated and meaningful (as indicated in H.R. v. Czech Republic, para. 188). Although several organisations have expressed their dismay about this type of practices, this cannot, simply, establish a presumption of discrimination.

2. ACCESS TO THE TESTS

- I. **The doctrine of reversal of the burden of proof can only be effective if claimants have access to the evidence and information relevant to their case.** Access to evidence is one of the most relevant key elements for effectiveness (principle of effectiveness art. 47 Charter of Fundamental Rights Spain). The absence of an effective right of access to evidence is a violation of the substantive duties of States.
 - ✓ ***The "Kelly" case (Kelly and others v The United Kingdom)***: claimed to be a victim of discrimination and requested that other documents relating to different individuals who had applied to enrol on the same course be brought into the proceedings. His application was dismissed without first referring a **question to the CJEU for a preliminary ruling**, asking whether the inadmissibility of the evidence was contrary to the doctrine of the reversal of the burden of proof. In response, the CJEU ruled that ***the doctrine of the reversal of the burden of proof does not establish a prerogative to have access to any document but that, nevertheless, the limitation of this right could be considered a breach of the negative obligation of non-discrimination.*** The essential question is whether the defendant's refusal to allow the plaintiff to have access to evidence restricts him sufficiently so that he cannot even establish the "necessary facts".
 - ✓ ***The case of Meister v Speech Design Carrier System***: In this case, in which an applicant for a job requested information about whether another individual had been selected and under what criteria this had occurred, the CJEU found that the Employment Discrimination Directive did not, however, state that **the failure to produce the documents could raise an inference about the existence of a presumption of discrimination and, therefore, reverse the burden of proof.**

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Thank you / Danke schön / Muchas gracias and enjoy
beautiful Barcelona!

