

## ZESHAN MUHAMMAD V. SPAIN

### EUROPEAN COURT OF HUMAN RIGHTS

## ZESHAN MUHAMMAD V. SPAIN

### APPLICATION

#### INTRODUCTION

1. This case concerns racial profiling by the police. The applicant was stopped by the police who explained that they were doing so “because you are black”. Spain’s Public Security Law, which does not require reasonable suspicion for police stops, and the Constitutional Court’s jurisprudence, enabled the discrimination to take place.

#### STATEMENT OF FACTS

##### A. The identity check

2. The applicant, Mr. Zeshan Muhammad, a Pakistani citizen, has resided in Spain since 2005. He speaks Spanish and Catalan fluently, and holds a long-term residence permit that allows him to live and work in Spain indefinitely, under the same conditions as if he were a Spanish national.
3. On 29 May 2013, at approximately 15:30, Mr. Muhammad and his friend Mr. Kamran Ali, also of Pakistani origin, were strolling through a busy street in Barcelona on their way home when two officers in a National Police car stopped alongside them. One of the officers (Officer 1) rolled down the car window and asked for the identity documents issued by the Spanish authorities to resident foreigners (*Número de Identificación de Extranjeros* or “NIE”). Both of them immediately produced their identity documents. After handing his document over, Mr. Muhammad respectfully asked Officer 1 for the reasons of the identity check. Officer 1 referred to the colour of Mr. Muhammad’s skin to explain the reasons behind the identity check, using racially charged language. Although there were numerous members of the majority Caucasian population in the immediate vicinity, no one else was stopped or checked. [Doc. 37, Mr. Muhammad’s statement, para. 1-3; Doc. 19, Mr. Kamran Ali’s sworn statement as eyewitness, para. 1-3].
4. The literal terms of the conversation after Mr. Muhammad’s question were as follows:

Officer 1: “No le voy a pedir la identificación a un alemán” (I am not going to ask for his identity document to a German person)”.

Mr. Muhammad: “Es por mi apariencia y el color de mi piel?” (Is it because of my physical appearance and the colour of my skin?).

Officer 1: “Sí, porque eres negro y punto” (Yes, it is because you are black, and that’s it). [Doc. 37, para. 3; Doc. 19, para. 3].

5. Immediately after Officer 1 admitted that the reason for the stop was the colour of Mr. Muhammad's skin, the latter respectfully said to the officer that it was not necessary to abuse his authority. Then, Officer 1 got out of the car, and in front of a few dozen people in the immediate vicinity, slapped Mr. Muhammad on his face, and pushed him inside the car while saying he was being arrested "por listo" (for being smart). [Doc. 37, para. 3; Doc.19, para. 4]. Officer 1 told Mr. Kamran Ali that he could leave. Then, the police car drove away with Mr. Muhammad. [Doc. 19, para. 4].
6. Once in the car, and on the way to the National Police station at Barcelona harbour to which Mr. Muhammad was taken (*Puesto Fronterizo Barcelona, Puerto*), Officer 1 threatened Mr. Muhammad with potential negative consequences when renewing his residency permit and went on insulting him using markedly racist expressions, such as "mono" (monkey). At the police station a third police officer referred to the applicant as a "cerdo" (pig). [Doc. 37, para. 4-5].
7. At the police station the police officers registered Mr. Muhammad's detention and gave him a notice of offence for his "negativa a identificarse, falta de respeto a la autoridad y actitud chulesca" (refusal to identify, lack of respect towards the authority and cocky attitude). After approximately an hour or an hour and a half, he was released, and the same two police officers who had stopped Mr. Muhammad drove him to a bus stop. [Doc. 37, para. 5].

#### **B. Immediate and successive attempts to seek a remedy**

8. In the evening of 29 May 2013, immediately after being released from the National Police station, Mr. Muhammad called Mr. Kamran Ali and they went together to two different Catalan Police stations (*Mossos d'Esquadra*), in Plaza de España and Santa Coloma de Gramanet, to lodge a complaint against the National Police officers for their misconduct. Police officers at both regional police stations refused to receive Mr. Muhammad's complaint arguing that they do not accept complaints against police officers and referring him to the tribunals. [Doc. 37, para.6; Doc. 19, para. 5].
9. On 30 May 2013, the day following the identity check, Mr. Muhammad lodged a criminal complaint against the police officers with Barcelona's investigating judge on duty [Doc. 15]. The pre-trial criminal proceedings related to the unlawful detention and did not include the discriminatory check because it is not a crime. The investigating judge eventually dismissed the pre-trial criminal proceedings and an appeal chamber upheld his decision.
10. On 15 July 2013, the human rights NGO SOS Racisme Catalunya filed a complaint on Mr. Muhammad's behalf with each of the Catalan police stations mentioned above challenging their refusal to register Mr. Muhammad's complaint against the National Police for their misconduct [Doc. 16 and 17]. The police acknowledged receipt of the complaint, but deferred to the other proceedings. [Doc. 18].

### C. Administrative complaint to Ministry of Interior

11. On 7 April 2014, Mr. Muhammad filed an administrative claim for damages (*reclamacion por responsabilidad patrimonial del Estado*) with the Ministry of Interior (“the Ministry”) concerning the discriminatory identity check [Doc. 21]. Such a check is not defined by the law as a criminal offence; thus, it was excluded from the criminal proceedings conducted by Barcelona’s investigating judge (see para. 9 above). Therefore, as accepted by the Ministry, the subject matter of the administrative proceedings was limited to the discriminatory identity check. [Doc. 22, 24, 25].
12. In his claim, Mr. Muhammad requested from the authorities an acknowledgement that the identity stop he faced was discriminatory and unlawful. He also requested reparations in the form of compensation for moral damages, and a public apology to be published in order to restore his dignity. To substantiate his claim, Mr. Muhammad submitted Mr. Kamran Ali’s sworn statement as eyewitness of the discriminatory identity check and of Mr. Muhammad’s attempts to file a complaint at the police stations [Doc. 19], Mr. Muhammad’s documented immediate and subsequent efforts to seek a remedy [Doc. 15, 16, 17], statistical expert reports indicating indirect discrimination [Doc. 11 and 20], international, regional and national human rights bodies’ reports concluding that Spanish police identity checks amounting to racial profiling were a pervasive and widespread practice [Doc. 1, additional submissions, para. 10-17], and NGO reports corroborating the statistical conclusions. [Doc. 4-8].
13. On 6 November 2014, the Ministry dismissed the claim. Ignoring the abundant corroborating evidence submitted by Mr. Muhammad, the Ministry’s resolution concluded that his claim was supported only by his testimony, which differed from the police authorities. [Doc. 28]. The Ministry’s decision referred to and was based on:
  - a) The Barcelona National Police Headquarters’ report No. 1895 (*Jefatura Superior de Policia*) [Doc. 23]. In turn, this report is based on, and literally transcribes, a report prepared by the chief of police (*Comisario Principal*) for Barcelona’s border crossing point station (*Puesto Fronterizo de Barcelona*) (“CP report”), which, in turn, relies exclusively on the report (*minuta*) prepared by the two unnamed officers in question (officers with police identity cards No. 26.680 and 89.315, respectively) [Doc. 14]. The chief of police who drafted the CP report was the superior of the two unnamed officers and served at the same police station (*Puesto Fronterizo de Barcelona*). The CP report reproduces the unnamed officers’ report word for word, alleging that the identity check was motivated by Mr. Muhammad’s “provocativa” (provocative), “desafiante” (defiant), and “chulesca” (cocky) attitude against them as they were driving by and his subsequent refusal to show his ID card. [Doc. 23].
  - b) A report prepared by a lawyer attached to the National Police Headquarters’ Legal Department (*Gabinete Juridico*), who also served as the officers’ defence counsel in the criminal proceedings conducted

by Barcelona's investigating judge (see para. 9 above). This report concluded that "as reported by the officers, Mr. Muhammad's identity check was not based on his ethnic features but motivated by his cocky and disrespectful attitude when the police car drove by". [Doc. 26].

14. During these administrative proceedings, Mr. Muhammad's request to examine the two unnamed officers was rejected [Doc. 27], despite the fact that the officers' version of events as reproduced in the police administrative record was the only evidence contrary to the applicant's case.

#### **D. Judicial administrative proceedings before *Audiencia Nacional***

15. On 12 January 2015, Mr. Muhammad promptly instituted administrative judicial proceedings (*procedimiento contencioso-administrativo*) against the Ministry's dismissal of his administrative claim before the *Audiencia Nacional* administrative court. Mr. Muhammad submitted with this application all the evidence mentioned above, and reiterated his request for reparations. [Doc. 29].
16. During trial, the administrative judge hearing the case (*Juzgado Central Contencioso-Administrativo No. 11, Audiencia Nacional*) refused the request of Mr. Muhammad's lawyer to summon and question the police officers. The judge also refused to have the expert witness on statistics examined, even after Mr. Muhammad's lawyer informed the judge that the expert was available outside the courtroom waiting to be called. Although Mr. Muhammad's lawyer challenged the refusal, the judge upheld his decision arguing that statistics were immaterial to the case. Thus, no witnesses were heard. The State lawyer representing the Ministry of Interior did not present a single piece of evidence and referred exclusively to the unnamed officers' report, included in the administrative file, to support his defence.
17. During the hearing before the *Audiencia Nacional*, the State lawyer argued that racial profiling by the police when performing migration control operations was declared to be constitutional by the Spanish Constitutional Court in its 2001 decision in the case of *Rosalind Williams*. [Doc. 2]. The State lawyer, using racially charged language, alleged that the officers demanded identification from "two individuals of foreign appearance" not belonging to the "raza mediterránea, íbera, celtíbera, caucásica" (Mediterranean, Iberian, Celtiberian, Caucasian race) [Doc. 30, minute 11:25 to 11:29]. Mr. Muhammad's lawyer relied upon the decision of the UN Human Rights Committee (HRC), which, in its 2009 ruling in the case of *Rosalind Williams v. Spain*, found that police identity checks motivated by the race or ethnicity of the individuals stopped are discriminatory and violate Article 26 of the International Covenant on Civil and Political Rights (ICCPR). The HRC urged Spain to bring the practice of racial profiling to an end. [Doc. 3]. Despite its legally binding status in Spain, neither the State lawyer nor the *Audiencia Nacional* mentioned, let alone took into consideration, the HRC decision. [Doc. 30-31].
18. Mr. Muhammad's lawyer also requested during trial a referral of a preliminary question to the Court of Justice of the European Union in order

to clarify whether the Return Directive (2008/115/EC) and Article 21 of the EU Charter of Fundamental Rights must be interpreted as precluding the practice of police racial profiling, as well as the precedent set by the Spanish Constitutional Court in the above mentioned 2001 Rosalind Williams decision.

19. On 14 September 2015, the *Audiencia Nacional* dismissed the application and concluded that Mr. Muhammad had not substantiated his claim, based on the existence of purportedly contradictory versions of the facts between those alleged by the police officers and Mr. Muhammad. The reasoning and conclusion of this judgment merely adopted the version of events contained in the unnamed officers' report, as recorded in the administrative file. [Doc. 31].
20. On 20 October 2015, Mr. Muhammad's lawyer filed a request for judicial review (*incidente de nulidad de actuaciones*) with the same administrative judge. The review requested the annulment of the trial and judgment due to the infringement of the appellant's right to a fair trial, as protected by both the Constitution and the European Convention. [Doc. 32].
21. On 17 May 2016, the tribunal issued a decision (*auto*) rejecting the request for judicial review. [Doc. 33].

#### **E. Constitutional appeal**

22. On 30 June 2016, Mr. Muhammad's lawyer promptly lodged a constitutional appeal (*amparo*) with the Constitutional Court against the discriminatory identity check, the Ministry of Interior's administrative decision rejecting Mr. Muhammad's claim, and the *Audiencia Nacional's* decisions (both judgment and *auto*). [Doc. 34].
23. In addition to the substantive human rights claims (See Exhaustion section), the appeal renewed the request for a preliminary reference to the Court of Justice of the European Union.
24. The *amparo* appeal argued that the case was constitutionally relevant (*transcendencia constitucional*) and therefore admissible for a number of reasons, regarding both the discriminatory check and the *Audiencia Nacional's* judgment. [See below and Doc. 1, para. 10-16, 37-39, 46, 50-55, 78-83].
25. The *amparo* alleged that the discriminatory identity check was of constitutional relevance because the Constitutional Court's jurisprudence on racial profiling, established in the 2001 *Rosalind Williams* decision, contradicts the 2009 UN HRC's *Rosalind Williams* decision; it was therefore necessary to modify the constitutional case law to bring it into conformity with human rights standards binding on Spain. The constitutional appeal contended that the 2001 constitutional precedent in *Rosalind Williams* continues to be applied in violation of the principle of non-discrimination and Spain's obligations to implement the 2009 HRC ruling. [Doc. 1, para. 50-55].
26. The *amparo* also argued that, since the Constitutional Court's 2001 ruling in *Williams*, further evidence had emerged indicating that police controls based

solely on the basis of racial appearance were widespread and had increased greatly. The composition of the Spanish population had changed significantly since 1992, when the police stopped Ms. Williams. As the population had become more multi-ethnic, these discriminatory police practices affected a considerable sector of the population. Moreover, in light of these population changes, it was no longer reasonable – if in fact it ever had been – for an officer to presume that physical appearance was a proxy for nationality or national origin. Accordingly, the *amparo* claimed significance beyond the individual case, providing an opportunity for the Court to rule on a legal issue of general relevance and national social impact. [Doc. 1, para. 10-21, 84-85].

27. On 3 November 2016, in a three-line decision, the Constitutional Court declared the *amparo* appeal inadmissible on the grounds that it lacked constitutional relevance. [Doc. 35].
28. The discriminatory stop has caused Mr. Muhammad a deep feeling of humiliation, unfair persecution, exclusion and marginalization, all of which infringe upon his personal dignity. Moreover, Mr. Muhammad has since suffered two more discriminatory identity checks. (Doc. 37, para. 8)

#### **F. Domestic Context**

29. The stop of Mr. Muhammad took place in the context and was part of a well-documented pattern of ethnic profiling by Spanish police in the conduct of identity checks. [Doc. 1, para. 10-21].
30. This pattern of racially discriminatory stops by Spanish police has been repeatedly reported on and criticized by the UN HRC, the UN Committee on the Elimination of Racial Discrimination (CERD), the European Commission against Racism and Intolerance (ECRI), the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (“Special Rapporteur on Racism”), the Committee of Ministers of the Council of Europe, and the Spanish Ombudsperson. This systematic practice has also been exhaustively reported by non-governmental organizations and confirmed by police unions. A research study conducted by independent academics based on a 2013 nationwide survey demonstrated the disproportionate impact that identity checks have on ethnic minorities in Spain. [Doc. 1, para. 18-21].
31. Spanish law grants police officers unlimited discretion to carry out a stop or search: no reasonable suspicion of wrongdoing is required and it is left to the unfettered discretion of the police officer to decide whether to stop, request identity documents or search any particular person. [Doc. 1, para. 6, 63-66]

## STATEMENT OF ALLEGED VIOLATIONS AND EXPLANATIONS

### A. Violation of the right not to be subjected to discrimination on grounds of race, colour or ethnic origin (Protocol 12) (see further Doc. 1, para. 27 to 56)

1. *Direct Discrimination.* The singling out of Mr. Muhammad for a police identity check because of his skin colour constitutes discrimination prohibited by Protocol 12 (“Discrimination on account of, inter alia, a person’s ethnic origin is a form of racial discrimination,” *D.H. v Czech Republic*, para. 176.) Mr. Muhammad was stopped and required by National Police officers to provide his identity card based solely on the colour of his skin as evidenced by the police explanation to him. The fact that no other person belonging to the Caucasian majority population was stopped reinforces the discriminatory nature of the stop to which the applicant was subjected. As a result, Mr. Muhammad suffered, on account of his race, colour or ethnic origin, less favourable treatment than other people in an analogous or relevantly similar situation (*Lithgow v UK*, para. 177; *Fredin v Sweden*, para 60).
2. *Breach of procedural obligations.* Mr. Muhammad presented to the national court, and the court failed to take account of, evidence amounting to an arguable claim of discrimination on grounds of race, colour or ethnic origin capable of shifting the burden of proof, including statistical evidence. Yet, the Government did not present any evidence to the contrary and failed to use all available means to combat racism, to secure evidence and to explore all practical means of discovering the truth (*Stoika v. Romania*, para. 117-119, *B.S. v. Spain*, para. 58). The judgment failed to respond to the allegation of discrimination.
3. *Indirect discrimination.* The application of facially neutral legislation in a manner that has disproportionate prejudicial effects on persons of ethnic characteristics different from the majority Caucasian population constitutes indirect discrimination (*D.H. and Others v. Czech Republic*, para. 184). Although the legal provisions granting stop and search powers to police officers with no requirement for reasonable suspicion are facially neutral, statistical evidence indicates that they disproportionately impact individuals from ethnic minorities, such as Mr. Muhammad, leading to indirect discrimination.
4. *Lacuna in domestic law protection from discrimination.* The Constitutional Court’s jurisprudence set by the 2001 *Rosalind Williams* decision declaring lawful the use of ethnic profiling as a legitimate practice by the police when performing migration control operations severely undermines protection from discrimination and has been described by ECRI as the leading cause of widespread violations of the prohibition of discrimination in Spain. This is a binding decision; hence, there is a clear lacuna in domestic law protection from discrimination (*Explanatory Report to Protocol 12*, para. 26).

**B. Violation of the right to private life (Article 8) (see further Doc. 1, para. 57 to 72)**

5. The discriminatory identity check that Mr. Muhammad had to endure compounded by the fact that it was conducted in public view, and in an undignified manner, humiliated and embarrassed him, and contributes to the stereotyping of his ethnic group, which amounts to a violation of Mr. Muhammad's right to respect for private life (*Gillan and Quinton v. the UK*, para. 63; *Aksu v. Turkey*, para. 58).
6. When taken together, the unfettered powers granted to the police by the law, which does not require reasonable suspicion of wrongdoing to stop an individual; the lack of adequate legal safeguards, including independent oversight mechanisms against abuse; and the lack of guidance in their exercise render Mr. Muhammad's stop arbitrary and constitute a failure by the state to prevent such a violation (*Gillan v. the UK*, para.76-77, 83-87; *Colon v. the Netherlands*, para. 73).
7. Spain has failed to put in place an adequate legal and administrative framework to provide sufficient protection against ethnic profiling, which, compounded by the failure to collect sufficient information to identify whether discrimination is occurring, enables ethnic profiling to occur.

**C. Violation of the right to a fair hearing (Article 6(1)) (see further Doc. 1, para. 73 to 87)**

8. There were numerous irregularities in the proceedings through which the applicant sought compensation for ill-treatment by state agents, which rendered the whole process unfair, infringing Mr. Muhammad's right to a fair hearing.
9. During trial, the *Audiencia Nacional* judge arbitrarily denied Mr. Muhammad's request to summon and question the police officers involved in the identity check, and to examine the expert statistician, which placed him at a substantial disadvantage vis-à-vis the opposing party (*Gorraiz Lizarraga and Others v. Spain*, para. 56). Instead, the written record of the police officers' account, as provided in the course of the police internal inquiry carried out by their superior, serving at the same police station, was adopted in the reasoning and conclusion of the judicial decisions, without having been tested. (*Al-Khawaja and Tahery v. the United Kingdom*, para. 119-147; *Anguelova v. Bulgaria*, para.138)
10. The judgment of the *Audiencia Nacional* failed to conduct a proper examination of the submissions adduced by Mr. Muhammad. In particular, the decision failed to address the discrimination arguments (*Kraska v. Switzerland*, para. 30; *Van de Hurk v. the Netherlands*, para. 59; *Perez v. France* [GC], para. 80).
11. Despite Mr. Muhammad's requests for judicial review, the shortcomings in the fairness of the proceedings were not remedied at a later stage, either at the same level by the *Audiencia Nacional* judge or by the Constitutional Court.

12. The case raised a fundamentally important legal issue whose adjudication falls exclusively within the Constitutional Court's jurisdiction; yet, the Court failed to provide sufficient reasoning when declaring Mr. Muhammad's constitutional appeal inadmissible (*Sardon Alvira v. Spain*, para. 56).
13. Although the Constitutional Court was the last instance ruling, it failed to give any reasons for not granting the preliminary reference to the Court of Justice of the EU requested by Mr. Muhammad, and did not even mention the request (*Dhahbi v. Italy*, para. 31).

**Violation of the right not to be subjected to discrimination on grounds of race, colour or ethnic origin and to private life (Article 14 read in conjunction with Article 8)**

14. For the reasons set out above (paragraphs 1-7), there is also a violation of Article 14 read in conjunction with Article 8 (private life). The applicant considers that the question of discrimination is most appropriately considered under Protocol 12.

**STATEMENT OF EXHAUSTION AND COMPLIANCE WITH SIX-MONTH RULE**

**Exhaustion of domestic remedies**

15. The application should be declared admissible as Mr. Muhammad satisfies the criteria set forth in Article 35 of the Convention.
16. Mr. Muhammad has exhausted domestic remedies according to applicable rules and procedures of domestic law, including an *amparo* appeal before the Constitutional Court. The decision of the Constitutional Court is final and conclusive.
17. On 7 April 2014 Mr. Muhammad lodged an administrative claim with the Ministry of Interior (Expediente No. 38/14) [Doc. 21]. On 6 November 2014, the Ministry rendered an administrative resolution dismissing the claim [Doc. 28]. Mr. Muhammad based his claim on the rights protected in the Spanish Constitution, specifically Articles 14 (right to non-discrimination), 18 (right to honour), 10 (right to dignity), 24(1) (right to effective judicial protection) and 24(2) (right to a fair trial), as well as Articles 8 (right to private life), 14 (right to non-discrimination), Article 13 (right to a remedy) of the ECHR, its Protocol 12, and European Union legislation (Article 21 European Union Charter of Fundamental Rights, Return Directive and related provisions).
18. On 12 January 2015, Mr. Muhammad instituted administrative judicial proceedings (*procedimiento contencioso-administrativo*) before the *Audiencia Nacional* administrative court (*Juzgado Central Contencioso-Administrativo No. 11 de la Audiencia Nacional*) in **Procedimiento Abreviado 7/2015** [Doc. 29]. Mr. Muhammad reproduced the legal claims included in the administrative claim lodged with the Ministry of Interior. On 14 September 2015, the *Audiencia Nacional* dismissed the application in judgment No. 123, 2015. [Doc. 31].

19. On 20 October 2015, Mr. Muhammad's legal representative filed an application for judicial review (*Pieza de Nulidad Excepcional 7/2015*) with the *Audiencia Nacional* administrative judge No. 11 (*Juzgado Central Contencioso-Administrativo No. 11 de la Audiencia Nacional*) [Doc. 32], which was rejected by *auto* issued on 17 May 2016 [Doc. 33]. Mr. Muhammad based his request for review on Articles 24(1) (right to effective judicial protection) and 24(2) (right to a fair trial) of the Constitution, Article 6 (right to a fair hearing) of the ECHR, as well as Article 21 of the European Union Charter of Fundamental Rights, and the EU Returns Directive and related provisions.
20. On 30 June 2016, Mr. Muhammad filed **Constitutional Court Appeal No. 3800/2016** with the Constitutional Court [Doc. 34], which was declared inadmissible in decision rendered on 3 November 2016 [Doc. 35]. Mr. Muhammad based his appeal on Articles 14 (right to non-discrimination), 18 (right to honour), 10 (right to dignity), 24(1) (right to effective judicial protection) and 24(2) (right to a fair trial), as well as Articles 8 (right to private life), 14 (right to non- discrimination), and 6 (right to a fair hearing) of the ECHR, its Protocol 12 and Article 21 European Union Charter of Fundamental Rights, Return Directive, and related provisions.

#### **Six-month rule**

21. Applicant's legal representative was served with copy of final decision from the Constitutional Court on 8<sup>th</sup> November 2016. Therefore, the application complies with the six-month rule.

## ADDITIONAL SUBMISSIONS

1. On 29 May 2013, Spanish police officers singled out Mr. Muhammad, a lawful Spanish resident, for no reason other than his race, then publicly humiliated him in a manner that impaired his dignity and caused him profound emotional distress. This act of racial profiling was not an isolated event. To the contrary, it was enabled by Spain's inadequate legal framework and flawed constitutional jurisprudence, and emblematic of a consistent pattern of ethnic profiling and racially discriminatory law enforcement that has been well-documented by Council of Europe mechanisms, and a host of international, regional, and national human rights monitoring bodies.
2. The European Court is asked to find that the treatment of Zeshan Muhammad violates the Convention.

### **Relevant legal provisions**

#### Discrimination

3. Spain's legal framework for combating racism and racial discrimination includes several pieces of legislation in different areas, such as labour law, education, and public health, but there is no comprehensive framework prohibiting racial discrimination.<sup>1</sup>
4. Article 14 of the Spanish Constitution prohibits discrimination<sup>2</sup> and Article 5 of the Organic Law on the Security Forces explicitly refers to the law enforcement officials' obligation to respect the principle of non-discrimination when performing their duties.<sup>3</sup> Organic Act No. 4/2000 on the rights and freedoms of foreigners in Spain ("Aliens Act") seems to place foreigners on an equal footing with Spanish citizens as regards fundamental rights and public freedoms.<sup>4</sup> However, the right to equality before the law for noncitizens is not expressly recognized by the Constitutional provisions governing the right of foreigners.<sup>5</sup>

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<sup>1</sup> UN Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere*, UN Doc. A/HRC/23/56/Add.2, 6 June 2013, para. 11.

<sup>2</sup> Article 14: "Spaniards shall be equal before the law, without discrimination of any kind based on birth, race, sex, religion, opinion or any other personal or social condition or circumstance."

<sup>3</sup> Organic Law 2/1986, of 13 March 1986, of State Security Forces and Bodies. (*Ley Orgánica de Fuerzas y Cuerpos de Seguridad del Estado*)

<sup>4</sup> Organic Law 4/2000, of 11 January 2000, on the rights and freedoms of foreigners in Spain and their social integration, Article 3. (*Ley Orgánica sobre Derechos y Libertades de los extranjeros en España y su integración social*).

<sup>5</sup> Article 13(1) of the Constitution states that foreigners and Spaniards have equal rights, under the conditions provided for in international instruments to which Spain is a party and in national legislation. The UN SR on Racism urged Spain to address this shortcoming, note 1 above, para. 60.

5. Also, numerous regional and international human rights conventions ratified by Spain prohibit discrimination on racial or ethnic grounds<sup>6</sup> and these treaties form part of the Spanish legal system.<sup>7</sup> Furthermore, fundamental rights and freedoms protected by the Constitution must be interpreted in light of Spain's human rights obligations,<sup>8</sup> and the interpretation of those rights must therefore be consistent with the interpretation of those human rights treaties provided by their supervisory bodies.<sup>9</sup>

#### Police powers to stop and search

6. The main law governing identity checks by law enforcement agents relevant at the time of Mr. Muhammad's identity check was Organic Law 1/1992 on the protection of public security ("Public Security Law").<sup>10</sup> Article 20(1) provides police officers, in the exercise of their duties of investigation and prevention, with powers to "carry out identity checks of individuals in public spaces or where the request took place, provided that the knowledge of the identity of that person is necessary for the protection of security". No reasonable suspicion of wrongdoing is required and it is left to the discretion of the police officer to decide whether to stop, request identity documents or search any particular person.
7. Article 20(3) of the Public Security Law compels the police to keep a registry of the identity checks carried out, their length of time and the reasons behind the stops, but only in cases where individuals cannot be identified and are taken to the police station with the purpose of preventing the commission of an offense or to impose a fine. No record is kept of other stops that do not lead to such circumstances.
8. Foreign nationals and Spanish citizens have the same obligation to carry their identity documents and to submit to identity checks "when so requested by the authorities or its officers in the exercise of their functions".<sup>11</sup>
9. The National Police is the police branch entrusted with the performance of functions related to foreigners and immigration control.<sup>12</sup>

#### **Domestic Context**

##### Pattern of ethnic profiling

10. The racial profiling suffered by Mr. Muhammad was not an isolated event. Rather it is emblematic of a larger pattern of ethnic profiling and racially discriminatory behaviour by law enforcement officials in Spain that has

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<sup>6</sup> International Covenant on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination (CERD); European Convention on Human Rights (ECHR), and its Protocol No.12

<sup>7</sup> Article 96(1) Constitution.

<sup>8</sup> Article 10(2) Constitution.

<sup>9</sup> Constitutional Court, Judgment 303/1993, 25 October 1993, FJ 8.

<sup>10</sup> Organic Law 1/1992, 21 February 1992, on Citizen Security Protection .

<sup>11</sup> Royal Decree 557/2011, 20 April 2011, by which the Regulation of the Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, is approved, Article 205(2).

<sup>12</sup> Organic Law 2/1986, note 3 above, Article 12.

been well-documented by international, regional and national human rights supervisory bodies. Unfortunately, the Constitutional Court judgment in *Rosalind Williams* has apparently contributed to the prevalence of racial profiling in Spain.

11. In *Rosalind Williams*, the Constitutional Court stated that a person's racial or ethnic identity is a legitimate indicator of nationality, and to refer to the race of a person in a "descriptive" manner is not *per se* discriminatory, as "specific physical or ethnic characteristics can be taken into consideration as reasonably indicative of the national origin of the person who has them".<sup>13</sup> In a dissenting opinion, a judge affirmed that the introduction of criteria based on race is contrary to Article 14 of the Constitution, emphasizing the negative impact of the decision, particularly because "Spain is already a multiracial society, in which a high number of persons of other races live and these persons can be Spanish as well as documented foreigners".<sup>14</sup>
12. Following the Constitutional Court decision, the case was submitted to the UN Human Rights Committee. In its submissions, Spain defended the legitimacy of the practice of ethnic profiling.<sup>15</sup> In 2009, the Committee ruled in favour of Ms. Rosalind Williams, and held that police identity checks motivated by the race or ethnicity of the individual stopped are discriminatory and violate Article 26 of the ICCPR, read together with Article 2(3).<sup>16</sup>
13. ECRI's most recent country report on Spain, noting the 2001 Constitutional Court's decision in *Rosalind Williams*, expressed concern "about consistent reports of large-scale unmotivated identity checks being carried out with increasing frequency in neighborhoods with a high presence of foreign citizens";<sup>17</sup> concerns that were also reported by CERD the same year.<sup>18</sup> Moreover, ECRI observed that a police trade union had made public a Government memorandum mandating the arrest of a monthly quota of immigrants at a Madrid police station.<sup>19</sup>
14. After their last visit to Spain, the UN Special Rapporteur on Racism concluded in 2013 that "ethnic profiling by law enforcement agents continues to be a persistent and pervasive problem, with significant adverse impacts on police/community relations and the enjoyment of the rights of the individuals targeted".<sup>20</sup> In 2013, the Council of Europe indicated that "ethnic profiling by the police continues to be reported as a widespread

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<sup>13</sup> Constitutional Court, Judgment 13/2001, 29 January 2001, FJ 8.

<sup>14</sup> *Ibid.*, Dissenting Opinion, para. 6.

<sup>15</sup> *Rosalind Williams v. Spain*, UNHRC, Decision of 17 August 2009, para. 4.3

<sup>16</sup> *Ibid.*, para. 7.2, 7.4, 8.

<sup>17</sup> ECRI, Fourth Report on Spain (Adopted on 7 December 2010, published in 2011), para. 201.

<sup>18</sup> CERD, Concluding Observations, UN doc. CERD/C/ESP/CO/18-208 April 2011, para. 10.

<sup>19</sup> ECRI, Fourth Report on Spain, note 17 above, para. 201.

<sup>20</sup> Report of the UN SR on Racism, note 1 above, para. 51.

practice: persons belonging to some minority groups are disproportionately stopped and searched, especially on public transport and in the street”.<sup>21</sup>

15. In 2016, CERD reported the persistence of identity checks based on ethnic or racial profiling despite the inclusion of the principles of non-discrimination and proportionality concerning identity checks, in the new Public Security Law.<sup>22</sup> The Committee urged Spain “to adopt the necessary measure to definitely bring this practice to an end”.<sup>23</sup>
16. The Spanish Ombudsperson, in the 2013 annual report, indicated having received a high number of complaints about the generalized use of identity checks based on ethnic and racial profiling by the police.<sup>24</sup> The Ombudsperson issued a number of recommendations to the Police General Directorate to eradicate this practice, including the introduction of stop forms, the gathering of disaggregated data, and the setting up of a specific complaint mechanism.<sup>25</sup> These recommendations are yet to be met.
17. Pervasive racial profiling by Spanish police has also been documented and reported by different civil society and human rights organizations, such as *Brigadas Vecinales de Observación de Derechos Humanos*,<sup>26</sup> Amnesty International,<sup>27</sup> *Ferrocarril Clandestino*<sup>28</sup> and *Grupo Inmigrapenal*.<sup>29</sup>

#### *Statistical data documenting disproportionality*

18. In April 2013 a report by respected academics, based on a survey conducted among Spain’s majority population and ethnic minorities on their experience with police identity stops,<sup>30</sup> described the disproportionality in police stops affecting ethnic minorities, compared to the stops affecting the majority Caucasian population.

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<sup>21</sup> Council of Europe Committee of Ministers, *Resolution CM/ResCMN(2013)4 on the implementation of the Framework Convention for the Protection of National Minorities by Spain*, 10 July 2013.

<sup>22</sup> CERD, Concluding Observations, UN doc. CERD/C/ESP/CO/21-23, 13 May 2016, para. 27.

<sup>23</sup> *Ibid.*, para. 28.

<sup>24</sup> Doc. 9, Defensor del Pueblo, *Annual Report 2013*, Volume I, p. 225-226. Also available at [https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013\\_Informe\\_Anual\\_Vol\\_I\\_Informe\\_2013.pdf](https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013_Informe_Anual_Vol_I_Informe_2013.pdf)

<sup>25</sup> Doc. 10, Defensor del Pueblo, *Recommendation 45/2013*, 17 April 2013, Annex E.1, p. 154-156. Also available at [https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013\\_Anexo\\_E\\_1\\_Recomendaciones\\_2013.pdf](https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013_Anexo_E_1_Recomendaciones_2013.pdf)

<sup>26</sup> Docs.5 and 7, Brigadas Vecinales de Observación de Derechos Humanos, *Controles de Identidad Racistas en Madrid, 2010-2011* (2011); *Cuando la Vulneración de Derechos se Normaliza. Controles de Identidad Racistas en Madrid, 2011-2012* (2012).

<sup>27</sup> Doc. 6, Amnesty International, *Stop Racism, not People. Racial Profiling and Immigration Control in Spain*, 2011.

<sup>28</sup> Doc. 4, Ferrocarril Clandestino, *Informe de Investigación sobre Controles, Identificaciones y Detenciones*, 2010.

<sup>29</sup> Doc. 8, Grupo Inmigrapenal, *Controles de identidad, detenciones y uso del perfil étnico en la persecución y castigo del inmigrante “sin papeles”: ilegalidad e inconstitucionalidad de determinadas prácticas policiales*, 2011.

<sup>30</sup> Doc. 11, José García Añón, Ben Bradford, Jose A. García Sáez, Andrés Gascón Cuenca y Antoni Llorente y Ferreres, *Identificación por perfil étnico en España. Informe sobre experiencias y actitudes en relación con las paradas policiales* (Valencia: Tirant lo Blanch, 2013). Open Society Justice Initiative supported this report.

19. This report strongly indicates that the National Police has maintained a pattern and practice of ethnic profiling:<sup>31</sup>
- a) 6% of Caucasians born in Spain surveyed, reported having been stopped while on foot over the last two years. In comparison, 11 % of non-Caucasians surveyed, also born in Spain, reported having been stopped while on foot in a public space.
  - b) 13% of Caucasians of foreign descent surveyed reported having been stopped while on foot over the last two years; compared to 24% of non-Caucasians of foreign descent surveyed reported to being stopped while on foot in a public space.
20. The survey also reveals, when accounting for nationality and immigration status, the disproportionality in police stops affecting ethnic minorities compared to ethnic majorities, indicating a pattern and practice of ethnic profiling:<sup>32</sup>
- a) When looking at Spanish citizens, there is evidence of racial disparity in the use of identity checks. Of Spanish nationals surveyed, there is a strong association between ethnicity and being stopped on foot by the police. 10% of Spanish nationals of ethnic minorities reported being stopped in the past two years, versus 6% of Caucasians Spanish nationals.
  - b) When looking at legal residents, there is also evidence of racial disparity in the use of identity checks. Of legal residents surveyed, there is also a strong association between ethnicity and being stopped on foot by the police. 14% of legal residents of ethnic minorities reported being stopped in the past two years versus 7% of Caucasian legal residents.
21. In sum, the statistics as well as the reports and resolutions by international, regional and national human rights institutions and NGOs demonstrate a pattern and practice of ethnic profiling by the police. Moreover, the State's argument to the HRC in the *Rosalind Williams* case to the effect that the practice is legitimate, the failure to disavow the practice after the Committee's decision, and the State lawyer's forceful defence of the Constitutional Court's 2001 decision in *Rosalind Williams* during the proceedings of the present case constitute further evidence of state practice.
- Lack of independence, impartiality, and accountability
22. The failings and shortcoming of the administrative and judicial proceedings in Mr. Muhammad's case were the result of the persistent and general problem of lack of independence and impartiality on the part of authorities handling investigations of police misconduct, with the subsequent lack of accountability for misconduct and racially-discriminatory behavior. This pattern has been reported by international, regional and national human rights bodies.

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<sup>31</sup> *Ibid.*, page 121

<sup>32</sup> Doc. 20, Ben Bradford, *Expert Report on police stops, ethnicity, nationality and immigration status*, 31 March 2014, Tables 1 and 2.

23. In May 2013, after having received a large number of complaints about ethnic profiling, the national Ombudsman reiterated the recommendation to establish a complaints mechanism for persons who claim to have been subjected to discriminatory identity controls.<sup>33</sup>
24. In 2011, ECRI reiterated in its last report on Spain its call on the Spanish authorities to improve the response of the internal and external control mechanisms to complaints of racist or racially-discriminatory behavior on the part of the police.<sup>34</sup> ECRI further noted that there is still no independent commission to investigate allegations of human rights violations by the police and that complaints of police misconduct continue to be dealt with internally through the Ministry of Interior.<sup>35</sup> Concerns that were also indicated by the Council of Europe, adding that cases of police misconduct and abuse continue to be reported.<sup>36</sup> Similarly, the Special Rapporteur against Racism concluded that oversight over police misconduct, particularly with regard to racial discrimination and ethnic profiling, which is provided through internal disciplinary procedures, should be complemented by an independent civilian mechanism.<sup>37</sup>
25. Following his visit to Spain in 2013, the Commissioner for Human Rights of the Council of Europe noted “with deep concern that charges relating to allegations of ill-treatment inflicted by law enforcement officials are frequently dismissed by judges”,<sup>38</sup> stressing the lack of an independent complaints mechanism concerning the actions of law enforcement authorities.<sup>39</sup> The Commissioner recommended the adoption of measures to address the practice of ethnic profiling in identity controls and ensure that any racially-motivated misconduct is effectively investigated and adequately punished, and the setting up of an independent complaints mechanism.<sup>40</sup>
26. In 2016, CERD urged the Spanish authorities to adequately investigate and punish identity checks based on ethnic profiling.<sup>41</sup>

## **VIOLATIONS OF THE EUROPEAN CONVENTION**

### **A. Protocol 12: Violation of the right not to be subjected to discrimination on grounds of race, colour or ethnic origin**

27. The treatment of the applicant violated the prohibition of discrimination because (1) the police stop was discriminatory, (2) there were numerous breaches of the procedural protections inherent in Protocol 12, (3) the

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<sup>33</sup> Doc. 9, Defensor del Pueblo, *Annual Report 2013*, note 24 above, p. 225-226.

<sup>34</sup> ECRI, Fourth Report on Spain, note 17 above, para. 205.

<sup>35</sup> *Ibid.*

<sup>36</sup> Council of Europe Committee of Ministers, *Resolution CM/ResCMN(2013)4*, note 21 above.

<sup>37</sup> Report of the UN SR on Racism, note 1 above, para. 85.

<sup>38</sup> Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Spain from 3 to 7 June 2013 (CommDH(2013)18), 9 October 2013, para. 110-111 and 132.

<sup>39</sup> *Ibid.*, para. 141,144.

<sup>40</sup> *Ibid.*, para. 147, 153.

<sup>41</sup> CERD’s review of Spain, 2016, note 22 above, para. 28.

operation of police stop powers as applied in practice disproportionately impacts members of ethnic minorities, and (4) Spanish law does not recognise that ethnic profiling is unlawful discrimination, in contravention of European and international standards.

1. The police stop of Mr. Muhammed was discriminatory

28. The singling out of Mr. Muhammad for a police identity check because of his skin colour, racial or ethnic origin, constitutes discrimination in violation of Protocol 12.

*Relevant legal standards*

29. Article 1 of Protocol No. 12 to the ECHR enshrines a general prohibition of discrimination.<sup>42</sup> It extends the scope of protection to cases where a person is discriminated against, on any ground including race, colour or national origin, by acts or omissions by a public authority, such as law enforcement officers.<sup>43</sup> The meaning of the term “discrimination” in Article 1 is intended to be identical to that of Article 14 of the Convention and it is to be interpreted in the same manner.<sup>44</sup> This Court has clarified that non-national citizens also enjoy the right to non-discrimination enshrined in both the Convention and Protocol 12.<sup>45</sup>
30. The Court has established that discrimination is treating differently persons in analogous or relevantly similar situations based on identifiable characteristics, without an objective and reasonable justification.<sup>46</sup> It has also held that “where the difference in treatment is based on race, colour, or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible”,<sup>47</sup> as certain grounds of distinction, such as ethnicity, are generally regarded as inherently suspect. While law enforcement activities in general may be a legitimate aim under some circumstances, the Court has found that in the context of law enforcement activities “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures”.<sup>48</sup>
31. ECRI’s General Recommendation No. 11 defines ethnic profiling as “the use by police with no objective and reasonable justification, of grounds such as race or colour, nationality or ethnic origin in control, surveillance or investigation activities”.<sup>49</sup> It further clarifies that the use of these grounds has no objective and reasonable justification if it does not pursue a

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<sup>42</sup> Spain ratified Protocol 12 on 13 February 2008, and it entered into force on 1 June 2008.

<sup>43</sup> Explanatory Report to Protocol 12, para. 22.

<sup>44</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, Grand Chamber Judgment of 22 December 2009, para. 55.

<sup>45</sup> *Koua Poirrez v. France*, Judgment of 30 September 2003, para. 49.

<sup>46</sup> *Carson and Others v the United Kingdom*, Judgment of 16 March 2010, para. 61.

<sup>47</sup> *D.H. v. the Czech Republic*, Grand Chamber Judgment of 13 November 2007, para. 196.

<sup>48</sup> *Timishev v. Russia*, Judgment of 13 December 2005, para 58.

<sup>49</sup> ECRI, *General Recommendation No. 11 on combating racism and racial discrimination in policing*, 29 June 2007, para 28.

legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>50</sup>

#### *Arguments*

32. Mr. Muhammad presented evidence of the discriminatory stop to the national court that amounted to an arguable claim of discrimination on grounds of race, colour of ethnic origin as set out below (para. 39). However, the national court failed to conduct a proper examination of the submissions and evidence adduced by Mr. Muhammad, including statistical evidence, and to apply the burden of proof relevant in discrimination cases. The *Audiencia Nacional*'s judgment failed to consider or even refer to the discrimination claims raised by Mr. Muhammad.
33. Spanish society is multi-racial and multi-ethnic. In addition to the majority Caucasian population, it is composed of many Spaniards and foreigners with residence permits who belong to racial and ethnic minorities. There is no reasonable and objective justification for making distinctions on the basis of racial or ethnic characteristics, let alone treating differently racial or ethnic minorities, in the context of immigration control.
34. As the National Police officer's own words make clear,<sup>51</sup> Mr. Muhammad was singled out, stopped and required to provide his identity card based solely on the colour of his skin. The eyewitness, Mr. Kamran Ali, confirmed in his testimony that, contrary to the police officers' contention, when the National Police officers demanded to see identification of both Mr. Muhammad and himself, they showed their identity cards immediately.<sup>52</sup> Mr. Ali corroborated Mr. Muhammad in recounting that, when Mr. Muhammad asked for the reasons of the check, the officer said that "I'm not going to stop a German person" and that stopped Mr. Muhammad "because you are black".<sup>53</sup>
35. Although a comparator is not necessary, the fact that Mr. Muhammad was the victim of discrimination is reinforced by the fact that no other individual belonging to the majority Caucasian population was stopped in the same street immediately before, during, or after his identity check.<sup>54</sup> This point has not been disputed in the national proceedings. It is also consistent with the pattern of disproportionate and indiscriminate stops of racial and ethnic minorities by Spanish police repeatedly documented by international, regional and Spanish human rights bodies and NGOs,<sup>55</sup> and indicated by the statistics adduced by Mr. Muhammad.<sup>56</sup>
36. Mr. Muhammad's immediate and successive attempts to seek justice through the different available mechanisms right after his release from the

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<sup>50</sup> *Ibid.*

<sup>51</sup> Doc. 37, para. 3.

<sup>52</sup> Doc. 19, para. 2-3.

<sup>53</sup> Doc. 19, para. 3.

<sup>54</sup> Doc. 37, para. 2-3 and Doc. 19, para. 2.

<sup>55</sup> See above para. 10-17.

<sup>56</sup> See above para. 18-21 and Doc. 11 and 20.

police station corroborate the veracity of his allegations.<sup>57</sup> They further reveal the negative impact of the discriminatory check on him, and the extent of the humiliation and infringement of personal dignity suffered by Mr. Muhammad.<sup>58</sup>

## 2. Breach of procedural obligations inherent in Protocol 12

37. The Convention requires member states to use all available means to combat racism, to secure evidence, and to explore all practical means of discovering the truth, as well as to deliver a fully reasoned, impartial and objective decision, as this Court has required.<sup>59</sup> This means that there are a number of procedural obligations inherent in the prohibition of discrimination in Protocol 12.
38. Numerous shortcomings in the domestic administrative and judicial proceedings show that the authorities failed to conduct an effective investigation and to take all necessary steps to ascertain whether discriminatory conduct could have played a role in the identity check. The courts failed to respond to a *prima facie* case of discrimination, failed to shift the burden of proof to the state to demonstrate a non-discriminatory reason for the stop, failed to consider expert statistical evidence that was submitted, and failed to investigate the allegations of discrimination appropriately. They also failed to deliver fully reasoned, impartial and objective decisions, ignoring matters indicative of racial prejudice.

### *The Applicant presented a prima facie case*

39. Mr. Muhammad demonstrated a difference in treatment and it was for the Government to show that it was justified.<sup>60</sup> The *prima facie* evidence Mr. Muhammad adduced included his own testimony, his documented immediate and successive attempts to seek remedy, and the testimony of Mr. Kamran, as well as an abundance of corroborating documentary and statistical evidence concerning the pattern and practice of racial profiling by police in Spain. Taken together, this evidence was capable of shifting the burden of proof; hence, the onus was on the Government to produce evidence establishing the facts that cast doubt on the victim's account.<sup>61</sup> Yet, during both the administrative proceedings and the trial before the *Audiencia Nacional*, the authorities did not present any evidence to the contrary and simply referred to the officers' account as recorded in the administrative file.

### *Failure to investigate and use all available means to combat racism*

40. The administrative file was the product of a process that lacked impartiality and independence, which severely undermined its reliability and effectiveness.<sup>62</sup> The police chief (*Comisario Principal*) who carried out the investigation into the applicant's allegations was the immediate superior of

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<sup>57</sup> Application form para. 8-10.

<sup>58</sup> Doc. 37, para. 8.

<sup>59</sup> *Stoica v. Romania*, Judgment of 4 March 2008, para. 117, 119; *B.S. v. Spain*), Judgment of 24 July 2012, para. 58.

<sup>60</sup> *D.H. v. the Czech Republic*, para. 177.

<sup>61</sup> *B.S. v. Spain*, para. 58.

<sup>62</sup> Application form, para. 13-14.

the officers in question and served at the same police station.<sup>63</sup> There was, thus, a clear hierarchical and institutional connection that fails to meet the requirements of independence from those implicated in the events required by the Convention.<sup>64</sup> Notably, the report on which the Ministry's decision dismissing the applicant's complaint was based (*Jefatura Superior Policia's* report No. 1895) literally reproduces the report carried out by this police chief (*Comisario Principal*). In addition, the National Police Legal Department's report incorporated into the administrative proceedings was carried out by the same lawyer that acted as the police officers' defence counsel in the criminal proceedings conducted by Barcelona's investigating judge.<sup>65</sup> During the administrative proceedings before the Ministry of Interior, the administrative authorities rejected the applicant's well-founded request to examine the police officers arguing that the officers' report (*minuta*) and the report No. 1895 by the *Jefatura Superior de Policia* were already included in the administrative record.<sup>66</sup> Lastly, the Ministry's final decision failed to assess or even mention the eye-witness statement of Mr. Kamran,<sup>67</sup> which corroborated the testimony of Mr. Muhammad in every significant respect. The authorities heavy reliance on the information provided by the officers, further adds to the lack of independence of the police investigation and administrative proceedings.<sup>68</sup>

*Failure to accept statistical evidence*

41. The Court has established that “when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.”<sup>69</sup> The Court recognizes that the statistical evidence produced need not necessarily be the State's official statistics. In such cases, the Court may accept the statistics submitted by the applicants “that can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination.”<sup>70</sup>
42. Despite being facially neutral, statistical evidence reveals that the legal provisions granting unfettered powers to the police disproportionately affect those from ethnic minorities, such as Mr. Muhammad. The Expert Report

<sup>63</sup> Doc. 23, Barcelona National Police Headquarters's (*Jefatura Superior de Policia*), report No. 1895, of 30 April 2014. This report literally reproduces within inverted commas excerpts of the internal report carried out by the police chief (*Comisario Principal*), which mentions that the officers in question serve in the very same station, *Puesto Fronterizo del Puerto de Barcelona*.

<sup>64</sup> *Angelova v. Bulgaria*, Judgment of 13 June 2002, para. 138

<sup>65</sup> Application form, para. 13, and Doc. 26, Report No. 13/2014, dated 28 May 2014, prepared by National Police legal department (*Gabinete Juridico*) and authored by Pedro Rodriguez, who informs that the police officers implicated in the events were legally represented by him in the criminal proceedings, para. 3.

<sup>66</sup> Doc. 27, Ministry's resolution No. 469, of 18 July 2014, rejecting applicant's request to examine officers, para. 6.

<sup>67</sup> Doc. 28, Ministry's Resolution No. 710, of 6 November 2014, *Expediente* No. 38/14.

<sup>68</sup> *Angelova v. Bulgaria*, para. 138.

<sup>69</sup> *D.H. v. The Czech Republic*, para.188.

<sup>70</sup> *D.H. v. The Czech Republic*, para.190-191.

submitted in the domestic proceedings concludes with a high degree of certainty that both Spanish nationals and foreigners with residence permits in Spain from ethnic minority groups are more likely to be stopped on foot than their Caucasian counterparts.<sup>71</sup> This has been confirmed in the reports of national, regional, and international supervisory bodies which have looked into the question as well as by civil society organizations.<sup>72</sup>

43. This statistical evidence was based on a survey carried out among both Spain's majority population and ethnic minorities regarding their experience of police identity stops, which was analysed by experts from the Human Rights Institute of the University of Valencia and from the University of Oxford.<sup>73</sup> The statistics are reliable and significant, and are sufficient to constitute *prima facie* evidence capable of shifting the burden of proof to the State.<sup>74</sup> Nevertheless, the Government has not produced any alternative evidence.
44. The *Audiencia Nacional* judge refused, during trial, to examine the expert witness, Ben Bradford, although he was readily available outside the courtroom waiting to be called.<sup>75</sup> (See arguments under Article 6, para. 80).
45. The judgment subsequently disregarded the statistical evidence as well as the reports of supervisory bodies and NGOs. The court concluded that, regardless of their evidentiary value before other institutions, the statistics would not be considered in respect of Mr. Muhammad's complaint.<sup>76</sup> Consequently, it failed once again to use all available means to combat racism, to secure evidence and to explore all practical means of discovering the truth.

*Failure of the judgment to respond to allegations of discrimination*

46. Contrary to its clear obligations under this Court's jurisprudence, the national court failed to address the allegations of discrimination raised by Mr. Muhammad, or the abundant evidence offered in support. Despite Mr. Muhammad's arguments criticizing the lack of independence of the report of the *Jefatura Superior de Policia*,<sup>77</sup> the *Audiencia Nacional*'s judgment merely adopted the report's content in its reasoning and conclusion without carrying out a more thorough investigation.<sup>78</sup> The judgment further failed to assess, or refer to, the sworn eye-witness statement of Mr. Kamran; disregarded the voluminous statistical evidence and reports adduced by Mr. Muhammad; and inverted the burden and standard of proof, contrary to what should be applied in discrimination cases. The national court thus failed to exhibit the practical independence required for an investigation to be

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<sup>71</sup> Doc. 11, page 121; Doc. 20, Tables 1 and 2, and para. 18 to 21 above.

<sup>72</sup> Paragraphs 10-17 above, and Docs. 4-8.

<sup>73</sup> Doc.11 and 20. The survey was conducted by the leading Spanish firm Metroscopia and analysed by Oxford and Valencia University scholars with expertise on statistics and discrimination.

<sup>74</sup> *DH and others v Czech Republic*, para. 188-189.

<sup>75</sup> Doc. 30.

<sup>76</sup> Doc. 31, *Audiencia Nacional*'s Judgment, 14 September 2015, FJ 4.

<sup>77</sup> Doc. 29, Judicial application before the *Audiencia Nacional*, filed on 12 January 2015, para. 76.

<sup>78</sup> Doc. 31, *Audiencia Nacional*'s Judgment, FJ 4.

effective,<sup>79</sup> let alone to use all available means to combat racism, to secure evidence and to explore all practical means of discovering the truth, and to deliver a fully reasoned, impartial and objective decision, as this Court has required.<sup>80</sup>

### 3. Indirect discrimination

47. Although the legal provisions granting stop powers to police officers with no requirement of reasonable suspicion are facially neutral, statistical evidence indicates that they disproportionately impact individuals belonging to racial and ethnic minorities, such as Mr. Muhammad, leading to indirect discrimination.
48. The Court has established on several occasions that indirect discrimination consists of a difference in treatment that may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.<sup>81</sup>
49. Although the stop powers in the Security Law and Aliens Act are ostensibly neutral, they are applied in a manner that has disproportionate prejudicial effects on persons with racial or ethnic characteristics different from the majority Caucasian population. Indeed, in failing to require reasonable suspicion of wrongdoing and leaving to the unfettered discretion of a police officer the decision whether to stop, request identity or search any person, Article 20 of the Security Law fails to meet the requirements requested by the Court.<sup>82</sup> Moreover, such uncircumscribed decision authority leads unsurprisingly to rampant discriminatory application, which the evidence presented before the national authorities and this Court amply demonstrates.

### 4. Lacuna in domestic law protection from discrimination

50. The discriminatory stop of Mr. Muhammad was enabled by Spain's inadequate legal framework and flawed constitutional jurisprudence, which together have given rise to a clear lacunae in protection from discrimination
51. The Constitutional Court's jurisprudence reflected in the 2001 *Rosalind Williams* decision allows police officers to use racial, ethnic and other physical characteristics in the context of migration control, i.e., to determine the likelihood that someone is a foreign national.<sup>83</sup> In sanctioning as constitutional the use of racial profiling as a legitimate migration control practice by the police, this ruling has severely undermined the protection from discrimination afforded by the European Convention and other binding international standards and has contributed to widespread discriminatory policing practices in Spain.<sup>84</sup>

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<sup>79</sup> *Anguelova v. Bulgaria*, para. 138.

<sup>80</sup> *Stoica v. Romania*, para. 117, 119; *B.S. v. Spain*, para. 58.

<sup>81</sup> *DH and others v Czech Republic*, para. 184.

<sup>82</sup> *Gillan and Quinton v. the United Kingdom*, Judgment of 12 January 2010, para. 76-77.

<sup>83</sup> Constitutional Court, Judgment, note 13 above, FJ 8.

<sup>84</sup> In 2005, ECRI already identified the Constitutional Court's decision as a leading cause behind the continued practice of racial profiling. ECRI, Third Report on Spain (Adopted on 24 June 2005, published in 2006), para 18.

52. The dissenting opinion concluded that the introduction of criteria based on race is contrary to Article 14 of the Constitution, and emphasized the negative impact of the decision, particularly bearing in mind the multi-ethnic composition of Spanish society.<sup>85</sup>
53. The 2009 UN Human Rights Committee's decision in the *Rosalind Williams* case concluded that police identity checks motivated by the race or ethnicity of the individual stopped are discriminatory and violate Article 26 of the ICCPR, read together with Article 2(3). In doing so, the Committee effectively rejected the Constitutional Court's reasoning. However, the Committee's decision was not implemented properly by Spain, and therefore the police practice of racial profiling has continued unabated.
54. In 2011, after taking note of the Constitutional Court's judgment and the subsequent HRC decision in *Rosalind Williams*, ECRI noted the contradictory legal positions relating to racial profiling and urged the Spanish authorities "to ensure an effective prohibition of all racial profiling practices by the police throughout the country".<sup>86</sup> In its Third country report on Spain, published in 2006, ECRI had already identified the Constitutional Court's decision as a leading cause behind the continued practice of racial profiling.<sup>87</sup>
55. The State lawyer's firm reaffirmation during trial of the Constitutional Court's outdated *Rosalind Williams* doctrine, in which he forcefully and repeatedly reminded the judge of its binding nature [Doc. 30, minutes 4:10 to 4:30 and 10:46 to 11:05], leaves no doubt that the authorities continue to this day fully to endorse the practice of racial profiling by the police.
56. In dismissing Mr. Muhammad's constitutional appeal, the first case brought to its attention concerning the police practice of ethnic profiling since the *Rosalind Williams* case, the Constitutional Court missed an opportunity to bring its case law into conformity with international and regional human rights standards. Posed with a fundamentally important legal issue that is arguably contributing to human rights violations, the Constitutional Court chose to disregard Mr. Muhammad's appeal and refused to address the lacuna in protection from discrimination that undoubtedly persists in the Spanish legal system.

#### **B. Violation of the right to private life (Article 8)**

57. The discriminatory identity check that Mr. Muhammad had to endure compounded by the fact that it was conducted in public view and in an undignified manner, humiliated and embarrassed him, and contributes to the stereotyping of his ethnic group, which amounts to a violation of Mr. Muhammad's right to respect for private life.
58. The unfettered powers granted to the police by the law, and the lack of guidance in their exercise, without adequate legal safeguards and an

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<sup>85</sup> Constitutional Court, Judgment, note 13 above, Dissenting Opinion, para. 6.

<sup>86</sup> ECRI, Fourth Report on Spain, note 17 above, para. 201-204.

<sup>87</sup> ECRI, Third Report on Spain, note 84 above, para 18.

independent oversight mechanism against abuse, renders Mr. Muhammad's stop arbitrary and constitutes a failure by the state to prevent such violations.

#### Relevant legal standards

59. The Court has reiterated that the notion of "private life" within the meaning of Article 8 of the Convention is a broad term not susceptible to exhaustive definition.<sup>88</sup> It has further established that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8 and embraces multiple aspects of the person's physical and social identity, such as an individual's racial or ethnic identity.<sup>89</sup> In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group, thus affecting the private life of members of the group.<sup>90</sup> The Court has concretely considered that stereotyping as a justification for disparate treatment is contrary to the Convention.<sup>91</sup>
60. In this regard, the Court has explained that the obligation to uphold Article 8 has two components: (i) States have a negative obligation to "protect the individual against arbitrary interference by the public authorities", and (ii) States have "positive obligations inherent in the effective respect for private life" which may involve "the adoption of measures designed to secure respect for private life".<sup>92</sup>
61. An interference with Article 8 is justified only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 of Article 8, and is "necessary in a democratic society" in order to achieve the aim or aims.<sup>93</sup> For the measure to be "in accordance with the law," it must have some basis in domestic law and be compatible with the rule of law, which requires some measure of protection against arbitrary interference: the law must clearly indicate the scope of the discretion conferred on the competent authorities and the manner of its exercise, and powers impacting fundamental rights cannot be unfettered.<sup>94</sup>

#### The interference in Mr. Muhammad's right to private life

62. The discriminatory identity check that Mr. Muhammad suffered constituted an interference with his right to respect for private life. The fact that the check was conducted in public in a humiliating way embarrassed him and augmented the level of interference in his private life.<sup>95</sup> In addition, since it was carried out based solely on his skin colour, racial or ethnic origin, it

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<sup>88</sup> *Aksu v. Turkey*, Judgment of 15 March 2012, para. 58.

<sup>89</sup> *Aksu v. Turkey*, para. 58, *Ciubotaru v. Moldova*, Judgment of 27 April 2010, para. 49.

<sup>90</sup> *Aksu v. Turkey*, para. 58.

<sup>91</sup> *Konstantin Markin v Russia*, Grand Chamber Judgment of 22 March 2012, para. 141-143.

<sup>92</sup> *Aksu v. Turkey*, para. 59.

<sup>93</sup> *Liberty and Others v. the United Kingdom*, Judgment of 1 July 2008, para. 58.

<sup>94</sup> *Gillan and Quinton v. the United Kingdom*, para. 76-77.

<sup>95</sup> *Gillan and Quinton v. the United Kingdom*, para. 63

contributed to the negative stereotyping of his ethnic group; thus, affecting the private life of Mr. Muhammad as a member of the group.<sup>96</sup>

63. *Unfettered discretion to stop.* Article 20(1) of the Public Security Law applicable at the time of the event confers an unduly wide discretion on the police, both in terms of the authorization of the power to stop and search and its application in practice. The discretion given to individual police officers to carry out a stop is absolute. The law does not define the criteria for exercising discretion: not only is it unnecessary for the officer to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped, enabling the arbitrary use of the powers in question.<sup>97</sup> The police stop powers were not, therefore, “in accordance with the law”, and neither was the interference suffered by Mr. Muhammad.<sup>98</sup>
64. The present case confirms the Court’s view that “there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer” and that “the risk of the discriminatory use of the powers against persons of ethnic minorities is a very real consideration”.<sup>99</sup> Available statistics showing that persons of ethnic minorities are disproportionately affected by the powers, and the national, international, and regional human rights supervisory bodies’ views and reports on Spain corroborate that those risks have become a reality.<sup>100</sup>
65. Police stop powers are not subject to adequate legal standards against abuse and the police discretion is not subject to effective control. Article 20(3) of the Public Security Law compels the police to keep a registry of the identity checks carried out, their length of time and the reasons behind the stops, but only in those cases where individuals cannot be identified and are taken to the police station for the purpose of preventing the commission of an offence or to impose a fine. As considered by the Court, where there are such broad statutory powers, applicants face formidable obstacles in showing that the exercise of those powers is *ultra vires* or an abuse of power.<sup>101</sup>
66. *Lack of safeguards.* It would appear that safeguards against abuse and effective control are provided by the right of an individual to challenge a stop by way of an administrative action in damages or judicial review. However, in the absence of any obligation on the part of the officer to demonstrate a reasonable suspicion, “it is likely to be difficult if not impossible to prove that the power was improperly exercised”.<sup>102</sup> Significantly, the limitations of both the administrative proceedings before the Ministry of Interior and judicial actions are clearly demonstrated by the present case. In this regard, international and regional human rights

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<sup>96</sup> *Aksu v. Turkey*, para. 58.

<sup>97</sup> *Gillan and Quinton v. the United Kingdom*, para. 83-86.

<sup>98</sup> *Gillan and Quinton v. the United Kingdom*, para. 76-77.

<sup>99</sup> *Gillan and Quinton v. the United Kingdom*, para 85.

<sup>100</sup> Domestic context above, para. 10-21.

<sup>101</sup> *Gillan and Quinton v. the United Kingdom*, para. 80

<sup>102</sup> *Gillan and Quinton v. the United Kingdom*, para. 86.

supervisory bodies have criticized the lack of independent, impartial police oversight mechanisms and accountability against police discriminatory behaviour and abuse.<sup>103</sup>

67. *No legitimate aim.* In addition, the interference in Mr. Muhammad's private life was not necessary for it was not justified by any legitimate aims. Official surveys show that immigration and public insecurity were at the relevant time, and still are, among the least of Spain's citizens' worries;<sup>104</sup> hence, they cannot be considered a "pressing social need" for the purposes of the necessity test. More importantly, the Court has held that in the context of law enforcement operations, "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures".<sup>105</sup>
68. In sum, the interference was neither "in accordance with the law" nor necessary, and it follows that there has been a violation of Article 8 of the Convention.

#### Failure to collect information

69. The positive obligation to prevent discrimination must include a duty to collect sufficient information to assess whether an apparently neutral policy has a discriminatory effect. The Government has failed to collect information and adopt adequate measures to bring the police practice of ethnic profiling to an end.
70. ECRI has recommended the monitoring of "police activities in order to identify racial profiling practices, including by collecting data broken down by grounds such as national or ethnic origin, language, religion and nationality",<sup>106</sup> a call supported by the Council of Europe Commissioner for Human Rights.<sup>107</sup> Similarly, the EU Fundamental Rights Agency has stated that "Statistical information relating to the use of police powers is both available and disaggregated according to race, ethnicity or religion, greatly facilitates proving a claim of indirect discrimination in the context of ethnic profiling."<sup>108</sup>

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<sup>103</sup> Domestic Context above, para. 22-26.

<sup>104</sup> Docs. 12 and 36, official surveys by Centro de Investigaciones Sociológicas, *Barómetro De Mayo, Estudio n° 2.987*, May 2013, p. 3-5. Also available at [http://datos.cis.es/pdf/Es2987mar\\_A.pdf](http://datos.cis.es/pdf/Es2987mar_A.pdf); and *Barómetro de Febrero, Estudio n° 3168*, February 2017, p. 4-7. Also available at [http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/3160\\_3179/3168/es3168mar.pdf](http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/3160_3179/3168/es3168mar.pdf)

<sup>105</sup> *Timishev v. Russia*, para 58.

<sup>106</sup> ECRI, *General Policy Recommendation 11*, note 49 above, para.2.

<sup>107</sup> Council of Europe Commissioner of Human Rights, *Human Rights of Roma and Travellers in Europe*, February 2012, pp. 83-84.

<sup>108</sup> EU Fundamental Rights Agency, *Towards More Effective Policing: Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, 2010. The Fundamental Rights Agency makes similar observations about the importance of racially disaggregated statistics for proving discrimination in the context of the EU Racial Equality Directive, see EU Fundamental Rights Agency, *The Racial Equality Directive: application and challenges* (2012), pp.13-14.

71. The UN Special Rapporteur on contemporary forms of racism has also highlighted that disaggregated data collection in regard to racial and ethnic profiling is “essential in order to measure actions of law enforcement agencies, particularly in connection with discretionary actions such as identity checks and stop and search”,<sup>109</sup> and in order to prove the existence and the extent of racial and ethnic profiling.<sup>110</sup>
72. The Spanish Ombudsman has reported the Government’s failure to collect disaggregated data and has issued recommendations mirroring the human rights institutions’ recommendations mentioned above.<sup>111</sup> These recommendations are yet to be implemented, and the present case illustrates the Government’s disregard for their value.

### **C. Violation of the right to a fair hearing (Article 6(1))**

73. The irregularities in the proceedings, instituted in exercise of a civil action seeking compensation for ill-treatment by state agents, rendered the whole process unfair, infringing Mr. Muhammad’s right to a fair hearing in violation of Article 6(1).

#### Relevant legal standards

74. The notion of “fair hearings” applicable in cases concerning the determination of civil rights and obligations includes the right of the parties to civil proceedings to submit any observation they consider relevant to their case.<sup>112</sup> This right can only be seen to be effective if the observations submitted by the parties are actually “heard”. In other words, the tribunal has a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties.<sup>113</sup>
75. The procedural fairness guarantee by Article 6(1) also includes the principle of equality of arms, which requires a “fair balance” between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.<sup>114</sup>
76. Moreover, although the States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases, the provisions of Article 6(2) and (3) have relevance outside the strict confines of criminal law.<sup>115</sup>

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<sup>109</sup> UN Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere*, UN Doc A/HRC/29/46, 20 April 2015, para. 62.

<sup>110</sup> *Ibid.*, para. 68.

<sup>111</sup> Doc. 9, Defensor del Pueblo, Annual Report 2013, note 24 above, pp. 225-226, and Doc. 10, Recommendation 45/2013, of 17 April 2013, note 25 above, p. 154.

<sup>112</sup> *Andrejeva v. Latvia*, Grand Chamber Judgment of 18 February 2009, para. 96.

<sup>113</sup> *Kraska v. Switzerland*, Judgment 19 April 1993, para. 30.

<sup>114</sup> *Gorraiz Lizarraga and Others v. Spain*, Judgment of 27 April 2004, para. 56.

<sup>115</sup> *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993, para. 32.

77. The Court has recognized that a civil action seeking compensation for ill-treatment allegedly committed by agents of the State falls within the scope of Article 6(1).<sup>116</sup>

The violation of Mr. Muhammad's right to a fair hearing

*a) The Audiencia Nacional proceedings*

78. During trial, the *Audiencia Nacional* judge arbitrarily denied Mr. Muhammad's request to summon and question the police officers involved in the identity check, and refused to consider relevant and decisive evidence, which placed him at a substantial disadvantage vis-à-vis the opposing party. In contrast, the written record of the police officers' account, provided during the internal inquiry carried out by their superior – during which there was no opportunity for cross-examination or independent scrutiny – , was integrated in the reasoning and conclusion of the judicial decisions and given full evidentiary value.
79. The question of admissibility of evidence and of its evidentiary weight is primarily a matter for regulation under domestic law. However, the police officers' testimony provided under impartial examination, in the applicant's presence and in public, would have constituted evidence of, at least, *prima facie* relevance to Mr. Muhammad's case. The rejection by the *Audiencia Nacional* of Mr. Muhammad's request for their appearance before the court, combined with the prior and identical refusal by the Ministry of Interior, falls short of the diligence which the State must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner.<sup>117</sup> In addition, the judgment of the *Audiencia Nacional* was based solely on the police officers' report as recorded in the internal police investigation, such that the proceedings failed to meet the fair trial standards required by the Convention.<sup>118</sup> There was no good reason for the non-attendance of the officers as witnesses and, consequently, for the admission of their untested accounts as evidence, and there were no sufficient counterbalancing factors to compensate for the handicaps caused to Mr. Muhammad as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.<sup>119</sup>
80. During trial, the judge further rejected Mr. Muhammad's lawyer's request to have the expert witness on statistics, Mr. Ben Bradford, examined, and disregarded the statistical evidence and international and national human rights bodies' and NGOs' reports adduced by Mr. Muhammad. Mr. Muhammad alleged indirect discrimination and produced statistics which were reliable and significant and therefore sufficient to constitute *prima facie* evidence of indirect discrimination.<sup>120</sup> As a result, the statistics and the expert witness were appropriate evidence in a discrimination case. Yet, the

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<sup>116</sup> *Aksoy v. Turkey*, para. 92

<sup>117</sup> *Caka v. Albania*, Judgment of 8 December 2009, para. 108 and 115.

<sup>118</sup> *Al-Khawaja and Tahery v. the United Kingdom*, Judgment of 15 December 2015, para. 119-147.

<sup>119</sup> *Ibid.*

<sup>120</sup> *DH and others v Czech Republic*, para. 188.

judge rejected this evidence outright and refused to allow verification of it without giving sufficient reasons for its refusal; thus, Mr. Muhammad was deprived of a fair hearing.

81. The trial court deprived Mr. Muhammad of the opportunity to effectively challenge the arguments and evidence adduced by the State, failing to guarantee the equality of arms between the parties, which resulted in an unreasonable and arbitrary decision, incompatible with Article 6(1).
82. The *Audiencia Nacional*'s judgment failed to conduct a proper examination of the submissions, arguments and evidence adduced by Mr. Muhammad. In particular, the decision failed to consider or even reference the discrimination claims.<sup>121</sup> In doing so, the tribunal failed to comply with the ordinary tribunals' function to protect fundamental rights in all kinds of legal proceedings, required under domestic law.<sup>122</sup>
83. The shortcomings in the fairness of the proceedings were not remedied at a later stage – neither at the same level by the *Audiencia Nacional* judge during trial or in the subsequent judicial review filed by Mr. Muhammad, nor by the Constitutional Court – despite Mr. Muhammad raising these issues in his grounds of appeal. In sum, such errors have infringed rights and freedoms protected by the Convention.

*b. The Constitutional Court's decision*

84. The applicant's case raised a fundamentally important legal issue whose settlement falls exclusively within the Constitutional Court's jurisdiction; yet, the Constitutional Court failed to provide sufficient reasoning when declaring Mr. Muhammad's *amparo* appeal inadmissible.
85. The Court has consistently held that it is acceptable under Article 6(1) of the Convention for national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing the admissibility of such complaints if the matter raises no fundamentally important legal issue.<sup>123</sup> As argued above,<sup>124</sup> the Constitutional Court's jurisprudence set out in the 2001 *Rosalind Williams* decision severely undermines the protection against discrimination and has been the leading cause of widespread violations of the prohibition of discrimination. Yet, confronted for the first time to address a fundamentally important legal issue that affects thousands of individuals, the Constitutional Court dismissed the constitutional appeal in a three-line decision.
86. Furthermore, although under national law there is no judicial remedy against the Constitutional Court's decision, there was no reference to the reasons why it considered that the question raised did not warrant referral to the

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<sup>121</sup> Doc. 31, *Audiencia Nacional*'s Judgment, Merits.

<sup>122</sup> Article 7(1) Ley Organica del Poder Judicial (Judiciary Organic Law); Constitutional Court's decision STC 95/1997, 19 May 1997, FJ 3.

<sup>123</sup> *Beraza Oroquieta v. Spain*, Decision of 25 September 2012; *John v. Germany*, Decision of 13 February 2007; *Teuschler v. Germany*, Decision of 4 October 2001.

<sup>124</sup> See paragraphs 50-56.

CJEU or to the applicant's request for a preliminary ruling; failure that contravenes the principles set forth by the Court.<sup>125</sup>

87. The irregularities identified in the proceedings, before both the Constitutional Court and the *Audiencia Nacional*, are sufficient to render the proceedings as a whole unfair.<sup>126</sup> Therefore, there has been a violation of Article 6(1).

**D. Violation of the right not to be subjected to discrimination on grounds of race, colour or ethnic origin and to private life (Article 14 read in conjunction with Article 8)**

88. For the reasons set out above (paragraphs 27-72), there is also a violation of Article 14 read in conjunction with Article 8 (private life). The applicant considers that the question of discrimination is most appropriately considered under Protocol 12.

**CONCLUSION AND JUST SATISFACTION**

89. The factual and legal arguments demonstrate that Mr. Muhammad's identity stop was conducted by the police solely based on his skin colour, race or ethnic origin and therefore amounts to unlawful discrimination. Furthermore, this discriminatory check has infringed upon Mr. Muhammad's personal dignity, honour and private life. For the reasons detailed in this submission, the Court should find that the Convention has been violated and provide appropriate relief. Mr. Muhammad requests that relief be granted, including moral damages caused in the amount of €3,000, his dignity be restored by the issuing of a public apology, widespread dissemination of the decision, and a subsequent apology in major media outlets.

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<sup>125</sup> *Dhahbi v. Italy*, Judgment of 8 April 2014, para. 31.

<sup>126</sup> *Miroļubovs and Others v. Latvia*, Judgment, of 15 September 2009, para. 103.