RÉPUBLIQUE FRANÇAISE
LE DÉFENSEUR DES DROITS

Paris, 3 February 2015

Decision MSP-MDS-MLD-2015-021 by the Defender of Rights

The Defender of Rights,

Pursuant to Article 71-1 of the Constitution of 4 October 1958;

Pursuant to Organic Law No. 2011-333 dated 29 March 2011 relative to the Defender of Rights and notably Article 33;

Pursuant to decree No. 2011-904 dated 29 July 2011 relative to the procedure applicable before the Defender of Rights;

Pursuant to the European Convention on Human Rights and Fundamental Freedoms, notably Articles 3, 5, 8, 14 and Article 2 of Protocol No. 4 of the Convention;

Pursuant to European Directive 2000/43/CE dated 29 June 2000 relative to the implementation of the principle of equality of treatment between persons without distinction according to race or ethnic origin;

Pursuant to law No. 2008-496 dated 27 May 2008 adapting various provisions to community law in the area of the fight against discrimination;

Pursuant to Articles 78-1 and following of the Code of Criminal Procedure;

Pursuant to Article L.141-1 of the Code of Judicial Organisation;

Having received a referral concerning appeals against 13 judgements given on 2 October 2013 by the Paris District Court, dismissing the plaintiffs of their claims aiming to implicate the liability of the State due to the performance of discriminatory identity checks and to obtain reparation for harm (Nos. 12/5871, 12/5873, 12/5874, 12/5875, 12/5876, 12/5877, 12/5878, 12/5879, 12/5880, 12/5881, 12/5882, 12/5883,
12/5884),

Decides to present the following observations before the Paris Court of Appeal.

The Defender of Rights

Jacques Toubon

Observations before the Paris Court of Appeal

Considering that they were victims of discrimination during identity checks carried out by the police, in 2012, the claimants, Messrs. A., B, C, D, E, F, G, H, I, J, K, L, M, had the Law Officer of the State and the Minister of the Interior summonsed before the Paris District Court, in order to have the liability of the State ascertained and to sentence the State to repair the harm suffered.

On 2 October 2013, by 13 judgements, the District Court declared itself competent to rule concerning these claims, considering that the provisions of Article L.141-1 of the Code of Judicial Organisation opened the way for a claim for the liability of the State due to the defective functioning of the public justice service which should apply in this case. On this basis and after having set aside the provisions of the law dated 27 May 2008 relative to the adjustment of the rules on the burden of proof in matters of discrimination, the court dismissed the plaintiffs of their claims, on the grounds that the proof of discriminatory or inappropriate behaviour by the police, constituting gross misconduct, was not provided.

The claimants lodged an appeal against the judgements. On 13 November 2014, their representatives referred the matter to the Defender of Rights requesting intervention in the procedure before the Paris Court of Appeal, based on Article 33 of Organic Law No. 2011-333 dated 29 March 2011.

The Defender of Rights does not intend to give an opinion here on the interpretation of the facts of the case. He wishes to draw the attention of the Paris Court of Appeal to his findings concerning the individual complaints referred to him and the work that he was able to perform on practices in matters of identity checks, and concerning the requirements of European law relative to the fight against discrimination, particularly the positive obligations incumbent upon the State which are inherent to the effective protection of rights.

The observations that civil society is now putting forward concerning the existence of discriminatory identity checks must lead it to take concrete measures aiming to prevent and suppress this type of measure, by sufficiently controlling the checks and providing sufficient guarantees against the risks of abuse and arbitrariness.

The identity check

The identity check is the request made to a person by a law enforcement agent, a police officer or member of the gendarmerie, to prove their identity by any means. It arises from the combination of Articles 78-1 and 2 of the Code of Criminal Procedure (CCP) that the identity check is in reality an injunction or order given by law enforcement to a citizen, who is coerced to remain where he/she is to reveal his/her identity. The person questioned is therefore held at the disposition of the police or gendarmerie, usually in the place of the operation, for the time necessary to demonstrate his/her identity and for police files to be consulted.[1]

The power to check identities is devolved to all police and gendarmes, whatever their rank, in their capacity as agents of the criminal investigation department (Article 20 of the CCP). However, the check must be carried out under the responsibility of an officer of the Criminal Investigation Department.

The conditions authorising a law enforcement agent to carry out an identity check are specified in Article 78-2 of the CCP. It should be noted that Articles 78-2-1 to 78-2-4 also

[1] C. GIRAULT, *"Identity checks and verifications"*, directory of criminal law and criminal procedure, Dalloz, June 2010 (updated October 2013).

specify the use of identity checks, but concerning specific situations (requisitions from the French public prosecutor concerning searches of business premises, for the purposes of searches and action against acts of terrorism and vehicle inspections), which are not covered by the present observations.

There are three main categories of situations.

Firstly, according to the terms of the first subparagraphs of Article 78-2 of the CCP, any person may be checked for whom there exists "*one or more plausible reasons to suspect*" that he/she has committed or tried to commit an offence, he/she is preparing to commit a crime or an offence, he/she is likely to provide information useful to investigation in case of a crime or an offence or he/she is the subject of a search ordered by a court authority.

Furthermore, the French public prosecutor may also, upon written requisition, order identity checks for identifying and proceeding against certain offences in a place and at a time that he/she specifies. It is generally accepted that these first two categories of checks may be qualified as checks carried out in the name of the criminal investigation department, in other words, with the aim of identifying and proceeding against the perpetrators of an offence.

Lastly, a third category of checks are carried out in the name of the administrative police, to prevent disturbances to public order. This provision was introduced into the CCP in 1993 by the law relative to checks and verifications of identity. Given the vague character of its wording, this has, from the outset, been interpreted subject to the Constitutional Court (Decision No. 93-323 DC dated 05 August 1993), emphasising *"whereas the practice of generalised and discretionary identity checks would be incompatible with respect for individual liberties; whereas it is permissible for the legislator to specify that checking the identity of a person may be unrelated to his/her behaviour, it remains that the authority concerned must justify, in all cases, specific circumstances establishing the risk of harm to public order giving grounds for the check"*.

It should be noted that although the identity checks followed by police custody or identity verification are counted and precisely identified, the checks that required no action are not. This lack of traceability and objective data gives free range to subjective points of view expressed by the players[2].

Observations of players

In 2012, the Defender of Rights emphasised the points of view of the various players on the subject. Firstly, institutional players such as the National Ethics Commission (CNDS), from which the Defender of Rights has taken over the duties, and the National Consultative Commission on Human Rights (CNCDH) have taken a position. The CNDS gave several opinions on identity checks, noting the importance of them being exercised in accordance with legal conditions so that they could not be considered as "*discriminatory identity checks*" and regretting that it was not able, each time, to determine the conditions under which the checks can be carried out. For the CNDS, the fact that it is not possible to verify the manner in which the persons are selected, particularly in the case of operations carried out upon requisition by the French public prosecutor[3], is problematic.

When appraising numerous cases, the CNDS and the Defender of Rights have come up against the impossibility of finding any trace of those carrying out an identity check (see, for example, opinion No. 2009-77, April 2010). In a case that was the subject of a court procedure, a check on two Palestinians was justified by the police because an individual was standing behind a pillar opposite another who was sitting on a bench. For

[2] Report concerning the relationships between police and citizens and identity checks, October 2012, p.9 http://www.defenseurdesdroits.fr/sites/default/files/upload/rapport_controle-identite-final_0.pdf

[3] CNDS, report 2010.

the police officer, one of them "*was hiding*" behind the pillar. The Commission considered that these reasons did not correspond to the provisions of Article 78-2 of the CCP and that the check could be considered as "*discriminatory*" (opinion No. 2008-89, 6 April 2009). In another case, a man was checked at a station, in Lyon, and when he asked why he was being checked, he was told: *"because you are an Arab".* In the context of his investigation and notably when the police officer was interviewed, he simply stated that, as it concerned requisitions from the public prosecutor's office, he did not need to give a reason (opinion No. 2010-11, 17 January 2011). In its opinion No. 2008-123 concerning an identity check on two street musicians (followed by an arrest), in Avignon, the Commission stated that the writers of the questioning and submission report stated that they carried out an identity check on *"an individual of African appearance who was in the process of making a sale as an illicit street vendor".* However, the police, when interviewed, admitted, during the investigation by the IGPN and before the Commission, that in reality they checked this person because he had a large bag, he had the appearance of an illicit street vendor and that no merchandise was visible. The Commission considered that the check was in reality "*discriminatory*".

The CNCDH, in its 2010 report entitled "*The Fight against Racism, Anti-Semitism and Xenophobia*" gave a report of all of the work concerning the question of identity checks. In it, it revealed that the police over-check a section of the population characterised by the fact that they are young, male, dressed in a typically-young manner and from visible minorities. The Commission invited the ministry of the interior to take the necessary measures to fight against any discriminatory behaviour within the police, notably by monitoring the activities of the police in order to identify ethnic profiling practices.

At the European level, the European Union Fundamental Rights Agency (FRA)[4] and the Council of Europe's European Commission against Racism and Intolerance (ECRI)[5] found, in the context of their work, the practice that is known as discriminatory ethnic profiling. Concerning the associations and non-governmental organisations, there are many who have condemned, based on research work, surveys and observations on the ground, the over-representation of certain immigrant population groups, without apparent legitimate reason, in the identity checks practised by law enforcement[6]. These practices lead to targeting not based on behaviour but based on stereotypes and racial or ethnic characteristics.

Since 2012, it is clear that the resentment expressed by certain citizens remains. The appeals lodged by the 13 plaintiffs are a good illustration of this. Also, one year after the publication of its report on the relations between police and citizens and identity checks, the Defender of Rights decided to continue the study on the question of identity checks and their procedures.

[4] http://fra.europa.eu/sites/default/files/fra_uploads/1133-Guide-ethnic-profiling_FR.pdf

[5] http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2014/09/ecri_-_quatrieme_rapport_sur_la_france_-_2010.pdf p. 43 to 45

[6] http://www.cnrs.fr/inshs/recherche/docs-actualites/rapport-facies.pdf/
http://www.hrw.org/sites/default/files/reports/france0112frForUpload.pdf
/
http://www.gisti.org/IMG/pdf/np_controle_identite_v3.pdf

1. Positive obligations inherent to effective protection against discrimination

Standards relative to the fight against discrimination

A consequence of the principle of non-discrimination, the principle of equality is enshrined by the Constitution in its Article 1, which states that: *"France is an indivisible, secular, democratic and social Republic. It shall ensure equality, before the law, of all citizens without distinction by origin, race or religion."* This principle of equality applies to the public service as a body for the application of laws. In a ruling in 1951[7], the Council of State enacted a general principle of the right to equality, which governs the functioning of the public services and means that all persons who find themselves in an identical situation with regard to the public service must be governed by the same rules. This rule covers the various public service interlocutors, both civil servants who must be impartial and treat users in a neutral manner, and users between each other. The administrative and court judges are the guarantors of the application of the principle of equality and non-discrimination in relation to public services.

European Directive 2000/43/CE dated 29 June 2000 also enshrines the principle of the equality of treatment between persons without discrimination by race or ethnic origin, in the access to goods and services and the supply of goods and services.

The law dated 27 May 2008, making various adaptations to Community Law in the area of the fight against discrimination, prevents any direct or indirect discrimination based on real or assumed membership, or non-membership, of an ethnic group or a race, in matters of social protection, health, social benefits, education, access to goods and services or supply of goods and services. Its Article 4 states: *"Any individual believing themselves to be a victim of direct or indirect discrimination presents the facts that lead them to believe that this is the case before the relevant court. In light of this information, it is for the defendant to prove that the measure in question is justified on objective grounds that are entirely devoid of discrimination".*

Also, Articles 225-1 and 225-2 of the Criminal Code prevent discriminations as defined by the law, when they consist of refusing the supply of a good or service; of hindering normal exercise of any economic activity; of refusing to hire or sanctioning or dismissing a person; or of making access to a good, a service or a job subordinate to conditions based on a prohibited reason and notably the origin, physical appearance, or real or assumed membership or non-membership of a given ethnic group, a nation, a race or a religion. These provisions therefore cover such inequalities of treatment when they are committed in relation to access to a public service and Article 432-7 of the Criminal Code also provides for severer penalties in the case of discrimination committed by a person bearing public authority in the exercise of his/her functions, when it consists of refusing the benefit of an entitlement granted by the law or hindering the normal exercise of any economic activity.

Lastly, the European Code of Police Ethics, adopted in 2001 by the Committee of Ministers of the Council of Europe, recommends in its Article 40, that *"the police must carry out their duties equitably, in particular according to the principles of impartiality and non-discrimination"*[8].

[7] CE, sect., 9 March 1951, No. 92004, *Société des concerts du conservatoire*.

[8] Recommendation Rec (2001) 10 of the Committee of Ministers to member States on the European Code of Police Ethics adopted on 19 September 2001.

Significant international jurisprudence

"*Discriminatory*" identity checks constitute discriminatory measures with regard to the European Convention on Human Rights and Fundamental Freedoms (ECHR), notably the principle of non-discrimination enshrined by Article 14, according to the terms of which: *"The exercise of the rights and liberties recognised in the […] Convention must be ensured, without any distinction based notably on […] race, colour […] national or social origin, membership of a national minority […]"*. This article, "the exercise of rights and liberties" guaranteed by the Convention and its Protocols, may be combined, in the case of identity checks, with Articles 5 and 8 of the Convention, and Article 2 of Protocol n 4, which protect respectively the right to freedom and security, the right to privacy (Gillan and Quinton v. United Kingdom, no 4158/05, § 57,ECHR 2010) and freedom of movement (Timichev v. Russia, Nos. 55762/00 and 55974/00, ECHR 2005-XII). According to constant jurisprudence from the Court, a difference in treatment is discriminatory if it lacks objective and reasonable justification, meaning it does not pursue a "legitimate aim" or if there is no "reasonable relationship of proportionality" between the resources employed and the aim targeted by the measure (Chassagnou and others v. France [GC], nos 25088/94, 28331/95 and 28443/95, § 91, ECHR 1999-III).

As racial discrimination is "a particularly odious form of discrimination" (*Natchova and others v. Bulgaria* [GC], nos 43577/98 and 43579/98, § 145, ECHR 2005-VII), the Court considers that the level of protection guaranteed to citizens seeking justice must be the highest. Consequently, when a difference in treatment is based, directly or otherwise, on race, colour or ethnic origin, or on nationality, the concept of "reasonable and objective justification" must be interpreted as restrictively as possible. Furthermore, the Court considers that no difference in treatment based exclusively or to a decisive extent upon the ethnic origin of a person can be objectively justified (*ibid*, § 176).

The Court has already had occasion to condemn discriminatory measures based on origin. It did it, for example, in the case of *Timichev v. Russia,* concerning refusal of entry to the national territory based on membership of the Chechen community (aforementioned). It should also be remembered that a discriminatory identity check could constitute degrading treatment contrary to Article 3 of the ECHR. Already in 1978, the Court's Commission, when referred the case of a refusal of permission to enter or remain in the United Kingdom concerning persons from territories formerly under British control, considered that *"discrimination based on race could, under certain circumstances, represent, in itself, "degrading treatment"* according to the meaning of Article 3" (petition No. 4626/70 and others, decision dated 6 March 1978). This jurisprudence was subsequently confirmed, notably in the case of *Cyprus v. Turkey*, in which the Court considered that the discrimination suffered by Greek Cypriots was of such seriousness that it constituted degrading treatment (*Cyprus v. Turkey* [GC], no 25781/94, ECHR 2001-IV). In this case, the cause was the demeaning and disgraceful living conditions imposed on these persons, due to their ethnic origin and religion.

Note that, at the international level, the International Covenant on Civil and Political Rights offers greater protection than the ECHR because the Human Rights Committee (HRC) has judged that the right to non-discrimination, guaranteed by Article 26 of the Covenant, was an autonomous right. The Committee considers that Article 26 enshrines the general principle of equality before the law, proclaimed by Article 7 of the Universal Declaration on Human Rights, which "prohibits any discrimination, in law or in fact, in all domains relating to the authority and protection of the public authorities" (HRC decision n° 172/1984, 9 Apr. 1987, *Broeks v. The Netherlands).*

In the case of *Williams Lecraft v. Spain* (No. 1493/2006), concerning the breach of Article 26

constituted by a police identity check motivated by the colour of the skin of the person in question, the Committee considered that the check constituted illegal discrimination. When the plaintiff asked the police officer why he was the only person asked to show his papers, he replied *"it's because you are black".* The HRC warned against targeting persons presenting certain physical or ethnic characteristics, which *"would not only have negative repercussions in terms of the dignity of the persons concerned, but would also contribute to propagating xenophobic attitudes in the population in general and would be contrary to an effective policy on fighting racial discrimination".*

The positive obligations of the State in matters of discrimination

The effective protection of rights requires States not only to refrain from arbitrarily interfering in the exercise of rights protected by the Convention, but also to take appropriate and concrete measures to prevent and suppress such interference committed by agents of the State and third parties. Such positive obligations also exist in matters of discrimination. The Court has reaffirmed it numerous times, particularly in the case of *Natchova and others* (aforementioned), where it emphasised that the prohibition of discrimination in general, and discrimination based on race and ethnic origin in particular, reflects, in the same way as the other rights guaranteed by the Convention and its Protocols, the fundamental values of the democratic societies which form the Council of Europe.

In the *Timichev* case, the Court considered that this type of behaviour required "particular vigilance and energetic reaction" from the authorities and that they should use all means at their disposal to combat racism, thus strengthening the democratic conception of society, in which diversity is perceived not as a threat, but as a resource (aforementioned § 56).

Identity checks carried out in a discriminatory manner with regard to persons, due to their origin, their nationality or their skin colour, therefore require the authorities to adopt concrete and firm measures that are able to prevent and suppress this type of act.

These positive obligations may be material and/or procedural. They may concern certain particularly vulnerable groups when they need enhanced protection. This is the case of members of the Roma community or women who are victims of domestic violence (*Oršuš and others v. Croatia,* [GC], No. 15766/03, §§ 147-148, ECHR 2010 and *Opuz v. Turkey,* no 33401/02, ECHR 2009). These measures may include the establishment of a legislative framework to sufficiently protect individuals from acts contrary to the Convention (see, as an example, *Abdu v. Bulgaria,* No. 26827/08, 11 March 2014), the adoption of specific criminal provisions suppressing and punishing discriminatory acts and acts of racist violence (*Nikolay Dimitrov v. Bulgaria,* No. 72663/01, § 67, 27 September 2007), the establishment and effective application of a system suppressing all forms of violence and offering sufficient guarantees to victims (*Opuz*, aforementioned), the establishment of a distinction, in the judicial system and in practice, between offences of a racist and ethnic connotation and other offences, the specific duty to conduct an enquiry to establish whether the incriminating facts are based on racist motives (*Natchova* aforementioned, § 160). Breaches of such obligations would be tantamount to closing one's eyes to the gravity of such acts and considering them as ordinary acts, which could constitute unjustified treatment, irreconcilable with Article 14 of the Convention (*Natchova* aforementioned).

The position of the Court on the extent of the positive obligations of States in matters of discrimination is shared by the other European and international control bodies. In this regard, reference is made to the recommendation on general policy relative to the fight against racism and racial discrimination in the activities of the police (No. 11), where the ECRI requests member States to define and clearly prohibit racial profiling in the law, namely *"the use, by the police, without objective and reasonable justification, of reasons such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities".* It also requests them to *"to ensure the opening of an effective investigation into allegations of racial discrimination or abusive behaviour with racist motivation by the police and, where applicable, to make sure that the perpetrators of such acts are appropriately punished"*[9].

In another recommendation concerning racial discrimination in the administration and functioning of the criminal justice system, given this time by the United Nations Committee on the Elimination of All Forms of Racial Discrimination, signatory States are reminded of the obligation to "*take the necessary measures to prevent questioning, arrests and searches based, de facto, exclusively on the physical appearance of the person, his/her colour, appearance, membership of a racial or ethnic group or any other "profiling" which exposes him/her to greater suspicion*" (general recommendation XXXI, § 20).

Thus, the unanimous conclusion of the existence of identity checks carried out in a discriminatory manner on persons due to their ethnic origin, their nationality, their appearance or the colour of their skin, must lead the authorities to take concrete and effective measures to prevent and eradicate such acts. These must occur at several levels, both at the level of the legal regime applicable to identity checks when these confer broad discretionary power on police officers (**2**), and at the level of the guarantees provided for in the implementation of the system (**3**).

2. The necessity of a legal regime that sufficiently controls the identity checks system

The legislative provision governing identity checks must meet the quality requirements of the law; this implies that the powers conferred on the police be sufficiently controlled and covered by appropriate legal guarantees against abuse. Indeed, according to constant jurisprudence by the European Court of Human Rights, any interference with a right guaranteed by the Convention and its Protocols must be *"specified by the law"*. This means that the contested measure must have a legal basis in internal law and be compatible with the pre-eminence of the law, a fundamental principle of a democratic society (*Gillan and Quinton*, aforementioned). The law must therefore be sufficiently accessible and predictable, so that citizens seeking justice can adapt their behaviour. To meet these requirements, internal law must offer adequate legal protection against arbitrariness and infringement of fundamental rights by the public authorities. It must define, with sufficient clarity, the degree of discretion conferred on the executive power and the procedures for its execution. This level of precision depends, states the Court, to a large extent on the content of the text in question, the matter that it is intended to govern and the number and status of those to whom it is addressed. This requirement is not fulfilled when the power of assessment granted to the executive is unlimited.

The Court considered that these requirements were not fulfilled in the case of *Gillan and Quinton v. The United Kingdom* (aforementioned), concerning the legislative provisions authorising police officers to question and search for the purposes of preventing acts of terrorism. The texts that were criticised conferred discretionary power that was too broad on police officers and did not specify the procedures for executing the measures. Without strict governance, these measures were based essentially on "*premonition*" or "*professional intuition*" of police officers. The officers therefore did not need to demonstrate the existence of legitimate reasons, or even subjectively have the slightest suspicion concerning the person questioned and searched. According to the Court, this system granted extensive powers to the police and caused a clear risk of arbitrariness and discrimination with regard to categories of the population. It considered that this risk was demonstrated in this case by the statistics, which showed disproportionate use of this power against persons who were black or of Asian origin. Lastly, it added that under these circumstances, the existence of legal control or action for reparation is not sufficient to constitute a guarantee against abuses when the police officer is not required to demonstrate the existence of legitimate suspicion because it would be impossible to prove the abuse of power.

The work carried out by the Defender of Rights on identity checks has highlighted the problem of the use of purely subjective criteria for making an identity check. Indeed, it appears that the identity checks which cause problems are not those carried out based on objective criteria (such as behaviour), but those based on criteria assessed subjectively by the member of the police or gendarmerie. Yet, he was able to ascertain that in reality, most of the identity checks were carried out upon requisition by the French public prosecutor, as was the case for 8 of the 13 plaintiffs in this case. Yet, once the requisition is delivered, there is no formal obligation to state a reason for the checks.

The question of the reason for the check raises the difficulty of objectifying the choice of person checked in the context of checks pursuant to requisition and administrative checks, which may be carried out on any person independent of his/her behaviour. The question arises of knowing the criteria used by the agents for choosing the persons that they check. The work of the Defender of Rights has shown that these are largely based on subjective criteria such as their feeling or "instinct". It is therefore up to the agents to freely assess which people are checked, independently of their behaviour. These criteria are specific to each agent, who builds his/her own "police instinct" or framework for interpretation.
These may be based on numerous factors such as the profile of the person, his/her assumed ethnic origin, his/her dress or other factors, and/or according to stereotypes.

Because the criterion which has led to an identity check is subjective, it is very difficult to verify it, even more so as it is not formalised and the persons performing the checks often do not themselves know the precise reasons that led them to make the checks.

The measures aiming to improve the governance of identity checks must be accompanied by guarantees in the implementation of the system, to protect citizens seeking justice from risks of abuse and arbitrariness.

3. Necessary guarantees against the risk of abuse and arbitrariness

With regard to the ECHR, the authorities have the obligation to provide guarantees giving a real counterweight to the extensive powers granted to the executive, in order to offer citizens seeking justice adequate individual protection against arbitrariness and the risks of abuse (*Gillan*, aforementioned, § 79).

Improvement of the means of undertaking proceedings and seeking proof should enable the effectiveness of non-discrimination to be ensured in the area of police checks.

a) Guarantee access to effective judicial review

The procedures for identity checking and verification are subject to judicial review, exclusively by judges. The Constitutional Court emphasised, in its decision of 5 August 1993, that *"it is the responsibility of the judicial power, guardian of individual liberty, to control, in particular, the conditions relative to the legality, reality and relevance of the reasons for operations to check and verify identity"* [10].

The lack of traceability of identity checks

As the Paris District Court observed in the judgements given on 2 October 2013, the legislative provisions applicable to identity check procedures do not specify any written trace of the checks that took place: *"[…] even if this act by the criminal investigation department, carried out in application of the provisions that have just been mentioned, did not give rise to any statement of offence or, consequently, the establishment of any proceedings"*.

Effectively, although identity checks followed by police custody or an identity verification are the subject of a written procedure, those which are not are not recorded in writing.

Indeed, identity checks in France are not subject to any legal obligation for traceability. The checks do not have to be recorded, no receipt is delivered, and police and gendarmes have no obligation to report a check on a formal report in the case where this does not lead to the ascertainment of an offence.

The absence of a reason and written procedure, in particular any trace of the check that was made (at least specifying the date and place of the check , the name of the checking agent and the person checked and the reasons justifying the measure), or even oral notification to the person checked of the legal basis of the measure and the reasons for the check, hinder access to judicial review and can deprive the subject of the check of the possibility of effectively challenging the measure and denouncing its discriminatory character. In these cases, the only factors are often the testimony of the police against that of the person checked. Depriving the latter of this information makes the rights that he/she has theoretical and illusory. Yet, the European Court has emphasised, numerous times, that the objective of the Convention is to protect concrete and effective rights (see, in particular, *Artico v. Italy,* 13 May 1980, § 33, series A no 37). Also, the lack of communication of the reasons for the check fuels the feeling of injustice of the person checked, who may legitimately assume that the check is based on subjective factors such as his/her origin.

From lack of a priori control for checks pursuant to requisition…

One must remember that checks pursuant to requisition from the public prosecutor's office were validated by the Constitutional Court providing that they are subject to strict *a priori* control by the French public prosecutor in order to ensure respect for fundamental freedoms[11].

[10] Recommendation Rec (2001) 10 of the Committee of Ministers to member States on the European Code of Police Ethics adopted on 19 September 2001.

[10] Constitutional Court, decision No. 93-323 DC dated 5 August 1993.

[11] *Ibid*.

In the absence of a control mechanism, due to the increasing demand from requisitions by law enforcement, their systematic sequencing amounts to generalising, in certain zones, the practice of discretionary identity checks, because they are carried out independently of the behaviour of the person. Yet, the Constitutional Court has stressed that *"the practice of generalised and discretionary identity checks would be incompatible with the respect for individual liberties"*[12]. The delivery of requisitions for which the time periods follow on after each other is therefore a real problem from the point of view of respect for fundamental freedoms.

… to lack of subsequent control

Indeed, going beyond the control of requisitions, the French public prosecutor is informed of identity checks only if the person checked is subsequently remanded in police custody. If the check does not lead to any proceedings, the public prosecutor has no knowledge of it.

Concerning judges, they are only confronted with court proceedings disputing an identity check when it is sent to them. Such is the case when an identity check gives rise to questioning, when the alleged perpetrator of the offence in question could enter a plea of illegality before the court judge, claiming that the check was essentially based on his/her ethnic origin, supporting this, for example, by the record of evidence of the questioning.

Ultimately, a large share of identity checks are not therefore controlled by the court authority. The guarantee of effective judicial review of a coercive measure such as identity checks therefore imposes an obligation on the State to establish the conditions for traceability and the reasons for the checks. It must be accompanied by another procedural guarantee: adjustment to the rules on the burden of proof.

b) The necessary adjustment of the burden of proof

In contrast to what the District Court asserts, the law No. 2008-496 dated 27 May 2008 making various adaptations to community law in the area of the fight against discrimination, notably Directive 2000/43/CE, prohibits any discrimination based on real or assumed membership, or non-membership, of an ethnic group or a race, in matters of access to goods and services or the supply of goods and services. Article 4 relative to the adjustment of the burden of proof is applicable before a civil court to the actions and measures adopted by the public services. The law confined itself only to removing criminal prosecution from the scope of the system.

Consequently, as the plaintiffs call into question the functioning of the public justice service, of which the police operations form part, the aforementioned provisions are applicable to the dispute. The plaintiffs must therefore benefit from an adjustment of the burden of proof which makes it incumbent upon the services in question to prove the absence of discrimination, from the moment when they present the facts that enable the existence of discrimination to be presumed.

This rule on adjusting the burden of proof arising from community law has also been systematically transposed to all civil and administrative procedures in matters of discrimination: in this regard, reference is made to Article L.1134-1 of the Employment Code and to Article 1 of law No. 89-462 dated 6 July 1989 aiming to improve relationships in the rental sector. This is also what the administrative judge does. For example, in a case of the refusal, by a municipality, to make a room available to a French Muslim association for religious practices, the Council of State considered that it was the responsibility of the municipality to prove the difficulty of meeting this request (CE, 26 August 2011 No. 1106560). The cases *Perreux* and *Mme Delaunay must also be cited* (CE, Ass., 30 October 2009,

12 *Supra 10*.

No. 298348 and CAA Versailles, 29 December 2009, No. 08VE00296). It is interesting to refer to the conclusions of the rapporteur public in the context of the ruling by the administrative court of appeal of Versailles dated 29 December 2009 (AJDA 2010, p.742). As the 2008 law was not applicable at the time of the events, the directive dated 15 December 1997 was applied, concerning the presumption of discrimination and the adjustment of the burden of proof. *"Although this usage instruction, relative to the administration of proof, was drawn up by the Council of State at the time of an action for exceeding powers, there is no reason not to apply it to an action for damages in an administrative court for repairing the harmful consequences of actions for which the legality must be assessed with regard to the principle of non-discrimination".*

In this regard, the interpretation of the law dated 27 May 2008 is supported by jurisprudence from the Strasbourg Court. It considers that in matters of discrimination, when the plaintiff has produced the beginnings of proof concerning the existence of a difference of treatment arising from a measure or a practice, it is incumbent upon the party summonsed to demonstrate that this difference of treatment is justified (in particular, see *Chassagnou and others v. France* [GC], Nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III). Furthermore, aware of the difficulties in providing proof of discrimination, the Court considers that to ensure effective protection of citizens' rights, statistical data may be used to establish the existence of a difference of treatment between two groups of persons in similar situations. It did this notably in cases of discrimination where the plaintiffs claimed that the discrimination resulted from a difference in the effect of a general measure or a situation of fact (*Opuz*, aforementioned, § 183). European Union law lays down the same requirements (*D.H. and others,* aforementioned, §§ 84-91).

c) Guarantee citizens seeking justice an effective means of recourse against a measure harming the principle of equality of treatment

The Paris District Court has ruled on the basis of Article 141-1 of the Code of Judicial Organisation (CJO), according to the terms of which the State is required to repair the harm caused by the defective functioning of the justice service. This liability is implicated only for gross misconduct or denial of justice. It arises from the jurisprudence of the Court of Cassation that gross misconduct covers *"any shortcoming characterised by an event or series of events showing the inability of the public service to fulfil the duties for which it is responsible".*

European law requires the authorities to guarantee citizens seeking justice effective recourse against any measure harming their rights and the principle of equality of treatment. The Court emphasised this when recording its jurisprudence on Article 13, which enshrines the right to effective recourse (see notably *Kudła v. Poland* [GC], no 30210/96, § 157, ECHR 2000−XI). This means that the authorities must provide citizens with the means by which they can obtain appropriate redress for breaches of their rights guaranteed by the Convention. This recourse must be "*effective*", in practice and in law. Article 7 of the aforementioned Directive 2000/43 lays down the same requirements; it requires States to ensure that judicial and/or administrative procedures are accessible to all persons who consider that they have been wronged by non-respect for the principle of equality of treatment.

Yet, when the identity checks are without consequence, which characterises situations where persons consider that they have been checked abusively, requiring citizens seeking justice to prove gross misconduct without adjusting the burden of proof and without requiring the public service to justify itself, amounts to depriving citizens seeking justice, who allege the discriminatory character of the measure, of a means of effective recourse allowing them to

dispute the legality of the measure and obtain appropriate redress; in contrast to a person subject to criminal prosecution, who can dispute the regularity of the identity check before the judge.

The conditions for the implementation of identity checks that are not the subject of criminal prosecution and the burden of proof imposed by the District Court could lead us to wonder whether such an interpretation of the recourse specified by Article L. 141-1 is, according to the jurisprudence of the European Court, an effective means of recourse, meaning adequate and sufficient, to prevent and effectively suppress discrimination likely to occur during identity checks.

It is also permissible to doubt the appropriate and sufficient character of redress for the breach which could be granted to the victim under such conditions (*Kudła*, aforementioned). Indeed, this recourse allows reparation of the harm caused to him/her by the payment of compensation pursuant to a fault by the justice service, but nothing is provided for concerning the punishment of the agent responsible. Yet, the authorities have a duty to take measures aiming to prevent and suppress discriminatory acts, and to punish those responsible for them. In certain cases where the plaintiffs express grievances relative to Article 3 of the ECHR protecting any person against inhuman and degrading treatment, the Court has considered that a procedure which aimed only to allocate damages, without any other measure allowing the identification and punishment of those responsible, could not be considered as effective recourse (*Turan Cakir v. Belgium*, no 44256/06, § 48, 10 March 2009, *Assenov and others v. Bulgaria*, 28 October 1998, Recueil 1998-VIII, § 102). This jurisprudence is perfectly transposable to the present cases, with regard to the requirements laid down by the Court to guarantee effective protection of rights. Article 15 of the aforementioned Directive 2000/43 also moves in this direction because it asks the States to implement effective, proportionate and deterrent penalties in case of discrimination.

Thus, in our opinion, the Court of Appeal must wonder how the applicable text can be interpreted to offer citizens seeking justice sufficient guarantees against the risk of having identity checks escape any effective judicial review and wonder whether the recourse for defective functioning of the Justice service specified by Article 141-1 of the CJO constitutes an effective means of recourse against abusive identity checks, according to the meaning of the jurisprudence of the ECHR, and, in particular, effectively accessible to persons who allege that went they were subject to identity checks based on discriminatory reasons.

These are the observations that the Defender of Rights intends to bring to the attention, and wishes to submit for the assessment, of the Paris Court of Appeal.

The Defender of Rights

Jacques Toubon