

SITUATION TESTING

A method of proving
discrimination



Organization for Security and
Co-operation in Europe
Mission to Skopje



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 **ХЕЛСИНШКИ**
КОМИТЕТ ЗА ЧОВЕКОВИ
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SITUATION TESTING

- a method of proving discrimination

Neda Chalovska

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SITUATION TESTING

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List of abbreviations:

European Union EU

European Convention for Human Rights ECHR

European Court of Human Rights ECtHR

European Committee of Social Rights ECSR

European Social Charter ESC

Law on prevention and protection against Discrimination LPPD

Criminal Code CC

Commission for Protection against Discrimination CPD

Organization for Security and Co-operation
in Europe Mission to Skopje OSCE

Network for Protection against Discrimination NPD

United Nations UN

EU Charter of Fundamental Rights The Charter

Republic of Macedonia RM

Council of Europe CE

United States of America USA

The Court of Justice of the European Union CJEU

Foundation Open Society Macedonia FOSM

Helsinki Committee for Human Rights of RM MHC

Preface:

As a multiethnic and multicultural country, the Republic of Macedonia is a land of differences, which are not always accepted by the citizens of different ethnicity, i.e. origin. Due to this, such differences often lead to discrimination on several grounds: ethnicity or ethnic origin, religion, nationality, skin color, race. However, there is also discrimination which is not related to the ethnic origin, but to other traits a person is born with - sex, sexual orientation, social origin, or which are acquired during one's lifetime - marital status, health status, political affiliation. Also, discriminatory grounds that in their nature in many cases are variable are age and disability. Considering the fact that in 2010, the Law on prevention and protection against discrimination was adopted, coming into force on the 1st of January 2011, and which is a *lex generalis* in the field of discrimination, we may conclude that initiating procedures for determination and protection against discrimination is a relatively new field for the judges, law practitioners and also for the equality body formed in line with this law - the Commission for protection against discrimination.

Perhaps the greatest burden when proving discrimination falls on the victims of discrimination and the civil society organizations working in this field and offering direct services for free legal aid of citizens and other people for protection against discrimination, because they were and shall be the connection between citizens and institutions, when there is a limitation of rights which are protected by the Constitution and the laws of the Republic of Macedonia. Hence, organizations must find manners and methods of proving discrimination, which is difficult to do in most cases.

One of the methods which led to change in some European countries when proving direct discrimination, and hence led to changing the legislation in order to accept this manner of proof as evidence in court proceedings for discrimination is *Situation testing*. This method is also used for conducting research, the results of which are further used for advocacy or lobbying for change of discriminatory practices or changes of legislation, raising the awareness of the public regarding certain discriminatory practice, as well as for monitoring and documenting the situation regarding discrimination.

Situation testing is a method used in cases of discrimination when there is insufficient facts and evidence and the allegations are difficult to prove. Situation testing involves the use of organized applicants or actors, in order to investigate the occurrence of discrimination in different processes and areas, on different grounds. It is particularly adequate in cases of direct discrimination, which is often hidden behind various excuses, as well as for testing rights which are already contained in legislation and international standards. The model of individual justice

is often inadequate when proving structural and institutional discrimination, and situation testing facilitates disclosing and proving discrimination in these cases.

Encouraged by the positive effects of the employment of this method in other countries, and taking into consideration the fact that situation testing has not been used as means of evidence in the Republic of Macedonia, the need for the use of this method imposed itself, since in case it is efficiently implemented it can be used as means of evidence, not only in court representation, but also in the processes of lobbying and advocacy of certain groups before the relevant institutions.

Apart from the general methodology for use and implementation of the method of situation testing, this document also provides an insight into national and European legislation in the field of protection against discrimination, the decisions of the European Court of Human Rights and the Court of Justice of the European Union referring to cases of direct and indirect discrimination and the means of evidence employed to prove discrimination, considering the fact that our country is a candidate country for EU membership, and consequently is bound to align its legislation with the EU legal system, which, among other things, stipulates prohibition of discrimination.

Introduction:

European legislation on prevention and protection against discrimination

The administration of justice through anti-discrimination law, in national legislation as well as within the supranational legal system of the European Union (EU), is established on several grounds: primarily accentuating the European Convention on Human Rights (ECHR) and adherence to it by all member-states of the European Union and of the Council of Europe (CE) and further on, having in mind the EU's non-discrimination directives. Hence, "European anti-discrimination law" suggests that „there is a unified system of non-discrimination rules throughout Europe”.¹

The initial document that European anti-discrimination law relies on is the ECHR, Article 14 prohibiting discrimination, therefore guaranteeing equal treatment in the enjoyment of other rights stipulated by the Convention. Furthermore, Protocol 12 (2000)² widens the scope of the prohibition of discrimination and guarantees equal treatment in the enjoyment of all rights,

¹ "Handbook on European anti-discrimination law", FOOM, Skopje, 2013

² By now, November 2014, the Protocol has been ratified by 18 countries, members of the Council of Europe www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF16/07/2010/&CL=ENG

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including rights according to national legislation³. Also, there is additional protection against discrimination built in the Framework Convention for the protection of minorities, adopted by the Council of Europe on 01.02.1995 which stipulates the minimal rights that the member countries of the CE and the other signatories of the Convention are bound to guarantee and protect.

Another key document for European anti-discrimination law is the European Social Charter, which was first signed on the 18.10.1961, and then amended on the 3rd of May 1996. The significance of the Charter covers the field of economic and social rights, comprising the corpus of rights also stipulated by the ECHR. However, with the additional Protocol (adopted in 1998), the list of rights from the social domain within the Charter was expanded with the right to non-discrimination, by means of inserting the following: right to equal opportunities and equal treatment and occupation, without discrimination on the ground of gender, the right to informing and consultation, the right to participation in the determination and decision regarding working conditions, and the right of elderly people to social protection. The Charter contains explicit provisions for general equal treatment and non-discrimination in article E which presents an opportunity for contribution of the European Social Charter in understanding the right to non-discrimination in the EU. From this aspect, adequate and effective remedies in proving alleged discrimination may be encountered in the work of the European Committee of Social Rights, because it insists on the effectiveness of the prohibition of discrimination during employment and in labor relations, stating all grounds for discrimination, or primarily, political affiliation, ethnic background, religion, race, language, sex, age and health status, as prohibited grounds for discrimination. In this sense, the work of the Committee also comprises the shifting of the burden of proof (particularly regarding workers as plaintiffs) as a difference in treatment in cases of alleged discrimination and calls for introducing facilitating regulations, which shall enable the plaintiff to justify the allegations before the court. Furthermore, the Committee established that the legislative framework should guarantee protection of the worker against dismissal or suspension from his/her job, in case the worker had submitted a complaint or had initiated litigation. And finally, in cases of violation of the prohibition of discrimination, the Committee established that the legislation should determine sanctions for the employers and adequate compensation for the workers - proportional to the damage suffered by the worker as a victim. There is a procedure

³ “According to the explanatory report of the Protocol, it has been created in order to strengthen the protection against discrimination, which is considered an essential element in guaranteeing human rights. More specifically, the Protocol was produced from a series of debates on strengthening gender and racial equality”. See more in “Handbook on European anti-discrimination law”, http://www.echr.coe.int/Documents/Handbook_non_discr_iaw_MKD.pdf , publisher FOOM, Skopje, 2013

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for submitting collective complaints by the civil associations to the Committee for violating the rights protected by the European Social Charter, but the Republic of Macedonia has still not accepted this collective complaint procedure.

From the aspect of the burden of proof, in its conclusions for Romania, the Committee directly expresses its regret for the lack of regulations facilitating the burden of proof in cases of alleged discrimination, where the alleged victim carries the entire burden of proof.⁴ The Committee had a similar reaction in the case of Malta, with requesting information from the state regarding the rules of proving cases of alleged discrimination, and whether the motive of the employers is taken into consideration as a determining factor by the court, in the assessment of whether discrimination had occurred.⁵

European Union

The European Union was primarily inspired by free trade, and subsequently by stabilized social and economic relations, leading to the Treaty Establishing the European Economic Community (1957), containing a provision for prohibition of discrimination on the ground of sex, in the context of employment.

The principle of equal treatment and non-discrimination is also a fundamental principle of the EU Treaty, according to which the compliance with the human rights and fundamental freedoms, democracy and rule of law are fundamental values of the EU. Article 2 from the treaty also stipulates promotion of sex equality, while Article 7 stipulates a suspension clause as a means to protect human rights and liberties, which stipulated limitation of certain rights of the EU member countries in case of severe and permanent violations of human rights, as well as sanctions in cases of violation of the fundamental principles by the member-countries.

A particularly significant document in the protection of human rights and freedoms and the principle of non-discrimination is the EU Charter on Fundamental Rights⁶, which contains a line of civil, political, economic and social rights for all the citizens and people residing in EU. The Charter stipulates equality of all people before the law, prohibits discrimination on grounds of sex, race, color, ethnic or racial origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation and obliges the Union to respect cultural, religious and linguistic

⁴ Concl. 2002 (Romania) pp. 117 – 121

⁵ Concl. XVI-1, vol. 2 (Malta) pp. 408 – 411

⁶ The full text of the Charter can be read at the following link: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

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diversity. The Charter entered into force on 01.09.2009, with the entry into force of the Treaty of Lisbon⁷.

By establishing the principle of equal treatment as a fundamental principle of EU law, in 2000, two directives were adopted in order to guarantee this principle and protect the EU member countries from discrimination: The Directive for equality in employment prohibited discrimination on the grounds of sexual orientation, religion and belief, age and disability in employment **2000/78/EC**⁸, and the Directive for racial equality **2000/43/EC**⁹, which prohibited discrimination on the grounds of race or ethnicity in employment, but also in the social protection and social security system, as well as in the access to goods and services including housing. These directives ban four types of discrimination - direct and indirect discrimination, harassment and instruction for discrimination. In 2004 the Directive for implementing the principle of equal treatment between men and women in the access to and supply of goods and services 2004/113/EC, which broadened the scope of the ban on discrimination on the grounds of sex and in the area of access to goods and services, and in 2006 the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). From a procedural aspect, the Directive on the burden of proof in cases of discrimination based on sex 97/80/EC adopted on 15.12.1997 is particularly significant, which stipulates that the burden of proof shifts to the side of the sued/discriminator, in case there are assumptions that discrimination has been inflicted.

What derives from this anti-discrimination system on these grounds, from the institutional debate within the EU, is the “Horizontal directive” project, which means protection in all areas stipulated with the Directive for racial equality. The significant contribution of European anti-discrimination law in national judicial systems reflects with adoption of laws at the national level that allow access to all areas of society available to all individuals based on fair and equal terms.

Conclusively, the key concepts for the anti-discrimination directives and EU equal treatment law involve the definition for direct and indirect discrimination, harassment, victimization and instruction for discrimination, shift of burden of proof, adjustments of the working environment for people with disability (known as reasonable accommodation), defending the rights of victims by

⁷ The full text of the Treaty of Lisbon can be read at the following link:
http://eurlex.europa.eu/legalcontent/EN/ALL/;ELX_SESSIONID=Dp5YJITfnzV5LmGhbcWsqKDGXbHJn2GrQRZWn152wYLCym5LKnBX!-267846139?uri=OJ:C:2007:306:TOC.

⁸ The full text of Directive 2000/78/EC is available on the following link:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

⁹ The full text of Directive 2000/43/EC is available on the following link:
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>

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the civil associations and trade unions, social dialogue, as well as effective and proportionate deterrent sanctions, involving compensation for the victim.¹⁰

United Nations

The international documents of the United Nations (UN) have a particular impact on the European legislation, since they serve to establish the international standards and fundamental values in the protection of human rights. The following documents are of great importance for the European legislation, as well as the Republic of Macedonia, for we have ratified them:

- Universal Declaration of Human Rights
- Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Rights of the Child
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Rights of Persons with Disabilities
- Conventions of the International Labour Organization
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights

National legislation for prevention and protection against discrimination

Constitution

With its independence and the adoption of the Constitution, the Republic of Macedonia took on the obligation to comply with the principle of equality of all citizens, in the realization of their rights and freedoms, regardless of their sex, race, skin color, national and social origin, political and religious affiliation, property and social status, as well as that all citizens are equal before the laws and the Constitution (article 9). With the development of national legislation, the prohibition of discrimination started appearing in laws regulating various fields, such as labor relations, health care, education, social protection. Moreover, the number of grounds for discrimination

¹⁰ "How to present a Discrimination Claim", European Commission [Directorate-General for Justice], 2011

listed in the Constitution increased, by adding gender, health status, age, disability, marital and family status.

The Constitutional Court, in accordance with Article 11 from the Constitution, is competent to protect the rights and freedoms of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation. The procedure for protection of these rights is laid down in the Rules of Procedure of the Constitutional Court which stipulates that any citizen considering that an individual act or action has infringed his or her right or freedom, as provided in Article 110.3 of the Constitution, may lodge an application for protection by the Constitutional Court within 2 months from the date of notification of the final or legally binding individual act, or from the date on which he or she became aware of the activity undertaken creating such an infringement, but not later than 5 years from the date of the activity's being undertaken (Article 51). In an application it is necessary to state the reasons for which protection is being sought, the acts or actions by which rights or freedoms have been infringed, facts and evidence on which the application is based, as well as other information necessary for the decision of the Constitutional Court (Article 52).

Article 110, paragraph 3 from the Constitution bestows a quite limited authority on the Constitutional Court when it comes to the protection of civil rights and freedoms, since it can only take action solely related to the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the grounds of sex, race, religion or national, social or political affiliation. In addition, this protection is narrowed down due to the restrictive actions of the Constitutional Court taken towards protection of these rights. In case the decisions taken by the Constitutional Court, adopted upon requests for establishing and protection against discrimination, are taken into question, it shall be determined that in most of them the court declares itself incompetent, which in particular brings into question the efficiency of the court in the protection against discrimination ¹¹.

Law on the Ombudsman

The competence to process cases of unequal treatment of citizens on a certain ground, as well as to protect the principle

¹¹ Overview of the work of the Constitutional Court for 2011, 2012 and 2013

of adequate and righteous representation of the members of the communities in the state administration bodies, local self-government bodies and public facilities and services, is also given to the Ombudsman. Such additions to the competences of the Ombudsman, given in the Law on the Ombudsman from 2003¹², have imposed the need for opening special departments for anti-discrimination and adequate and equitable representation, and a department for protection of the rights of children and persons with special needs, which have been operating to this day. Regarding competences and principles of discrimination, the Ombudsman shall initiate a procedure upon a received complaint or on their own initiative if the allegations, evidence and facts, or information received otherwise, show that the state bodies or other bodies have violated the constitutional and legal rights of the citizens, or have violated the principles of non-discrimination and adequate and equitable representation of the communities; furthermore, the Ombudsman may react to the state bodies and other bodies on issues of protection of the principles of non-discrimination, by giving their opinion, i.e. they may, on their own initiative, give recommendations, opinions and critiques; also, the Ombudsman monitors the situation in regard to the respect of the principles of non-discrimination and adequate and equitable representation of the communities, by visiting and making insight into state bodies and other bodies; and finally, the Ombudsman informs the Parliament of the RM on the compliance with the principles of non-discrimination and adequate and equitable representation of the communities on the part of the state bodies and other bodies in an annual report.

Law on equal opportunities between men and women

Following the EU's efforts for gender equality and equal inclusion of women in the private and public sphere, as an EU accession candidate, in 2006 the Republic of Macedonia adopted the Law on Equal Opportunities between Men and Women¹³, which is the first law fully dedicated to achieving the principle of equality, in this case on the grounds of sex and gender. With this law, it was established for the first time that "Unequal participation of women and men is present when the representation of women or men in government on all levels, including judiciary, legislative and executive government, local self-government, as well as all other facilities and services, political functions, commissions and boards, including the bodies which represent the country

¹² Official Gazette of the RM no. 60/2003 and 114/2009

¹³ Official Gazette of the RM no. 6/2012, 30/2013 and 166/2014

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on international level is less than 40%.” (Article 6, paragraph 3 - Special measures). Moreover, this law also stipulated the existence of a special Representative for equal opportunities within the Ministry of Labor and Social Politics, to whom the citizens, but also organizations and trade unions, may submit complaints for establishing unequal treatment on the grounds of sex and gender.

Law on Labour Relations

In 2005, a new Law on Labor Relations¹⁴ was adopted, including a provision on the prohibition of discrimination on several grounds, for which there is also judicial protection. Namely, Article 6 of this law stipulates that the employer may not put the applicant for employment - the candidate for employment or employee in an unequal position due to their racial or ethnic background, skin-color, sex, age, health state i.e. disability, religious, political or other belief, union membership, national or social background, family status, property, sexual orientation or other personal circumstances. The Law bans direct or indirect discrimination, harassment and sexual harassment.

Law on Prevention and Protection against Discrimination

Starting from the need of comprehensive protection against discrimination which aside from physical persons would also cover legal entities and will cover grounds and areas which are not stipulated in the Constitution, in 2010 the Law on Prevention and Protection against Discrimination¹⁵ was adopted. The Law stipulates prevention and protection against discrimination in the realization of rights guaranteed by the Constitution, the laws or ratified international agreements, i.e. prohibits any direct or indirect discrimination, calls for or inciting discrimination, and assisting in discriminatory practices on the grounds of sex, race, skin color, gender, affiliation with a marginalized group, ethnicity, language, citizenship, social origin, religion or religious belief, other beliefs, education, political views, personal or social status, mental and physical disability, age, family or marital status, property status, health condition or any other ground stipulated by law or a ratified international agreement. Sexual orientation and gender identity were not included as separate grounds for discrimination in the Law, which ensued in major criticism of the Law.

¹⁴ Official Gazette of the RM no. 62/2005, 106/2008, 161/2008, 114/2009, 16/2010 (consolidated text), 50/2010, 52/2010, 158/2010 (consolidated text), 47/2011, 11/2012, 39/2012, 52/2012 (consolidated text), 13/2013 and 25/2013, 170/2013, 187/2013, 113/2014

¹⁵ Official Gazette of the RM no. 50/2010 and 44/2014

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Comprehensive implementation of the Law by all state institutions was envisaged as well as the bodies of the units of local government, legal entities with public legal authorizations and legal and physical entities in the area of labour and labour relations, education, science and sport, social security including the area of social protection, pension and disability insurance, health insurance and health protection, legislation and administration, housing, public information and media, access to goods and services, membership and activity in unions, political parties, civil associations and foundations or other membership-based organizations, culture and other areas defined by law.

Regarding the forms of discrimination, the Law prohibits direct and indirect discrimination, harassment, including sexual harassment, urging and incitement of discrimination - instruction to discriminate, victimization, as well as more severe types of discrimination - multiple, prolonged and repeated discrimination.

The Law defines direct discrimination as any unfavorable action, differentiation, exclusion or limitation of a person which as a consequence has or could lead to suspension, violation or limitation of the equal recognition or exercise of human rights and basic freedoms compared to the treatment given or possibly given to another person in identical or similar circumstances. This definition excludes each act of direct discrimination which would result in limitation of rights as a consequence, which is why this definition is not in accordance with Directive 2000/78/EC¹⁶. This gap is also reflected in the work of the Commission for Protection against Discrimination which terminates or halts its procedures when the discrimination is removed or the right exercised without establishing whether direct discrimination had been inflicted against the person who filed the complaint¹⁷.

With the Law on Prevention and Protection against Discrimination, the Commission for Protection against discrimination was formed; it is an independent and autonomous body, competent to raise initiatives and/or process complaints in cases of discrimination; to give opinions and legal information to the persons who have submitted complaints; to inform the public and submit an annual report to the Parliament; to monitor the implementation of the Law; to give recommendations and to cooperate with relevant

¹⁶ This was also the stance presented by the authors in the publication *Guidelines on the role of Commission for Protection against Discrimination in court proceedings and shifting of burden of proof* prepared by the OSCE Mission to Skopje and the Academy for Judges and Public Prosecutors, 2013, p. 12.

¹⁷ Report on the three years of work of the Network for Protection against Discrimination pp. 20-22

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bodies in the direction of taking measures in favor of the equality of citizens.

The procedure in front of the Commission for Protection against Discrimination starts by filing a complaint to the Commission, in writing or orally in the minutes, without obligation to pay a fee or other compensation. Along with the complaint the person submits evidence and facts which would serve to prove the act of discrimination or discriminatory treatment. The complaint may be submitted not later than three months as of the day of the violation, or no later than one year as of the moment of discovering the act of discrimination. Upon submission of the complaint, the Commission submits it to the person that it has been filed against within 15 days as of the day of receipt, who needs to respond to the allegations in the complaint within 15 days as of its receipt. The commission provides its opinion on the alleged discrimination within 90 days as of the day of submission of the complaint and informs the submitter and the person that the complaint has been filed against. With its written opinion, and upon establishing discrimination, the Commission also recommends a way of removing the violation of the law.

The deadline of 90 days as of the day of receipt for the Commission to provide an opinion has not been complied with in most of the complaints, which is due to the weak capacities of the Commission. The criticism of the Commission was mostly in this vein, since it is still impossible to conclude that it serves as an efficient mechanism for protection against discrimination, which is also due to the failure of the Commission to become a preventative mechanism for prevention of discrimination¹⁸.

The Law on Prevention and Protection against discrimination also provides for legal protection against discrimination which is initiated by means of a lawsuit before the civil courts and which, apart from seeking to establish that the defendant violated the right to equal treatment, prevent any possible further action towards violation of the equal treatment get compensation for material or immaterial damage, may also demand that the media publish the verdict which establishes the violation of rights. In cases of discrimination where there is a presumption of discrimination, the shift of the burden of proof is stipulated in the Law on Prevention and Protection against Discrimination, yet there is still no practice evidencing the implementation of this instrument by the domestic courts in the litigation initiated for protection against discrimination.

¹⁸ Report on the three years of work of the Network for Protection against Discrimination pp. 20-22

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It is of particular importance that the Law includes provisions which enable bodies, organizations, institutions, associations or other entities dealing with protection of the rights to equal treatment which are being contested in the proceedings, to occur as third parties in the litigation on the side of the person claiming to be discriminated against. These provisions also act as an incentive to the civil associations, as well as the Commission for Protection against Discrimination to get involved in the litigation on the side of the victims of discrimination in order to contribute with their experience in the process of establishing discrimination and consequently act preventatively in future cases of discrimination.

The provision enabling the submission of a joint action for protection against discrimination by associations and foundations, institutions or other organizations of the civil society which have a justified interest to protect the collective interests of a certain group or deal with protection of the rights of equal treatment within the scope of their activities. They may file a lawsuit and act as co-litigants in the proceedings before the court against the person who violated the right to equal treatment, if they presume that the actions of the defendant have violated the right to equal treatment of a larger number of people. This provision makes it possible for the civil society to act proactively and institute court proceedings in order to protect a certain group - a larger number of people, against discrimination.

The law also stipulates sanctions for physical and legal entities which have committed any of the forms of discrimination, as well as in cases in which they fail to provide information about discrimination or allow access to the records at the request of the Commission within 30 days. Infringement proceedings can also be initiated by the Commission for Protection against Discrimination, in accordance with the Law on Prevention and Protection against Discrimination and the Rules of Procedure of the Commission which in Article 17 stipulates that the Commission initiates proceedings before the competent authorities for violations of this law (example: infringement proceedings).

Criminal Code

Apart from civil proceedings, protection against discrimination may be sought in criminal proceedings as well, given that discrimination is a criminal offense under the Criminal Code, in accordance with Article 137 - Violation of equality of citizens, Article **319 - causing hatred, discord or intolerance on national,**

racial, religious, and other discriminatory basis and Article 417 - racial and other discrimination. The said articles of the Criminal Code provide for a broad and open list of protected characteristics¹⁹. Sexual orientation and gender identity are once again not included as separate protected characteristics.

Other laws

Anti-discrimination provisions are a part of many other laws that regulate different areas - health care (Law on Healthcare and the Law on the Protection of Rights of Patients), education (Law on Primary Education, Law on Secondary Education, Law on Higher Education), social protection (Law on Social Protection), media and advertising (Law on Audio and Audiovisual Media Services), children's rights (Law on Child Protection), judiciary (Law on Courts).

The laws in the area of health care, education, social welfare, and labor relations provide for supervision by inspectors working in these areas upon receipt of a complaint that a person has been discriminated against or that discrimination has been committed against several persons or in case they establish discrimination while performing regular supervision of institutions / legal entities.

Lack of evidence in cases of discrimination and shifts in the burden of proof

Due to the sensitivity of the field of discrimination and cases of discrimination which limit the rights of individuals, the principle of shifting the burden of proof to the defendant was created through the international court practice. However, this is not done immediately after submitting the lawsuit to the court, or the complaint to the Commission for Protection against Discrimination. The shift of the burden of proof should occur when the plaintiff has made it credible that they have been a victim of discrimination. Theoretically, this sounds easy, but the problem arises in practice, particularly in the actions of judges who have insufficient experience in processing cases of discrimination. Hence the following question - where is the line of shifting the burden of proof to the defendant? Even though every case of discrimination

¹⁹ Official Gazette of the RM, no. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 60/2006, 73/2006, 139/2008, 114/2009 135/2011, 185/2011, 142/2012 and 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 115/2014, 132/2014, 160/2014

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is unique, there are certain already established principles for shifting the burden of proof, which, if adhered to, may lead to an established judicial practice in this field, which shall further on be easily applied to each individual case of discrimination.

One of the instruments that the judges should employ when shifting the burden of proof is making the **prima facie** cases of discrimination, i.e. those cases where the claims already contain sufficient facts and evidence that make it likely on a balance of probabilities (probable) that there has been discrimination against the plaintiff, unless the defendant proves otherwise. After presenting a prima facie case of discrimination by the plaintiff, the burden of proving that there is no discrimination completely shifts to the defendant. We shall give an example of a **prima facie** case in employment, i.e. labor relations, and show what is sufficient to shift the burden of proof to the defendant in such cases:

1. The plaintiff belongs to a certain group/community or has personal traits which are protected by law as prohibited grounds for discrimination
2. The plaintiff has applied for the job and was qualified
3. The plaintiff's application was rejected
4. The job position for which the plaintiff had applied remained vacant after the rejection or any other person that was employed had lower qualifications than the plaintiff

Shifting the burden of proof is important in cases of alleged discrimination, because the victims of discrimination do not have sufficient information; the information is in the possession of the defendant. If in the beginning the plaintiff is requested to have all the evidence and information needed to prove the alleged discrimination, and not only to make it credible that the defendant had committed discrimination, this may seriously influence the efficient procedure for establishing and protection against discrimination.

Although national legislations do not allow the use of different means of evidence there is still international and comparative judicial practice which points to a diversity in the process of proving the claim on the part of the plaintiff. Hence, the plaintiff can support the claim of discriminatory treatment with statistics, situation testing (see below), material evidence, questionnaires and other means of evidence, such as audio and video materials, expert opinions, public speeches, statements from media, statements from the government representatives, reports from international and

national organizations, connection to “circumstances of evidence”.²⁰

Strategic litigation is one of the most significant ways of tackling discrimination. Court decisions may have a long-term effect in combating discrimination and additionally, may facilitate proving the discriminatory treatment in situations when the principle of equality has been violated.

Further on are a few cases of shifting the burden of proof which led to establishing a practice on international level for the use of this instrument, and thus led to a change in the national legislation towards shifting the burden of proof on the opposite party/the defendant:

3.1. The Court of Justice of the European Union

By incorporating the principle of non-discrimination as one of the basic principles on which to further build the EU legislation, procedural prerequisites for its substantial protection were also provided, such as the instrument of shifting the burden of proof. The Court of Justice of the EU (CJEU) adopted a range of decisions that guarantee its implementation, especially considering the fact that in the absence of evidence and access to evidence, discrimination is difficult to prove. After the adoption of the first two decisions of the Court, the adoption of the Directive on the burden of proof in cases of discrimination based on sex (97/80 / EC) followed, and then other directives which were founded on this instrument, based on which the major influence of the Court in the EU legislation may be recognized, towards protection of the rights and freedoms of the people.

Below are a few cases from the EU Court of Justice

› *The Danfoss Case*

In the Danfoss case, the plaintiff presented statistical data that female employees earned on average 7% less than male workers and the EU Court of Justice established that “if the wage system is non-transparent and the statistical data points to a discrepancy in the salaries between the male and female worker, the burden of proof shifts to the employer to prove that the pay gap between the male and female workers is not sex-related”. This stance of the EU Court of Justice (the decision was adopted on 17.10.1988)

²⁰ “How to present a Discrimination Claim”, European Commission [Directorate-General for Justice], 2011

originates from the need to shift the burden of proof, since had it not been for this instrument, it would have been impossible to prove the discrimination on grounds of sex in the payment system (Danfoss **Case 109/88**).

› *The Brunnhofer Case*

In the Brunnhofer Case the plaintiff exposed allegations for discrimination on grounds of sex, since she had been paid less compared to her male colleagues who were at the same position. CJEU stated that the prosecutor shall have to prove the following: firstly, that she received lower pay compared to her male colleagues who were at the same position, and secondly, that she did work of equal value as the work done by them. This was sufficient to prove that the different treatment could solely be explained on grounds of her sex, and therefore the burden of proof automatically shifted to the employer to prove the opposite (CJEU, Susanna Brunnhofer Case, paragraph 51-62)²¹.

› *The Enderby Case*

The CJEU ruled that there was a *prima facie* case when it was shown that the pay of the speech therapists was significantly lower than the pay of pharmacists, and that speech therapists were almost exclusively women, while pharmacists were mainly men. This information was sufficient to shift the burden of proof ((Case C-127/92 Enderby)²².

› *The Feryn Case*

A statement by which the employers made it clear that they shall not employ people of certain ethnic or racial background may provide facts of the kind that may lead to the presumption of discriminatory employment policy. Hence, the employer shall be the one to present evidence that the principle of equal treatment had not been infringed, which may be achieved, among other things, by proving that the present employment practice does not correspond to the statements given (Case C-54/07 Feryn).

› *The Meister Case*

In the Meister Case, the plaintiff claimed that she had been a victim of discrimination based on gender, age and ethnic origin in the process

²¹ Guidelines on the role of Commission for Protection against Discrimination in court proceedings and shifting of burden of proof prepared by the OSCE Mission to Skopje and the Academy for Judges and Public Prosecutors, 2013, p.

²² A training manual for judges for anti-discrimination legislation, OSCE Mission to Skopje and Judges and Prosecutors, 2012, p. 50 prepared by the OSCE Mission to Skopje and the Academy for Judges and Public Prosecutors, 2013, p. 50

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of selection of candidates for employment and therefore the court required the employer to make the information about the hiring of another candidate at the end of the process publicly available. The CJEU deemed that although the anti-discrimination directives do not provide the right to access to this type of information, it may not be ruled out that the defendants refusal to give any access to information to the plaintiff could be one of the factors which would be taken into consideration in the context of establishing the facts from which it can be presumed that direct or indirect discrimination had taken place (CJEU, Meister Case, paragraphs 47-48).

› *The Asociaia ACCEPT Case*

In the recent verdict of the CJEU on the case of discrimination on grounds of sexual orientation in the recruitment of players by a professional football club, it was established that a *prima facie* case of discrimination on grounds of sexual orientation may be challenged, for example, by a reaction on the part of the defendant and in which the club publicly refrains from the various statements that the occurrence of discrimination was based on and the existence of employment policies in order to provide compliance with the principle of equal treatment. In addition, in this verdict the Court stated that no evidence intruding upon the right to privacy should be sought in order to shift the burden of proof.

3.2 The European Court of Human Rights

This is very well explained in the case law of the European Court of Human Rights (ECtHR), which, together with other regional and global mechanisms for protection of human rights, has adopted the shared burden of proof in a more general sense, in regard to proving the allegations for violations of human rights.²³

It is important to mention that European anti-discrimination law largely influences the case law of the Court, and this is noted in

²³ „According to the ECtHR, it accepts as facts the claims which: “are supported by the free assessment of all evidence, including conclusions which may be derived from facts and presumptions submitted by the parties in the dispute... Evidence can be derived from the simultaneous existence of sufficiently strong, clear and aligned conclusions, or similar, undisputed presumptions of facts. Apart from this, the necessary degree of persuasion in order to reach a concrete conclusion, and in this direction, the distribution of the burden of proof, are inseparably connected with the specificity of facts, the nature of the allegations and the rights (according to the ECHR) which had allegedly been violated.” This was confirmed in the case *Timishev v. Russia*, the plaintiff claimed that due to his Chechen origin, he was prevented from passing a control point in a certain region. the ECtHR decided that such treatment was confirmed with official documents which show the existing policy of limiting the movement of ethnic Chechen people. The explanation of the state was deemed unconvincing, considering the inconsistencies in its claims that the victim voluntarily left after not being given advantage in the row. The ECtHR accepted that the plaintiff was discriminated against, based on his ethnicity.” See more in *Handbook on European anti-discrimination law*”, FOOM, Skopje, 2013 p. 137

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the references of the ECtHR in regard to European law. Finally, the Court's increased attention towards victim resulted in adjustments in the responsibilities deriving from the burden of proof.

Further in this text, we shall cover several examples from the practice of the European Court of Human Rights.²⁴

From 2005, in cases where specific rules or particular measures have been shown to have a disproportionate impact on women or Roma, the Strasbourg Court has called for the burden of proof to be shifted. The Court's rationalization in a large number of cases of discrimination testifies that, in order to prove the existence of laws, procedures and policies of indirect discrimination, it is necessary to take into consideration evidence collected by means of non-ethical procedures, even statistical indicators showing to that kind of practice. Similar to older decisions, the court confirms this in order to make it easier to victims of discriminatory policies to protect themselves. Thus, in its verdict in the Case of *Horváth and Kiss v. Hungary*, the court re-states its decision from *D.H. and others v. Czech Republic*, and strenghtens the stance regarding the type of evidence that may occur in order to establish indirect discrimination.

The shift in the burden of proof in cases of discrimination is once again confirmed in the case of *Horváth and Kiss v. Hungary*. The verdict from *D.H. and others v. the Czech Republic* was taken as a precedent and it was confirmed that even in cases of initiating reasonable doubt of discriminatory policies, practices or legal regulations, the burden of proof shifts to the respondent state and it is obliged to give an objective explanation and justification for the existence of such laws, policies or practices.

The protection from any kind of discrimination that the European Convention on Human Rights provides in Article 14²⁵, does not only involve passive protection of every individual i.e. refraining from discriminatory practices and activities. On the contrary, as the ECtHR has acted in a number of decisions, Article 14 also produces a positive obligation of the state. In other words, the state is obliged to actively act to create appropriate legislation and implement

²⁴ The examples are taken from Isabelle Rorive, "Proving Discrimination Cases – The Role of Situation Testing", MPG and the Center for Equal Rights, Brussels, 2009

²⁵ Article 14 stating: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

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policies that will provide uninterrupted enjoyment of all rights and freedoms without discriminatory marks on any of the grounds contained in this article. Additionally, from the practice of the ECtHR, and contrary to the practice of many countries (including the RM) two elements that are extremely important for proving discrimination can be discussed: firstly, the method of raising suspicion and proof of the presence of a discriminatory practice / policy, and secondly, the burden of proof in such proceedings.

The Court also recognizes discrimination in the unequal treatment of individuals in a relatively similar situation without objective and reasonable justification. At the same time, discrimination can be discerned in a practice or policy which is seemingly neutral and not directed towards a particular group, and seeks to protect the characteristics of the group, thus causing discriminatory treatment²⁶ which can lead to individual cases of direct discrimination²⁷. Moreover, unlike direct discrimination, indirect discrimination arises from a state policy, legislation or practice, which is apparently neutral and is considerably more difficult to prove. The EC has expressly confirmed its position in several decisions (*D.H. and others v. the Czech Republic* in 2007, *Oršuš v. Croatia* in 2010, *Horvath and Vadaszi v. Hungary* in 2010, *Horvath and Kiss v. Hungary* in 2013). Thus, in the case *D.H. and others v. the Czech Republic* in 2007, the Court explains that the methods for proving indirect discrimination can even be based only on official and statistical information indicating the discriminatory policy²⁸. Later in *Horvath and Kiss v. Hungary*²⁹ the Court further explains that “reliable statistical indicators may be sufficient to constitute *prima facie* evidence, yet this does not mean that indirect discrimination cannot be proved without statistical evidence.”

The second element that the ECtHR takes into consideration in the passing of decisions is the burden of proof in cases of indirect discrimination. Namely, in *D.H. and others v. The Czech Republic* in 2007, the Court in a detailed and clear manner states that “as soon as an individual shows that there is unequal treatment, it is up to the respondent state to prove that such treatment is justified.” In addition, the ECtHR confirms that *prima facie* evidence which would serve as a sufficient basis to shift the burden of proof on the country is necessary (as it had been previously stated in *Nachova v. Bulgaria* 43577-78/98, July 2005). At the same time, the court explains that there is no unified and strict definition for assessing evidence, but that it is evaluated according to the court’s free assessment of the court and are considered a range of circumstances and facts

²⁶ Verdict of ECtHR, *D.H. and others v. the Czech Republic* 57325/00, November, 2007, paragraph 175

²⁷ Verdict of ECtHR., *Oršuš and Others v. Croatia*., 15766/03, March 2010, paragraph 150

²⁸ *D.H. and others v. the Czech Republic*, p.64, paragraph 180

²⁹ Verdict of ECtHR *Horvath and Kiss v. Hungary* 11146/11 January 2013, paragraph 107-108

which may be of consequence for individual cases. Finally, the court informs that the burden of proof and the character of the evidence may not be considered singularly, but solely as a combination of facts within the case, the circumstances and rights which may be violated. This position of the court is further confirmed in a series of decisions, such as is the case of *Horvath and Vadaszi v. Hungary*³⁰ in 2010. This Court here refers to the case of *D.H. v. the Czech Republic* as a precedent, and once again reiterates that when “the applicant alleging discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden shifts to the respondent State, which must show that the difference in treatment is not discriminatory”. The consistency of the Court can also be recognized in the decision of *Horvath and Kiss v. Hungary* from 2013, where the Court additionally explains that this practice of shifting the burden of proof on the state is with the sole purpose to facilitate proving indirect discrimination by the victims, which would otherwise be extremely difficult to prove.

What follows is a detailed elaboration of two cases from the ECtHR practice

› *The Hoogendijk case against Netherlands before the ECtHR (2005)*³¹

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

› *The D.H. case against the Czech Republic before the ECtHR (2006 and 2007)*³²

In the important *D.H.* case decided in the Grand Chamber on 13 November 2007, the Court reversed its much-criticised previous

³⁰ Decision of ECtHR, *Horvath and Vadaszi v. Hungary*, 2351/06, November 2010

³¹ *Hoogendijk against the Netherlands*, Application no. 58641/00

³² *The D.H. against the Czech Republic case*, Application no.57325/00

decision of the Chamber and accepted a shift of the burden of proof on the basis of statistics that although not “entirely reliable” revealed “a dominant trend that has been confirmed both by the respondent State and the independent supervisory bodies which have looked into the question”. At issue was the placing of disproportionate numbers of Roma children in “special” primary schools for the learning impaired in the Czech Republic. This practice, widespread across Central and Eastern Europe, amounts in effect to racial segregation and denies Roma children access to a standard of education comparable to their non-Roma peers. Research by the European Roma Rights Centre showed that Roma school children in the city of Ostrava were 27 times more likely than similarly situated non-Roma to be placed in special schools. In its decision, the Court specifically refers to EU law: “The Court observes that Council Directives 97/80/EC and 2000/43/EC stipulate that persons who consider themselves wronged because the principle of equal treatment has not been applied to them may establish, before a domestic authority, by any means, including on the basis of statistical evidence, facts from which it may be presumed that there has been discrimination (...). The recent case-law of the Court of Justice of the European Communities (...) shows that it permits claimants to rely on statistical evidence and the national courts to take such evidence into account where it is valid and significant”. Accordingly, it ruled that “where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory (...). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (...), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof”. It took eight years for the applicants to successfully win their case, and the Court in Grand Chamber deliberated on its final ruling for eight months. Its decision is a model of clear thinking that provides guidelines on how the burden of proof can be mitigated in order to effectively address discrimination cases. In this case the applicants relied on statistics they compiled, not official statistics as in the previous mentioned *Hoogendijk* case.

4. Situation testing

“In a world in which stories have more power than studies, testing generates studies that are stories³³.” Situation testing involves direct observation of unequal treatment of the equals; a simple, concrete formulation with large narrative power.

³³ Dr. Marc Bendick, expert on non-discrimination working in the USA as a consultant, especially in the area of labour relations

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This method proves the unequal treatment against a certain person/group with a certain protected ground in a comparable situation, when another person/group with different and contrary characteristics receives favorable treatment. This amounts to the so-called “situation testing” when determining the difference in treatment in cases of discrimination.

Compared with statistical evidence that are more likely to prove indirect discrimination, situation testing is used to prove direct or systematic discrimination and it can not be used in cases of indirect discrimination, especially because the apparently neutral practice is not applied to everybody.

Pairs used in situation testing are formed in a way that makes them differ on the basis of one unique characteristic which is protected by law. The goal of this manner of proof in cases of discrimination is creating situations which provoke the reaction of a person who had allegedly committed discrimination, without showing the fact that this discriminatory behavior is being observed. On the other hand, the candidates participating in situation testing should be consistent in the representation of people who had been exposed to discriminatory treatment due to their personal characteristic, i.e. they should possess that trait and be part of the situations of alleged discrimination. Finally, the goal of this method is to reveal the practice of discrimination. Other than the name used in this document, situation testing may be encountered under different names, such as situation tests, testing, audition, pairing-comparative testing, discrimination testing and practical testing.

Situation testing is most appropriate for establishing direct discrimination. Thus, in contemporary conditions, the most well-known examples of situation testing are the European examples for restrictive policies of services available to the public, i.e. prohibition of entry for certain persons of foreign origin, access denied to jobs or apartments. Situation testing as a method of proving direct discrimination is used by organizations, equality bodies, but also by journalists, and sometimes even by citizens. The findings may be intuitively understood by policy makers, media and the public.

Historically, situation testing started being used in Great Britain and the United States in 1970, for measuring discrimination and creating public policies for prevention. This method was developed by sociologists, under the name of “research testing” and was derived as part of the work of government commissions and think-tank initiatives working in the field of social issues. Hence, situation testing is a significant procedure in the systematic research of social relations and creating strategies for equal treatment. Here, the “Havens” (1982) case is important,

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when the US Supreme Court indisputably defended the right of testers and organizations working for fair housing conditions, , precisely on the basis of evidence provided by means of situation testing. The Court stated that “The black individual respondent (Coleman) has standing to sue in her capacity as a “tester.” Section 804(d) establishes an enforceable right of “any person” to truthful information concerning the availability of housing. A tester who has been the object of a misrepresentation made unlawful under 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a damages claim under the Act. That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the fact of injury within the meaning of 804(d). If, as alleged, Coleman was told that apartments were not available while white testers were informed that apartments were available, she has suffered “specific injury” from petitioners’ challenged acts, and the Art. III requirement of injury in fact is satisfied. However, since the white individual respondent (Willis) alleged that he was informed that apartments were available, rather than that petitioners misrepresented to him that apartments were unavailable, thus alleging no injury to his statutory right to accurate information, he has no standing to sue in his capacity as a tester and, more to the point, has not pleaded a cause of action under 804(d). Pp. 373-375. [455 U.S. 363, 365]”

As in the US, in Europe as well, situation testing as a method of obtaining evidence in cases of alleged discrimination is used often and successfully.

Thus, apart from using this method in sociological research, raising public awareness, as well as developing public policies, situation testing has large potential in strengthening evidence in individual cases of alleged discrimination. Furthermore, strategic litigation may be facilitated by using this method, meaning that collecting evidence for the presumptions of unequal treatment, and their submission to the court may contribute to a shift in the burden of proof.

Using situation testing as a manner of collecting evidence and complaints, with which the plaintiff stands before the court, is an absolved practice in European jurisprudence, even though it has only been covered within the regular legal system in Hungary, France and a part of Belgium.

The United Kingdom and the Netherlands have maintained practice of situation testing, but this area of combating discrimination also plays a valuable role in Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Hungary, Latvia, Slovakia, Sweden

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and Romania, all in contemporary conditions. For example, the systematic use of situation testing in Hungary can be seen through the important legal victories over the widespread discrimination against Roma people. Also, organizations and other entities working on equal treatment in Austria, Cyprus, Italy and Germany have started using situation testing in cases of discrimination. Yet, in a dozen of European countries, situation testing has not even been considered as a technique of proving discrimination, for example in Estonia, Ireland, Luxembourg, Malta, Poland, Portugal, Slovenia and Spain.

Further on in the text, we shall chronologically cover several examples from the practice of different national legal systems, from the aspect of situation testing.³⁴

› *President of the Zutphen District Court - Holland rules that situation testing does not amount to provocation (1980)*³⁵

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

At the request of Mr. A and the NGO, the President of the Court in a preliminary decision based on civil law forbade the discotheque to refuse entry to Mr. A on the grounds of his race or his skin color or his adherence to an ethnic minority group. The defence argued that the NGO and its members had provoked the disco into a criminal offence. The President dismissed this line of reasoning, stating that “it is by no means plausible that the plaintiffs had an interest in the respondent’s refusal of services, in the pursuance of his profession, to members of the NGO Open Doors on the grounds of racial discrimination.”

› *Amsterdam Local Criminal Court (Holland) rules that testing does not amount to abetting a punishable offence (1982)*³⁶

T and B, both from an ethnic minority background, and H and B, both native Dutch, separately asked to enter disco Y. T and

³⁴ Examples taken from Isabelle Rorive, “Proving Discrimination Cases – The Role of Situation Testing”, MPG and the Center for Equal Rights, Brussels, 2009

³⁵ Opinion 2005-136, available in Dutch on the website of the Equal Treatment Commission, www.cgb.nl

³⁶ 4 January 1982, RR 6p. 36, reported by R. Holtmaat as quoted from D. Houtzanger (“Testing litigation in the Netherlands”)

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B were refused on the pretext that they were not members. The other couple, H and B, were allowed in shortly afterwards, although they were not members of the club. T and B reported this as a criminal offence to the police, who investigated the case. The public prosecutor brought the case before the local court. T and B joined in as civil parties and requested damages. The defence claimed that the plaintiffs had abetted a punishable offence by going to Y in order to see whether Y was discriminating, and to provoke that using witness. The Court argued “We reject this defence. Neither T and/or B nor the other witnesses intentionally stimulated the discrimination and in no way has it been made plausible that they had an interest in the defendant’s discriminatory behavior against T and/or B.” The defendant was sentenced to a fine of 240 euro. The plaintiffs were awarded symbolic damages of 0.50 euro each.

› *Liege Court of Appeal, Belgium recognizes the principle of “role play” in obtaining testimony (1988)*³⁷

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

› *Amsterdam Criminal District Court, Holland validates testing carried out without supervisor of the police (1992)*³⁸

The Anti-discrimination Agency (ADA) carried out situation testing in a number of discotheques in Hilversum. The defence claimed that the evidence was inadmissible because the test had been carried out as a part of an investigation by the ADA without the guidance and supervision of the police or public prosecutor. The Court dismissed this defense, stating that the police had made a report after the ADA reported the offence. The argument that an investigation by an ADA should be carried out under supervision of the public prosecutor was held to have no basis in law.

› *The Equal Treatment Commission (Holland) accepts situation testing to prove unequal treatment (1997)*³⁹

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

³⁷ Decision adopted on 11 March 1988, available on the website of CECLR, www.diversite.be

³⁸ 20 març 1992, RR 6p.287, reported by R. Holtmaat as quoted from D. Houtzanger (“Testing litigation in the Netherlands”)

³⁹ 10 June 1997, 6p. 1997-65 available in Dutch on the website of the Equal Treatment Commission www.cgb.nl reported by R. Holtmaat as quoted from D. Houtzanger (“Testing litigation in the Netherlands”)

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In the complaint submitted to the Equal Treatment Commission, the ADA stated that the groups participating in the test could be assumed to be average discotheque visitors. They had no relationship with the ADA; they had no criminal past; they could not be distinguished from the average discotheque visitors as far as hairstyle, clothing, shoes etc. were concerned, and the persons participating had sufficient command of the Dutch language to communicate with the doorman.

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

The Finnish League for Human Rights case (2002)

In autumn 2002, an NGO, the Finnish League for Human Rights, conducted some situation tests in order to investigate whether restaurants were denying entry to people of minority background. Testers were divided into members of minority ethnic groups (people of foreign origin or Roma) and members of the majority ethnic group. On the basis of this investigation 11 crime reports on discrimination were filed with the police. In six of these cases, discrimination was found and the accused were sentenced to fines. In four cases the public prosecutor decided not to bring charges and one case failed because it was not brought to court within the time limit prescribed by law.⁴⁰

Supreme Court decision (Hungary) on denial of services towards Roma (2003)⁴¹

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

The Prague Airport case of discrimination of Roma before the House of Lords, (Great Britain)

A decision by the House of Lords in 2004 also underlines the issue of proof in discrimination cases. It concerned an operation

⁴⁰ T. Makkonen, country report on the measures for combating discrimination (Директиви 2000/43/ЕС и 2000/78/ЕС), Finland, situation until 8th of January 2007

⁴¹ Appeal accepted on 24 August 2005, given in the Review of European anti-discrimination law, 2006

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

“Since 1968, it has been unlawful for providers of employment, education, housing, goods and other services to discriminate against individuals on racial grounds. The current law is contained in the Race Relations Act 1976, which in most respects is parallel to the Sex Discrimination Act 1975. The principles are well known and simple enough to state although they may be difficult to apply in practice. The underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally. Thus it is just as discriminatory to treat men less favourably than women as it is to treat women less favourably than men; and it is just as discriminatory to treat whites less favourably than blacks as it is to treat blacks less favourably than whites. The ingredients of unlawful discrimination are (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group; (ii) that the treatment is less favourable to one; (iii) that their relevant circumstances are the same or not materially different; and (iv) that the difference in treatment is on sex or racial grounds. However, because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment less favourable than that of a comparable person (ingredients (i), (ii) and (iii)) is shown, the court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds”. The handling of the testimony and the other situation testing evidence by the law lords is well illustrated in Baroness Hale of Richmond’s opinion:

“ 92. Mr Vasil, a Czech Roma working for the ERRC (European Roma Rights Centre), observed most flights leaving for the UK on 11 days in January, 13 days in February, 14 days in March and 13 days in April 2002. He was able to identify the Roma travelers by their physical appearance, manner of dress and other details which were recognizable to him as a Roma himself. His observations showed that (...) any individual Roma was 400 times more likely to be rejected

than any individual non-Roma. (...) 93. Mr Vasil also observed that questioning of Roma travelers went on longer than that of non-Roma and that 80% of Roma were taken back to a secondary interview area compared with less than 1% of non-Roma. The observations of Ms. Muhic-Dizdarevic, who was monitoring the operation on behalf of the Czech Helsinki Committee, were to much the same effect. (...) The ERRC conducted an experiment in which three people tried to travel to the UK for a short visit. Two were young women with similar incomes, intentions and amounts of money with them, one non-Roma, Ms Dedikova, and one Roma, Ms Grundzova; the third, Ms Polakova, was a mature professional married Roma woman working in the media. Ms Dedikova was allowed through after only five minutes' questioning, none of which she thought intrusive or irrelevant. Her story that she was going to visit a woman friend who was also a student was accepted without further probing. Ms Grundzova was refused leave after longer questioning which she found intrusive and requests for confirmation of matters which had been taken on trust from Ms Dedikova. Ms Polakova was questioned for what seemed to her like half an hour, was then told to wait in a separate room, and was eventually given leave to enter. She felt that the interview process was very different from that undergone by the non-Roma passengers travelling at the same time as her and that the only reason she was allowed to travel was that she had told them that she was a journalist interested in the rights of the Roma people. All three of these people were to some extent acting a part, in that their trips had been provoked and financed by the ERRC, but they were genuinely intending to pay a short visit to a friend or relatives living here."

› *Prague Municipal Court accepts testing an access to employment (2004)*⁴²

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

⁴² 2006 Hearing on 31 March 2004, submitted to the Audit of the European anti-discrimination legislation, 2006.

› *President of the Brussels Court of First Instance, Belgium, reverses the burden of proof based on the result of testing (2005)*⁴³

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

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

› *Kezmarok District Court, Slovakia, on the expectation of testers not to be served (2006)*⁴⁴

In a testing experiment, two Roma children were denied equal service in a sweet shop. The court decided that direct discrimination had occurred on the ground of ethnicity but did not grant financial compensation, as according to the court, the children expected to be refused service and as a result of this expectation, there was no cause to award compensation. The judgment has been appealed. This is clearly a discriminating judgment, because it rules that Roma should be expected to be discriminated against as opposed to saying that discrimination is illegal in all instances and should serve as a basis for awarding damages.

1. France

› *Situation testing of racial discrimination in the area of education - institutions of private education (France) 2011*

⁴³ Decision for urgent hearing adopted on 3 June 2005 published in the *Revue du droit des étrangers*, 2005

⁴⁴ Verdict No. 3C 157/05, 10 November 2006, Z. Dlugosova

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A group of researchers in France tested the registration of students in private educational institutions with the help of two “fictitious” dads who contacted more than 4,000 Catholic educational institutions where they requested information about enrollment in schools. One of them had a traditional French name (the control tester) and the other person involved in the research had a name typical for the regions of North Africa (protected tester). The test results revealed the existence of racial discrimination, as the father with the traditional African name received fewer responses and most of the answers he got were not positive. In addition, the father with the typical French name received more positive responses as opposed to the father with a typical North African name, who had been often told that it is necessary for him to show up for an interview in the educational institution before they can register his child. One of the authors of the study explained the testing results to the French public in a radio-show aired on the state radio France-Info.

According to a larger number of sources, the researchers came to the conclusion that private schools in France act discriminatorily in the selection of students and registration of new students. The reasons for the uneven distribution of students in public schools and private schools depending on their financial status and ethnicity cannot be analyzed solely as a result of the lack of information on enrollment in private institutions. Three researchers from CNRS⁴⁵ focused on the way to apply for enrollment in a private school using the testing method. The survey was conducted between March and June 2011. The project was based on discrimination in enrollment in private schools. The testing was conducted in 4269 private institutions on the territory of France. “According to the results it was easy to notice the discrimination,” said the researchers involved in the testing⁴⁶. In 18% of cases, private schools discriminate against people, i.e. parents and students **who do not have French ancestry**⁴⁷.

› *Situation testing and discrimination in housing (Belgium)*

The Flemish organization Minderhedenforum in 2012 published the results of the testing of racial discrimination in housing. The testing was conducted in Antwerp and Ghent. The test results show that one in three housing applicants was discriminated against when they attempted to gain

⁴⁵ National Center for Scientific Research/ Centre national de la recherche scientifique/

⁴⁶ Published in the media “Le CNRS juge l’enseignement privé discriminant”, 14.01.2014 <http://www.lefigaro.fr/actualite-france/2014/01/14/01016-20140114ARTFIG00381-le-cnrs-juge-l-enseignement-prive-discriminant.php>

⁴⁷ The methodology of this testing is similar to the methodology used in the situation testing in the kindergartens of RM, case 2

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access to housing. The survey included people who had foreign names and surnames and individuals with traditional Belgian names and surnames. People with foreign names and surnames rarely received positive responses when applying to rent housing, unlike the people with typical Belgian names and surnames who were frequently invited to talk with the owners of the places they wanted to hire.

The results did not come as a surprise to the researchers at all. In 2009, the Alarm Committee from Molenbeek, Brussels, performed similar testing for discrimination in housing. The research conducted in 2009 showed that 28% of candidates - foreigners participating in the study were discriminated against.

“Minderhedenforum regularly receives reports of discrimination in the housing market in Belgium” - tells Edouard Delruelle, deputy director of the Center. In 2011, the Center opened 113 different files relating to discrimination on the housing market in Belgium and 116 files relating to discrimination in Flanders. Almost 40% of these cases involved racial discrimination. However, one must take into account the fact that it is very difficult to prove cases of discrimination based on race, given that a very large number of victims of racial discrimination do not appeal to the competent authority when they feel discriminated.

› *Situation testing of racial discrimination in clubs in Reeperbahn (Germany) 2012*

Partly because of previous experiences, and partly at random choice, eight famous German nightclubs were involved in the testing conducted by the organization “Basis & Woge eV”. The principle was simple: three men of African descent want to go to a nightclub. Three white men stand in line behind them. Later on, two men of Arab origin step in the line, and two men of German descent stand behind them. The age structure and the clothes of all persons involved in the research is similar. No person is under the influence of alcohol, they are all in a good festive mood. The reaction of the owner of the nightclub showed that there is racial discrimination. People with African and Arab descent were not allowed entry into the nightclub, unlike those of German origin and looking typically German, who were immediately allowed to enter the nightclub. The existence of racial discrimination is an indisputable fact in this situation. Birt White, one of the researchers involved in the situation testing said that the testing ended after two hours, since with all of the material organization collected within those two hours, it was more than enough to clearly identify the discriminatory elements. The sentences “You cannot get here today!”, “This is not the place for you” or “This

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is a private party” do not sound offensive, and therefore it is impossible to immediately prove direct racial discrimination.

However, it must be considered that there is no reason why the testers would be banned from entering the nightclubs, given that no person was behaving aggressively or was under the influence of alcohol. Regardless of whether the employees in the nightclubs consciously or subconsciously did not let the people with different backgrounds enter nightclubs, it can be concluded that there is racism and racial discrimination which is unavoidably evident in this situation. The problem is that employees in nightclubs in Germany keep out those people who do not look German, instead of those who are aggressive or intoxicated. A large number of people who migrated to Hamburg in the past few years have had such an experience at least once in some of the German nightclubs.

The researcher Birt White of “Basis & Woge Ev” stated his conclusion after the testing ended. “What worries us is not the issue how to point a finger and blame several German nightclubs since they are not individual cases, but a fundamental problem. With the test results, we have attracted the attention of many and helped them comprehend the real problem, and also showed that testing in several nightclubs in Hamburg is not enough to reduce the effect of racial discrimination. Something has to be done, and it is a fact that it is possible to take measures with very little effort and people who can serve as good examples”, said White⁴⁸.

› *Situation testing on the existence of racial discrimination in the access to nightclubs (Romania)*

On the evening of July 7, 2001, the Department of Human Rights of the Romani CRISS, together with the Association of Roma Youth and Students - ROMANITIN in Iasi, organized situation testing due to the assumption of the existence of racial discrimination against Roma, the goal of which was to identify public spaces in the city of Iasi (discos, bars, etc.), where the Roma are not allowed access. Thus, young Roma and young non-Roma people tested 5 discos. The methodology was designed in a way which covered three groups of testers - the first and third group consisted of two young people who were not Roma and the second consisted of three young Roma people.

The testers were granted access in two discos, probably due to the absence of a security guard at the entrance. The young Roma were not allowed to enter the other discos, especially those Roma with darker skin. In one of the discos the security person stated

⁴⁸ The full video of the press conference is available at the following link: <http://www.antidiskriminierung.org/?q=node%2F344>

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that whenever there were problems in the disco, they were caused by people with dark skin, referring to the Roma.

› Initiative of the Czech Ombudsman for conducting situation testing together with civil associations from the Czech Republic

In 2013, the Czech Ombudsman concluded a collaboration agreement with two Czech CSOs (Counseling Centre for Citizenship, Civil and Human Rights in Prague and the IQ Roma Service in Brno), to initiate the implementation of situation testing. These civil society organizations were to help the victims of discrimination in the process of finding and collecting evidence for possible court or administrative proceedings for violations of the prohibition of discrimination.

The ombudsman noted the increasing number of questions that called for situation testing (rejecting an applicant for employment on the basis of age or sex, ban on membership in clubs based on ethnicity, prohibiting the provision of financial services based on nationality, etc.). In order to change the situation, the Czech Ombudsman decided to contact several NGOs whose focus was on work in the field of anti-discrimination and to ensure effective cooperation. The Ombudsman is one that takes into account the evidence obtained during the testing.

These examples serve to show how situation testing was accepted as a mechanism of collecting evidence in civil and criminal court proceedings and also before the Commissions for Equality in several European countries: the United Kingdom, Netherlands, the Czech Republic, Finland, Slovakia. The most important in the said decisions is that situation testing is not a method which is against the law, that the testers are in fact victims of discrimination and can be plaintiffs in civil proceedings to establish discriminations and that if the discrimination is established in their specific cases, they may be entitled to indemnity.

II. METHODOLOGY

As we mentioned before, the method of situation testing can be used in various cases: research, advocacy, reporting in the media and representation in court. Also, it can be used to prove discrimination before the equality bodies in the country, in our case Commission for Protection against Discrimination and the Ombudsman. The opinions of the equality bodies can further be used as evidence in court proceedings (although the court is not bound by the opinion of the equality Bodies) and for changing certain practices, according to the possibilities of the equality bodies. Research can be further used for lobbying and advocacy, in order to change a certain discriminatory practice, or to amend legislation. It can also be used for raising awareness about the existence of discrimination in a certain field. Hence, this methodology shall give the basis for both types of situation testing, but it should be further developed, depending on the case or research which needs to be conducted. The goal of this methodology is to help develop scenarios for certain cases or research, and to give directions on how to conduct them successfully.

1. BASIS

Essentially, situation testing is a method involving the use of “organised” applicants or actors, in order to investigate the occurrence of discrimination in different processes and areas, on different grounds. This means that after complaints of people who were truly discriminated, or after learning that there is a certain discriminatory practice, persons with the same protected characteristics as the discriminated persons are sent to the location in order to test the alleged discriminator. Immediately after the testers, control testers are sent, which possess the same traits as the testers, except for the characteristic due to which discrimination had occurred. For example, in cases of alleged discrimination of Roma people by a night club, a Roma person would be a tester, while a person who is not Roma would be the control tester. Apart from the different ethnicity, the testers would match each other in all other traits - age, sex, dress, hair style. It is important to mention that the testers must not have consumed alcohol.

This procedure is repeated several times with different testers in order to make the testing reliable as means of proof. If the testing is conducted in the form of research, this procedure

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is repeated many more times.⁴⁹ This is the basis of the situation testing method, on which a scenario is further constructed, depending on the case.

It is best that the situation testing is conducted immediately after reporting a certain case of discrimination, but it is not wrong to conduct it after a certain period of time, particularly if there are indicators that this discriminatory practice is being repeated.

By applying the situation testing method, it can be determined whether a certain case of discrimination is an isolated case, or there is a discriminatory practice toward a certain group, or community, which is protected by law.

There are five basic phases in the process of situation testing:

1. Selection of a coordinator which shall develop and conduct the entire process
2. Preparation for the testing - determining the facts of the case, collecting information on the alleged discriminator and the location of the testing, preparation of a testing scenario, elaboration and preparation of a protocol, creating questionnaires, selection of testers, training of testers, creating contracts and statements
3. Conducting the testing - presence at the testing location
4. Interaction with the testers (de-briefing with testers - to allay anxiety over the possible humiliation and discrimination suffered) filling the questionnaires, collecting statements from the testers, summary of the results
5. Documentation and follow-up on the case⁵⁰

What is typical for situation testing, when conducted in order to be means of proof in court proceedings, is that if the results are “positive”, i.e. if the testers with the protected traits are discriminated against, they shall be the plaintiffs in the court

⁴⁹ According to the methodology of situation testing of discrimination on the ground of nationality in employment, created by the International Labor Organization - ILO, it is necessary to have 175 “positive” cases of discrimination, and to perform at least 300 testings in a geographical area in order to consider this research relevant in proving discrimination. You can view the entire methodology on the following link: <http://www.jus.uio.no/smr/english/about/programmes/serp/docs/ILO.pdf>

⁵⁰ (follow-up of the testing must continue, because in some cases, the tester who was first rejected, or their rights were limited, may be contacted after a certain period of time (several days after the testing) because the situation might change and the discriminator might contact them and fulfill their request (for example, if the tester was told that they will not be hired or that they may not rent the apartment or house, they might be contacted after a while and be told that they will be hired or that they may rent the apartment or house)

procedure, while control testers shall be witnesses. This means that the persons who had been discriminated against and had reported discrimination, which has been proved true with the testing, cannot be plaintiffs in the court proceedings.

The only way for the persons who had reported to appear as plaintiffs in the proceedings is to react immediately, i.e. to send control testers immediately after the report, which is difficult to do and only in certain areas (for example access to goods and services - coffee bars, night clubs or employment processes).

2. PROBLEM

In order to start any research, procedure before the equality bodies or court case, there must be knowledge that there is discrimination on a certain ground in some area. Such knowledge may be obtained from complaints by the citizens, or from monitoring the situation with the rights of the people/citizens with whom the civil organization works in a certain field. To consider, and then to lead a case as a case of direct discrimination against a certain person or an entire group or community, the following is necessary:

1. Limitation of rights stipulated by the Constitution and laws of the Republic of Macedonia
2. The limitation must have been done because of to their personal characteristics, their status or affiliation to a certain community or group, which are protected by law as grounds for discrimination
3. A comparator is needed, i.e. a situation where under the same conditions, another person who does not belong to that certain community or does not possess those traits, has realized their rights.

Basically, situation testing provides evidence on the linkages between the less favorable treatment and the protected ground.

There are few cases of direct discrimination where there is direct evidence proving that it occurred, yet there some such are examples. In this direction, we would mention the case of failure to provide reasonable accommodation or make buildings and services accessible to disabled people, such as is the practice of the banks in the Republic of Macedonia towards blind people. The Helsinki Committee determined that there has been unequal treatment of blind people in the banks in the Republic of Macedonia, while using bank services and products which require a signature from the client, in which case the banks do not recognize the signatures of blind people, do not permit using a facsimile and compel them to give power of attorney to a third party in order for that

person to sign on their behalf and for their account. Blind people also face problems when using online banking services, due to the banks' internal regulations (use of tokens, codes and similar security tools, which blind people are unable to use). Additionally, the banks do not enable the use of assistive technology, such as a speech feature ATM, Braille printer, software solutions for access to electronic services etc. In this case, situation testing is not needed, because there is direct evidence that blind people have restricted access to banking services and products (not having their signature recognized, facsimile not permitted, compelled to give power of attorney to a third person who would sign on their behalf and for their account), as opposed to other people who can freely use these services. Furthermore, a statement can also be considered direct proof (example - an employer announces the dismissal of mid-age employees, and their replacement with younger employees, because he wants the company to acquire a "younger" image), a written order (example - not to employ people from a certain ethnic community or "to remove all Roma employees from the food departments" - the case of discrimination against Roma by the management of the City Mall trade centre), or an advertisement (example - job advertisement for an office job, stating that only women may apply). If there is such evidence, in these cases of discrimination court proceedings may be initiated without conducting situation testing.

However, in most cases there is no direct evidence that direct discrimination occurred, because it is usually hidden and in order to prove it, other methods must be applied, such as the situation testing method.

It must also be taken in consideration that situation testing is not always the best method to prove discrimination, because after reporting a case or obtaining knowledge of a certain discriminatory practice, a thorough analysis should be performed on whether the testing shall provide useful evidence in order to confirm whether discrimination had indeed occurred or not.

3. OBJECTIVE

After determining the problem (case and need for evidence), we should determine the objective we want to achieve in the case, and depending on the objective, we should determine the steps of action toward the achievement. Hence, if there is a need for situation testing, we should determine the goal we want to achieve, i.e. whether the method of situation testing shall be used for research or court representation. This depends on whether we want to prove that there is discrimination on a certain ground in a certain field due to conducting discriminatory practice, change of legislation or raising awareness in order to motivate

the state or the discriminated persons to take actions (**research**) or with the results and by initiating court proceedings against the alleged discriminator we want to prove that there has been discrimination in the given case, which shall further on be a basis for future cases of discrimination in that field or on that ground, that the testing was performed on, which would prevent future cases of discrimination or a certain discriminatory practice will be changed (**court representation**). Also, situation testing can be applied in the proceedings before the Ombudsman and the Commission for Protection against Discrimination. Moreover, it is important to emphasize that through court representation of cases of discrimination the plaintiff gets individual justice, while with research we want to prove discriminatory practices, because we want systemic change.

4. CAPACITY OF THE NON-GOVERNMENTAL ORGANIZATION

In order to successfully conduct situation testing, a prior analysis of the capacity of the NGO is needed, i.e. to find out whether it has the necessary resources and knowledge of all the aspects of this method. Thus, it is necessary to conduct this analysis before the beginning of the testing, and it should elaborate on the following aspects:

1. Human resources
2. Finances
3. Contact with the community being discriminated
4. Trained persons which would be coordinators and testers of the testing
5. Attorney(s) with certain experience in court cases of discrimination, who would represent the victims/testers or experts in lobbying and advocacy

1. The preparation and conduction of the testing may take time and human resources, which is why the NGO should assess the quantity of time and number of employees necessary to implement this method, based on which it shall be further decided which period would best fit the implementation. Of course, during this assessment we should have in mind the case which is to be tested, because in some cases one certain period of time would better suit the testing than another⁵¹, and in some cases an urgent reaction is necessary due to the essence of the case⁵².

⁵¹ Example - if you want to perform situation testing of discrimination in the access to goods and services - night clubs, the testing should be performed during night time

⁵² Example - in situation testing in employment, due to the short time period, you must have ready testers which will apply for the job

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2. There should also be an assessment of the finances available for the testing. Depending on the strategy, or scenario for the testing, different amounts of funds will be needed. For example, it depends on whether the testing shall be conducted via telephone, or on the very location, which would certainly require more finances. The number of times the testing is to be repeated also influences the financial plan.

3. In order to conduct the testing successfully, we need to have contact with the group/community which has the protected characteristics due to which discrimination had occurred, in order to easily find people for the role of testers. However, contact with the group/community is not mandatory, because it can also be made via cooperation with other NGOs.

4. It is particularly important that the NGO has trained persons who would be the coordinators of the testing, because the coordinator has the most important role in the entire process - from creating a methodology/scenario, to documenting the entire process, in order for it to be used as evidence in court. Also, a very important thing is choosing the testers and control testers - the best way is if they are trained already when you want to do the testing.

5. To achieve the objective of the testing, we need to find attorneys with certain experience in cases of discrimination, who would lead the case in court (in cases when testing is conducted for the purpose of court evidence) or experts in lobbying and advocacy (in cases when testing is conducted for research whose goal is to make a certain change in the legal regulations or discriminatory practices).

5. THE ROLE OF THE COORDINATOR

As we said previously, the coordinator has the most important role in the entire process of situation testing. The coordinator must be a person qualified to conduct the testing process - to have previous knowledge of the implementation of the situation testing method in order to prepare an adequate protocol containing the reason for the preparation of a scenario which would be most appropriate for proving the discriminatory practice in that case, to be aware of all steps which need to be taken in order for the testing to be accepted as evidence by the court, i.e. for the research to be considered reliable, to be able to provide appropriate training for the testers, to prepare questionnaires to be filled by the testers and to properly document all evidence. It is also significant to mention that in cases when situation testing is used as evidence in court, the coordinator is a witness to the process of situation testing, particularly from the aspect of filling questionnaires and statements of control testers, which are also witnesses in the proceedings. Additionally, the coordinator should

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have in mind that they are also to appear in court as a witness in order to explain the entire testing process.

Steps:

1. Research on the alleged discriminator and the location of the testing

The coordinator should first do research on the alleged discriminator and the location of the testing, i.e. the location which is reported or is known to be discriminatory. This research should provide information on whether there had previously been reports of discrimination, perhaps a court decision against the alleged discriminator for previous discrimination, data on the procedures of the alleged discriminator⁵³, data on the location - the usual number of people inside, number of employees, number of security staff, number of rooms, representative of the institution, if testing a case of discrimination on the ground of physical disability - is the location accessible to persons using a wheelchair, is there information for use of physical force in that location. The coordinator should also examine all legal segments which may contribute to a more successful testing, or may hinder the process, due to which they should be avoided and not applied.

2. Preparation of a scenario and protocol

The testing scenario, the concept of which must guarantee matching characteristics of testers and control testers, except for the protected characteristic, and must be representative (as a general rule it can be repeated once, twice or more often) , should contain the reason for the testing (explaining the discriminatory practice and the objective to be reached by conducting the testing), the exact testing procedure, which words shall be used, the possibility/impossibility of other people being witnesses, clear listing of legal aspects, that no recording is allowed - neither video nor audio, as well as no photographs⁵⁴.

The role of the coordinator is to decide which kind of testing (in person or telephone) will be most appropriate for proving discrimination in that particular case. There are cases when it is impossible to conduct a telephone test (eg. discrimination towards Roma at border crossings in the country), while there are cases when it is more efficient and appropriate to conduct telephone testing (eg.

⁵³ Example - there are strong indications that certain general practitioners in Skopje discriminate Roma women, i.e. doctors refuse to register them as their patients, saying that they have exceeded the number of patients they may have, which prevents Roma women from accessing health protection. These findings may easily be found in the laws and bylaws on the work of general practitioners.

⁵⁴ Even though audio and video recording has been used as a method of documenting in other countries and may present strong evidence in cases with situation testing, in the Republic of Macedonia it is prohibited in Article 151 - Unauthorized eavesdropping and audio recording and Article 152 - Unauthorized recording

discrimination of children with intellectual disability by nurseries in the country). Telephone testing is carried out quickly, requires less funding, testers do not always have protected characteristics, which can be found much easier (in the case of research on a particular discriminatory practice), testers can note certain information during the implementation of testing, which further helps them to complete the questionnaire faster. Telephone testing can be recorded in some countries. NGO members can also sit in on the conversation to act as witnesses later.

Even though every protocol's concept should be in line with the scenario and the case, in order to give a clearer picture, Annex 1 contains examples of questions which the protocol should contain, and in which order, allowing for adding or removing questions depending on the scenario, on the grounds of concrete testing cases.

3. Preparation of a questionnaire

The goal of the questionnaires is to give accurate data on the events of the testing location and to precisely explain the behavior of the alleged discriminator. This is why they should be detailed and comprehensive, in order to be further used as evidence, or to provide the information necessary for the research. Thus, it is necessary that the questionnaires contain the following:

Data (on the tester, the location or institution, date, data on the control tester - name and surname, date of testing, time of testing - if the testing is by telephone, then the start and end time is noted, and if it is personal, then the approximate start and end time is given)

Data on the staff (name and surname - if it is possible to obtain such data, greetings and manner of greetings - handshake or verbal, inviting to take a seat)

Objective data actualization of the circumstances in that situation (time and place of waiting to be served or called for a conversation)

Questions on obtained information (reasons for the rejection, have there been any remarks by the person regarding the tester's protected trait, have there been attempts for further contact, has another offer been made as a substitute for the rejection)

Data on the answers and reactions of the tester

Other data from the testers' considerations

Follow-up

If there has been an attempt for further contact or there has been unexpected contact with the tester, the follow-up form is filled immediately, and it is similar to the questionnaire form where the entire conversation is noted.

4. Selection of testers

The coordinator should pay particular attention to finding adequate testers, because they have the most important role in making the testing accepted as evidence in court or sufficiently reliable for the research to be accepted. Apart from matching the characteristics of protected testers and control testers, the coordinator should be very careful regarding the credibility of testers, which gives legitimacy to the testing. Thus, the coordinator must be careful in regard to the following:

- the testers must not be connected with each other, or connected to the previously discriminated person (relatives, friends, intimate partners)
- the testers must not have prejudice toward the discriminated person
- they have not been victim of the alleged discrimination for which the testing is going to be conducted
- it is recommended that the testers do not have a criminal past
- the testers should not be too emotional
- the testers must not have had previous contact with the discriminator being tested
- the testers must not be underage persons

During the selection of the testers, the coordinator should also be careful in regard to the testers's personal capabilities, as follows⁵⁵:

- the capability of making objective observations, lack of prejudice or the capacity to successfully overcome prejudice, reliability, certainty, trustworthiness for longer engagement, lack of bias, capacity to suppress their own feelings during the testing, calmness, not being prone to provocations, good self-awareness, capacity for independent thinking and decision-making, creativity.

⁵⁵ Criteria given by the Migration policy group - MPG, as an NGO with many years of experience in conducting situation testing and organizing and conducting trainings for situation testing. Link to their website: <http://www.migpolgroup.com/>

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Additionally, the testers should match not only in regard to visible characteristics (height, body type, general attractiveness), but also in regard to characteristics such as being open/closed, warmth of personality etc.

In the case of telephone testing, special attention should be paid to the language or dialect spoken by the tester⁵⁶. What is also typical for the telephone testing is that the testers do not really need to possess the protected characteristics, so if you are not able to find a suitable tester, it can also be someone who does not have all of the necessary features, as well as a protected characteristic.

What will particularly influence the credibility of testers is the amount of funds being given to them for their participation in the testing, something the court will be particularly careful of, if the goal of the testing is to initiate court proceedings. A large financial compensation may be seen as negative influence on the testers' objectivity, which is why it is recommended to not offer compensation, or to offer a symbolical amount. Thus, the coordinator must notify the testers on the amount of the compensation before they accept to participate in the testing and before the contract is signed.

During interviews with testers, the coordinator must familiarize them with the possible effects of the testing, i.e. that in case there is discrimination against the protected testers, it is very likely that negative feelings, anxiety, need for reaction etc. might occur, due to the injury against dignity, but that these feelings should not be shown at that moment. The control tester should be told that they should precisely observe the entire process, because later they would need to testify in regard to all events. It is very important that the testers are explained the connection to future processes on the basis of the testing results, i.e. they must be told that if there is a court procedure, the protected testers shall appear as plaintiffs, and control testers as witnesses. It must also be said that the court procedure might last several years, as well as that the case might be exposed in the media.

5. Training of testers

After selecting the testers, a training is conducted, with the following goals:

1. Certainty that the testers can be convincing in their roles;
2. Matching personal styles of the partners in each tester team;
3. Certainty that the testers have understood the need for complete objectiveness, eliminating any predisposition to provoke discrimination;

⁵⁶ Please see Case 2 of Annex 1

SITUATION TESTING

4. Certainty that the testers have fully understood the methodology and scenario.

The testers' training usually lasts one week and ends with a full test play of the roles of all teams, in order to be certain that all details have been remembered by the testers. The test role play can first be done with one team, and then with the other(s), depending on the number of repetitions needed in the actual testing. When the situation is being tested via phone call, it is performed by each tester, while the coordinator can act as the alleged, or possible discriminator.

It is very important to explain to the testers the meaning of provocation in the case, as well as inciting the occurrence of discrimination. For example, protected testers may ask why a certain right is limited (why aren't they being let in the night club, why haven't they been served in a coffee bar, restaurant, why are they not being hired), but they must not ask direct questions which hint the protected trait of the tester (You're not letting me in because I'm Roma? You're not hiring me because I'm a woman, right?). A provocation may also be inappropriate behavior or comment, an impulsive reaction, jokes by the tester on the account of the protected characteristic, violent behavior etc.

It is important to explain to them the protocol and instructions according to which they should act, the details on the locations and the attitude of the person being tested, they should be reminded not to show emotions and reactions on the very location of the testing, reminded of the confidentiality of the information from the testing, i.e. that they may give statements on the testing only with the knowledge and permission from the coordinator.

Moreover, the training process should also emphasize the manner of dress of the testers, for which purpose it is best that they are dressed on the day of the test play as they would be on the day of the actual test.

5. Signing contracts with the testers and giving statements for safekeeping of data

In order to determine the legal relationship with the testers, after their selection, they sign a contract containing the following information:

- Personal information of the tester or organization

- The tester is a minority in comparison with the control tester - the contract should state the protected characteristic

- Data on the location or institution which is to be tested

– a method of proving discrimination

Date of testing, methodology of testing (for example, the tester is a potential customer or a candidate asking for services or employment)

Duties of the tester: Appearance on the test location, non-biased behavior, cooperation with the coordinator, filling the questionnaire, duty as a witness, confidentiality clause

Duties of the organization: To represent the tester in every legal procedure related to the testing; to pay them the amount given in the contract; to pay the expenses of the tester related to conducting the testing and fulfill other obligations from this contract; to pay a certain amount for the time dedicated to giving testimony; to process the personal data of the tester for the purposes of the procedure only, not to disclose them to third parties, except for the relevant court or another authority

Apart from signing contracts, the testers should fill and sign a statement regarding the use of sensitive information, and use of the results in court proceedings/media.

6. CONDUCTING THE TESTING

After the training, the testers are considered prepared to perform the testing. Testers should always be encouraged to review the protocol and their test instructions before approaching the location of the testing, regardless of whether it is personal or by telephone. This review is particularly important if the tester performs different types of tests during the same period of time.

During the testing, testers should stay calm and ask all necessary questions in order for the testing to be successful, and

The coordinator is also present during the testing, but at a distance from the testing location, sufficiently close to be available to the testers shortly after the test. The coordinator monitors the process and in order to be able to efficiently coordinate the teams, he/she should not be coordinating more than four teams of connected testers. When the protected tester finishes the test, the control tester, who is nearby, should immediately head to the location of the testing and perform the control test.

The coordinator meets the testers at an agreed location, and they should arrive shortly after the testing, in order to fill in the questionnaires and describe their experiences and emotions. It is also the role of the coordinator to talk to the protected testers and calm them down, because they can become very

emotional due to a humiliating experience and an injury to their dignity.

In some cases there may be a need for two coordinators and specificity of the case (for example, the discrimination of Roma on the borders in Republic of Macedonia where a coordinator is needed to wait for the testers who will not cross the border and will be located on the border in Republic of Macedonia, while the second will wait the testers who will cross the border and will be located at the border crossing of the Republic of Serbia).

7. FILLING QUESTIONNAIRES AND COLLECTING STATEMENTS

Even though in some methodologies it is stated that the questionnaires should be filled within a maximum of 24 hours after the test, we believe that they should be filled immediately after the testing, because emotions and experiences are at their most intensive in this period. This also applies to telephone testing, i.e. the questionnaires should be filled immediately after finishing the telephone conversation. Apart from filling questionnaires immediately after the test, the testers also give statements on how they had been feeling during the test, and if harassing questions were asked, how did they influence their emotions.

8. DOCUMENTING AND FOLLOW-UP

After the coordinator receives all questionnaires and statements, they process them and summarize the results - this determines whether the test was successful, i.e. whether there was discrimination in that case, or that it cannot be stated that there was discrimination.

The coordinator does this in a general report, in which they should carefully explain the entire process. This report may also contain the obstacles they had faced together with the testers, during the entire process, the questionnaires filled by the testers, their statement, previous reports by citizens and that in the past there has been discrimination in the same location and by the same institution/company/organization. This report, whose annex shall contain the questionnaires and statements by the testers, shall be submitted to the court as evidence in court, and on this basis, the coordinator shall be summoned as a witness in the court procedure.

The coordinator continues to monitor the testing due to the possible contact with the protected testers by the discriminator. If this happens, new questionnaires are filled and added to the general report, in order to submit them as evidence before the court.

9. USING THE RESULTS

Even when determining what we want to achieve with the testing, i.e. determining our objective, we choose the manner in which we shall use the testing - research or court representation. **Research** will be a tool in the processes of lobbying and advocacy in order to change a discriminatory practice, amend legislation or raise awareness in order to motivate the state or discriminated persons to take actions. Or the results from the testing can be used to initiate a court procedure against the alleged discriminator and prove that there has been discrimination in that case, which shall further be a basis for future cases of discrimination in this field and on that ground for discrimination, which would prevent future cases of discrimination, or would change a certain discriminatory practice (**court litigation**). Furthermore, the selection of the strategy used will depend on the results of the testing. Appropriate assessment needs to be done on which strategy would most efficiently lead towards fulfillment of the set goal.

1. Strategic litigation

When deciding that a certain test is to be performed and that the results of it, if “successful”, shall be a basis for initiating proceedings, this case becomes a **strategic litigation case for the organization**, which should be further developed and monitored very carefully. The goal of the organization is to use these strategic litigation cases to change discriminatory practices toward the community which is a focus group of the organization's work. In strategic cases, the organization should also inform the media on the results of the testing and the initiating of court proceedings, in order to raise public interest for cases of discrimination and encourage the citizens to report discrimination and initiate a procedure for their protection.

2. Advocacy

The test results, particularly if they have been repeated many times or if the test was conducted as research, may be used for advocacy, i.e. to make an attempt to use the results to incite political action, by using methods such as civil education and public campaigns, in order to influence decision-makers to pay more attention to the practice(s) proven discriminatory with the testing. The advocacy strategy may involve activities such as: newspaper articles, statements of discriminated persons or testers themselves, distribution of materials which shall briefly tell the stories of the victims of discrimination.

3. Lobbying

Lobbying is a process which can be used after situation testing, in order to achieve changes in the legal framework and/or procedures/practices in the field we work in. Lobbying influences decision-makers, i.e. their engagement in order to overcome problems. Hence, lobbying is not always a pleasant task and we often have to temporarily suppress our personal views (not to renounce them!) in order to reach those whom we request to make a decision in favor of our goal. There are several things we need to overcome in order to successfully lobby and to achieve the desired change.

1. Preparation of a plan for developing the initiative and lobbying

The Plan for developing the initiative is a basic document which must be prepared before we start the lobbying activities. This Plan is important, as it would contain our goals, help us avoid as many “traps” as possible, which would otherwise hinder our lobbying, thus the plan would help us keep a straight path toward our goal. There are several key parts the Plan should contain - name of plan / initiative, goal of the initiative, budget, benefits from the initiative, potential partners, potential adversaries, changes we want, accountable institutions.

2. Argument paper

After targeting your supporters, it is important that you start preparing the Argument paper. This paper shall set the basis on which you would build the relationships with your supporters, as well as the relationships with decision-makers. It is also a reminder of the arguments you have collected, for the justification of your demand for changes.

3. Work with relevant institutions/decision-makers

In order to work with the institutions, you should first study the decision-making structures and profile them, as well as form a group of supporters from these institutions.

4. Public relations

One of the strategically important aspects are the relations with the general public, expert public and media. When lobbying, it is best to use relationships we previously had with certain journalists/media. This is how you will have the media working for you, in order to lobby successfully and achieve the desired change.

ANNEX 1

Cases of discrimination and situation testing protocols (preliminary scenarios and instructions)

Case 1

Discrimination of the Roma at the border crossing points in RM

Throughout the entire 2013, complaints were sent to various organizations (including the Helsinki Committee) in regard to unjustified limitation of the freedom of movement of Roma people on the border crossing points, with the excuse that they are potential asylum seekers, and their passports were either stamped or marked with two lines. The goal of this marking is to show that this person has once been prevented from crossing the border and that it is a potential asylum seeker in one of the European countries. This practice occurs in a large number of cases, regardless of whether the persons are visiting their families which live in one of the EU countries, or perhaps in non-EU countries, and they are going on a celebration or to the duty-free shops to purchase products.

This case was also presented before the Commission for Protection against Discrimination, as an equality body whose mandate is to give an opinion on whether discrimination has occurred in a certain case. The Commission was unable to determine whether there had been discrimination in this case, stating that there is insufficient evidence and that other methods of proof of this discriminatory practice should be considered.

Also, the Ombudsman sent harshly criticized the Ministry of Interior that the reported number of cases of limitation of the right of movement of Roma people, proves that these are not isolated cases and they are turning into a discriminatory practice of the state towards the Roma community.

The Basic Court Skopje 2 Skopje establish discrimination on the basis of ethnicity in an individual case where one family of the Roma community were not allowed to cross the Macedonian border and participate on a wedding of close relatives in Germany. This decision is not yet final.

Hence, this case became a strategic case and a scenario was created for conducting situation testing, in order to initiate a strategic litigation process, protocol and instructions.

SITUATION TESTING

Scenario: A total of 6 testers, all men, from which: protected testers - 4 Roma, control testers - 1 Macedonian, 1 Albanian, aged 35-45.

They all take a bus to the Republic of Serbia, through the border crossing point Tabanovce, in the city of Bujanovac, where Roma, Albanians and Serbians live. The goal of the trip is visiting friends. Citizens of the Republic of Macedonia may travel to the Republic of Serbia only with IDs, but a decision was made for the testers to use passports, all unstamped and unmarked with lines, i.e. without any sign that the protected testers are potential asylum seekers. Another criteria for the selection of testers was that the members of their families must also have no stamp or lines in their passports. The control testers sit close to the protected testers, in order to hear all the questions by the border police, observe their behavior, and thus be competent to testify in that regard.

Time period: One test was planned for the night shift during a weekend, and the second for the day shift during the workweek. The goal of the different time period of testing is to test the behavior of the border police in different shifts.

Timeframe: During August 2014

Coordinators: Two coordinators - one of which shall not cross the border and shall wait on/near Tabanovce, while the other coordinator shall cross the border and wait near the border in the Republic of Serbia.

Filling questionnaires: After the testing, questionnaires will be filled individually, with no presence of other testers, in order to eliminate the possibility of influence.

Contents of the questionnaire: demographic data, name and surname, date, sex, ethnicity, means of transportation, goal of the trip, time, names and surnames of border police officers, the time spent held at the border, were they called out of the bus individually, were they asked for additional documents, what were they asked, what was the attitude of the officers, their tone of voice, time period of being held in such manner, reasons stated in regard to the limitation of the right to cross the border, whether someone else from the bus was also returned and whether their passport was marked - with a stamp or lines.

– a method of proving discrimination

Type of test	Personal
Number of tests	2
Scenario	6 testers, protected testers - 4 Roma, control testers - 1 Macedonian, 1 Albanian, aged 35-45, traveled to Serbia by bus. Travel documents - passport. None of the testers has a stamp or lines marking that they have already been prevented from leaving the country; this also applies to their family members.
Tester team	Apart from the different ethnicity, they all have matching sex, age, finances, employment, marital status, dress manner.
Manner of testing	Protected and control testers sit close, but not next to each other. For example they can sit in the same row but on the other side, or on the seats behind.
Previous contact	None
Reasons for traveling	They are traveling to Bujanovac, Republic of Serbia

Indicators	
Request to step down from the bus	No questions asked at this phase
The response is that they will not be allowed to cross the border	The testers may ask why are they not allowed to cross the border

SITUATION TESTING

Instructions for the testing

Before the testing, every tester should once again read the protocol and repeat it, because the border police may ask personal questions or status-related questions - employment, finances, marital status.

Conducting the testing:

In the bus, remain calm and do not show that you know the other testers, nor that you are in the role of a tester in any manner.

When you arrive at the border, you should give your passport to the border police calmly, just like anyone else on the bus.

If a border police officer enters the bus, his name and surname should be noted first, and then the manner in which he treats all passengers, and how he treats Roma people (manner of asking and type of questions, tone of voice, how long was he asking questions, did he ask them to step down from the bus).

If asked why are you going to the Republic of Serbia, the scenario is told, i.e. you're going to a close friend whom you have not seen for a long time. The officer may ask additional questions, for example - where have you met your friend, how long haven't you seen him, why visit now, and you must respond to all those questions calmly.

The officer may tell you to step down from the bus, to which you may not object or ask why it is necessary or why you are the only one to do so.

Try to remember all questions you were asked, and also try to note at what time were you asked to go outside of the bus and how long were you kept there.

If the officer makes a telephone call and talks to someone, try to hear the topic of the conversation and if a name is mentioned, try to remember it.

If in the end you are told that you cannot cross the border, you may ask why and remember the entire answer.

Even though this may be very degrading and humiliating for you, it is most important that you stay calm and in no way give statements which may be considered a provocation, because the testing might be considered unsuccessful and therefore unusable as evidence in court.

The following questions are considered a provocation - "Are we being asked to go outside the bus because we are Roma?" "We cannot cross the border because we are Roma?"

– a method of proving discrimination

If after questioning you, the officer tells you that you may cross the border, you will have no objections or questions on why you were asked to step outside and why you were questioned. You shall go back in the bus and cross the border.

If you are told that you cannot cross the border, you shall call the coordinator and head to the location where you have agreed to meet. The coordinator will give you the questionnaires, which are to be filled individually by every tester.

It is important not to share feelings and experiences with the other testers in the meantime, in order to be able to provide individual responses after the testing.

This also applies to the situation when you are able to cross the border, you shall call the coordinator and head to the location where you had agreed to meet. The coordinator will give you the questionnaires, which are to be filled individually by every tester.

QUESTIONNAIRE - IN PERSON TESTING

Case - discrimination towards Roma on the borders

CONTROL: (name and surname)
TESTER (name and surname)

Where was the testing conducted:

Date of the testing:

Profile of the tester:

1. Sex male/female
2. Age _____
3. Ethnicity _____

Means of transportation: _____

Goal of the trip: _____

Time the bus leave from Skopje: _____

SITUATION TESTING

Time the bus arrived on Tabanovce crossing border:

Time spent at the border: _____

Time you left the border: _____

Time you got back to Skopje: _____

Time you arrived in Bujanovac: _____

Time you got back to Skopje from Bujanovac:

Name and surnames of the of border police officers:

1. _____

2. _____

3. _____

4. _____

5. _____

How did you got the name/s of the police officer/s?

1. From his/hers/their badges
2. You asked him/her/them
3. He/She/They presented themselves

Did the police officers ask you more questions than the other passengers in the bus?

Yes/No

If the answer is yes, what kind of questions did they ask?

Did the police officers ask you for more documents than the other passengers in the bus?

Yes/No

– a method of proving discrimination

If the answer is yes, what kind of documents did they ask for?

Were you asked to leave the bus”

Yes/No

If yes, were you called out of the bus individually

Yes/No

If no,

1. Were you called out with the other Roma,
2. Or there were persons with other nationality

If there were persons with other nationalities, can you emphasize which:

Macedonian

Albanian

Bosnian

Turkish

Other _____

How many officers were questioning you?

What was the attitude of the officers?

Please explain

SITUATION TESTING

What was the tone of the voice of the police officers?

Please explain

How long were you held out of the bus?

Did they take you in separate office or you were questioned out of the bus?

Which reasons were stated in regard to the limitation of the right to cross the border?

Did they mark your passport?

Yes/No

If yes, please explain how - with a stamp or lines

Was there someone else from the bus also returned?

Was their passport marked - with a stamp or lines?

– a method of proving discrimination

Did you ask any questions why you are not allowed to cross the border?

Yes/No

If yes, please specify the questions you asked

Did the police officer/s give you answers?

Yes/No

If yes, please specify the answers of the police officers

How did you feel when the officers said that you will not cross the border?

When was this report completed?

Date (day/month/year): _____

Signature:

CASE 2

Discrimination against children with intellectual disabilities by the kindergartens in RM

Inspired by a case of discrimination against a child with physical disability by a kindergarten in Skopje, and considering the historical discrimination against people with intellectual disabilities and their marginalization in society, we decided to explore discrimination towards children with intellectual disabilities by kindergartens.

In this case our goal shall be to raise awareness about this discriminatory practice and increase education of the employees in kindergartens in regard to children with intellectual disabilities, especially for children with light intellectual disabilities, because it is recommended that they go to regular kindergartens and regular schools.

Hence, this case became a strategic case and a scenario was created for conducting situation testing, protocol and instructions.

When creating the scenario, our starting point was the number of kindergartens in the Republic of Macedonia - a total of 70 kindergartens in 46 municipalities, 14 of which are private kindergartens, 11 of which are in Skopje and 3 in other towns in Macedonia.

When selecting testers, we took into consideration that in Macedonia different cities have different dialects, therefore, 2 testers were selected for Skopje, while testers from each individual region were selected for the other cities.

Scenario: A total of 74⁵⁷ testers, all women, employees or associates of organizations that work in the field of human rights, one of which will have the characteristics of a mother of a child with an intellectual disability, and the other shall be a mother of a child with no intellectual disability. The mothers will call the kindergartens, asking if there is a free place for her 3-year old child with a slight intellectual disability (slight developmental difficulties). The control tester shall contact the kindergarten, asking if there is room for her child who has no disabilities⁵⁸. The research will be conducted only by employees/associates of the national NGOs, because of the need for fast action.

In regard to telephone testing, it is typical that testers need not truly have the protected characteristics, thus, if you cannot find

⁵⁷ In the process of conducting this testing no testers from all the municipalities in the country were found and therefore testers were used which did not speak the typical dialect. This did not affect the results of the testing and the said testing was successfully conducted.

⁵⁸ The control tester poses the question without stating that the child has no disability

– a method of proving discrimination

an adequate tester, the role can be filled by a person without the needed characteristics, or the protected characteristic (in the case a mother of a child with intellectual disability, i.e. a mother of a child).

Time period: The protected tester shall call at 09:30, while the control tester shall call at 12:30.

Timeframe: During September, October and November 2014.

Coordinators: The coordinator will be present during the whole process of the telephone testing, because it will be conducted in the NGO's offices.

Filling questionnaires: When the test is finished, the questionnaires shall be filled individually, immediately after finishing the telephone conversation, and they shall be given to the coordinator.

Contents of the questionnaire: demographic data, name and surname, date, sex, ethnicity, manner of testing, time of beginning and end of the telephone conversation, duration of the conversation, name and surname of the speaker from the kindergarten, whether the first question regarding a free place in the kindergarten was answered positively, whether the answer changed to a negative one upon hearing the information that the child has an intellectual disability, whether there were questions related to the degree of disability of the child, whether there were questions about the child's behavior, if yes, list the questions asked, your replies, whether there were any comments referring to people with intellectual disabilities, whether you were told to call the kindergarten again in order to receive information on whether a place for the child was made available, and whether you were told when you should you call again, whether the speaker asked for your telephone number in order to call you if there is an available place in the kindergarten?

SITUATION TESTING

Type of test	Telephone test
Number of tests	70
Scenario	74 testers, women, one of which will have the characteristics of a mother of a child with an light intellectual disability, and the other shall be a mother of a child with no intellectual disability, they will all be employed and married, and the husband shall also be employed. Mothers call the kindergartens, asking if there is a free place for her 3-year old child with a slight intellectual disability (slight developmental difficulties). The control tester shall contact the kindergarten, asking if there is room for her child who has no disabilities. The child's age is 3 years.
Tester team	All are women, may have different dialects, may have different ethnicity, age up to 40 years.
Manner of testing	The protected tester calls at 09:30, and the control tester calls at 12:30.
Previous contact	None
Reason to call	Requesting access to kindergarten services

Instructions for the testing

Before the testing, every tester should once again read the protocol and repeat their characteristics, because the speaker from the kindergarten might ask personal questions or status-related questions - employment, finances, marital status.

Because this is a telephone test, you may mark each answer throughout the entire conversation with aspects that might help you fill in the questionnaire later.

Conducting the testing:

Throughout the entire conversation you must remain calm and must not show that you are a tester.

When you call, you should be polite and start the conversation with “good morning” (for protected testers) or “good day” (for control testers) and introduce yourself.

– a method of proving discrimination

Then you shall ask who are you speaking to - and note their name and position in the kindergarten. Then you will state your request.

You may get an immediate reply that there is no free space in the kindergarten, after which you shall thank them for their response, politely say good bye and hang up.

If before you receive a response you are asked questions in regard to the degree of intellectual disability of the child, its behavior, reactions, relations to other children, you shall note them. You will respond to all questions calmly and with no signs of nervousness or agitation.

If they ask for your telephone number and state that they shall contact you additionally, because they need to consult others for situations like this, you shall give them your telephone number and tell them that you will expect their call. You may ask who they would consult and note whether the answer was given to you. If they contact you and notify you of the outcome, you shall fill the additional questionnaire for follow-up and send it to the coordinator.

If the response is positive, you shall say that you shall bring your child in the following days, thank them and hang up.

In any case, the attitude of the speaker should be noted, in particular whether it changed after being told that the child has an intellectual disability.

After the finished conversation, you shall call the coordinator and tell them the outcome, your feelings and experiences. After this, you shall fill in the questionnaire and send it to the coordinator.

QUESTIONNAIRE - TELEPHONE TESTING

Case - discrimination towards children with intellectual disabilities by the kindergartens in the Republic of Macedonia

CONTROL TESTER: (name and surname)

PROTECTED TESTER (name and surname)

Where was the testing conducted:

SITUATION TESTING

Date of the testing:

Profile of the tester:

1. Age _____
2. Ethnicity _____

Goal of the call: _____

Time call began: _____

Time call ended: _____

This is call attempt number: 1 2 3 4 5

Were you able to speak with a person from the kindergarten?

Yes/No

If no, why not?

1. Told to call back later
2. Wrong number
3. The person hung up
4. No answer
5. Other (specify)

Name and surname of the person you talked to:

1. _____
2. _____
3. _____

Position held by the person you talked to:

When you asked about the availability for the kindergarten, what was the answer

1. There is a place for the kindergarten



– a method of proving discrimination

2. There is not a place for the child in this moment
3. The person did not know wheter there is an available place
4. Something else (specify): _____

Did the person that you talked to tell you that there are necessary documents and an application that you must fill in?

Yes/No

Did the person that you talked to tell you that you must have a certificate that the child is physically and psychologically healthy to attend kindergarten?

Yes/No

If yes, specify how they told you:

Did the person that you talked to request information about your income, source of income or occupation?

Yes/No

If yes, please specify what the person said

Did the person make any remarks about disability or persons with disabilities?

Yes/No

If yes, please specify what the person said

SITUATION TESTING

Did the person that you talked to make any remarks about the absence of people trained to work with children with intellectual disabilities?

Yes/No

If yes, please specify what the person said

Did the person that you talked to make any remarks about race/ethnicity, religion or families with children?

Yes/No

If yes, please specify what the person said

What arrangements were made regarding future contact between you and the person?

1. The person said that he/she would call back
2. The person invited you to call him/her back
3. Future arrangements were not made
4. Other (specify)

When was this report completed?

Date: _____

Day of week: _____

Time: _____

Signature:



– a method of proving discrimination