

Non-discrimination Under Article 14 ECHR: the Burden of Proof

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1 Introduction

1.1 *Prima Facie Discrimination*

Article 14 of the European Convention on Human Rights (ECHR) stipulates a general ban against discrimination.¹ It provides that the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. On one hand, Article 14 ECHR has the limited scope of being an accessory right applicable only in relation to the enjoyment of the rights and freedoms otherwise protected by the Convention. On the other hand it has a very wide range as it entails an open-model non-discrimination clause, which is not limited to an exhaustive list of discrimination grounds. Further, Article 14 does not stipulate anything on the concept of discrimination, the burden of proof for prima facie discrimination or on what may constitute objective and reasonable justification for such prima facie discrimination. This open structure of Article 14 has significant consequences as to its interpretation and application and provides for what may sometimes on the surface seem unstructured and perhaps conflicting case law.²

The Court has established an analytical framework in its case-law under Article 14. This analytical framework allows the identification of the Convention's operative concepts of discrimination. The test set out in the first Article 14 judgment, the *Belgian Linguistics* case of 1968, is still instrumental.³ To begin with, the concept of discrimination and the analytical approach of the Court hold that a difference in treatment must exist. Sometimes, the Court adds to its express delimitation of the analytical framework that it is different treatment of persons in analogous or relevantly similar situations that must exist.⁴ In other cases no express reference is made to this issue as part of the analytical approach, but it is generally implied and present in the reasoning of the Court. If the required difference in treatment and its basis are established the Court proceeds to the objective justification test. Under the objective justification test a violation occurs if the difference in treatment has no objective

1 *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No. 5.

2 Article 1 of Protocol 12 to the Convention, *cf. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No. 177, provides for an independent right to non-discrimination in the enjoyment of any right set forth by law and a ban against discrimination by any public authority. On issues other than the clear difference in scope, Article 1 of Protocol 12 follows the open structure of Article 14 and can be anticipated to be interpreted in line with the established interpretation of Article 14. Protocol 12 entered into force on 1 April 2005, but as of August 2006 only 14 member States have ratified it. Finland is the only Scandinavian country to have ratified Protocol 12.

3 “Case relating to certain aspects of the laws on the use of languages in education in Belgium”, *Belgian Linguistics*, 23.07.1968, Series A, 6.

4 As early as in *National Union of Belgian Police v. Belgium*, 27.10.1975, the second case in which the Court pronounced on Article 14, the consideration was added that: “...it safeguards individuals, or groups of individuals, placed in comparable situations.”, *cf. para. 44*.

and reasonable justification. Such justification exists if the difference of treatment pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In *Thlimmenos v. Greece* the Court restated its analytical approach in the above terms. On the basis of this not being the only possible facet of the prohibition against discrimination the Court formulated a new test under Article 14, and placed a State under a positive obligation to accommodate different situations for the first time. The judgment stated: “The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”⁵ The Court, thus, spelled out the *Thlimmenos* test in terms of a failure to meet positive State obligation to accommodate for differences when the same treatment results in discriminatory effects. The Court has also established yet another analytical test in relation to discriminatory effects analysis under Article 14. In *Hugh Jordan v. The United Kingdom* it is stated: “Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory, notwithstanding that it is not specifically aimed or directed at that group.”⁶ Based on the brevity of the Court’s statements of principle in these cases and the scarcity of case-law actually applying these tests, it is difficult to elaborate in detail on the Convention’s analytical approaches to discriminatory effects analysis. Both approaches could be lumped together as constituting an operative concept of indirect discrimination under the Convention. There are however, important inherent differences that should not be overlooked.⁷ Firstly, the *Thlimmenos* test implies that justice requires the State to treat the applicant differently from the group of comparison, whereas the *Hugh Jordan* test implies that justice requires the State to treat the applicant the same as the group of comparison. The two tests, thus, are suited to correcting two different types of wrongdoings. Secondly, cases tried under the *Thlimmenos* test have a clearer conceptual connection with positive State obligations than cases tried under the *Hugh Jordan* test. Thirdly, the *Hugh Jordan* approach to *disproportionate* effect captures the cases where it is not necessary that every person of the relevant group is affected by the discriminatory effect while the *Thlimmenos* approach implies that the discriminatory effect is the same for all the persons belonging to the group construed to be in a different situation from the group of comparison. Finally,

5 *Thlimmenos v. Greece* [GC], 06.04.2000, Reports 2000-IV, para. 44.

6 *Hugh Jordan v. The United Kingdom*, 04.05.2001, unpublished, available at “www.echr.coe.int/echr”, para. 154.

7 Wintemute, Robert: *Filling the Article 14 “Gap”: Government Ratification and Judicial Control of Protocol No. 12 ECHR*, (2004) 5, *European Human Rights Law Review*, p. 484, at pp. 496-498, identifies the *Thlimmenos* approach as constituting a concept of indirect discrimination, while at the same time acknowledging that two different situations come under such a concept (“exclusive impact” and “disproportionate impact”). See also Sandra Fredman: *Equality: A New Generation?*, (2001) 30 *Industrial Law Journal*, p. 145, at pp. 156-158 who argues that there are deep-seated ambiguities in the concept of indirect discrimination, and identifies three different types.

the problems that arise in relation to proof of prima facie discrimination are different as the *Thimmenos* test is suited to fact-situations where the treatment complained of and its basis are more likely to be clear-cut and overt, whereas the typical fact situation under the *Hugh Jordan* test requires considerably more elaboration in terms of the existence of the “policy or measure” (i.e. different treatment) in question and the establishment, typically through statistical evidence, of the claimed disproportionate effect on a particular group of people (i.e. the discrimination ground). It is, *inter alia*, for these reasons that it is submitted that for clarity of analysis the different analytical tests should be dealt with separately. Therefore, in the following, the *Thimmenos* approach will be dealt with under the heading of *passive discrimination* and the *Hugh Jordan* approach will be dealt with under the heading of *indirect discrimination*.⁸

The intensity of judicial scrutiny of cases analysed under these tests varies in practice. Variations are governed by the doctrine of the margin of appreciation, which is involved with delineating the appropriateness of judicial intervention in a case.⁹ In adjudicating claims of discrimination under Article 14, there are various factors that influence the width of the margin of appreciation. The Court has most clearly established certain categories of cases where the margin of appreciation of States narrows down and the Court performs strict scrutiny of the treatment in question. In these cases it holds that only very weighty reasons can justify differentiation. These categories of cases consist of the sensitive discrimination grounds of sex, ethnic origin/race, birth in or outside marriage, nationality, religion and sexual orientation.¹⁰

It is a well known issue in discrimination law that there is a close relationship between the effectiveness of protection against discrimination and the allocation of the burden of proof. Surprisingly little attention has, however, been directed towards the question of the burden of proof under Article 14 ECHR. It is possible to discern certain main trends in the allocation of the burden of proof under Article 14.¹¹ The traditional tendency to place the burden of proof on the party who takes a case to court and seeks a change in the *status quo* would justify the fact that the applicant bears the burden of proof for prima facie discrimination. The policy consideration that the substantive guarantee of non-discrimination is to remain effective, then, justifies a shift in the burden of

8 For further reading on related issues, see Arnardóttir, Oddný Mjöll: *Equality and Non-Discrimination under the European Convention on Human Rights*, The Hague, Martinus Nijhoff Publishers, 2003, pp. 95-125.

9 See for example Mahoney Paul: *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, (1998) 19:1 Human Rights Law Journal, p. 1 and Schokkenbroek, Jeroen: *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, (1998) 19:1 Human Rights Law Journal, p. 30.

10 For further discussion of the influencing factors see Arnardóttir, supra note 8, Chapter 5.

11 See e.g. Ovey, Claire and White, Robin: *Jacobs and White The European Convention on Human Rights*, 4th. ed., Oxford, Oxford University Press, 2006, pp. 425-426 and van Dijk, P. and van Hoof, G.J.H: *Theory and Practice of the European Convention on Human Rights*, 3rd. ed., The Hague, Kluwer Law International, 1998 pp. 721-722 and p. 727 and Harris, David, O’Boyle, M. and Warbrick, C: *Law of the European Convention on Human Rights*, London: Butterworths, 1995, pp. 470-474.

proof and places the burden on the respondent State to establish that the treatment in question is not discriminatory.¹² However, some judgments on Article 14 ECHR do not place any emphasis on proof for prima facie discrimination and proceed directly to the objective justification test, many cases seem to merge consideration of whether a prima facie case of discrimination has been established with applications of the objective justification test, while other cases exhibit a maximal burden on the applicant to establish prima facie discrimination and do not reach the level of objective justification scrutiny at all. It can hardly be said that the jurisprudence of the Court on this issue is characterised by great clarity or coherence.

As the Convention's operative concepts of discrimination are not clearly and expressly defined, the question of what is needed more precisely to prove prima facie discrimination under the Court's different analytical test is equally elusive. The issue needs further systematic elaboration. Such elaboration can only be provided with reference to the Convention's operative concepts of discrimination and by induction from the case-law of the European Court of Human Rights (the Court). On that basis, this paper will endeavour to answer the question: What does it take to establish a prima facie case of discrimination under Article 14 ECHR?

1.2 How to Approach Proof under Article 14 ECHR?

The European Court of Human Rights follows an investigatory model of proceedings in the sense of having, at least theoretically, an active role in fact-finding, *cf.* Article 38(1)(a) ECHR. As a function of the exhaustion of domestic remedies rule, *cf.* Article 35 ECHR, the Court will, however, generally rely on the fact finding of the domestic courts.¹³ The concept of a "burden of proof" is taken to encompass two distinct obligations; the burden to come forward with evidence on the one hand and the burden of persuasion on the other hand. It is also taken to be true that in adversarial proceedings both obligations apply while in investigatory proceedings only the risk of non-persuasion applies. When the time comes for decision in the case, one party or the other is always going to

12 See generally Robert Belton: *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, (1981) 34:5 *Vanderbilt Law Review*, p. 1205. Relevant is also the fact that the respondent in a discrimination case is likely to control the evidence much rather than the applicant, see Bindman, Geoffrey: *Proof and Evidence of Discrimination*, in Hepple, Bob and Szyszczak, Erika M. (eds.): *Discrimination: The Limits of Law*, London, Mansell, 1992, p. 57. The rationale for the similar burden of proof in EC law is provided in *Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex*, (1998) O.J. L14/6, Preamble, para. 17: "Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national Courts if the effect of introducing evidence on an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory." See also *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, (2000) O.J. L180/22, Article 8, and *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, (2000) O.J. L303/16, Article 10.

13 Kokott, Juliane: *The Burden of Proof in Comparative and International Human Rights Law*, The Hague, Kluwer Law International, 1998, p. 218.

bear the risk of non-persuasion so the burden of persuasion can be taken to be universal and unavoidable if the result of a proceeding is to be to arrive at a decision.¹⁴ Referrals in the following to the “burden of proof” under the ECHR are, thus, to be taken as referrals to that aspect of the burden of proof that relates to the burden of persuasion.

Dealing with issues of proof and evidence under the Convention it is important to keep in mind that the Court is an international court, which does not operate on the basis of a developed theory or detailed stipulations of procedural law. Its approach to fact finding is also governed to a great extent by its specific situation, being further removed from the facts than a national court and entrusted with the role of supervising the implementation of State obligations as opposed to establishing facts as a court of first instance and pronouncing on individual liability. Accordingly, in *Nachova and Others v. Bulgaria*, the Court spelled out the current state of the law on proof under the Convention in a rather flexible and contextual approach:

“It notes in this connection that in assessing evidence, the Court has adopted the standard of proof “beyond reasonable doubt” However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States’ responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.”¹⁵

It is evident that the Court is highly aware of the relationships between its approach to issues of proof, “the specificity of its task”, and the nature of the substantive right and interest at stake. Juliane Kokott has elaborated on these interrelationships and argues that the same values form the basis to interpretation of human rights treaties and to the allocation of the burden of persuasion.¹⁶ A

14 In adversarial proceedings the Court can only rely on the evidence adduced by the parties so the parties can consent to withholding certain evidence and, thus, affect the outcome of a case. In investigatory proceedings this would not be theoretically possible, as the Court would actively undertake to discover the “truth”. See generally Kokott, *supra* note 13, pp. 148-156.

15 *Nachova and Others v. Bulgaria* [GC], 06.07.2005, unpublished, available at “www.echr.coe.int/echr”, para. 147.

16 See Kokott, *supra* note 13, pp. 211-212.

balancing act between State sovereignty and national democratic discretion on the one hand and the effective protection of human rights on the other permeates the interpretation of the Convention and presents itself in adjustments in the margin of appreciation. Kokott argues that an approach to the burden of proof that rigidly follows State sovereignty and a corresponding burden of persuasion on the applicant, or an approach that rigidly follows the effective protection line and, thus, allocates the burden of persuasion on the respondent State, misses this essential feature of human rights law. Therefore, according to Kokott, the allocation of the risk of non-persuasion must follow the weighing of interests as presented in the interpretation of the substantive provisions in question.¹⁷ This way: "...the margin of appreciation may also be seen as fulfilling a function very similar to that of the burden of proof."¹⁸ The margin of appreciation encompasses the interpretational weighing of interests between reliance on State sovereignty and the respondent State's own assessment of the situation in question on one hand and the need for effective protection of human rights on the other. As the allocation of a wide margin of appreciation leads to reliance on the evaluation of domestic authorities it functions as placing the burden of persuasion on the applicant.¹⁹ Conversely, a narrow margin of appreciation functions as placing the burden of persuasion on the respondent State. As argued by Kokott: "...the ultimate answers to the problem of burden of proof seem to derive, at least insofar as international human rights are concerned, from the interpretation of the substantive law involved. More precisely, the solution depends on the delimitation of functions and competences between international courts and the sovereign states as laid down in the human rights conventions."²⁰ This approach, clearly, puts in focus the difficulties related to distinguishing between law, normative evaluations and facts in human rights law.

In light of the above and the highly evaluative nature of Article 14 ECHR, whose application is in many respects also influenced by references to general conditions in society such as existing conditions of marginalisation, it is to a large extent an exercise in normative evaluations of the arguments and rationalisations of the parties to establish whether the requisite "facts" have been proved.²¹ However, in instances where there are problems with the domestic

17 *Ibid*, p. 215. Kokott does not deny that in addition to allocating the burden of persuasion in line with the interpretation of the substantive provision: "...external factors, such as the availability or suppression of evidence, may appear to create the need for modifications. Often, these modifications concern the evaluation of evidence and the required degree of persuasion, instead of the ultimate risk of non-persuasion.", *ibid*.

18 *Ibid*, p. 219.

19 *Ibid*, pp. 219-220.

20 *Ibid*, p. 147. Contra *see* Schokkenbroek, *supra* note 9, p. 33 where he argues that problems in relation to establishing the facts do not relate to the margin of appreciation doctrine as the doctrine does not concern establishing the facts of the case, but only the appreciation and assessment of those facts. This misses a) the difficulties in distinguishing between taking certain "facts" as established and their normative assessment and b) the similar function of the procedural tool of allocating the burden of proof and the substantive tool of adjusting the margin of appreciation as elaborated on by Kokott.

21 In particular as regards proof for similar/different situations and objective justification, the difficulties related to distinguishing between law, normative evaluations and facts become

authorities' investigation and adjudication of claims of human rights violations, the Court will be faced with the most difficult problems of fact-finding more akin to the position of a court of first instance.²²

This paper will present a structured analysis of the Court's case-law, and thus explain its approach to the issue of the burden of proof under Article 14 ECHR. It is commonly argued that the applicant under Article 14 has to prove a) the different or similar treatment in question, b) its basis and c) being in a relevantly similar or significantly different situation to the appropriate group of comparators. It is only after the applicant has established these factors that the burden is taken to shift onto the State to provide objective and reasonable justification.²³ The presentation of the material will follow this approach and deal in detail with the main categories of possible fact situations and the parameters of the operative concepts of discrimination under Article 14. With reference to Kokott's thesis, special attention will be directed to the interrelationships between the function of the burden of proof and the margin of appreciation in different situations.

2 Different or Similar Treatment?

2.1 Overt Different or Similar Treatment

Establishing the different treatment or, under the *Thlimmenos* test, the similar treatment complained of is usually the easiest step in preparing a claim of prima facie discrimination.²⁴ In most cases the treatment itself is clear and explicit on the face of the application.²⁵ For example, in *Stec and Others v. The United Kingdom* the complaint concerned legislative stipulations providing for a different pensionable age for men and women respectively.²⁶ As will be discussed in Chapter 4 *infra*, the more complex issues in these cases arise when it comes to comparing the treatment in question with the treatment of other groups.

very clear. In relation to international human rights law, Kokott, *supra* note 13, pp. 145 and 167, has forwarded that the distinction between fact and law can be even more blurred than in national constitutional law and that drawing a line between the establishment of facts and their evaluation can be impossible, in particular as regards facts that do not concern the parties directly but have more to do with the general conditions in society.

22 See Erdal, Ugur: *Burden and standard of proof in proceeding under the European Convention*, (2001) 26, *European Law Review Human Rights Survey*, p. 68, at p. 71. This is a situation that has *inter alia* occurred in certain lines of cases having to do with serious allegations of violations of Articles 2, 3, 13 and 14 ECHR in Turkey and Bulgaria, *cf. infra*.

23 *Supra* note 11.

24 Harris, O'Boyle and Warbrick, *supra* note 11, p. 470.

25 It is possible, however, that the applicant cannot establish having been subject to the treatment complained of, *see e.g. Çiçek v. Turkey*, 27.02.2001, unpublished, available at "www.echr.coe.int/echr", para. 187.

26 *Stec and Others v. The United Kingdom*, 12.04.2006, unpublished, available at "www.echr.coe.int/echr".

2.2 *Discriminatory Effects of Neutral Measures and Covert Discriminatory Practices*

It is more problematic for the applicant to establish how neutral legislative provisions that stipulate general criteria, or other facially neutral State measures, have a different *effect* on different groups of people.

Sometimes the Court approaches cases claiming discriminatory effects of neutral measures very formally and entertains no objective and reasonable justification review at all. For example, in *Stubbings and Others v. The United Kingdom*, one of the applicants' complaints concerned the discriminatory effect on them, as victims of childhood sexual abuse, of a neutral and general stipulation for limitation periods on civil claims for intentionally caused injury. The Court referred to the requirement that the applicant must establish that *other persons in an analogous or relevantly similar situation enjoy preferential treatment* and in a very formal and cursory application found no different treatment because the "neutral" rules applied equally to all of those stipulated subject to them.²⁷ In other instances where discriminatory effect has been claimed, the Court is clearly not convinced that different treatment exists, but nevertheless proceeds to some form of very lenient objective and reasonable justification review. Many examples fall into this category of cases.²⁸ They seem generally to be characterised by the fact that the discrimination ground claimed is one of the non-sensitive grounds of discrimination that generally indicate a wide margin of appreciation and a corresponding burden of proof on the applicant.

It was, however, in cases concerning a sensitive discrimination ground commanding a narrow margin of appreciation where the Court for the first time explicitly considered the possibility of construing discrimination under the Convention so as to encompass indirect discrimination. In *Hugh Jordan v. The United Kingdom*, the Court declared that: "Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory, notwithstanding that it is not specifically aimed or directed at that group."²⁹ The applicant claimed that the overwhelming majority of people killed by the security forces in Northern Ireland were Catholics or nationalists and referred to the few prosecutions and even fewer convictions for the use of unlawful or excessive force in relation to these incidents. This situation was claimed to establish discrimination on the grounds of national origin or association with a national minority.³⁰ In *Shanaghan v. The United Kingdom*, the applicant claimed discrimination on the

27 *Stubbings and Others v. The United Kingdom*, 22.10.1996, Reports 1996-IV, paras. 72-73. Another aspect of the case concerned the express distinction between victims of intentionally caused injury and negligently caused injury.

28 For example *Kamasinski v. Austria*, 19.12.1989, Series A, 168, *The National & Provincial Building Society, The Leeds Permanent Building Society and The Yorkshire Building Society v. The United Kingdom*, 23.10.1997, Reports 1997-VII, and *Streletz, Kessler and Krenz v. Germany*, 22.03.2001, Reports 2002-II.

29 *Hugh Jordan v. The United Kingdom*, supra note 6, para. 154. See also *McShane v. The United Kingdom*, 28.05.2002, unpublished, available at "www.echr.coe.int/echr".

30 *Hugh Jordan v. The United Kingdom*, supra note 6, para. 152.

same grounds as: “The vast majority of victims from collusion between the security forces and paramilitaries came from the nationalist community.”³¹ The Court, however, reasoned that it: “...does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14.”³² In these judgments there was nothing unclear or indirect about the differentiation ground related to the alleged disproportional effect, it was national origin or association with a national minority. It was the disproportionate effect itself (i.e. the different treatment in question) that had not been established, as there was no evidence to the effect that the killings in question *involved the unlawful or excessive use of force*,³³ or that the incidents *established a practice or a pattern*.³⁴

The approach of the Court in these judgments, although explicitly setting out a concept of indirect discrimination under Article 14, is in fact no different from the earlier judgments in which discriminatory effects of neutral measures have been claimed. Most applicants fail in establishing *prima facie* discrimination either on account of not establishing the covert discrimination ground, *cf.* Chapter 3 *infra*, or on basis of not establishing the completely different or disproportionate effect of the neutral measures in question (i.e. the different treatment at stake). According to the Court, statistics exhibiting an adverse effect are by themselves not enough to establish a discriminatory practice and applicants must make out their cases in a more detailed manner. The formulation of the Court places applicants under a duty to establish also an *underlying practice or pattern* to make out their case of *prima facie* indirect discrimination. In other words, the applicant must not only establish the effect itself but also the *cause or reason* behind the effect.³⁵

Under this approach the conceptualisation of disproportionate effect discrimination under the Convention seems transferred from the realm of clear indirect discrimination, which focuses primarily on the effects of measures, back into to the realm of direct discrimination, which focuses on the underlying reasons for the effect in question. The applicant not only has to establish statistically disproportionate effect but also a specific practice underlying the adverse effect, which means that it is only clear and express neutral practices, such as written or clearly formulated tests or practices, that come under

31 *Shanaghan v. The United Kingdom*, 04.05.2001, unpublished, available at “www.echr.coe.int/echr”, para. 127. The applicant’s son had been killed by a masked gunman and the applicant claimed that his death was: “...the result of collusion by the security forces with loyalist paramilitaries and that he was the victim of a widespread pattern of killings whereby persons perceived as IRA members or sympathisers were targeted with the knowledge and involvement of the authorities.”, *cf.* para. 77. The allegation was emphatically denied by the respondent Government, *cf.* para. 82.

32 *Hugh Jordan v. The United Kingdom*, *supra* note 6, para. 154.

33 *Ibid.*

34 *Ibid.* See also *Shanaghan v. The United Kingdom*, *supra* note 31, para. 127.

35 This approach seems to confirm the prediction of Harris, O’Boyle and Warbrick, *supra* note 11, p. 477, who did not deny the possibility that the concept of indirect discrimination might be construed as part of Article 14, but argued at the same time that: “... the burden upon the applicant to establish that it exists is severe.”

scrutiny.³⁶ It seems, then, that instead of introducing something completely new in the *Hugh Jordan* test, the Court only for the first time explicitly stated that which was already inherent in the concept of direct discrimination functioning under the Convention; that discriminatory effects of neutral measures or measures that were not intended to discriminate can be found in violation of the Convention.³⁷ It is, indeed, not a novel interpretation that the distinction between direct and indirect discrimination becomes blurred when establishing intent is not a precondition for finding direct discrimination and/or when the courts look at the *reasons* underlying disproportionate effects of neutral measures when applicants claim indirect discrimination.³⁸ The Court thus, in fact, did not introduce an easily workable concept of indirect discrimination with these judgments, and the burden on an applicant to prove her prima facie case of discriminatory effect will remain a very heavy one.

Applicants endeavouring to establish a prima facie case of discriminatory practices or patterns, including discriminatory applications of neutral legislation, have indeed been faced with a heavy burden to lift. This is equally demonstrated in case-law on *direct discrimination* as in the more recent case-law based on the new analytical test for *indirect discrimination*. As there is little overt and express about the treatment in these cases, this difficulty may be expressed through placing upon the applicant an additional burden to establish how other persons in an analogous or relevantly similar situation enjoy preferential treatment compared with the applicant.

From the realm of direct discrimination *Larissis and Others v. Greece* is a case in point. Here, the applicants alleged that Greek law against proselytism was applied in a discriminatory manner, in that it was only applied to members of religious minorities and not to members of the Greek Orthodox Church. The Court found that: "...they have not produced any evidence to suggest that an officer in the armed forces who attempted to convert his subordinates to the Orthodox Church in a manner similar to that adopted by the applicants would have been treated differently."³⁹ Many other examples exist of difficulties in

36 On a similar situation under the American Civil Rights Act (1991) see Selmi, Michael: *Indirect discrimination: a Perspective From the United States*, in Loenen, Titia and Rodrigues, Peter R. (eds.): *Non-Discrimination Law: Comparative Perspectives*, The Hague, Kluwer Law International, 1999, p. 213, at p. 216.

37 See Chapter 3 *infra*.

38 On the law of the United Kingdom, see Bindman, *supra* note 12, pp. 61-62. In such circumstances he questions the value of insisting on two concepts and two approaches, except they be construed as having some different practical consequences. On Canadian law see Vizkelety, Béatrice: *Adverse Effect Discrimination in Canada: Crossing the Rubicon from Formal to Substantive Equality*, in Loenen, Titia and Rodrigues, Peter R. (eds.): *Non-Discrimination Law: Comparative Perspectives*, The Hague, Kluwer Law International, 1999, p. 223, at p. 236. Loenen, Titia: *Indirect Discrimination: Oscillating Between Containment and Revolution*, in Loenen, Titia and Rodrigues, Peter R. (eds.): *Non-Discrimination Law: Comparative Perspectives*, The Hague, Kluwer Law International, 1999, p. 195, at p. 204 refers to the Canadian approach and argues that it is: "...conceptually-speaking quite defensible..." to discard the distinction between direct and indirect discrimination, while nevertheless preferring that it be maintained.

39 *Larissis and Others v. Greece*, 24.02.1998, Reports 1998-I, para. 68.

substantiating claims of discriminatory application of law.⁴⁰ In clear cases, however, the applicant may be successful. In *Pine Valley Developments Ltd. and Others v. Ireland* the treatment complained of was the application of beneficial legislation to all planning permission holders of the same category as the applicants, but not to them. The Government contested the factual foundation of the claim of different treatment but did not succeed as the different treatment had been clearly established in litigation before the domestic Courts.⁴¹ In *Fredin v. Sweden* it was also relatively easy for the applicants to establish the different application of law while they could not establish the similarity of the situations compared. The Court emphasised that: “For a claim of violation of the Article to succeed, it has therefore to be established, *inter alia*, that the situation of the alleged victim can be considered similar to that of persons who have been better treated.”⁴² The applicants complained that a provision in legislation enabling the revocation of licences to exploit gravel pits had only been applied to their business but not to any other. The Court found that: “...in the absence of further information from the Government [...] the Court has to presume that the applicants’ pit is the only one to have been closed by virtue of that amendment. However, this is not sufficient to support a finding that the applicants’ situation can be considered similar to that of other ongoing businesses which have not been closed.”⁴³ The different application of neutral law was, thus, considered established but the applicants could not lift the burden of proof for establishing similarity of situations.

Two examples can be mentioned from the realm of more recent cases on discriminatory effect. In *Posti and Rahko v. Finland*, the applicants claimed that the overall policy of the executive branch of Government was to favour open-sea fishing to the detriment of coastal fishermen in State-owned waters, while the Government claimed that the express fishing restrictions applied equally to all fishermen. The Court found that the applicants had not lifted their burden to establish detrimental differential treatment.⁴⁴ Conversely in *Zarb Adami v. Malta* the contested administrative practice could be established and was found in violation of Article 14. The case concerned the disproportionate representation of men *viz-á-viz* women on an official list of people potentially obliged to serve as jurors. The Court stated that while statistics were not by themselves sufficient to disclose a discriminatory practice, discrimination might: “...result not only

40 For example *Sunday Times v. The United Kingdom (I)*, 26.04.1979, Series A, 30, (non-uniform application of injunctions against publication not proved) and *Sporrong and Lönnroth v. Sweden*, 23.09.1982, Series A, 52, (non-uniform application of imposing expropriation permits not proved).

41 *Pine Valley Developments Ltd. and Others v. Ireland*, 29.11.1991, paras. 52 and 64. The Government relied only on the non-existence of different treatment and did not try to forward any justification. Having found the treatment to have occurred the Court found a violation of Article 14 taken together with Article 1 of Protocol 1, *cf.* paras. 63-64.

42 In *Fredin v. Sweden*, 18.02.1991, Series A, 192, para 60.

43 *Ibid*, para. 61.

44 *Posti and Rahko*, 24.09.2002, Reports 2002:VII, paras. 85-86. See also *Nerva and others v. The United Kingdom*, 24.09.2002, Reports 2002:VIII, para. 48.

from a legislative measure, but also from a *de facto* situation.”⁴⁵ The Maltese Government explained that the practice was to place only those who were active in the professions and the economy on the jury list, as they were *inter alia* less likely to seek exemption for family reasons. For all practical purposes, then, it did not deny an administrative practice underlying the disproportionate effect. Not surprisingly, the Court referred to the *Hugh Jordan* test and the narrow margin of appreciation accorded to States when different treatment is based on sex, and found that this practice lay at the heart of the complaint rather than functioning to towards providing a objective and reasonable justification as claimed by the State.

In conclusion it is submitted that it is generally very difficult for applicants to establish an underlying practice as the reason behind the claimed discriminatory effect. It will be particularly so in cases involving the non-sensitive discrimination grounds that allow for a wide margin of appreciation and correspondingly place a heavier burden of proof on the applicant. The narrow margin of appreciation in cases involving sensitive discrimination grounds, however, has the effect to ease the applicant’s burden and may allow these cases to be reviewed for objective and reasonable justification for which the respondent State bears the burden of proof. The recent *Zarb Adami v. Malta* judgment may give cause for some optimism for applicants claiming disproportionate effect based on sensitive discrimination grounds. However, applicants in cases involving discriminatory effect may additionally, depending on the relevant fact-situations, also face considerable obstacles in lifting the burden of proof for the discrimination ground in question or for their significantly different situation under the *Thlimmenos* test, see Chapters 3 and 4 *infra*.

3 The Discrimination Ground

3.1 The Basis for Different or Similar Treatment

As the list of discrimination grounds in Article 14 is non-exhaustive the applicant has a wide range of possible factors to identify as the discrimination ground. Sometimes it is clear and explicit on the face of the treatment complained of but in other cases it is not so obvious and there is room for doubt.⁴⁶ Hence, it varies greatly whether it is a heavy burden to lift to establish the necessary causal link between the different treatment complained of and its basis (the discrimination ground).

How difficult it may be to establish the differentiation ground in a case is relative to the claim being made and the overall circumstances of the case. Identifying it is in fact of paramount importance to the applicant’s case as it defines the comparisons called for in analysing the case further. The significance of the many possible discrimination grounds varies in relation to the varying

45 *Zarb Adami v. Malta*, 20.06.2006, unpublished, available at “www.echr.coe.int/echr”, para. 76.

46 Harris, O’Boyle and Warbrick, *supra* note 11, pp. 472-473.

significance of the values underlying the desire to outlaw them. Different treatment based on sensitive grounds such as ethnic origin/race or sex is much more difficult to justify than different treatment based on, say, profession. Some grounds for differentiation are *prima facie* morally deplorable while others are not necessarily so. Accordingly, the discrimination ground in a case directly influences the width of the margin of appreciation accorded to States.

3.2 *Overt Discrimination Grounds*

In cases where the discrimination ground complained of is easily identified from being overt or express, lifting the burden of proof on this issue correspondingly becomes easy. Examples from case-law abound, especially concerning legislative stipulations, *cf.* for example *Stec and Others v. The United Kingdom*.⁴⁷

3.3 *Covert Discrimination Grounds*

3.3.1 *Intent and direct discrimination*

Generally, there is no express requirement under the Convention to establish intent to discriminate against particular groups. In the *Belgian Linguistics* judgment the Court declared that objective justification had to be assessed in relation to the *aims and effects* of a measure.⁴⁸ In *Marckx v. Belgium* this approach was further established as the Court expressed the opinion that measures in support of the legitimate aim of encouraging the traditional family could nevertheless be in violation of Article 14 if their *object or result* prejudiced “illegitimate” families.⁴⁹ It seems clear that the approach of the Court was not to make subjective intentions a condition for establishing *prima facie* discrimination.

Cases where the discrimination ground is covert are nevertheless very difficult to deal with under the concept of direct discrimination. This is because an applicant who endeavours to establish a case of *prima facie* direct discrimination where the discrimination ground is covert will have to allege subjective intent or motive on part of the discriminator or her claims will at least inherently border on such an allegation. And applicants alleging a subjective intention for direct discrimination have not been successful in lifting their burden of proof for that claim before the Court.⁵⁰

47 *Stec and Others v. The United Kingdom*, *supra* note 26.

48 *Belgian Linguistics*, *supra* note 3, para. 10.

49 *Marckx v. Belgium*, 13.06.1979, Series A, 31, para. 40.

50 Harris, O’Boyle and Warbrick, *supra* note 11, p. 477, referring to *Handyside v. The United Kingdom*, 07.12.1976, Series A, 24 (a claim of political persecution not proved, similarity with situations of comparison not shown) and *Abdualziz, Cabales and Balkandali*, 28.05.1985, Series A, 94 (concerning the claim of racial motivation, compare with the strict approach to the expressly stipulated badge of difference of sex). *See also generally* Cameron, Iain: *Protocol 11 to the European Convention on Human Rights: the European Court of Human Rights as a Constitutional Court?*, (1995) 15 Yearbook of European Law, p. 219, at p. 255: “In the absence of very clear proof to the contrary, the Court is understandably reluctant to accuse a State of not being in good faith...”

The *Velikova v. Bulgaria* and *Anguelova v. Bulgaria* are good examples. They belong to a group of cases where the human rights violation in question arises under Article 2 or Article 3 of the Convention.⁵¹ In these types of cases the Court has stated that where an individual is taken into police custody in good health but is found to be injured at the time of release or is later found dead: "...it is incumbent on the State to provide a plausible explanation of the events leading to his death, failing which the authorities must be held responsible..."⁵² The Court has, thus, reversed the burden of proof for the cause of injury or death under Articles 2 and 3 and placed it on the respondent State. In *Velikova* and *Anguelova*, it was additionally claimed that prejudice against the Roma people in Bulgaria was a decisive factor contributing to the ill-treatment and murders in question. Reports from intergovernmental and human rights organisations confirming a general context of hostility and prejudice and references to the ethnic origin of the victims made by the responsible police officers were, however, not considered enough to meet the standard of proof *beyond reasonable doubt* for a prima facie case of discrimination based on ethnic origin. The question of reversing the burden of proof for the causal link between the established treatment and the discrimination ground in question was not dealt with in these cases.⁵³

Around the same time as the *Velikova* and *Anguelova* judgments were pronounced, a string of judgments on the situation of Kurds in Turkey met a similar fate. The cases concerned house-burnings, deaths, disappearances and ill treatment as well as lack of investigation into the incidents. All cases relate to a period of disturbances and conflict between PKK terrorists and State security forces. In the absence of meaningful investigations into the complaints of the applicants at the domestic level, the Commission investigated the facts of the cases at hearings in Turkey where it *inter alia* heard witnesses. Among other complaints the applicants claimed that the incidents were based on discriminatory grounds, namely that of their ethnic (Kurdish) origin. The applicants either clearly alleged intent or their claims bordered on such allegations. In no case did the Commission or the Court find allegations of discrimination on account of Kurdish origin substantiated by the applicants beyond reasonable doubt. Hence, no review of objective justification was undertaken.⁵⁴

These questions were dealt with again by the Court in the recent Grand Chamber judgment of *Nachova and Others v. Bulgaria*. Here it was established that an arresting officer had fired an automatic burst in a Roma neighbourhood

51 *Velikova v. Bulgaria*, 18.05.2000, Reports 2000-VI and *Anguelova v. Bulgaria*, 13.06.2002, Reports 2002-IV. See also e.g. *Selmouni v. France*, 28.07.1999, Reports 1999-V.

52 *Velikova v. Bulgaria*, supra note 51, para 70.

53 *Ibid*, paras. 91-94 and *Anguelova v. Bulgaria*, supra note 51, paras. 163-168.

54 See for example *Akdivar and Others v. Turkey*, 16.09.1996, Reports 1996-IV, ("...deliberate and unjustified policy...", para. 98), *Kurt v. Turkey*, 25.05.1998, Reports 1998-III, ("...forced disappearances primarily affected persons of Kurdish origin.", para. 143.), and *Hasan Ilhan v. Turkey*, 09.11.2004, unpublished, available at "www.echr.coe.int/echr", ("...because of his Kurdish origin...", para. 128).

against non-violent and unarmed fugitives from compulsory military service. One witness also testified that he had shouted “You damn Gypsies” at him only moments after the shooting. No investigation into the possible racist motives behind these events took place at the domestic level. The applicants alleged that: “...prejudice and hostile attitudes towards persons of Roma origin had played a role in the events leading up to the deaths...”⁵⁵ In its judgment, the Chamber referred to the standard of proof of beyond reasonable doubt as being a standard that allows flexibility and referred to the Courts specific task of ruling on State responsibility under international law. It referred to it being recognised in European law and by the Court itself *cf.* the *Hugh Jordan* test, that discrimination cases might require a specific approach to issues of proof. It also referred to its case-law under Articles 2 and 3 and Article 4 of Protocol 4, providing that in situations of serious human rights violations involving evidential difficulties and ineffective domestic investigations, the Court could draw negative inferences or shift the burden of proof to the respondent Government. In light of the serious circumstances surrounding the deaths in question it then held that the burden of proof shifted over to the State which had to satisfy the Court that the events were not shaped by any discriminatory attitude. Then, in light of *Velokova* and *Anguelova* establishing earlier incidents of serious police brutality against people of Roma origin, and in light of the general context of numerous reports of prejudice and hostility, it found that there had been racial discrimination.⁵⁶ The Grand Chamber, however, rejected this approach. It restated the Court’s approach to issues of proof, including the standard of proof beyond reasonable doubt, as quoted in Chapter 1.2. *supra*, and held that the applicants had not discharged their burden of proof for a *prima facie* case of discrimination based on ethnic origin.⁵⁷ On the reversal of the burden of proof it held:

“The Grand Chamber cannot exclude the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis. However, where it is alleged – as here – that a violent act was *motivated by racial prejudice*, such an approach would amount to requiring the respondent Government to prove the absence of a particular *subjective attitude* on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated. The Grand Chamber, departing from the Chamber’s approach, does not consider that the alleged failure of the authorities to carry out an effective investigation into the alleged racist motive for the killing should shift the

55 *Nachova and Others v. Bulgaria* [GC], *supra* note 15, para. 124.

56 *Nachova and Others v. Bulgaria*, 26.02.2004, unpublished, available at “www.echr.coe.int/echr”, paras. 158-175.

57 *Nachova and Others v. Bulgaria* [GC], *supra* note 15, paras. 148-155.

burden of proof to the respondent Governments with regard to the alleged violation...⁵⁸

The Grand Chamber found no violation of Article 14 in its substantive aspect. However, it established for the first time a separate procedural aspect of Article 14, and found the lack of effective investigation to be in violation of this procedural aspect. Six judges dissented and found a violation on the basis of sufficiently strong, clear and concordant un rebutted presumptions of racial discrimination.⁵⁹

In theory the *Nachova* judgment did not exclude a shift in the burden of proof for an arguable claim of discrimination. Subsequent judgments where the issue has been raised, however, do not reveal any examples.⁶⁰ In the odd extreme case, however, it is conceivable to establish beyond reasonable doubt a covert ground for direct discrimination.⁶¹

3.3.2 Effects and the question of indirect discrimination

Applicants can also claim that measures have a discriminatory effect on basis of a certain discrimination ground without reference to subjective intentions. In these cases the discrimination ground is overt but “neutral” so that the applicant attempts to allege another covert discrimination ground and discriminatory effect on basis of that. Such cases can arise under *passive discrimination* or *indirect discrimination* alike. Applicants have generally not been successful in discharging the burden of proof when they claim discriminatory effects of measures based on covert badges of differentiation. It seems that many applications of this kind fail on account of the discriminatory effect in question not being established, *cf.* Chapter 2 *supra*. If the treatment (effect) in question is clear, many applications instead fail because the discrimination ground is not considered established.

Abdulaziz, Cabales and Balkandali v. The United Kingdom is considered to be the leading judgment establishing that, despite not emphasising intent, the Court is not prepared to enter fully into an indirect discrimination approach.⁶² A

58 *Ibid*, para. 157 (italics added).

59 *Ibid*, Joint partly dissenting opinion of Judges Casadevall, Hedigan, Mularoni, Fura-Sandström, Gyulumyan and Spielmann, para. 7.

60 *Bekos and Koutropoulos v. Greece*, 13.12.2005, unpublished, available at “www.echr.coe.int/echr”.

61 *See Cyprus v. Turkey*, 10.05.2001, Reports 2001-IV, para. 309. One of the discrimination claims in the case dealt with the living conditions of the Greek-Cypriots who live in the Karpas area of northern Cyprus. Court reached the: “...inescapable conclusion...” that the treatment in question: “...can only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion.” The discriminatory treatment in question was found so serious that it amounted to degrading treatment in violation of Article 3 of the Convention.

62 Loenen, Titia: *Rethinking Sex Equality as a Human Right*, (1994) 12:3 Netherlands Quarterly of Human Rights, p. 253, at p. 263 and Harris, O’Boyle and Warbrick, *supra* note 11, p. 477-478.

minority of the Commission had found the immigration rules in question “...indirectly racist...”⁶³ In particular the applicants had argued that the condition that the couple intending to marry had already met adversely affected people from the Indian sub-continent where arranged marriages were customary. The Court entertained no adverse effect analysis on the issue and decided this aspect of the application on the grounds that the purpose of the immigration rules generally was to protect the labour market and more specifically that the condition that intended spouses had met had the purpose of avoiding circumvention of the rules. The conclusion of the Court was that it had not been established that the immigration rules made a distinction *on the grounds of race*.⁶⁴ The alleged covert discrimination ground (race) was, thus, not proved whereas the overt discrimination ground (previous-meeting) was found proved but justified. Similarly, *Magee v. The United Kingdom* may also be an example of the difficulties related to establishing the discriminatory effect of *ex facie* neutral legal provisions on certain groups. The judgment seems to merge the proof of discrimination ground issue with the objective justification issue. The complaint concerned a difference based on national origin or association with a national minority as different anti-terrorist legislation was applicable to similar fact-situations in Northern Ireland and in England and Wales. The Court found that the different treatment was: “...not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the individual is arrested and detained.”⁶⁵ The overt discrimination ground of geographical location was found to exist and to be justified, but the covert discrimination ground claimed was not established.

The above judgments were decided before the creation of the *Hugh Jordan* test for indirect discrimination. Turning to developments since then we find that the Chamber judgment in *Nachova* revisited the *Hugh Jordan* test as a specific approach to the issue of proof under Article 14,⁶⁶ but it was not until the Chamber judgment in *D.H. and Others v. the Czech Republic* that the potential test case for proof of indirect discrimination surfaced. The case concerned 18 applicants of Roma origin who were placed in special schools for children with learning disabilities. By law, the criteria for placing a child in such a school were tests carried out in an educational psychology and child guidance centre and the consent of the child’s legal representative. The applicants stayed away from the unsuccessful *Nachova* attempt to establish a shift in the burden of proof. Instead they argued that they did not have to establish any intention to discriminate under a concept of indirect discrimination. They referred to the statistical disproportion in the number of Roma children placed in special schools, attributed this disproportion to a structural bias in the way the tests were designed, administered and interpreted and claimed that they had met their burden to establish beyond reasonable doubt the different treatment based on

63 *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 28.05.1985, Series A, 94, para. 84.

64 *Ibid*, para. 85.

65 *Magee v. The United Kingdom*, 06.06.2000, Reports 2000-VI, para. 50.

66 *Nachova and Others v. Bulgaria*, *supra* note 56, para. 167.

ethnic origin. The Court observed that several organisations had expressed concern about the arrangements whereby Roma children living in the Czech Republic were placed in special schools and the difficulties they had in gaining access to ordinary schools, and acknowledged that the statistics disclosed “worrying” figures.⁶⁷ Disappointingly, however, the Court did not embrace the opportunity to perform a pure indirect discrimination analysis, focusing only on the effects in question irrespective of intent. It, thus, did not follow up on the potential of the *Hugh Jordan* test as entailing a special approach to the question of proof of prima facie discrimination. There was no doubt about the disproportionate effect on Roma children and the underlying practice behind it. Instead of taking these factors as providing a prima facie case of discrimination based on ethnic origin the Court conceptualised the claim in terms of a requirement to show intent. It held that as there was no express reference to the pupils’ ethnic origin in the administrative practice of testing and as the tests were administered by qualified professionals: “...it would be difficult for the Court to go beyond this factual finding and to ask the Government to prove that the psychologists who examined the applicants had not adopted a particular subjective attitude.”⁶⁸ In conclusion, the applicants had not lifted their burden to establish a prima facie case of discrimination and the State never had to provide objective justification for the disproportionate effect in question.

D.H. and Others v. The Czech Republic has been referred to the Grand Chamber. It remains to be seen whether the Court will in fact construe the concept of indirect discrimination with reference to a subjective intention to discriminate on basis of a particular discrimination ground. Should the Grand Chamber choose to do so, in addition to the requirement that is already built into the *Hugh Jordan* test that the applicant has to establish an underlying practice or pattern, it will for all practical purposes erect an insurmountable burden of proof on applicants seeking redress of abuses arising from covert structural disadvantages.

There exists, however, a group of cases where the different effect is clear like in the cases discussed *supra* and the causal connection between the discrimination ground and this effect, although not express, is found to be close enough to satisfy the Court. In *Thlimmenos v. Greece* the applicant did not complain of the neutral rule that criminal offenders were excluded from the profession of chartered accountants *per se*, but rather of its effect on him as a Jehovah’s Witness refusing to serve in the military on religious grounds. The State was held liable for failure to accommodate his difference from other offenders. He was, thus, found to have been discriminated against on the ground of his religion although there was no reference to religion in the neutral rule in question.⁶⁹ It seems, then, that for discriminatory effects analysis under the *Thlimmenos* test (*passive discrimination*) there is no requirement for establishing

67 *D.H. and Others v. the Czech Republic*, 07.02.2006, unpublished, available at “www.echr.coe.int/echr”, para. 52.

68 *Ibid*, para. 49.

69 *Thlimmenos v. Greece*, *supra* note 5, see paras. 42-49.

intent.⁷⁰ Conversely, if the Grand Chamber upholds the Chamber judgment in *D.H. and Others v. The Czech Republic*, there will be a requirement to establish intent for discriminatory effects analysis under the *Hugh Jordan* test (*indirect discrimination*). Notably, the difference between the two types of cases lies in the fact that in *Thlimmenos* the different effect in question was different for everyone belonging to the relevant group, whereas the *Hugh Jordan* test refers to disproportionate effect on many belonging to the group in question while there is no requirement that everyone is affected. As everyone is affected under the concept of *passive discrimination*, the Court seems to find less cause for doubt about the causal link between belonging to the group in question and the treatment in question, which has the effect ease the burden on the applicant to establish her prima facie discrimination claim.

4 Comparability of Situations (Sameness/Difference)

A very important issue related to the burden of proof is the question of whether it is incumbent on the applicant to establish that the treatment complained of is different in relation to people in *relevantly similar situations*, or conversely is similar in relation to people in *significantly different situations*, before the onus is shifted onto the State to justify this treatment. This condition if strictly applied can function as a wide-reaching limitation on possible discrimination claims. The reason is that, the questions of comparability formulated in the question: “who are equal/unequal?” are really posed at the level where the value judgments governing equality analysis take place. According to the Aristotelian equality maxim relevantly similar situations prescribe similar treatment and relevantly dissimilar situations prescribe dissimilar treatment. Placing the burden on the applicant to establish clearly the sameness/difference of situations also places the burden on him/her to justify that the same/different treatment is required. It can be quite troublesome for the applicant to show that his/her situation is relevantly similar or different to that of the group of comparison and the arguments related to this issue go right to the heart of the justification for the treatment in question.⁷¹

Some commentators have concluded that this issue of establishing the similarity of situations has not figured prominently in the case-law of the Court, rendering its case-law less formalistic than a strict insistence upon showing comparability of situations would.⁷² Other commentators have criticised

70 Judge Wildhaber has referred to the *Thlimmenos v. Greece* judgment as a move away from the notion of discrimination as based on a covert intention to discriminate, see Wildhaber, Luzius: *Protection against Discrimination under the European Convention on Human Rights – A Second-Class Guarantee?*, in *Baltic Yearbook of International Law*, Vol. 2, 2002, p. 71, at p. 81.

71 For further discussion see Arnardóttir, *supra* n. 8, pp. 8-17.

72 Livingstone, Stephen: *Article 14 and the Prevention of Discrimination in the European Convention on Human Rights*, (1997) 1 *European Human Rights Law Review*, p. 25, at p. 30.

instances where the comparable situations test is not rigorously applied.⁷³ From the *Fredin v. Sweden* judgment it has been concluded that the burden is on the applicant to show that her situation is relevantly similar to that of the group of comparison.⁷⁴ Other judgments, including judgments pronounced after *Fredin v. Sweden*, suggest the opposite. These judgments often merge consideration of whether relevantly similar situations have been established with the objective justification scrutiny. Hence, they do not place a heavy burden on the applicant to establish the similarity of situations before embarking on the objective justification scrutiny for which the respondent State bears the burden of proof.⁷⁵ *Van Raalte v. The Netherlands* is a particularly clear example of how the sameness/difference argument may be the burden of either of the parties to the case. Here the Government tried to argue that the groups compared were not in a similar situation as differences with regard to biological possibilities to procreate once over the age of 45 justified a distinction based on sex. The Court explicitly noted that these factual differences did not affect the conclusion of similar situations as: “It is precisely this distinction which is at the heart of the question whether the difference in treatment complained of can be justified.”⁷⁶ The state of the case-law on the burden of proof in relation to establishing similarity of situation, thus, seems conflicting and unclear at face value. The literature seems not to have been able to explain the variations in the Court’s approach to this issue of whether the applicant is required to establish clearly that she is in a relevantly similar or significantly different situation to that of the group of comparison.

Ina Sjerps has argued that it is an artificial division to analyse a case of indirect discrimination by *first* establishing a disparate effect and *second* by dealing with whether it is justified.⁷⁷ Many, indeed countless, instances of disparate impact of neutral measures exist, but only some raise questions of discrimination. Before even considering bringing a case of indirect discrimination, a sense of injustice must exist and a value-loaded qualitative

73 Van Dijk and van Hoof, *supra* note 11, pp. 722-724. Their arguments go to the objective justification test focusing on public interest as opposed to the similarity of situations tests focusing on individual interest. Their argument is for a better protection of individuals, but strangely seems to miss the fact that all the cases they refer to on the allegedly beneficial comparability test result in a finding of non-violation. The important function of the burden of proof in this relation seems to have escaped their attention.

74 Ovey and White, *supra* note 11, p. 425, van Dijk and van Hoof, *supra* note 11, p. 722 and Harris, O’Boyle and Warbrick, *supra* note 11, p. 474. See *Fredin v. Sweden*, *supra* note 42.

75 For example van Dijk and van Hoof, *supra* note 11, pp. 724-726, refer to the following cases: *Dudgeon v. The United Kingdom*, 22.10.1981, Series A, 45., *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, *supra* note 63, and *Holy Monasteries v. Greece*, 09.12.1994, Series A, 301-A.

76 *Van Raalte v. The Netherlands*, 21.02.1997, Reports 1997-I, para. 40. Similarly see *Rasmussen v. Denmark*, 28.11.1984, Series A, 87, para. 37.

77 Sjerps, Ina: *Effects and justifications - Or How to Establish a Prima Facie Case of Indirect Sex Discrimination*, in Loenen, Titia and Rodrigues, Peter R. (eds.): *Non-Discrimination Law: Comparative Perspectives*, The Hague, Kluwer Law International, 1999, p. 237, at p. 247.

debate must take place.⁷⁸ A similar argument is equally relevant to direct discrimination. Equal situations require equal treatment and vice versa. Thus, the value arguments relevant to equality analysis are always at one level undertaken by arguing for the existence of relevantly similar situations or significantly different situations, once that is done successfully indications to the treatment due will also be established. The value-loaded qualitative debate will always at one level focus on the relevant similarity or difference of situations. Drawing on this inherent nature of the equality maxim as part of Article 14 ECHR, the following conclusion presents itself: Dividing the issues that need to be proved under claims of discrimination into the two levels of a) establishing sameness/difference as part of prima facie discrimination and a condition for objective justification scrutiny, and b) establishing sameness/difference as justification under objective justification scrutiny, is really artificial. The same qualitative and value-loaded reasoning decides either question. The very common merger of consideration of proof for establishing the relevant similarity of situations and the objective and reasonable justification analysis in the reasoning of the Court under Article 14 convincingly stands out in support of this conclusion. The answer to the question of the burden of proof in relation to sameness/difference does not lie in the two-tiered approach hitherto put forward in the literature under which each party bears the burden of proof as regards certain issues that can be divided into two distinct parts. The issue of similarity/difference simply cannot be divided in two. There is only one burden of persuasion for similarity/difference and the question is which of the parties bears it.

As regards establishing sameness or difference it emerges that the discrepancies in how the Court allocates the burden of persuasion on the issue can, in line with Kokott's theory, be explained by reference to the margin of appreciation. Factors that indicate a wide margin of appreciation will indicate that the burden of proof is on the applicant for establishing the similarity or dissimilarity of situations. Conversely, factors that indicate a narrow margin of appreciation will indicate that the burden of proof is on the respondent State to establish that the treatment in question is objectively justified with reference to the similarity or dissimilarity of situations. A few clear examples can be given to demonstrate the connection between the width of the margin of appreciation and the allocation of the burden of proof.⁷⁹ *Fredin v. Sweden* is a particularly clear example where the unclear discrimination ground and the field of life of property rights clearly indicated a wide margin of appreciation and the burden of proof for similarity was placed on the applicant.⁸⁰ In *Spadea and Scalabrino v. Italy*, a wide margin of appreciation was implied by the discrimination ground of "property" as well as the social situation of the applicant. The Court noted that

78 *Ibid*, pp. 239-241. She mentions for example pay differences between part-timers and full-timers (disparate impact on women) and pay differences between secretarial staff and managers (disparate impact on women).

79 For a detailed discussion of the factors that influence the width of the margin of appreciation under Article 14, see Arnardóttir, *supra* note 8, Chapter 5.

80 *Fredin v. Sweden*, *supra* note 42, para. 61.

relevantly similar situations had to exist, but merged the question of proof for similar situations with very lenient objective justification review.⁸¹ *Stubbings and Others v. The United Kingdom* is an example where traditional legal classifications into types of victims or types of offenders were the claimed badges of differentiation. These badges of differentiation indicated a wide margin of appreciation and the applicants bore the burden of proof for establishing the similarity of situations.⁸² Conversely, the *Van Raalte v. The Netherlands*, *Karlheinz Schmidt v. Germany*, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, *Rasmussen v. Denmark* and *Stec v. The United Kingdom* judgments are all clear examples of how the narrow margin of appreciation and strict scrutiny indicated by the discrimination ground of sex placed the burden of proof for similarity/difference on the State.⁸³ Also with respect to discrimination based on ethnic origin the judgment in *Aziz v. Cyprus* exhibits an instance where the respondent Government forwarded the different situation of Turkish Cypriots and Greek Cypriots as justification to no avail.⁸⁴ When it comes to enforcing rights based on positive obligations of States, the Court will generally allow a wide margin of appreciation.⁸⁵ This can be anticipated in cases where accommodation for differences is claimed under the *Thlimmenos* test. The burden to establish the requisite different situation commanding different treatment will, thus, presumably weigh heavily on applicants. It seems likely that the only applicants able to lift this burden will be those who can claim a sensitive discrimination ground that demands a narrow margin of appreciation, cf. *Thlimmenos v. Greece*.⁸⁶ This is borne out in *Pretty v. The United Kingdom* where the Court found no violation of Article 14 and was clearly not convinced that the different situation of the applicant required different treatment. In a very cursory consideration of the claim, it held that “even if” the *Thlimmenos* test was applied there was objective justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide.⁸⁷

81 *Spadea and Scalabrino v. Italy*, 28.09.1995, Series A, 315-B, para. 46.

82 *Stubbings and Others v. The United Kingdom*, 22.10.1996, Reports 1996-IV, paras, 73-74. The situations were not found comparable but “even if” they were, they were found justified.

83 *Van Raalte v. The Netherlands*, supra note 76, para. 40, *Karlheinz Schmidt v. Germany*, 18.07.1994, Series A, 291-B, paras 27-28, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, supra note 63, para. 79, *Rasmussen v. Denmark*, supra note 76, para. 37, and *Stec and Others v. The United Kingdom*, supra note 26.

84 *Aziz v. Cyprus*, 22.06.2004, Reports 2004-V, para. 37.

85 See for example Mahoney, supra note 9, at p. 5 and Schokkenbroek, supra note 9, p. 32.

86 *Thlimmenos v. Greece*, supra note 5.

87 *Pretty v. The United Kingdom*, 29.04.2002, Reports 2002-III.

5 Conclusions

In the past few years we have seen an increasing attention to the specific problems attached to issues of proof under Article 14 ECHR. This is probably the result of many interconnected factors such as the state of development of European non-discrimination law more generally, the relatively recent ratification of the Convention in European States with limited democratic traditions, the specific problems that arise when fact finding at the domestic level is ineffective and perhaps also a more mature and developed state of the law under Article 14 ECHR.

The simple model that has been offered in the literature on the burden of proof under Article 14 correctly emphasises that the applicant must establish the different treatment complained of and the discrimination ground. The question whether an applicant also bears the burden of proof for being in relevantly similar or significantly different situations to the group of comparison or whether the applicant also must establish that the group of comparison has enjoyed preferential treatment, has been the source of more confusion. It was established in Chapter 4 *supra* that the burden of proof resting on the applicant to establish *prima facie* discrimination should only be taken to encompass establishing a) the treatment complained of and b) the discrimination ground in question. The requirement that it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment is notably only present in the case-law in relation to situations where the establishment of different treatment raises problems such as in the categories of discriminatory effects of facially neutral measures or discriminatory application of law. It is submitted that establishing sameness or difference of situations should not be taken as strictly incumbent on one or the other party, either as a condition for objective justification scrutiny or as part of objective justification itself, but as a variable burden incumbent on either party depending on the width of the margin of appreciation and the factors that influence the strictness of review in the case.

Turning, then, to what it takes for an applicant to establish the treatment and the discrimination ground complained of it is submitted that the analysis of case law *supra* has exhibited that the applicants who succeed in establishing *prima facie* discrimination are primarily those who can refer to overt or express treatment and discrimination grounds. In these cases the overt nature of the claimed discrimination can be equated with an established intent, and subjective motive becomes irrelevant.⁸⁸ Conversely, when the treatment complained of is not express but consists of discriminatory effects of facially neutral measures, the Court has not been prepared to concentrate only on the effect in question but has required the applicant to establish also the reason (practice or pattern)

88 This provides for a similar approach as that of American constitutional law where the protection against discrimination only reaches intentional (direct) discrimination. Intent is, however, not construed as only encompassing subjective motive as all express discrimination (express badges of differentiation) is by definition considered intentional, *cf.* Sedler, Robert A.: *The Role of "Intent" in Discrimination Analysis*, in Loenen, Titia and Rodrigues, Peter R. (eds.): *Non-Discrimination Law: Comparative Perspectives*, The Hague, Kluwer Law International, 1999, p. 91, at 93.

underlying the effect. Further, in cases where the discrimination ground is covert the operative concepts of direct and indirect discrimination alike still seem to be conceptualised by the Court by requiring intent in the terms of a subjective motive to discriminate. This focus in the case-law blurs the otherwise potentially clear distinction between direct and indirect discrimination. In practice this means that the substantive issues at stake are not dealt with, as the burden of proof resting upon the applicant is not lifted and no review of objective justification takes place.⁸⁹ Finally, the concept of passive discrimination, encompassing a completely different effect of a facially neutral measure on everyone within the relevant group, seems to lie at the borderlines between direct and indirect discrimination and between overt and covert treatment and discrimination grounds. There is no need to establish intent as the completely different effect of the “neutral” measure in question upon the relevant group of people, although not express, is readily apparent from clearly affecting everyone belonging to that group. The causal link between belonging to the group and being subject to the treatment in question is thus clear and subjective motive becomes irrelevant.

It is clear, then, that establishing prima facie discrimination beyond reasonable doubt can be a cumbersome task for applicants under Article 14 ECHR. The standard of proof beyond reasonable doubt applied by the Court is also a contributing factor to this situation. This standard of proof has come under considerable criticism in recent years. Critics argue that this is a standard developed in national common law systems for establishing individual criminal liability against a presumption of innocence and not suited to the inherently different tasks of an international human rights court pronouncing on State liability. In cases where investigations into alleged serious violations have been ineffective at the domestic level, thus depriving the applicant of her possibilities of obtaining the necessary evidence, it has been argued that this standard of proof may lead to a practical impunity of violations.⁹⁰ The Court has already, in cases involving Articles 2, 3 and Article 4 of Protocol 4, and where the State has not performed an effective investigation, established special approaches to issues concerning proof. It has lightened the burden upon the applicants through inferences from circumstantial evidence and in certain situations shifted the burden of proof onto the respondent State. There is a close connection between the standard of proof required and the burden of proof in discrimination cases. The actual point at which the required standard of proof for prima facie discrimination is satisfied is the precise point at which the burden of proof shifts

89 See e.g. *Vizkelety*, supra note 38, p. 236, arguing that this entails that the State is relieved from its burden of proof for objective justification: “...creating a situation where the courts are in effect doing the Government’s job...”

90 Erdal, supra note 22, pp. 76-78. See e.g. *Labita v. Italy*, 06.04.2000, Reports 2000-IV, Joint partly dissenting opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič. For cases concerning alleged discrimination see *Anguelova v. Bulgaria*, supra note 51, Partly dissenting opinion of Judge Bonello and *Hasan Ilhan v. Turkey*, 09.11.2004, unpublished available at “www.echr.coe.int/echr”, Partly dissenting opinion of Judge Mularoni. See also Kokott, supra note 13, pp. 205-206, who argues that the standard of proof beyond reasonable doubt seems illogical for the international protection of human rights.

over to the respondent State to establish objective and reasonable justification. Where this crucial point lies is of paramount importance for the effectiveness of protection against discrimination. In the context of discrimination claims, which indeed are generally acknowledged to be difficult to prove, this criticism of the high standard of proof beyond reasonable doubt is highly relevant. It is submitted that the judgments dealt with in this article show that when the claim is based on discriminatory effect and/or a covert discrimination ground the conceptualisation of discrimination with reference to subjective intent and the application of the standard of proof beyond reasonable doubt leads to the fact that the burden of proof for prima facie discrimination is almost impossible to lift. In these cases the Court has not made use of its own flexible interpretation of the standard of proof and its flexible approach to the free evaluation of all evidence, including inferences from circumstantial evidence and presumptions, to ease the applicant's burden. In practice, albeit not in theory, the Court also still rejects the option of shifting the burden of proof for the discrimination ground over to the respondent State, even when the alleged discrimination takes place in an well established social context of prejudice and hostility and concerns the most serious violations of the right to life or the right to be free from torture, inhuman or degrading treatment.

The problems related to this approach are borne out in particular in cases on alleged discrimination based on ethnic origin (race). Being a particularly serious human rights violation, such discrimination indeed typically takes on covert forms.⁹¹ While the discrimination ground of ethnic origin has in the literature been argued as being one that *should* meet strict scrutiny it is interesting to note that the Court has circumvented dealing with the substance of claims of discrimination on the ground of ethnic origin. Most such claims have been frustrated by the lack of proof of prima facie discrimination and have, thus, not reached the level of objective justification scrutiny at all. The seriousness of the allegation, in fact, seems to have begun to function to the detriment of effective protection. A serious and unlikely situation like racial discrimination seems to hinge on a presumption in favour of States' not resorting to such deplorable forms of discrimination. This has the effect that the applicant's burden of proof is extremely difficult to lift. The problem is that, given the close relationship between the burden of proof and the margin of appreciation, this has the function of allocating a wide margin of appreciation to the State. Where the domestic authorities do not conduct effective investigations into claims of discrimination, this creates a context of impunity for serious violations against Article 14. Another interesting paradox in this context is the fact that it was precisely the seriousness of the claim of racially motivated violence that had the effect that the Grand Chamber found it untenable to allow a shift in the burden of proof for the

91 For the rare occurrence of discrimination based overtly on ethnic origin see *Moldovan and Others v. Romania*, 12.07.2005, unpublished, available at "www.echr.coe.int/echr". This case dealt with the aftermath of a racially motivated attempt to have a village "purged of the Gypsies", cf. para. 50. The discrimination ground was express by repeated discriminatory remarks made by the domestic courts and authorities in respect of the actual victims of the violation, cf. paras. 44, 66, 71 and 139. See also *Timishev v. Russia*, 13.12.2005, unpublished, available at "www.echr.coe.int/echr".

discrimination ground in *Nachova*. It is submitted that there is a double wrong involved in this approach and that it is in contrast with the Court's general approach to strictness of review under Article 14 in two important respects. Firstly, the *seriousness of the discrimination ground* of ethnic origin has the illogical effect to establish what can only be classified as a presumption in favour of non-violation. Secondly, the human rights violations in these cases consist of acts of violence that are found to contravene Articles 2 or 3 of the Convention. This *seriousness of the human rights violations* in question, paradoxically, seemed to provide the operative reason why Grand Chamber in *Nachova* found it untenable to ease the applicant's burden of proof for prima facie discrimination based on ethnic origin.⁹² To correct this double wrong and to establish a framework that can deal effectively with the most serious forms of structural disadvantage, one could look towards a concept of indirect discrimination analysis that does *not* require the establishment of subjective intent to discriminate. It remains to be seen whether the Grand Chamber will correct its course and eliminate the requirement for establishing intent in *D.H. and Others v. The Czech Republic*.⁹³

92 *Nachova and Others v. Bulgaria* [GC], supra note 15, para. 157.

93 *D.H. and Others v. The Czech Republic*, supra note 67.