Nachova and the Syncretic Stage in Interpreting Discrimination in Strasbourg Jurisprudence

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The purpose of this note is to formulate just one of the lessons to be drawn from the landmark case *Nachova and Others v. Bulgaria* which the European Roma Rights Centre (ERRC) won in February 2004 in the Chamber and in July 2005 in the Grand Chamber of the European Court of Human Rights (ECtHR). The Chamber judgment was greeted as a giant step forward in the anti-discrimination struggle, as the Court, for the first time in its history, found a violation of the guarantee against racial discrimination contained in Article 14 of the European Convention on Human Rights (ECHR). The finding brought back from legal anabiosis the Convention's prohibition of discrimination on grounds of race and ethnicity and opened a new stage for anti-discrimination litigation. While this victory vindicated the small company of ERRC and associated enthusiasts pressing for resurrection of Article 14, I would suggest seeing *Nachova* in a somewhat longer-term perspective. At this stage, the ECtHR concept of discrimination has not yet extricated itself from its association with subjective aspects related to intent. *Nachova* is a crossroads case in that it reveals this syncretism starkly and thus creates the basis for overcoming it and moving toward an interpretation according to which proving discrimination would not depend on the examination of the perpetrator's state of mind.

On July 7, 2005, the Grand Chamber, which heard the case on request of the respondent government, while finding unanimously that Bulgaria had violated Article 2 and the procedural aspect of Article 14 taken in conjunction with Article 2, voted, with a majority of 11 to 6 votes, that there had been no violation of the substantive aspect of Article 14 in relation to Article 2. The crucial argument is contained in §157 of the judgment:

> "[…]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."

By the end of 2005, three further ECtHR cases (including two litigated by the ERRC) found a violation of Article 14. In *Bekos v. Greece* (December 13, 2005) the Court applied the above logic from *Nachova*, dividing the protection contained in Article 14 into a substantive and procedural aspect, finding a violation of the procedural aspect and no violation of the substantive aspect, as no reversal of the onus could be allowed when the issue was the presence or absence of racial animus. However, in *Moldovan and Others v. Romania* (July 12, 2005) and then in *Timishev v. Russia* (December 13, 2005) the Court found violation of Article 14 without differentiating between a substantive and a procedural aspect.

In all four cases decided in the second half of 2005, the Strasbourg Court apparently applied a notion of discrimination that is a mixture of two preceding interpretations: one that depends on the presence of a certain subjective attitude motivating conduct, and another one that is irrespective of any mental state. The two interpretations are mixed up in all four judgments, irrespective of whether the related issue was racist violence or not. Whereas in all four cases discrimination is defined, with reference to *Willis v. the United Kingdom*, as "treating differently, without an objective and reasonable justification, persons in relevantly similar situations" (i.e. in the spirit of the EU anti-discrimination Directives), this definition was not understood as making intent irrelevant. In each of the judgments, and despite the different Convention rights at stake in each case (Art. 2 in *Nachova*, Art. 6 and 8 in *Moldovan*, Art. 2 of Prot. 4 in *Timishev*, and Art. 3 in *Bekos*), the motivation of the perpetrator was invoked in phrases such as "racial motivation", "racially motivated act", “attitude”, etc. Nor there is a clear differentiation between the concepts of racial discrimination and racism:

"[…] the Court's task is to establish whether or not racism was a causal factor in the shooting that led to the deaths of Mr Angelov and Mr Petkov so as to give rise to a breech of Article 14 of the Convention taken in conjunction with Article 2." (*Nachova* GC, §146).

In *Moldovan* and *Timishev*, where discrimination is not related to racist violence, the Court, despite the conceptual and/or verbal syncretism, was not deterred from shifting the burden of proof and in the end leaned toward the *Willis* definition when deciding that, as the respondent government had failed to provide an objective and reasonable justification of the different treatment, discrimination had occurred.

When we were building the arguments for *Nachova* in the late 1990s, we were not yet "prepared" (historically, as it were, and certainly while still litigating at the domestic level) to apply consistently the definition of discrimination that became better established only at a later stage, through the adoption of Directives 2000/43/EC and 2000/78/EC) that had shed off any reliance on intent, motivation, or any other subjective reality and relied entirely on the objective characteristics of unequal treatment. The main evidence we put forward to support out claim that Article 14 had been violated was that racial bias had played a part in the unlawful killing: for example, the perpetrator, Major G., had addressed a racist remark to a Romani bystander immediately after he had fatally shot the Romani fugitives Mr Angelov and Mr Petkov.

One lesson then for cases involving violence against disadvantaged groups is obvious. Since the general historic direction of interpreting discrimination is hopefully the one in which the intent is irrelevant, and since in any case the ECtHR is not a criminal court seeking to establish individual guilt, we should construe discrimination as an aspect of violent conduct solely by demonstrating that different treatment has occurred in relevantly similar situations and arguing that the different treatment was not objectively and reasonably justified. Thus, the strategy of substantiating a discrimination claim in *Nachova* for example would have been to argue that if the fugitives had not been Roma, the use of force would not have been as "excessive" as to result in a killing. Statistical and other objective evidence could be tabled to support this claim. The government to which the responsibility to disprove this allegation would then be shifted absent the

barrier of non-falsifiability (as identified in §157 cited above) would have the realistic option to prove the opposite: for example, that Major G. had acted throughout his career in identical ways in similar cases no matter what the ethnicity of his shooting victims was; or, at the institutional level, that the use of fatal force had been endemic and indiscriminate and resulted in proportionate numbers of killings of Roma and non-Roma. This strategy moves us toward a more consistent concept of discrimination applied in the different contexts of violent crime, employment, and access to services, which in its turn should result in stronger legal protection against discrimination.