

RECENT DEVELOPMENTS IN EU ANTI-DISCRIMINATION LAW

LITIGATING ROMA RIGHTS UNDER EU LAW AND EXPERIENCES FROM THE ECHR

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Introduction

1. There are 10-12 million Roma² living in the European Union ('EU'). The Roma make up the largest ethnic minority in the EU and evidence has clearly shown that they are more likely to face discrimination and social exclusion than others living in Europe.

2. Research by the Fundamental Rights Agency ('FRA') of the EU on the situation of Roma³ shows that:

- they face the highest levels of discrimination in access to housing, education, employment and healthcare;
- many Roma experience poor housing conditions;
- those living in such poor conditions have poor access to public services, including schooling and that as a consequence their chances in the labour market are diminished;
- many Roma who exercise their right to freedom of movement within the EU encounter problems registering their residence in their destination Member State and as a result they face difficulties in accessing national health systems, public housing and work in their new place of residence⁴.

3. The difficulties faced by Roma were formally recognised by the Council of Europe as long ago as 1969 and there have been no shortage of commitments, declarations and expressions of good intentions with regard to the improvement of their situation on the part of Member States since then. However, progress has all too often been thwarted at the stage where policies are to be implemented at a national or local level and as a consequence there has been little real improvement.

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² The term 'Roma' used in this paper should be read as including Roma, Sinti, Kale, and other related groups in Europe, including ethnic minorities that identify themselves as Romani Gypsies and Irish Travellers.

³ See the FRA *'EU-MIDIS Data in Focus Report 1: The Roma'* (2009).

⁴ See also the FRA report *'The situation of Roma EU citizens moving to a settling in other EU Member States'* (2009).

4. Roma continue to be subject to stigmatisation, discrimination and hate crimes. If anything, the hate speech has increased and far right groups have gained political ground in recent years.

5. It was against this background that on 20th October 2010 the Council of Europe issued the ‘Strasbourg Declaration on Roma⁵’ in which it was stated that:

“(1) Roma in many parts of Europe continue to be socially and economically marginalised, which undermines the respect of their human rights, impedes their full participation in society and effective exercise of civic responsibilities, and propagates prejudice.

(2) Any effective response to this situation will have to combine social and economic inclusion in society and the effective protection of human rights. The process must be embraced and supported by society as a whole. A genuine and effective participation of our fellow Europeans of Roma origin is a precondition for success.

(3) While primary responsibility for promoting inclusion lies with the member states of which Roma are nationals or long-term residents, recent developments concerning Roma in Europe have demonstrated that some of the challenges we face have cross-border implications and therefore require a pan-European response.”

Based upon those considerations the Member States of the Council of Europe adopted a list of 31 priorities, or steps, aimed at securing: non-discrimination; social inclusion; and the empowerment of Roma.

Discussion

6. This paper considers the extent to which Roma have themselves been able to address the discrimination they face and fight for their rights protected by the European Convention on Human Rights (the ‘ECHR’ or the ‘Convention’) in the European Court of Human Rights (the ‘ECtHR’ or the ‘Court’). It also considers how their experiences might inform the use of EU Law to tackle discrimination against Roma in the future.

The European Convention on Human Rights

7. The Council of Europe Member States adopted the ECHR in order to help achieve the aims of promoting the rule of law, democracy, human rights and social development. The ECHR sets out a legally binding obligation on the 47 Member States of the Council of Europe to guarantee a list of human rights to everyone within their jurisdiction. The ECtHR reviews the implementation of the ECHR by Member States when it determines cases brought against them.

⁵ In the Strasbourg Declaration the term ‘Roma’ is also used to refer to Roma, Sinti, Kale, and other related groups in Europe, including ethnic minorities that identify themselves as Romani Gypsies and Irish Travellers.

Roma and Convention rights

8. Cases brought by Roma before the ECtHR most frequently involve alleged violations of the rights protected by the following articles of the ECHR:

- Article 2 (right to life),
- Article 3 (freedom from torture, inhuman or degrading treatment or punishment),
- Article 5 (right to liberty),
- Article 6 (right to fair trial),
- Article 8 (right to respect for private and family life),
- Article 2 of Protocol 1 (right to education), and
- Article 4 of Protocol 4 (prohibition of mass expulsions).⁶

Of course, on occasion, Roma also bring cases before the ECtHR in which they allege the violation of other rights protected by the Convention, such as Article 10 (freedom of speech) and Article 11 (freedom of association).⁷

The ECHR's prohibition of discrimination

9. Article 14 of the ECHR guarantees freedom from discrimination with respect to the “rights and freedoms” guaranteed by the Convention. It does not stand on its own. For the discrimination to be actionable it must occur within the context of another right, such as freedom from torture, the right to family life, or the right of free speech.

10. Protocol 12 of the ECHR which has been ratified by many, but not yet all, of the Member States, expands the protection against discrimination to any right “set forth by law” of the Member State rather than just the rights enumerated in the Convention. Protocol 12 accordingly makes Article 14 freestanding and not dependent upon establishing an interference with another Convention right. While the underlying goal of Protocol 12 – a general ban on discrimination – is potentially radical, it is difficult to predict in advance how effective a tool it will become. Many of the larger member States – France, Germany and the United Kingdom, for example – have not ratified it (France and the United Kingdom did not even sign, much less ratify, the Protocol) and many countries with the largest Roma populations – Bulgaria, the Czech Republic, Slovakia, Hungary and Romania – have not ratified it. Thus, Article 14 remains the only viable tool for many of Europe’s Roma to challenge discrimination under the Convention.

⁶ In *Conka v. Belgium* (2002) 34 E.H.R.R. 54, Judgment date 5 February 2002, the Court stated that collective expulsion: “*is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.*”⁶ The applicants were a part of a group of Slovak Roma who were seeking asylum in Belgium. They reported to the police station in response to a notice stating that their attendance was required in order to complete their asylum application files. Instead, upon arrival at the police station, they were given an order to leave the country and held in a detention centre until their deportation en masse from Brussels four days later. The Court rejected the State’s claim that the applicants’ asylum claims had been denied based upon an examination of their personal circumstances. Given the large number of persons in the group, all of whom were expelled, the Court considered: “... *that the procedure followed did not enable it to eliminate all doubt that the expulsion might have been collective . . . [Therefore] . . . there has been a violation of Article 4 of Protocol No. 4.*”

⁷ See for example *Gypsy Council v United Kingdom*, App. No. 66336/01.

No substantive violation required

11. Although Article 14 is an accessory right, the Court does not need to find a violation of the underlying right. If the claim falls within the ambit of another Convention right, then the Court can consider Article 14 allegations. For example, in *Abdulaziz, Cabales, and Balkandali v. United Kingdom*,⁸ the applicants complained of different treatment for wives/fiancées who wished to immigrate to join their husbands in the United Kingdom than for husbands/fiancés to join their wives. They alleged violations of Article 8 and Article 14 in conjunction with Article 8. The Court found no violation of Article 8 because the applicants had no right under the Convention to a choice of residence and could have made their homes in Turkey, Pakistan, or elsewhere. Nonetheless, the claim fell within the ambit of Article 8 in conjunction with Article 14 and the Court ruled in their favour with respect to the discriminatory treatment of husbands and wives in similar situations.

Similar treatment for persons in similar situations; different treatment for persons in different situations

12. In essence, Article 14 guarantees that persons in similar situations should be treated in a similar manner with respect to Convention rights, unless there are objective and reasonable justifications for the different treatment. In *Hoffmann v. Austria*,⁹ a mother, who was a Jehovah's witness, was treated differently in a child custody matter because of her religion. In the *Belgian linguistic case*, French-speaking children living in Flemish-speaking communes were treated differently than Flemish-speaking children living in French-speaking communes.¹⁰ In the *Abdulaziz* case discussed above, the Court rejected the United Kingdom's argument that its different treatment of husbands compared to wives with respect to immigration matters was justified by the State's high levels of unemployment.

13. In *Munoz Diaz v. Spain*¹¹ the Court held that there had been a violation of Article 14 taken together with Article 1 of Protocol 1 (right to enjoyment of property) in circumstances where the Member State had refused to recognise a Roma woman's marriage (which had been solemnised in accordance with Roma customs and cultural traditions) and as a consequence had refused to award her a survivor's pension to which she would otherwise have been entitled had she been married in accordance with Spanish law.

14. In *Sedjic and Finci v. Bosnia and Herzegovina*,¹² the Grand Chamber of the Court found that both Article 14 and Article 1 of Protocol 12 of the Convention had been breached in circumstances where constitutional provisions treated a Roma and a Jew differently from others and prevented them from standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina.

⁸ See *Abdulaziz, Cabales and Balkandali v. United Kingdom*, (1985) 7 E.H.R.R. 471, Judgment date 28 May 1983.

⁹ See *Hoffman v. Austria*, (1994) 17 E.H.R.R. 293, Judgment date 23 June 1993.

¹⁰ See *Belgian linguistics case* (1970) 1 E.H.R.R. 252, Judgment date 23 July 1968.

¹¹ See *Munoz Diaz v. Spain* (2010), App. No. 49151/07, Judgment date 8 March 2010.

¹² See *Sedjic and Finci v. Bosnia and Herzegovina*, App. Nos 27996/06 and 34836/06, Judgment date 22 December 2009.

15. In *Paraskeva Todorova v. Bulgaria* the Court held that the sentence of three years imprisonment imposed upon a Roma woman breached Article 14 in conjunction with Article 6 in circumstances where the sentencing court had clearly taken account of her ethnicity when deciding not to suspend the sentence and had thereby appeared to subject her to different treatment without objective justification for having done so.¹³

16. Article 14 also guarantees the right of persons in different situations to be treated differently. In *Thlimmenos v. Greece*,¹⁴ the Court held that a Jehovah's witness who was sent to jail for refusing to wear a military uniform must be treated differently than "ordinary" criminals with respect to laws preventing those with a criminal record from becoming public accountants. While there was a legitimate reason for keeping convicted criminals from becoming public accountants, the same rationale did not apply to conscientious objectors, and their different circumstances compelled different treatment.

17. This reasoning is important in Roma cases – the Grand Chamber of the Court in *Chapman v. United Kingdom*¹⁵ specifically recognised the different lifestyle of the Roma and the State's positive obligation to facilitate that lifestyle, which could in some cases require different treatment for Roma because of their different situation:

*"The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases ... To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way life ..."*¹⁶

The State's "margin of appreciation" in discrimination cases

18. Freedom from discrimination under Article 14 is a qualitative rather than an absolute right, and Member States can have a considerable margin of appreciation. The different treatment must have an objective and reasonable justification – a legitimate end and means proportional to that end. Whether that margin of appreciation is wide or narrow depends upon:

- The nature of the right involved (States are given more leeway in social and economic fields whereas the margin with respect to fundamental rights is very narrow).
- The level of interference (is the underlying right completely eliminated?) In *Aziz v. Cyprus*,¹⁷ the Court found a violation on behalf of a Turkish Cypriot living in the Greek part of Cyprus who could not register to vote because the Cypriot constitution required Turks to be on the Turkish voting rolls and Greeks to be on the Greek voting rolls, thus completely depriving him of his right to vote.

¹³ See *Paraskeva Todorova v. Bulgaria* (2010), No. 37193/07, Judgment date 25 March 2010.

¹⁴ See *Thlimmenos v. Greece* (2001) 31 E.H.R.R. 15, Judgment date 6 April 2000.

¹⁵ See *Chapman v. United Kingdom* (2001) 33 E.H.R.R. 18, Judgment date 18 January 2001.

¹⁶ See paragraph 96 of the judgment.

¹⁷ See *Aziz v. Cyprus* (2002) 35 E.H.R.R. CD 14, Judgment date 22 June 2004.

- The public interest involved in the category of discrimination (the strong public interest in combating gender and racial distinctions requires a higher level of justification for discrimination on those bases).

Discrimination, education and the decisions in DH, Sampanis and Orsus

19. In the case of *DH v The Czech Republic*,¹⁸ the Court held that the Roma applicants had been the victims of indirect discrimination. The Grand Chamber stated that there had been a violation of Article 14 read in conjunction with Article 2 of Protocol 1 (the right to education) in circumstances where the applicants had been indirectly discriminated against when selected for and assigned to special schools for children with learning difficulties. Although Roma children only represented 5% of all primary school pupils at the time the application was lodged, they made up more than 50% of the overall population of special schools, and 80-90% of some of these schools.

20. The Grand Chamber concluded that: the selection tests were biased and did not take into account the special characteristics of Roma children;¹⁹ that the parents were not in a position to give informed consent;²⁰ and that, in any case:

*“no waiver of the right not to be subjected to racial discrimination can be accepted.”*²¹

21. In reaching that conclusion the Grand Chamber commented upon the margin of appreciation in the following terms:

“206. ... whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation ...”.

22. In the case of *Sampanis and Others v. Greece*²² a number of Roma applicants complained that there had been a violation of their rights protected by Article 14 read in conjunction with Article 2 of Protocol 1 of the Convention in circumstances where a local school: had at first failed to enrol and provide any education for their children; and later placed them in special “preparatory” classes, without any objective and reasonable justification.

¹⁸ See *DH v. The Czech Republic*, Application No. 57325/00, Judgment date 13 November 2007.

¹⁹ *Ibid.* paragraphs 200-201.

²⁰ *Ibid.* paragraph 202.

²¹ *Ibid.* paragraph 204.

²² See *Sampanis and Others v. Greece* App. No. 32526/05, Judgment date 5 June 2008.

23. It was accepted by the State that the children had missed the school year 2004-2005 but it was suggested that there had been no breach of the Convention because the applicants had not formally applied for their children to be enrolled but had simply approached the school to enquire about enrolment. The Court rejected that argument. It found that the applicants had explicitly expressed their wish to enrol their children and concluded that the school should have facilitated the enrolment of the applicants' children, given the vulnerability of the Roma community and the requirement to pay particular attention to their needs.

24. The applicants' children were enrolled for the 2005-2006 school year but at the beginning of that school year non-Roma parents protested about their admission and blockaded the school and demanded that the Roma children be transferred to another building. The applicants subsequently signed a statement drafted by school teachers to the effect that they wished their children to be transferred to another building and shortly thereafter their children began receiving "preparatory classes" in an annexe and the blockade was lifted.

25. The Court was able to infer from the facts of the case that the decision to place the Roma children in the annexe was influenced by the protests and blockade mounted by the parents of non-Roma children and it considered that the evidence adduced by the applicants created a strong presumption of discrimination. In the circumstances the Court examined whether the State had shown that the difference in treatment was as a result of objective factors, unrelated to the ethnic origins of the persons concerned. The State argued that the applicants' children had been placed in "preparatory classes" so that they could attain the level of education that would enable them to be transferred to "ordinary classes". However, the Court noted that: the school had not adopted any clear criterion or suitable test of capabilities or learning difficulties that could be used to choose which children to place in "preparatory classes"; and that the State had not provided any examples of Roma children that had been transferred to "ordinary classes" (despite the fact that the applicants' children had been attending lessons in the "preparatory classes" for 2 years), nor explained how the children were to be objectively assessed in order to determine their capability to join "ordinary classes".

26. Though the Court recognised that the applicants had signed a statement indicating that they wished their children to be transferred to the annexe it reiterated the point that had been made in *DH v. The Czech Republic*, namely that waiver of the right not to be discriminated against was unacceptable and would be incompatible with the Convention.

27. In conclusion, the Court decided that the State had discriminated against the applicants' children and that there had been a violation of Article 14 taken together with Article 2 of Protocol 1 of the Convention.

28. More recently, in *Orsus and Others v. Croatia*²³ the Grand Chamber reiterated the approach that it had taken in *DH v. The Czech Republic* and by a majority held that: the automatic placement of Roma children attending mainstream primary schools into separate classes, supposedly on account of their lack of proficiency in the Croatian language, had amounted to a clear difference in treatment which had not been objectively justified; and that, as a consequence, there had been a violation of the applicants' rights protected by Article 14 taken together with Article 2 of Protocol 1.²⁴

29. The Grand Chamber indicated that the temporary placement of children from ethnic minorities in separate classes on the basis of linguistic differences was not automatically contrary to Article 14 of the Convention and that it might be permissible if it served the purpose of bringing their command of the Croatian language up to an adequate level and then securing their immediate transfer to a mixed class.

30. However, the Grand Chamber made it clear that such a system had to be attended by adequate safeguards and it examined the facts in order to determine whether such safeguards existed in this case. When doing so, the Grand Chamber noted the absence of special language classes in the curriculum and the lack of active and structured involvement of social services in order to address the problems experienced by Roma children, which led to high drop out rates and poor school attendance.

31. In conclusion, the Grand Chamber held that the schooling arrangements for Roma children were not sufficiently attended by safeguards capable of ensuring that: in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group; and

“that a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued was achieved and maintained”.

The standard and burden of proof in discrimination cases

32. In Article 14 cases the Court will apply the *beyond reasonable doubt* standard of proof. In *Anguelova v. Bulgaria*,²⁵ the applicant's son, a Romani man, died while in police custody. The Court found the applicant's claim that he was tortured because of his ethnicity raised “serious argument” and noted that the State had not provided any other plausible explanation. Nonetheless, the Court could not conclude *beyond reasonable doubt* that the death and lack of a meaningful investigation into it were motivated by racial prejudice. That conclusion led Judge Bonello in a strong dissenting opinion to note that:

²³ See *Orsus and Others v. Croatia* (2010), App. No. 15766/03, Judgment date 10 March 2010.

²⁴ It should be noted that the Grand Chamber also found that there had been a violation of the applicants' rights protected by Article 6 of the Convention, having regard to the length of the proceedings before the domestic courts.

²⁵ See *Anguelova v. Bulgaria*, App. No. 38361/97, Judgment date 13 June 2002.

*“Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it.”*²⁶

33. The Court’s traditional approach was challenged in *Nachova v. Bulgaria*, where the applicants and intervenors argued that the *beyond reasonable doubt* standard of proof was simply too difficult to meet and pointed to a growing trend by other courts to shift the burden of proof in discrimination cases.

34. In *Nachova* the Grand Chamber acknowledged the *beyond reasonable doubt* standard, but noted that it had never been the purpose of the Court to borrow the approach of national legal systems that apply that standard and that it had no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court stated that it could base its conclusions on inferences that flow from the facts, and reiterated the point made in earlier cases that:

*“proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.”*²⁷

35. In Article 14 cases it is clear that once an applicant has proved that there has been a difference in treatment then the burden of proof shifts on to the respondent State to show that it was justified.

36. That point was recently made by the Grand Chamber in *DH v The Czech Republic*:²⁸

*“Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory.”*²⁹

37. In order to create this rebuttable presumption, the Grand Chamber stated that:

*“...statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.”*³⁰

²⁶ See *Anguelova v. Bulgaria*, App. No. 38361/97, Judgment date 13 June 2002, dissenting opinion.

²⁷ See *Salman v. Turkey*, App. No. 21986/93, Judgment date 27 June 2000; and *Nachova v. Bulgaria*, App. Nos. 43577/98 - 43579/98, Judgment date 6 July 2005, paragraph 147

²⁸ See *DH v The Czech Republic*, Application No. 57325/00, Judgment date 13 November 2007.

²⁹ *Ibid.* paragraph 189.

³⁰ *Ibid.* paragraph 188.

The procedural obligation to investigate possible racist motives

38. In *Nachova* the Grand Chamber endorsed the following analysis of the Member States' procedural obligation to investigate possible racist motives for acts of violence:

"160 ... States have a general obligation under Article 2 of the Convention to conduct an effective investigation in cases of deprivation of life.

... That obligation must be discharged without discrimination, as required by Article 14 of the Convention ... [W]here there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Compliance with the State's positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin ...

*... [W]hen investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, mutatis mutandis, *Thlimmenos v Greece* ...). In order to maintain public confidence in their law enforcement machinery, Contracting States must ensure that in the investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killings.*

Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute ... The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of ... racially induced violence."

39. The Grand Chamber added that:

"... the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure enjoyment of the right to life without discrimination."

40. Adopting those principles the Grand Chamber found that the State had failed in its duty under Article 14 of the Convention taken together with Article 2 to take all possible steps to investigate whether or not discrimination may have played a part in the events that led to the killing of two Romani men who had been shot dead by a military police officer.³¹

Conclusion

41. The cases brought before the ECtHR by Roma provide a snapshot of the appalling discriminatory treatment that they still suffer in Europe today and the extent to which their plight has contributed to the fashioning of the Court's jurisprudence on discrimination.³² The question for Roma, activists and the legal profession is whether EU law can also be used effectively to tackle such discrimination.

The European Union

42. The 27 Member States of the EU are also Member States of the Council of Europe and bound to comply with the ECHR.

EU anti-discrimination law - the Race Equality Directive

43. In 2000 the EU adopted the Racial Equality Directive 2000/43/EC (the 'RED' or the 'Directive'). It is the key piece of EU legislation designed to combat racial or ethnic discrimination. It emphasises that individuals should receive no less favourable treatment regardless of their racial or ethnic characteristics and it prohibits discrimination in the areas of: employment, education, social protection including social security and healthcare, and access to and the supply of goods and services, including housing.³³ The RED:

- required the creation of equality bodies and specialised judicial or administrative procedures to promote equal treatment in each Member State where they did not previously exist;
- stipulated that Member States should ensure that associations or other legal entities have the possibility of engaging in such procedures in support on behalf of individual victims;
- reversed the burden of proof, requiring only that the complainant bring forward facts "*from which it may be presumed that discrimination has occurred*", thus requiring the defendant to prove that the principle of equal treatment has not been breached;

³¹ In *Stoica v Romania*, App. No. 42722/02, Judgment date 4 March 2008 the Court not only found the State to have committed a substantive and procedural breach of Article 3 but also, having adopted the principles spelt out by the Grand Chamber in *Nachova*, a violation of Article 14.

³² Though the execution of such judgments by Member States has been lamentable: see http://www.errc.org/popup-article-view.php?article_id=3613.

³³ Article 3(1).

- gave the following definitions –
 - Direct discrimination is defined as where “one person is treated less favourably than another is, has been, or would be in a comparable situation on grounds of racial or ethnic origin”,³⁴
 - Indirect discrimination is defined as occurring where “an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.³⁵

44. In March 2010, FRA published a report entitled “*The Impact of the Racial Equality Directive, Views of trade unions and employers in the European Union*”³⁶ in which it was noted that employers and trade unions displayed a limited understanding of the relevance of the RED to Roma and that few respondents conceptualised their Roma populations as being a minority ethnic community protected by the Directive. This lack of understanding is very worrying and is mirrored by a similar lack of awareness on the part of Roma.³⁷

The EU Charter of Fundamental Rights

45. In 2000 the EU and its Member States also adopted the EU Charter of Fundamental Rights (the ‘Charter’). At that time, it amounted to a non-binding declaration of the list of human rights to which the Member States ascribe – a list which includes all the civil and political rights contained in the ECHR as well as economic, social and cultural rights.

46. However, when the Treaty of Lisbon came into force on 1st December 2009, the Charter of Fundamental Rights became a legally binding document; with which institutions of the EU are bound to comply; and which EU Member States must also comply with when they implement EU law.³⁸

47. As a consequence individuals now have the right to complain about EU legislation, or about national legislation that implements EU law, if they consider that the Charter has been infringed. Complaints relating to a Member State’s compliance with the Charter when implementing EU law will be brought before the national courts (which can then seek guidance on the correct interpretation of EU law from the European Court of Justice (‘ECJ’) through the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the EU).

³⁴ Article 2(2)(a).

³⁵ Article 2(2)(b).

³⁶ See http://www.fra.europa.eu/fraWebsite/attachments/Racial-equality-directive_conf-ed_en.pdf.

³⁷ See the FRA ‘*EU-MIDIS Data in Focus Report 1: The Roma*’ (2009).

³⁸ See Article 51 of the Charter. Protocol 30 to the Lisbon Treaty on the application of the Charter to Poland and the United Kingdom (and the Czech Republic) seems to give those Member States an “opt out” but it is questionable whether it will have any substantive effect.

48. It is worth noting that, in contrast to the ECHR, Article 21 of the Charter makes provision for a free-standing right of non-discrimination. It states that:

“1. Any discrimination based on any ground such as sex, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and the Treaty of the European Union, and without prejudice to the special provisions of those treaties, any discrimination on grounds of nationality shall be prohibited”.

The harmonisation of human rights law by the ECJ and ECtHR

49. Generally, when interpreting human rights protection under EU law the ECJ will look to the ECHR for inspiration and there is clearly effort on the part of both the ECJ and ECtHR to promote harmony and avoid conflict between the two jurisdictions. It follows that the ECtHR’s anti-discrimination jurisprudence arising from Roma cases is likely to influence the ECJ’s interpretation and application of the RED and Article 21 of the Charter in the future.

The EU accession to the ECHR

50. Individuals are not yet entitled to bring cases before the ECtHR against the EU where it is alleged that its institutions have breached their human rights. Instead, they must either complain to their national courts, which can then refer the case to the ECJ using the preliminary reference procedure; or complain about the EU indirectly to the ECtHR when bringing a claim against a Member State.

51. The Lisbon Treaty does provide for the EU to be a party to the ECHR in its own capacity, though when accession will take place is yet to be determined. Once accession takes place individuals will be able to bring an action against the EU before the ECtHR where complaint is made that the EU has failed to observe the ECHR.³⁹

Using EU law to combat discrimination faced by Roma

52. There has been little, if any, reported EU litigation concerning Roma to date. However, there is clearly scope for Roma and their advisors to use the provisions of the RED and the Charter in order to counter discrimination in a number of key areas in the future. Access to housing and the freedom of movement within the EU provide two obvious examples.

³⁹ See, for example, *Bosphorus v. Ireland*, App. No. 45036/98, Judgment 30 June 2005.

Access to social housing

53. In October 2009 the FRA published its report on “*Housing conditions of Roma and Travellers in the European Union*”. Put shortly, FRA found that:

- very few Roma knew that laws existed which prohibited discrimination in relation to ethnicity with regard to the provision of housing;
- Roma children of families who are exposed to forced evictions have great difficulties in attending school;
- those living in secluded settlements are most likely to attend segregated schools;
- Roma living in segregated communities or in substandard conditions have only limited access to public services and social networks;
- living in segregated areas makes it more difficult to find and secure work;
- substandard living conditions have severe consequences on health, particularly for women and children.

The FRA’s study confirmed that:

“Racism and discrimination

... racism is a serious obstacle to the enjoyment of adequate housing by Roma and Travellers. Public officials initiate targeted evictions of Roma and Travellers, and local authorities deny their access to social housing through measures that are directly or indirectly discriminatory against Roma and Travellers. Across the EU, private citizens organise campaigns for the expulsion of Roma and Travellers, sometimes fuelled by inflammatory media reports. In addition, as EU-MIDIS survey data indicate, Roma clearly perceive themselves to be regularly discriminated against by private landlords when they try and rent or buy housing. Because of racism and discrimination, Roma and Travellers have a severely limited choice concerning housing and accommodation and they are exposed to lower quality dwellings.

Problems of law at the national level

Despite a comprehensive legal framework at the international or regional level, it is evident that much work remains at the national level to ensure adequate protection to Roma and Travellers against housing rights violations. Few, if any, Member States can legitimately assert that their domestic legislation provides the full ambit of protection against housing rights violations, forced evictions and discrimination foreseen under international and European legal instruments. Protections against housing discrimination which do exist are underutilised. They rely on victims knowing that they can come forward with complaints and their subsequent willingness to actually do so. Yet the findings of the FRA’s EU-MIDIS survey clearly identify both a general lack of awareness among Roma of the available legal protections and complaint mechanisms, and unwillingness to file complaints, for a variety of reasons. The effectiveness of the legal protections in place is therefore highly questionable.

There are also clear instances when law or policies act specifically to limit or infringe the right to adequate housing by Roma and Travellers. Examples include Italian laws which segregated Roma and Sinti in substandard camps for nomads and make them targets of discriminatory or violent treatment, or laws regulating halting and evictions in France, Ireland or the United Kingdom.”

55. Similarly, in its report “*Standards do not apply, Inadequate Housing in Romani Communities*” (December 2010)⁴⁰ the European Roma Rights Centre (the ‘ERRC’) noted that its research had found that: many Roma lacked security of tenure and live in substandard and overcrowded housing conditions: local authorities continue to forcibly evict Roma or threaten them with forcible eviction and destruction of their property; and that Roma face a series of specific obstacles, including burdensome rules, restrictions and discriminatory practices which impede their access to social housing.

56. Clearly, in order for the inequalities and discrimination faced by Roma seeking access to social housing to be addressed they must be informed of their rights. Lawyers and activists must raise the awareness of Roma and be prepared to challenge discriminatory policies and practices wherever they arise. For example, eligibility criteria for social housing which are related to employment status or length of employment are likely to have a disproportionately negative impact on Roma (given their experience of high levels of unemployment and employment in short term work) and should be challenged as being contrary to Article 3(1)(h) of the RED.

Freedom of movement

57. The right of EU citizens and their family members to move and reside freely within the territory of the EU is enshrined in Article 18 of the Treaty establishing the EU and implemented by Directive 2004/38/EC (the ‘Free Movement Directive’ or ‘FMD’).

58. The European Commission has found that implementation of the FMD has been poor across the board:

“Communication by Member States of national implementing measures was incomplete and late in a large number of cases. Between June 2006 and February 2007 the Commission initiated infringement proceedings under Article 226 of the EC Treaty against 19 Member States for their failure to communicate the text of the provisions of national law adopted to transpose the Directive.”⁴¹

⁴⁰ The report studied the housing conditions of Roma in Albania, Bosnia and Herzegovina, Macedonia, Montenegro, Romania, Serbia and Slovakia. See the report at <http://www.errc.org/cms/upload/file/standards-do-not-apply-01-december-2010.pdf>

⁴¹ “*Report from the European Commission to the European Parliament and Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*” COM(2008) 340 Final, Brussels 10.12.2008, p. 2. *Ibid*, p. 3.

and that transposition has been disappointing:

“The overall transposition of Directive 2004/38/EC is rather disappointing. Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States.”⁴²

59. In its report *“The situation of Roma EU citizens moving to and settling in other EU member states”* (November 2009) the FRA noted that:

“At Member State level, there is no specific policy framework guiding the inclusion and integration of Roma EU citizens who have exercised their right to freedom of movement and residence...”⁴³

and that

“...research shows that often the incorrect application of the Free Movement Directive by national authorities at different levels of administration that are not appropriately trained can be responsible for the de facto withdrawal of certain rights and entitlements, particularly in the area of social assistance...”⁴⁴

60. In conclusion the FRA noted that:

“The case of Roma citizens settling in other EU Member States raises questions in terms of wider debates on anti-discrimination and integration and the meaning of EU citizenship and associated rights as a broad concept. The case of the Roma serves as a litmus test: the consequence for some of the most vulnerable citizens in the EU are an important indicator of the practical daily challenges faced by all citizens”⁴⁵

61. The position of migrant Roma in France serves to highlight the problems they face when seeking to exercise their rights under the Free Movement Directive. France has been returning migrant Roma to Romania and Bulgaria in significant numbers since at least 2007. The French authorities assert that many of these returns are voluntary but the Council of Europe’s Commissioner of Human Rights questioned that assertion in his 2008 report on France.⁴⁶

⁴³ See p. 34.

⁴⁴ *Ibid*, p. 32.

⁴⁵ *Ibid*, p. 9.

⁴⁶

See

[https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CommDH\(2008\)34&Language=lanEnglish&Ver=original&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P515_102369](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CommDH(2008)34&Language=lanEnglish&Ver=original&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P515_102369) and see also the observations made by the ERRC in its submission to the EU dated 27 August 2010 at <http://www.errc.org/cms/upload/file/france-ec-legalbrief-27-august-2010.pdf>.

62. In any event the return of migrant Roma seemed to gather pace in the summer of 2010 following the events that unravelled after a young Romani man was shot dead by police. His death provoked anger amongst the local Roma community and, following acts of public disorder committed by members of that community, the French President, Nicolas Sarkozy, called a meeting of the French Council of Ministers to discuss problems caused by their behaviour, stating at the meeting that:

“the state of lawlessness which characterises the Roma population who had come from Eastern Europe and now live on French territory [was] totally unacceptable.”⁴⁷

63. One of the decisions taken by the French Council was to evacuate all illegal encampments within the following three months. Shortly, thereafter, the Minister for Immigration, Integration, National Identity and Mutually-Supportive Development, Eric Besson, announced a bill making “aggressive begging” a reason to expel people from France.⁴⁸

64. The political pronouncements and action taken by the French authorities provoked outrage across Europe and the EU threatened to take legal action regarding the perceived failure by France to transpose and implement the FMD. However, the threat was withdrawn in October 2010 after France had given the EU assurances that it would ensure an effective and non-discriminatory application of EU law in line with the Treaties and the Charter.⁴⁹

65. What can we learn from these events. Well, the political reality seems to be that the EU will be reluctant to bring Member States to task (even in the face of what would seem to be clear breaches of the FMD and anti-discrimination provisions in EU law).

66. It also seems clear that Roma must take action themselves to combat such discrimination using the available provisions of EU law⁵⁰ - following the example of those Roma that have contributed so much to the evolution of the anti-discrimination jurisprudence of the ECtHR. Only then will the actions of Member States like France be subject to judicial scrutiny and judged against the principles of EU law.

Marc Willers
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⁴⁷ ‘The Porrajmos: the “Gypsy Holocaust” and Continuing Discrimination of Roma and Sinti After 1945’ by Sylvain Aubry in “The Holocaust in History and Memory” Vol. 3 (2010), p 99.

⁴⁸ *Ibid*, p. 101.

⁴⁹ *Ibid* pp. 101-102.

⁵⁰ For instance, Roma might challenge a removal decision on grounds that it violates the FMD (and possibly the RED as well as Article 21 of the Charter, given the anti-Roma rhetoric emanating from French politicians). A case could also be brought against France before the ECtHR for breach of Article 4 of Protocol 4 (prohibition on collective expulsions) together with Article 14 of the ECHR.