

WRITTEN COMMENTS

BY THE EUROPEAN ROMA RIGHTS CENTRE CONCERNING BULGARIA

For Consideration by the European Commission on the Transposition and Application of the Race Directive and on the Legal Issues Relevant to Roma Integration.



CHALLENGING DISCRIMINATION PROMOTING EQUALITY

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Bulgaria

CASE REVIEW: BULGARIA

This submission focuses on the situation of Roma in Bulgaria and shortcomings in the transposition and implementation of the Race Equality Directive, which has particular impact on Roma. This review includes broader elements of the anti-discrimination framework in Bulgaria, but does not purport to be comprehensive.

1 TRANSPOSITION OF RED INTO DOMESTIC LEGISLATION

1.1 THE GENERAL FRAMEWORK ON THE PROHIBITION OF DISCRIMINATION

A number of international instruments banning discrimination are in effect in Bulgaria, including the European Convention on Human Rights, the European Social Charter Revised, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Race Discrimination, the Convention on the Rights of the Child, the 111 ILO Convention.

The Constitution and binding international law are directly applicable by domestic courts, and supersede any conflicting legislation. They are enforceable against private parties, as well as public bodies. Apart from the Protection against Discrimination Act, the other significant law on equality is the Integration of Persons with Disabilities Act, which bans disability discrimination specifically and provides for positive and reasonable accommodation duties with respect to persons with disabilities in a number of key fields. The Criminal Code bans racially motivated violence and incitement to discrimination but these provisions lack any implementation in practice. Several national or international organizations have indicated a low percentage of the prosecution of racially motivated crimes as compared to the numbers of hate crimes reported by different organizations.¹

1.2 THE BULGARIAN ANTI-DISCRIMINATION LAW

The Protection against Discrimination Act (PDA) 2004 is the main anti-discrimination legislation in Bulgaria, which was enacted in order to transpose the EC equality directives. It is a single equality law universally banning discrimination on a range of grounds, explicitly including race/ethnicity, sex, religion/belief, sexual orientation, disability and age, and providing uniform standards of protection and remedies. In parallel, other, pre-existing abstract prohibitions of discrimination are still in place under other laws governing specific fields, as well as the Constitution.

The Bulgarian PDA generally complies with the EU Directives with some exceptions and goes beyond in significant aspects, including the material scope, the list of protected grounds, forms of discrimination banned, powers of the equality body, and special judicial redress.

The Bulgarian anti-discrimination law has a universal material scope, similar to that of Protocol 12 to the European Convention on Human Rights. The ban on discrimination is explicitly said to apply to any field, implicitly including all fields under the Race Directive, as well as any field beyond. This universal ban applies to all protected grounds, including race/ethnicity, religion/belief, disability, sexual orientation, age, and sex.

The Bulgarian Act prohibits and defines direct and indirect discrimination, including explicitly discrimination by association and by presumption. The Act defines direct discrimination as treating a person on protected grounds less favorably than another person is treated, has been treated, or would be treated in comparable circumstances. It further defines the notion of “on grounds of” as the actual, present or past, or assumed possession of one or more protected grounds by the person discriminated against, or by another person who is, in fact or presumably, associated with the person discriminated against, where this association is the cause of the discrimination.

The Act does not permit general justification for direct discrimination with respect to any ground. It provides for an exhaustive list of specific exceptions for all protected grounds, including for genuine and determining

¹ Bulgarian Helsinki Committee, Submission to the United Nations Human Rights Committee for consideration when compiling the List of Issues on the Fifth Periodic Report of Bulgaria under the International Covenant on Civil and Political Rights, report available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/BHC_Bulgaria_HRC100.doc; OSCE/ODIHR, Hate Crimes in the OSCE Region: Incidents and Responses Annual Report for 2011, report available at: <http://tandis.odihr.pl/hcr2011/pdf/Countries/Bulgaria.pdf>.

occupational requirements, for employers with a religious ethos, and for maximum and minimum ages for access to employment and education, requiring objective justification by necessity. Positive measures aimed at equalising opportunities for disadvantaged groups are allowed, and expressly mandated.

The Protection against Discrimination Act explicitly provides that harassment, incitement to discrimination, and victimisation constitute forms of discrimination. The Act further defines *racial segregation*, explicitly providing that it is a form of discrimination. Multiple discrimination is defined as discrimination on more than one of the protected grounds.

1.3 COMPLIANCE ISSUES WITH THE RACE DIRECTIVE

Definition of indirect discrimination

Expert reports² indicate that the Bulgarian anti-discrimination law has several flaws in relation to the transposition of the Race Directive. One example in this regard is the concept of indirect discrimination. The Bulgarian Act on Protection against Discrimination in Article 4 (3) defines indirect discrimination as “putting a person on [protected] grounds [...], through an apparently neutral provision, criterion or practice, at a disadvantage compared with other persons, unless such provision, criterion or practice is objectively justified by a legitimate aim and the means for achieving that aim are appropriate and necessary”.

The way the legislator has been referring to “on [protected] grounds” creates a possibility for indirect discrimination to be understood as a provision based on a protected ground, with “apparently neutral” taken to mean that the ground as a basis for the provision is concealed by a false or lacking explanation. A number of judicial decisions have shown a serious misunderstanding of the concept of indirect discrimination, some fusing it with direct discrimination.³

Legal experts consider that the adverse implications in such cases are serious because the absolute ban on direct discrimination is then diluted in such judges’ reasoning by the general justification test valid only for indirect discrimination. In addition, even in cases where conduct is properly dealt with as indirect discrimination by judges, the case law is weak overall, because as a rule judges do not strictly assess respondents’ justifications.⁴

Definition of instruction to discriminate

Another flaw of the Bulgarian law involves the definition of the concept “instruction to discriminate”. The Act on Protection against Discrimination bans incitement to discrimination, and defines it by referring as well to instructions to discriminate. However, this definition may not be compatible with the Directives as it requires direct intent as an element and the perpetrator to be in a position to influence their audience.⁵

Definition of racial segregation

Experts consider that the definition of racial segregation under the Protection against Discrimination Act is not compatible with European standards because it explicitly requires the state of separation to be ‘forced’.⁶ It thus implies that segregation may be chosen, i.e. that segregated persons may have waived their right not to be

² European Network of Legal Experts in the Non-discrimination Field, Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report Bulgaria, Margareta Ilieva, State of affairs up to 1st January 2012, available at http://www.non-discrimination.net/content/media/2011-BG-Country%20Report%20LN_FINAL_1.pdf.

³ *Ibid*, page 23.

⁴ *Ibid*, page 5, civil court decisions indicated in the Report: Decision no. 97 of 13.12.2004, case no. 365/2004 of Radnevo District Court; Decision of 19.12.2006, case no. 2756/2006 of Sofia District Court; Decision of 12.07.2004, case no. 1184/2004 of Sofia Regional Court; Decision of 19.08.2004, case no. 1262/2004 of Sofia District Court; Decision of 19.12.2006, case no. 2756/2006 of Sofia District Court. Decisions of the Supreme Administrative Court: Decision no. 11421 of 19.11.2007, case no. 5604/2007; Decision no. 12117 of 3.12.2007, case no. 8044/2007; Decision no. 4752 of 15.05.2007, case 11478/2006; Decision no. 11295 of 16.11.2007, case no. 6407/2007; Decision no. 13393 of 28.12.2007, case no. 8083/2007; Decision no. 7811 of 19.07.2007, case no. 1048/2007.

⁵ European Network of Legal Experts in the Non-discrimination Field, Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report Bulgaria, Margareta Ilieva, State of affairs up to 1st January 2012, available at http://www.non-discrimination.net/content/media/2011-BG-Country%20Report%20LN_FINAL_1.pdf.

⁶ *Ibid*, page 5.

discriminated against, including not to be segregated on racial grounds. Yet, the European Court of Human Rights has consistently held in Roma segregation cases that no waiver of the right to non-discrimination in this context is possible because it would conflict with an important public interest.⁷

2 THE BULGARIAN EQUALITY BODY: THE COMMISSION FOR PROTECTION AGAINST DISCRIMINATION (CPD)

2.1 THE ESTABLISHMENT AND MANDATE OF THE CPD

The Protection against Discrimination Act sets the establishment of CPD, its mandate and rules for its composition and functioning, key concepts, rights protection and promotion mechanisms as well. The Commission for Protection against Discrimination (CPD) is an independent specialized public body for prevention and protection against discrimination in the Republic of Bulgaria. It was established in 2005 in compliance with the Protection against Discrimination Act transposing the European Union antidiscrimination Directives. The Commission has a broad mandate, providing protection on 19 grounds listed in Article 4 of the Protection against Discrimination Act and has preventive and awareness-raising functions on equality and tolerance issues. CPD issues legally binding decisions and imposes compulsory administrative measures – mandatory instructions for termination and prevention of discrimination or for restoration of the initial situation. CPD also monitors their implementation.⁸

The Commission for Protection against Discrimination is a predominantly a quasi-judicial body. It is worth noting that in the opinion of the Advocate General⁹ of the Court of Justice of the European Union the Bulgarian CPD can be viewed as a ‘court or tribunal’ within the meaning of Article 267 TFEU in the case at issue.

2.1 CASE LAW OF THE CPD AND LACK OF A STRATEGIC APPROACH

Experts consider that the equality body’s case law is developing and mark as positive that fact that the CPD has ruled a number of times that stereotyping negative statements against minorities infringe human dignity and create a hostile/ offensive environment in breach of the law. In Roma cases, it also ordered media to abstain from further reporting the ethnic identity of persons where irrelevant. It is also noted that the CPD has progressively ruled based on international law that racial segregation may be at hand without coercion, where separation is a product of objective tendencies interpretation that transcends the formal limits of the law requiring the ‘forced’ separation.¹⁰

It is as well noted however, that the CPD does not use its power to start ex officio proceedings in any strategic way, without coherence, without prioritising issues, sometimes for (relatively) trivial matters. It has failed to target the most serious issues of discrimination, such as Roma segregation in education, Roma destitution and isolation in housing, institutionalisation of people with disabilities.,inter alia A further weak aspect is that equality body binding instructions (orders) have a poor record of execution by respondents.¹¹

7 European Court of Human Rights, case of D.H. v. Czech Republic, judgment of 13.11.2007; case of Sampanis and others v. Greece, judgment of 05.06.2008; case of Orsus and others v. Croatia, judgment of 16.03.2010.

8 Equinet, European Network of Equality Bodies, Bulgaria, Commission for Protection against Discrimination (CPD), available at: <http://www.equineteurope.org/Bulgaria>.

9 On 20 September 2012, Advocate General Kokott delivered an opinion in the case Valeri Hariiev Belov (C-394/11), brought before the Court through reference for a preliminary ruling from the Commission for Protection against Discrimination, the Bulgarian equality body.

10 European Network of Legal Experts in the Non-discrimination Field, Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report Bulgaria, , Margareta Ilieva, State of affairs up to 1st January 2012, available at: http://www.non-discrimination.net/content/media/2011-BG-Country%20Report%20LN_FINAL_1.pdf.

11 Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 006/54/EC (VT/2009/012), BULGARIA, Margarita Ilieva & Desislava Simeonova, April 2010: Focus Group Discussion with Equality Body members and staff.

3 THE GOVERNMENT STRATEGY ON ROMA

3.1 THE SETTING FOR ADOPTING A ROMA STRATEGY IN LINE WITH THE EU FRAMEWORK

According to Bulgarian NGO's¹² the Government responded positively to the European Commission's (EC) communication from April 5, 2011 on the EU Framework for National Roma Integration Strategies. The Bulgarian Prime minister issued an Order¹³ for establishing an interdepartmental working group comprising experts from ministries as well as non-governmental organisations with the aim to discuss an operational policy document on Roma.

The strategy submitted by the Bulgarian government to the European Commission has a number of shortcomings identified by NGOs as well as by the EC. For example, Integro - the Association of Grassroots Roma Organisations for Community Empowerment and Development - highlighted that in the area of education the Strategy refers to equal access of Roma children to quality education, tolerance and non-discrimination, integration of Roma children in mixed schools etc. but lacks specific quantitative indicators in regard to how these objectives will be achieved.¹⁴ In the area of health the objectives are not articulated in terms of concrete indicators: for instance, it is not clear how the ensured equal access of Roma to health care will be measured or what are the particular indicators to measure the improvement of the health status of women and children.¹⁵ The lack of indicators, measurable targets and clear cut actions are similarly applicable for the area of housing, employment.¹⁶

3.1 NON-DISCRIMINATION A PRIORITY WITHOUT TRANSLATION INTO ACTION

The Bulgarian strategy on Roma is accompanied by an action plan aimed to further detail the goals, objectives and measures. One major concern is related to the fact that the section on "Rule of law and Non-discrimination" is inappropriately addressed and it needs serious review and supplementing measures. Despite the fact that the Strategy lists among priorities "Non-Discrimination", this section is one of the least developed sections in the Action Plan.¹⁷

In its assessment of the Bulgarian strategy, the European Commission underlined several shortcomings¹⁸ that need to be seriously addressed by the Bulgarian Government. In the area of education the goals are not quantified, the scope of interventions is limited by the planned funding, segregation in primary and secondary education should be more appropriately addressed.¹⁹ In the area of employment more measures and sustainability needs to be envisaged. The lack of health insurance for Roma is not addressed in detail.²⁰ Overall a major problem relates to the lack of appropriate funding dedicated for the implementation of the Strategy.²¹

12 Review of the National Roma Strategy of Bulgaria By Integro Association staff members, report available at: http://www.ergonetnetwork.org/media/userfiles/media/Integro_Association_Reviewof_NIRS_Bulgariaeng.pdf.

13 *Ibid*, Prim Minister Order No R-185 from July 22, 2011 for establishing the interdepartmental work group for drafting an operational strategy in line with the EC Framework.

14 Review of the National Roma Strategy of Bulgaria By Integro Association staff members, page 3, 4, report available at: http://www.ergonetnetwork.org/media/userfiles/media/Integro_Association_Reviewof_NIRS_Bulgariaeng.pdf.

15 *Ibid*, page 4.

16 *Ibid*, page 4, 5.

17 *Ibid*, page 5.

18 Commission staff working document accompanying the document National Roma Integration Strategies: a first step in the implementation of the EU Framework Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, SWD (2012) 133, 21 May 2012, report available at: http://ec.europa.eu/justice/discrimination/files/roma_nat_integration_strat_en.pdf.

19 *Ibid*, page 25.

20 *Ibid*, page 26.

21 *Ibid*, page 26.

4 DISCRIMINATION AGAINST ROMA

4.1 OVERALL SITUATION OF DISCRIMINATION IN HOUSING AND EDUCATION

The Romani population in Bulgaria face multiple and wide-spread discrimination. Most Roma continue to live in de facto segregated housing in very sub-standard conditions without water, gas, electricity and heating.²² This accommodation is physically separate and public services such as health care institutions and schools, fire brigades and rubbish collectors are not readily accessible. In November 2006, the European Committee of Social Rights issued a decision finding that the lack of amenities constituted a violation of Article 16 of the Revised European Social Charter (right of the family to social, legal and economic protection) taken together with its non-discrimination provision.²³ In the same decision, the Committee held that the situation in Bulgaria constitutes a violation of Article 16 of the Revised European Charter in combination with the non-discrimination clause because Romani families were disproportionately affected by legislation limiting the possibility of legalising illegal dwellings. Moreover, evictions carried out with the assistance of Bulgarian authorities did not satisfy the conditions required by the Charter, in particular that of ensuring persons evicted are not rendered homeless.²⁴

In recent years evictions have continued to be carried out and the threat of evictions is increasingly imminent and real.²⁵ On 24 April 2012, the European Court of Human Rights delivered its judgment in the case of *Yordanova and others v Bulgaria*, in which it ruled against Bulgaria for its attempt to remove Roma from their homes which had been unlawfully built on a municipal land in the neighborhood of Sofia. The Court found that the enforcement of the removal order would amount to a violation of the applicants' right to respect for their home guaranteed by Article 8 of the European Convention. Even though the eviction order was in accordance with domestic law and pursued legitimate aims, it was not 'necessary in a democratic society' as the decision-making procedure "did not offer safeguards against disproportionate interference [with the right to respect for one's home] but also involved a failure to consider the question of "necessity in a democratic society".²⁶ The ECtHR indicated that its assessment on the compatibility of an eviction with the right to respect for one's home used the similar principles as the ones developed by the Committee on Economic, Social and Cultural Rights (CESCR) and the European Committee of Social Rights (ECSR).

Many Romani children encounter serious schooling problems, such as a high drop-out rate and insufficient reading and writing skills, which partly result from discrimination. Children continue to receive their schooling in a de facto segregated environment, where there is less in the way of human and financial resources than other schools and the education provided is of poorer quality. Furthermore, another serious concern is that Romani children with no specific disability continue to be placed in special schools for those with mental disabilities, whether because they have an insufficient knowledge of Bulgarian or simply because the schools provides free meals and this attracts certain disadvantaged Romani parents.²⁷

4.2 LACK OF AWARENESS OF ANTI-DISCRIMINATION LAW AND RACIALLY MOTIVATED CRIMES

Although party to almost every international treaty guaranteeing the right to equality, Bulgaria still has a long way to go before it achieves any concrete results in this area, particularly in the case of Roma.²⁸ It should be noted that a certain volume of case law is developing in connection with the Protection against Discrimination Act (PDA). Cases of discrimination in respect of access to employment and to commercial establishments such as restaurants, cafeterias and hotels have been heard by courts pursuant to the Protection against Discrimination Act, often because of discrimination against Roma. Some judges have handed down decisions

22 ERRC, Submission to UN HRC on Bulgaria, report available at: <http://www.errc.org/cms/upload/file/errc-submission-to-un-hrc-on-bulgaria-iccpr-aug-2010.pdf>.

23 European Committee for Social Rights, *No. 31/2005 European Roma Rights Centre (ERRC) v Bulgaria*, 30 November 2006, available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp.

24 See: <http://hudoc.esc.coe.int/esc2doc/escj/doc/200714/cc-31-2005-en-2.doc>, para. 57.

25 ERRC, Submission to UN HRC on Bulgaria, report available at: <http://www.errc.org/cms/upload/file/errc-submission-to-un-hrc-on-bulgaria-iccpr-aug-2010.pdf>.

26 ECHR, case of *Yordanova and others v Bulgaria*, decision available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110449#{"item id":\["001-110449"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110449#{).

27 ERRC, Submission to UN HRC on Bulgaria, report available at: <http://www.errc.org/cms/upload/file/errc-submission-to-un-hrc-on-bulgaria-iccpr-aug-2010.pdf>.

28 ERRC, Submission to UN HRC on Bulgaria, report available at: <http://www.errc.org/cms/upload/file/errc-submission-to-un-hrc-on-bulgaria-iccpr-aug-2010.pdf>.

that show that they are fully familiar with the PDA and the issues arising in connection with the application of anti-discrimination legislation. Civil society organisations have observed, however, that sometimes judges have insufficient knowledge of these issues, particularly when it comes to the shifting of burden of proof. Issues of racism and discrimination and the PDA are unfamiliar to many lawyers.²⁹

At the same time, significant outreach is required by bodies such as the Commission for Protection against Discrimination (CPD) to inform Roma about their rights and to encourage reporting of discrimination. A 2009 study from the European Union Agency of Fundamental Rights (FRA) showed that only 25% of Roma surveyed were aware of the anti-discrimination law in Bulgaria and only 10% of respondents were aware of an organisation that can offer support or advice to people who have been discriminated against.³⁰

When allegedly racially motivated crimes are reported, there is a general lack of effective remedies in Bulgaria and often little or no action is taken. It is especially troubling considering that racist attacks remain widespread in Bulgaria.³¹ The ERRC recorded 14 attacks against Roma and/or their property in Bulgaria between September 2011 and July 2012.³² In these cases at least three Romani individuals died following a violent incident; the attacks left at least 22 people, including a pregnant woman and two minors, with injuries; at least five Romani individuals had to be hospitalised after the attacks; in at least six cases Romani individuals were stabbed; in at least 17 cases Roma were beaten, including two minors; in one case shots were fired; in one case a bomb was used.³³

Authorities are not always objective when it comes to Roma, although the European Court of Human Rights (ECtHR or the Court) has specifically emphasised in five judgments against Bulgaria³⁴ that Bulgarian authorities have the duty to investigate any illegal acts induced by hatred, whether they are committed by members of the public or private officials.³⁵ The fact that people who commit racist offences are rarely prosecuted (or prosecuted with a minimal offence such as hooliganism) breeds a feeling of insecurity and a lack of confidence in the determination and ability of the authorities to combat such acts.³⁶ The FRA survey found that members of the Roma community have little confidence in the police, rarely report crimes against them or press charges.³⁷

29 ECRI Report on Bulgaria (fourth monitoring cycle), 24 February 2009, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/bulgaria/BGR-CbC-IV-2009-002-ENG.pdf>, 16.

30 European Union Agency for Fundamental Rights, Data in Focus Report: The Roma, 2009, available at: http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS_ROMA_EN.pdf, 7.

31 ECRI Report on Bulgaria, available at: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/bulgaria/BGR-CbC-IV-2009-002-ENG.pdf>, 32.

32 ERRC, Attacks against Roma in Bulgaria: September 2011–July 2012 available at: <http://www.errc.org/cms/upload/file/attacks-list-in-bulgaria.pdf>.

33 *Ibid.*

34 *Nachova and Others v Bulgaria*, 26/02/2004, 43577/98, *Assenov and others v Bulgaria*, 28/10/1998, 24760/94, *Hristov v Bulgaria*, 07/10/2008, 17608/02, *Sashov v Bulgaria*, 10/01/2010, 1414383/03, *Angelova and Iliev v Bulgaria*, 26/07/2007 55523/00.

35 See, e.g., *Nachova and Others v Bulgaria*, 26/02/2004, 43577/98.

36 ERRC, Submission to UN HRC on Bulgaria, report available at: <http://www.errc.org/cms/upload/file/errc-submission-to-un-hrc-on-bulgaria-iccpr-aug-2010.pdf>.

37 European Union Agency for Fundamental Rights, Data in Focus Report: The Roma, 2009, available at: http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS_ROMA_EN.pdf.