

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No.621/14

L.F.

APPLICANT

v

Hungary

RESPONDENT STATE

THIRD-PARTY INTERVENTION

I. Introduction

1. The European Roma Rights Centre (“the ERRC”) submits these written comments in accordance with the permission to intervene granted by the President of the Chamber.
2. In order to assist the Court in summarising the intervention for inclusion in the judgment, the ERRC has prepared the following summary:

The ERRC said that random inspections by public officials of Romani people’s homes were an example of “antigypsyism”, a phenomenon which also manifests itself in school segregation, police brutality, forced evictions, and other human rights violations which target Roma. The ERRC emphasised the way antigypsyism often manifests itself in Europe through stereotypes about Romani neighbourhoods, housing, and access to welfare benefits. In Hungary in particular, antigypsyism had manifested itself in recent years in programmes of forced evictions of Roma from cities, notably in Miskolc – Hungary’s fourth-largest city which passed a municipal ordinance that was designed to expel Roma living in a particular neighbourhood and that was ruled unconstitutional. Antigypsyism had also manifested itself in Hungary’s stigmatising public work scheme, in which large numbers of Romani welfare recipients are required to engage in menial “work” which does not help them enter the labour market. The ERRC described the “Érpatak Model” as a classic manifestation of antigypsyism and urged the Court to use the term “antigypsyism” to describe the particular forms of discrimination Roma face. The ERRC then defined and urged

the Court to apply the notions of “harassment” (as a form of discrimination) and “institutional racism”. When dealing with cases arising under Articles 14 and 8 where the notions of harassment and institutional racism were applicable, the ERRC encouraged the Court to take a holistic approach, understanding how complex forms of institutional discrimination (for example, spanning local authorities and police, and reinforcing each other) could result in discrimination cases before the Court. In such cases, the ERRC also argued that the burden of proof should shift to the Respondent Government to show that there was no discrimination.

II. The scale and nature of antigypsyism in Europe, and in Hungary in particular, particularly in relation to housing and social assistance

3. Roma have a word to describe what is happening when they are the targets of random “inspections” by authorities to see what conditions they are living in: antigypsyism. It is a word that also describes many other experiences which would be extraordinary in the lives of most Europeans, but are all too common among Roma: police brutality; forced eviction; refusal to provide healthcare; housing and school segregation; and many other human rights violations. Roma are targeted and profiled by public officials across Europe and subjected to inferior treatment based on the stereotypes that characterise antigypsyism.
4. According to the European Commission Against Racism and Intolerance (“ECRI”), “anti-Gypsyism” (which they spell with a hyphen) is *“a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination”*.¹ The Alliance Against Antigypsyism, of which the ERRC is a member and which spells the term without a hyphen, defines the concept as follows:

Antigypsyism is a historically constructed, persistent complex of customary racism against social groups identified under the stigma ‘gypsy’ or other related terms, and incorporates:

¹ See General Policy Recommendation No.13, CRI(2011)37.

1. a homogenizing and essentializing perception and description of these groups;
2. the attribution of specific characteristics to them;
3. discriminating social structures and violent practices that emerge against that background, which have a degrading and ostracizing effect and which reproduce structural disadvantages.²

5. The ERRC has already submitted third-party interventions to the Court about how antigypsyism manifests itself in police misconduct and school segregation.³ Here, we focus on housing and social assistance.
6. In order to understand antigypsyism's manifestation in these spheres, it is necessary to consider some of the common tropes of racism against Roma. Roma are stereotypically viewed as a threat to public order and their neighbourhoods are stereotypically seen as dangerous places. Although Roma in Hungary and in many other European countries usually live a settled (as opposed to nomadic) life, forced evictions push Roma to enact a stereotype common to antigypsyism: that Roma are nomadic and that this is somehow dangerous. A crisis of forced evictions of Roma, closely connected to political hate speech, is currently playing itself out in Bulgaria,⁴ and a State practice of forced evictions has been underway in France for many years.⁵ In Hungary, there have been recent, blatant attempts to clear Roma out of certain towns and cities. The most notorious example has been in Miskolc, the country's fourth-largest city; Hungary's

² The Alliance's paper, published in June 2016 and updated in June 2017, can be downloaded at www.antigypsyism.eu.

³ See, for example, our submission to the Court in *Kósa v Hungary* (pending, application number 53461/15) on school segregation and our submission to the Court in *M.F. v Hungary* (2017) concerning police brutality.

⁴ The problem is well described in a letter the Council of Europe Commissioner for Human Rights sent to the Prime Minister of Bulgaria: CommHR/CL/sf 004-2016 (available at [https://rm.coe.int/ref/CommDH\(2016\)9](https://rm.coe.int/ref/CommDH(2016)9)). See also *Aydarov and others v Bulgaria* (pending, application number 33586/15) and the third-party intervention we submitted in that case.

⁵ The ERRC and the Ligue des droits de l'homme conduct an annual census of forced evictions in France. The most recent census report for 2016 can be downloaded in English at <http://www.errc.org/cms/upload/file/roma-eviction-census-france-2016.pdf>. Information about what has been happening this year is available at <http://www.errc.org/article/thousands-made-homeless-in-france-will-government-cease-roma-evictions-during-winter-months/4600>.

highest court struck down municipal legislation that would have allowed the city to expel Roma from the so-called “numbered streets”,⁶ and litigation is pending concerning the continuous harassment Roma have suffered as a result of discriminatory conduct by the local authorities.⁷ For many Roma in Macedonia,⁸ Russia,⁹ Serbia,¹⁰ and elsewhere, forced evictions are one of the most physical and violent examples of the discrimination they experience every day. For Romani people, forced evictions are closely linked to the right-wing marches and hate speech designed to drive Roma out of their homes and neighbourhoods. See, e.g., *R.B v Hungary* (2016).

7. Antigypsyism also manifests itself in stereotypes about Roma and social benefits. The Court is already seized of at least one case concerning discrimination against Roma by benefits officers.¹¹ It is well understood that national commitment to welfare systems is highly correlated with ethnic homogeneity. Racial stereotypes against minority groups in countries with significant minority populations lead to less cohesive welfare systems, especially where those minority groups are disproportionately poor; for politicians, stirring up racial hatred is an effective way to reduce support for welfare programmes.¹² This manifests itself in Hungary, for example, in the country’s widely criticised “workfare”

⁶ The situation has been described in a 2016 report published by the Organization for Security and Cooperation in Europe, available at <http://www.osce.org/odihr/262026?download=true>. Information in Hungarian is also available at http://index.hu/belfold/2015/05/14/miskolc_kuria_rendelet_kikoltozes/ and <http://dev.neki.hu/miskolci-szamoszott-utcak-mar-minden-letezo-forumon-elmarasztaltak-a-magyar-hatosagok-miskolc-onkormanyzata/>.

⁷ Information about the current litigation is available in Hungarian at <https://tasz.hu/romaprogram/antidiszkriminacios-indul-miskolc-vezetese-ellen>.

⁸ See, e.g., *Bekir and others v Macedonia* (pending, application number 46889/16).

⁹ See, e.g., *Bagdonavicius and others v Russia* (2016).

¹⁰ The situation is set out in a letter that the Council of Europe Commissioner for Human Rights sent to the Deputy Prime Minister of Serbia: CommHR/EB/sf 008-2016, available at [https://rm.coe.int/ref/CommDH\(2016\)14](https://rm.coe.int/ref/CommDH(2016)14).

¹¹ *Negrea and others v Romania* (pending, application number 53183/07).

¹² Alberto Alesina and Edward L. Glaeser, *FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE*, Oxford University Press (2004): “*Racial divisions and racial preferences appear to deter redistribution, especially when poverty is concentrated in minority groups... Race hatred is often used strategically by politicians whose main objective is to avoid redistributive policies*” (page 10).

model, where many social assistance recipients – who, due to centuries of exclusion and discrimination, are disproportionately Roma – are required to engage in menial, economically insignificant “work” in order to receive subsistence levels of support.¹³ If you were to spend time in many Hungarian cities or towns, you would at some point see Romani people in brightly-coloured vests engaged in menial labour. They are doing this to avoid losing benefits; the situation reinforces deeply held stereotypes. Those performing this labour receive something like two hundred fifty euros before tax. This compulsory “work” prevents Roma from finding work in the labour market or receiving necessary training to find such work. Roma in Hungary have been and are still widely segregated in schools that given them a substandard education.

8. The “Érpatak Model” is the consequence of a worldview warped by antigypsyism. It is a Hungarian variant of the antigypsyism that often takes the form of forced evictions and refused benefits elsewhere in Europe. The “Érpatak Model” explicitly targets the “destructors” of society (*rombolók*, in Hungarian), playing on the racial stereotypes about Roma discussed above.
9. The ERRC urges the Court to use the word “antigypsyism” to describe the specific forms of discrimination that Roma face.

III. The applicability of the notions of “institutional racism” and “harassment” to the examination of claims formulated under Article 14 of the Convention taken with Article 8

¹³ A report on the system in Hungarian by the former Parliamentary Commissioner for National and Ethnic Minorities can be found at <http://www.kisebbségiombudsman.hu/data/files/223419918.pdf>. A report prepared for the European Commission in 2015 noted that the public works programme “*has become the more important employment scheme for vulnerable people, including the Roma... Yet it does not significantly improve employment prospects of participants: scarcely more than 10% of participants find a job on the regular labour market after taking part in the programme*”. The report (“Public works in Hungary: an efficient active labour market tool?”) can be downloaded at <http://ec.europa.eu/social/keyDocuments.jsp?advSearchKey=ESPNFlash&mode=advancedSubmit&langId=en&policyArea=&type=0&country=27&year=0>.

10. The Court has not had the opportunity to apply all aspects of anti-discrimination law that are common to the legal systems and practices of the Member States of the Council of Europe. *D.H. and others v Czech Republic* (Grand Chamber, 2007) was the first time, for example, that the Court had the opportunity clearly to apply the notion of indirect discrimination and to rely on statistical evidence to prove it; these concepts were already firmly established in European Union anti-discrimination law and anti-discrimination law across Europe. The ERRC submits that there are two more crucial concepts of anti-discrimination law and practice which will assist the Court in deciding cases that arise under Article 14 taken with Article 8: harassment as a form of race discrimination; and institutional racism.

a. Harassment as a form of race discrimination

11. As a form of discrimination, harassment is defined as follows in EU law: “*Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*” (EU Directive 2000/43, Article 2(3)). The Directive covers discrimination (including harassment) in relation, inter alia, to social protection, social advantages, and access to services which are available to the public, including housing (EU Directive 2000/43, Article 3 (e), (f), (h) respectively).

12. Harassment is a key concept for understanding discrimination under Article 14 of the Convention taken with Article 8. Harassment is different from direct discrimination in that the former obviates comparator analysis; when determining if someone has been racially harassed, it is not necessary to show that another similarly situated person has been or would be treated more favourably. It is also not necessary to show

discriminatory intent. The core of the legal question is whether the (unwanted) conduct was “related to racial or ethnic origin” and to show its purpose or its effect.

13. This question is closely connected to recent developments in the Court’s case law on stereotyping. As Judge Motoc pointed out in her Concurring Opinion in *Carvalho Pinto de Sousa Morais v Portugal* (2017), in cases involving stereotypes, the first phase is to name the stereotype (see above on common tropes of antigypsyism in relation to Roma, housing, and welfare), and the second is to contest them: “*what is methodologically important in the contesting phase is that we are not using a comparator*” (§18). This is very close to harassment analysis under anti-discrimination law. Where the facts of the case involve unwanted conduct against members of an ethnic minority group, the Court should seek to determine, first, whether that conduct is “*related to racial or ethnic origin*”. One way of doing this is to undertake the stereotype analysis that Judge Motoc set out. The Court must also determine, under the harassment analysis, whether the conduct has had “*the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*”. When Roma experience antigypsyism, this of course creates exactly that sort of effect, regardless of whether that was its purpose. See, e.g., *Moldovan and others (no.2) v Romania* (2005), § 111 (“*discrimination based on race can of itself amount to degrading treatment*”).

b. Institutional racism

14. As the Court will note, the definition of antigypsyism given by ECRI (see above, § 4) includes “institutional racism”. The term institutional racism was defined, notably, in the United Kingdom in the context of the murder of Stephen Lawrence: “*the collective failure of an organisation to provide an appropriate and professional service to people because of their colour,*

culture, or ethnic origin".¹⁴ In the ERRC's view, institutional racism does not necessarily imply that individual members of affected institutions espouse a racist ideology. Institutional racism can be the unconscious by-product of a society where antigypsyism is allowed to flourish.

15. Institutional racism may manifest in directly or indirectly discriminatory policy, in actions, or in failures to provide protection from discrimination.
16. The "Érpatak Model", whose proponents barely (if at all) hide their racist views, is an unusually overt form of institutional racism. Usually, as the definition given in the UK suggests, there is no evidence of racist motivation, and indeed all or most of the people in the institution concerned may not consciously hold any racist views. For example, the Court's consistent findings of violations of Article 14 taken with the procedural limb of Article 3 generally amount to a finding that there has been a collective failure to provide an appropriate service to the group targeted by a hate incident.
17. The Court has already conducted important exercises in exposing institutional racism or sexism in police forces. For example, in *Opuz v Turkey* (2009), the Court concluded "*that domestic violence is tolerated by the authorities*" (§ 196), also noting that "*the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence*" (§ 197). In other words, the Court found institutional sexism in the Turkish institutions responsible for protecting women from gender-based violence.

c. Consequences of the recognition of harassment and institutional racism for the consideration of complaints under Article 14 taken with Article 8

18. The ERRC urges the Court to name instances of racial harassment as such, using the term "harassment" (as defined, for example, in EU Directive 2000/43). The ERRC also urges the Court to describe situations

¹⁴ The Stephen Lawrence Inquiry, Report of an inquiry by Sir William MacPherson of Cluny (The MacPherson Report): Chapter 6. February 1999. Available at <https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry>.

that meet the definition of institutional racism using the term “institutional racism” or “institutional discrimination”. These concepts, like the concept of “indirect discrimination”, are key aspects of anti-discrimination law and practice in Europe and are necessary to describe the situations Roma face in Europe and which, because of institutional failings, come before the Court.

19. These concepts also have specific consequences for the Court’s analysis. In cases of violent hate crimes committed by police, the Court has a tendency to separate the procedural and substantive limbs of Article 3. See, e.g., *M.F. v Hungary* (2017). Article 8, by contrast, requires the Court to consider the situation more holistically. See, *mutatis mutandis*, *Sylvester v Austria* (2003), § 55. When dealing with facts that raise issues of harassment and institutional discrimination entirely involving public authorities, the ERRC urges the Court not to split the case into substantive and procedural aspects. This would miss vital institutional links. For example, the “Érpatak Model” can only exist because of institutional discrimination operating in a complex way at multiple levels: the local authorities may be open about their racism, taking comfort in the fact that police and national legislation have not historically provided an adequate level of protection to Romani victims of hate incidents (see *R.B. v Hungary* (2016)), or because national politicians engage in more subtle forms of hate speech – commonly known as “dog-whistle politics”.
20. These complicated dynamics cannot be caught by a simple finding of a failure to investigate. When public authorities, for example, are implementing an openly racist policy interfering with Article 8 rights and their actions are not investigated by police, the appropriate finding by the Court is a violation of Article 14 taken with Article 8, noting that the victims suffered racial harassment stemming from multiple forms of institutional racism that made recourse to the Court necessary.
21. The ERRC also submits that in cases raising issues of harassment and institutional racism engaging Article 14 taken with Article 8, the burden

of proof shifts to the Respondent Government once the victim has shown that there was unwanted conduct that had the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. It is enough to show that there is some connection to race or ethnicity. In keeping with the Court's case law on Article 14 taken with Article 8 (*E.B. v France* (Grand Chamber, 2008), § 74), this may take the form of applying a criterion so arbitrary (e.g. random checks for housing code violations) and so linked to racially stereotypical ideas (e.g. about Roma and housing) as to be a pretext.

The European Roma Rights Centre
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