IN THE EUROPEAN COURT OF HUMAN RIGHTS

NEGREA AND OTHERS

Applicants

v

ROMANIA

Respondent State

Application Number 53183/07

Applicants' Observations on the Government's Observations

1. The applicants submit the following observations on the observations, dated 10 October 2014, submitted by the Romanian Government ('the Government'). For ease of reference, the applicants follow the structure of the Government's observations. As the Government have not numbered the paragraphs of their observations, these observations refer to sections or page numbers of the Government's observations where needed.

I. Preliminary Remarks

2. The applicants have indicated their names on the application form, including the relevant changes resulting from their marriages.

3. Throughout the seven years that this case has been pending before the Court, both the applicants' representative ('the ERRC') and the applicants' domestic lawyer, Livia Labo, have maintained regular contact with the applicants. The applicants wish to pursue this application which offers their only hope to obtain redress for the violation of their rights. See Annexes A-F (statements to this effect, prepared with the assistance of the ERRC's local human rights monitor). The applicants note that the Government do not question the existence or validity of the form of authority submitted to the Court. See *Diallo v Czech Republic* (2011), § 45.

4. The Government appear to be suggesting that there is a requirement under the Convention for applicants' representatives to deposit "recent correspondence" with the Court in order to avoid a case being struck out under Article 37 § 1(a) of the Convention. No such requirement emerges from the Court's case law. The applicants also note that they have limited literacy skills and that their communication with the ERRC has been oral (in person and by telephone).

II. The Facts

5. The applicants have no response to the Government's comments as to the facts.

III. The Law

III.1 Relevant Domestic Law

III.2 The alleged violation of Article 14 taken with Article 8 and Article 1 of Protocol 1

6. The applicants do not contest the Government's summary of the Court's case law at the bottom of page 4 and the top of page 5 of their observations. However, the applicants note that the Government have not touched on the issue of indirect discrimination. This is a significant omission, given the applicants' complaint that they were victims of indirect discrimination: the criteria on the basis of which their children were refused social benefits disproportionately impact Roma and those criteria could not be justified, inter alia because they were unlawful under domestic law. The applicants recall the Court's summary of the notion of indirect discrimination: "*a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. Such a situation may amount to 'indirect discrimination', which does not necessarily require a discriminatory intent*". *Horváth and Kiss v Hungary* (2013), § 105. The principle is also set out in European Union Directive 2000/43, Article 2: "*indirect discrimination shall be taken to occur 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*". When alleging indirect discrimination, an applicant is not required to demonstrate discriminatory intent. *D.H. v Czech Republic* (Grand Chamber, 2007), § 184. Furthermore, while statistical evidence can be used to demonstrate that a facially neutral practice has a disproportionate impact on a particular group (as in D.H.), other forms of evidence can also be used. *D.H.* § 188; *Oršuš v Croatia* (Grand Chamber, 2010), § 153.

7. The applicants note that the Government do not contest the applicability of Article 8. The applicability of Article 8 in these circumstances is in any event clear under the Court's case law. See, e.g., *Dhahbi v Italy* (2014), §§ 39-41. On the other hand, the Government claim that Article 1 of Protocol 1 is not applicable. Their theory is that because the relevant benefits are awarded, as a matter of domestic law, in the name of the child, the application is inadmissible *ratione personae*. This formalistic approach is at odds with the Court's case law, according to which parents can claim to be victims of violations of the Convention resulting from failure to ensure payments of benefit awarded in respect of their children. *Trufanova v Russia* (2008). The applicant also recalls that "*the concept of 'possessions' in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: the issue that needs to be examined*

is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision". *Öneryıldız v Turkey* (2002), § 124. The Government rely on the formal classification of the benefits in domestic law, ignoring the clear fact that as the parents of small children, the applicants would have received the benefits directly and would have been entrusted to spend them in the best interests of their children. Furthermore, the notion of "property" in Article 1 of Protocol 1 has never been limited in the Court's case law to possessions that an applicant enjoys in her/his own name, but also extends to situations where an action or omission by the State may lead to a loss of income or money. The question is whether "*the legal position in question… had an economic value*" to the applicants. *Paeffgen GMBH v Germany* (decision, 2007), § 1. The benefits at issue, even if awarded in the name of the children, clearly had an economic value to the applicants: withholding it exacerbated the applicants' poverty by requiring them to use more of their scarce resources to look after their children. In any case, it was the applicants themselves who suffered the discriminatory treatment at the hands of the Frata municipal authorities, when acting in their own name and on behalf of their children.

8. The Government also claim that Paula Victoria Negrea and Didica Moldovan received supplemental benefit for families with more than two children. The applicants contest this assertion, which has not been supported by any evidence.

9. The Government also assert that there was no entitlement to the new-born benefit for the two applicants who gave birth prior to 1 January 2002 (Julieta Lenuţa Lăcătuş gave birth on 30 December 2001 and Dorina Ramona Rostaş on 5 September 2001). However, as a matter of domestic law (government decision no.1099/2001, article 44 § 22), the term "new born" refers to any child up to six months of age. As a result, Article 1 of Protocol 1 is also applicable to this benefit in respect of those two applicants.

10. As to Dorina Ramona Rostaş's alleged statement that she never claimed the benefit, Ms Rostaş denies ever having made such a declaration. The declaration itself is barely intelligible and Ms Rostaş notes that she is unable to read. In Ms Rostas's 2004 statement to the prosecutor, made in the presence of her lawyer, she affirmed that she did indeed request the benefit.

11. In relation to the Government's observations on the discrimination the applicants allege they experienced, there is some confusion in the Government's argument. The Government acknowledge that the claim is one of indirect discrimination, that is, a claim that "*the effect of a measure or practice is discriminatory*" (see above, § 6). Yet the Government insist, in the first full paragraph on page 7 of their observations, that it is incumbent on the applicants to demonstrate that the impugned treatment was different from that which non-Roma mothers in Frata experienced. As the applicants acknowledge, and the Government indicate at page 10 of their observations (fourth paragraph), every woman who gave birth to a child in the period concerned was apparently exposed to the same practice. What the applicants need to show in order to prove discrimination in this matter was the application of a facially neutral practice

which had a disproportionate impact on Roma and which could not be justified. The applicants did just that in their application: the applicants pointed out that the conduct they suffered was not only illegal (which the domestic courts found and the Government admit) but also had a disproportionate impact on Roma. There are two (illegal) practices at issue: the first was refusing benefits to unmarried parents; and the second was refusing to register incomplete applications for benefit. The applicants established in their application that these practices had a disproportionate impact on Roma: Roma were more likely to live in common-law (i.e. unofficial) marriages and less likely to be in a position to make a complete application for benefit without assistance, and for Roma, child benefit was more likely to be a significant part of their income. The Government claim, at page 11 of their observations (seventh paragraph) that the failure to grant benefits to certain applicants was not due to their belonging to a particular ethnic group, but because of the failure to respect certain procedural provisions of the law. The latter, however, constitutes precisely the facially neutral practice that the applicants claim had a disproportionate effect on Roma. See *Horváth and Kiss v Hungary* (2013), § 105. That practice, of course, could not be justified, because, as the domestic courts established, it was illegal.

12. The Government focus extensively on the fact that the applicants could have taken proceedings in the administrative courts in order to challenge the administrator's illegal conduct. This misplaced emphasis shows that the Government do not grasp the gravamen of the applicants' complaint: discrimination. An administrative claim under Law 29/1990 of the kind described at pages 8 and 9 of the Government's observations could only deal with the failure of the municipal secretary to conduct her tasks in accordance with the procedures prescribed by law. The Government have failed to show that under Law 29/1990, which was in force until 5 January 2005, the domestic courts could have examined the applicants' discrimination claim, above and beyond this far more limited legality review. The Court, in focusing its questions to the parties on the discrimination aspect of the case, has currently identified that the issue at the heart of the applicants' complaint is discrimination. This is why the applicants turned to the CNCD with a discrimination claim. In any event, the CNCD and the domestic courts found that the conduct was illegal; there was no separate need to go to the administrative courts to secure such a finding.

13. Administrative proceedings would have been particularly inappropriate in this case given the nature of the treatment the applicants were contesting. Law 29/1990 on administrative proceedings would have required the applicants to make a written request to which there was either a negative answer or no answer. But the applicants are mostly illiterate and therefore unable to make such a request. Their particular vulnerability in this respect required special attention from the authorities. See, mutatis mutandis, *Horváth and Kiss v Hungary* (2013), § 102. Instead of receiving such protection, the applicants were victims of a particularly insidious form of discrimination: *discrimination au guichet*, or revolving-door (as opposed to slammed-door) discrimination, where people are given facially neutral (albeit in this case illegal) reasons for being refused and no means to challenge the refusal. As the Cluj Court of Appeal explicitly recognised in its judgment of 8 July 2005, the practice of the Frata municipality was, illegally, to

refuse to register an application for benefits until the secretary deemed such an application to be complete. This deprived the applicants of any administrative decision which they could challenge before the courts in accordance with the provisions of law 29/1990. Formally, all the applicants were finally refused the new-born benefit as out of time, as their children were older than 6 months at the time the secretary was satisfied with their paperwork. The applicants were never issued with a decision finding that they had submitted inappropriate or insufficient documents, a decision which they could have challenged under law 29/1990. Again, the Government's argument that the claimants should have made an administrative claim misses the point: the applicants are complaining about discriminatory conduct that deprived them of the means to challenge the underlying refusal in the administrative courts.

14. The Government also claim at page 10 of their observations (penultimate paragraph) that S.L., despite acting in a way which everyone acknowledges was illegal, had been at her job long enough to know how to do it without discrimination against members of the community. The applicants invite the Court to make the opposite, more logical inference: given that S.L. would have been well aware that she was acting contrary to the law, it seems more likely that she was using her extensive knowledge of the procedures to exclude the group most affected by her illegal actions – Roma – without giving them a means of challenging her conduct. As set out in the application, Roma, as a result of their particular history and disadvantaged place in Romanian society, were more likely to be unmarried, illiterate, and dependent on benefits as a major source of income. S.L. would have known this, and would have known very well the impact of her actions. The Court has found it appropriate to question, under Article 14, a seemingly neutral criterion which appears suspicious because of the particular context. *E.B. v France* (Grand Chamber, 2008), § 73 (where the application of a criterion of showing a paternal and maternal referent in the household, while "*not necessarily… a problem in itself*", was deemed suspect when applied to single people seeking to adopt on their own and "*might therefore have led to an arbitrary refusal and have served as a pretext for rejecting the applicant's application on grounds of her homosexuality*"). The applicant urges the Court to undertake the same analysis here. Illegally requiring parents claiming benefit to show that they are married in a context where Roma are more likely not to be (officially) married may lead to an arbitrary refusal and serve as a pretext for rejecting applications from Roma families. Likewise, refusing (again illegally) to record incomplete applications may lead to arbitrary refusals and is suspect in this context: Roma were particularly unlikely to be able to produce all of the documents needed without assistance and, because of a lower level of educational attainment, were particularly disadvantaged when it came to asserting their rights. As in *E.B.*, the criteria, although facially neutral, match up so closely to the reality of life in one minority community as to raise an inference that they are discriminatory. Unlike in *E.B.*, the criteria S.L. was applying were also clearly contrary to domestic law.

15. In these circumstances, as in *E.B. v France* (Grand Chamber 2008), § 74, the burden of proof is on the authorities to show that these practices were not discriminatory. The Government have produced no information to discharge their burden of proof.

III.3 On the alleged violation of Article 6 § 1

1. The period to be taken into consideration

16. The Government state at page 11 of their observations that the period to be taken into consideration is seven years and nine months. The applicants argue that the period is longer: although the criminal proceedings formally ended on 14 April 2011, the applicants were not informed of the prosecutor's decision to this effect until March 2012 (and the Government have failed to show that the applicants received any notice prior to that month). See, mutatis mutandis, Worm v Austria (decision, 1996).

2. The particular situation of Dorina-Ramona Rostaş

17. For the reasons set out above (see § 10), the applicants reject the Government's suggestion, at the top of page 12 of their observations, that the period between 21 October 2003 and 10 March 2004 should not be taken into account in respect of this applicant. Ms Rostaş denies declaring that she did not wish to pursue her complaint and the Government have not produced convincing evidence that she made such a declaration.

3. Assessment of the length of the proceedings

18. The applicants reject the Government's suggestion that the applicants bear responsibility for the length of proceedings, and rely on their extensive explanation in the application of the course of these proceedings, which demonstrate the authorities' responsibility for their extraordinary length. The applicants reiterate that their criminal complaint did not entail any particular complexity, specifically in terms of identifying the perpetrators or administering evidence, which was limited to testimony and written documents. In any event, the proceedings mostly took place before the prosecutor and only before two degrees of jurisdiction. In the light of these circumstances, the applicants reiterate their complaint that the delay was unreasonable.

19. The Government suggest that the applicants should have made complaints to the police or prosecutor's office about the delay in the proceedings but, as the Government are all too aware, there were no effective remedies available to the applicants at the time to complain about the undue length of proceedings. *Vlad and others v Romania* (2013), §§ 113-125. The fact that the applicants did not pursue complaints which are ineffective under the Convention can hardly be held against them. The applicants therefore reiterate their claim that they were victims of a violation of the Article 6 § 1 due to the length of the proceedings.

III.4. On the alleged violation of Article 13 of the Convention

III.4.1 On the alleged violation of Article 13 of the Convention taken with Article 14, read with Article 8 and Article 1 of Protocol 1

20. The applicants contest that either of the two routes the Government propose – a complaint to the CNCD following by judicial proceedings, or a civil claim for discrimination – were effective.

The applicants recall in this respect that they are complaining to the Court that they were victims of indirect discrimination.

The first set of remedies remedy (claim to the CNCD and subsequent judicial proceedings)

21. The applicants maintain that what the Government refer to as the "first set of remedies" was ineffective for two reasons.
    a. First, the CNCD and the judicial courts ignored the claim of indirect discrimination, and so were unable to address the core of the applicants' complaint. See, mutatis mutandis, *Metropolitan Church of Bessarabia v Moldova* (2001), § 139 ("*in doing so the Supreme Court of Justice did not reply to the applicants' main complaints*").
    b. Second, the conduct of the CNCD was so poor as to meet the basic requirements of Article 13, and the subsequent judicial proceedings did not remedy those defects.

22. Domestic law did not explicitly incorporate the notions of indirect discrimination and the shift of the burden of proof in discrimination cases until OG 137/2000 was amended on 8 February 2007 to ensure the correct transposition of EU Directive 2000/43. While in theory it might have been possible for the CNCD and the domestic courts to apply the notions of indirect discrimination and the shift of the burden proof in order to resolve the applicants' complaint (the same way the Court itself has developed these notions in its case law when interpreting Article 14), they did not. As a result, the CNCD and domestic courts required the applicants to prove discriminatory intent. Under the Court's case law, and generally accepted principles of anti-discrimination law (see, e.g., EU Directive 2000/48), once the applicants had demonstrated the discriminatory impact of S.L.'s actions, the CNCD and courts should have shifted the burden of proof onto the person accused of discrimination to demonstrate either that there was no such impact or that her actions could be justified. As it was, the burden on the applicants was simply too high, depriving them of an effective remedy. See, mutatis mutandis, *Danilenkov v Russia* (2009), § 132-136; *Horváth and Kiss v Hungary* (2013), § 108 ("*Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (see, mutatis mutandis, Nachova and Others, cited above, § 147), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof*"); *Smith and Grady v United Kingdom* (1999), § 138 ("*even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention*"). The Government assert, in the third full paragraph on page 15 of their observations, that it falls on the national authorities to interpret national legislation. However, if that interpretation is so strict as to prevent the applicants from making their case, as it was

here, it will deprive the applicants an effective remedy, contrary to Article 13, read here with Article 14, taken in conjunction with Articles 8 and Article 1 of Protocol 1.

23. The applicants have already set out in their application the serious flaws in the CNCD's procedure, foremost among them (as the Government admit in the third full paragraph on page 14 of their observations) that the CNCD did not hear the applicants or the witnesses they proposed. The applicants acknowledge that a remedy under Article 13 does not necessarily have to be judicial or meet the other requirements of Article 6; "*but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective*". *Kudła v Poland* (Grand Chamber, 2000), § 157. Given the considerable difficulties that victims of discrimination have in proving that discrimination occurred (see, e.g., *D.H. v Czech Republic* (Grand Chamber, 2007), § 189) failing to provide the applicants with an adversarial procedure deprived the applicants of an effective remedy. See, mutatis mutandis, *Al-Nashif v Bulgaria* (2002), § 137; *Bank AD v Bulgaria* (2005), § 134 ("*the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights be, in certain cases, subject to some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence*"). The failing results from the CNCD's lack of any particular procedural rules at the time; such rules were only introduced after the entry into force of law 324/2006.

24. The question remains whether the subsequent proceedings before the national courts were sufficient to remedy the CNCD's failings. See, mutatis mutandis, *Leander v Sweden* (1987), § 84. They were not. As set out in the application, the applicants asked the domestic courts to clarify the apportionment of the burden of proof in the case; the Cluj Court of Appeal rejected the discrimination claim on the basis that it "*could not find with certainty and unequivocally that the applicants were subject to discrimination*", and the High Court of Cassation remained silent when faced with the applicant's request to clarify the burden of proof. See, mutatis mutandis, *Asalya v Turkey* (2014), §117 ("*The domestic court's absolute silence on these matters raises the suspicion that it took the authorities' assertions at face value, rather than subjecting them to a rigorous scrutiny*").

The second set of remedies (a civil claim for discrimination)

25. The Government claim that the applicants were not required to go to the CNCD but could instead make a claim in the civil courts. However, domestic law was not amended to allow those claiming to be victims of discrimination to go directly to court without complaining first to the CNCD until 22 July 2006, when law 324/2006 entered into force. The applicants could not benefit from this provision *ratione temporis*, and the Government have not provided an example of a case predating the entry into force of law 324/2006 where victims of discrimination were able to take their case directly to court. Indeed, one of the reasons cited by the Government for introducing law 324/2006 was the fact that some courts had already ruled it was compulsory to go to the CNCD before bringing a discrimination claim to court. See Annex G

(explanatory memorandum accompanying law 324/2006). In any case, the Government fail to explain why the applicants should have chosen to bypass the CNCD, assuming they had the option to do so.

26. Lhe lack of any practice showing that the civil courts understood and applied the concepts of indirect discrimination and the shift of the burden of proof in discrimination cases prior to 8 February 2007 also deprives such a remedy of its effectiveness (see above, § 22). Even the case which the Government cite at the third full paragraph on page 16 of their observations shows how the domestic courts, seven years after EU anti-discrimination legislation was transposed in Romania, were still struggling fully to articulate the notion of indirect discrimination.

III.4.2 The alleged violation of Article 13 of the Convention taken with Article 6 § 1

1. A complaint about the length of the criminal proceedings

27. The Government claim at pages 17-19 of their observations that the applicants had effective remedies to secure the acceleration of the criminal proceedings. However, as the Government are aware, the criminal proceedings ended in April 2011 and the applicants were only informed of this in March 2012. As the Court has already established, there was no effective remedy before that time in domestic law for complaints about undue length of proceedings in criminal matters. See, e.g., *Vlad and others v Romania* (2013) §§ 113-125. The Government argue in particular that the prosecutor had the power, if seized of a complaint, to take steps to speed up proceedings. However, the remedy they describe is purely discretionary. As a result, it cannot be considered effective. See, mutatis mutandis, *Buckley v United Kingdom* (Commission, 1994).

2. A claim against the State

28. The Government invite the Court, at pages 19-20 of their observations, to reverse its findings in *Vlad and others v Romania* (2013), §§ 114-119. However, the Government offer no convincing reason to do so. The eight domestic judgments at annex no.7 to the Government's observations, in particular, do not offer a sufficient basis to reverse the finding in *Vlad and others* that the alleged remedy was not widely and predictably available. As the Government admit in the last full paragraph on page 19 of their observations, the only possible remedy a civil case of this kind can provide is damages. According to the Court's case law, such a remedy is not the most effective solution to the kind of problem the applicants experienced. *Sürmeli v Germany* (2006), § 100.

3. The choice between civil and criminal claims

29. At pages 20-21 of their observations, the Government seem to argue that bringing separate civil proceedings against those who had discriminated against them constituted an effective remedy against the delay in the criminal proceedings. Leaving aside the fact, explained above, that the applicants did not have a civil remedy available to them for discrimination (see above, § 25), the applicants contest the logic of this argument. Having made a criminal complaint, the applicants

had a right under Article 6 § 1 to see the proceedings under that complaint conducted in a timely fashion. The violation is the excess length of the proceedings in and of themselves. Even if the applicants had begun civil proceedings against those who committed acts of discrimination against them, such proceedings would not have provided a remedy for the delay in the criminal proceedings. The Government's implication that the applicants are to blame for the undue length of proceedings by choosing a criminal complaint over a civil complaint is disingenuous, and rests on the cynical assumption that the applicants should have known the criminal proceedings would be ineffective.

List of Annexes

A. Declaration of applicant Paula Victoria NEGREA
B. Declaration of applicant Didica MOLDOVAN
C. Declaration of applicant Adriana-Paula LAKATOS
D. Declaration of applicant Rita-Cosmina CIURAR
E. Declaration of applicant Julieta-Lenuţa LĂCĂTUŞ
F. Declaration of applicant Dorina-Ramona ROSTAŞ
G. Explanatory memorandum accompanying law 324/2006