

Hysenaj

APPLICANT

v

Albania

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 urged the Court to name antigypsyism as underlying racist violence against and harassment of Roma in Europe. The Court had to use that word to describe the significance, under the Convention, of acts and omissions of State bodies that might appear isolated or accidental, but, in reality, formed part of and perpetuated a pattern of racial exclusion. The ERRC relied on two definitions of antigypsyism, one provided by the European Commission against Racism and Intolerance and the other more recently formulated by the Alliance Against Antigypsyism. The ERRC then provided a non-exhaustive survey of evidence that Council of Europe Member States were allowing antigypsyism to flourish in the years preceding the events at issue in the present case. The survey covered a wide range of unresolved (and usually improperly investigated) hate crimes across Europe. Moving to the issue of access to justice, the ERRC noted that despite the significant number of improperly investigated hate crimes against Roma in Europe, few cases had made it to the Court in recent years. The ERRC saw this as a symptom of the effects antigypsyism, and particular of institutional racism against Roma within police, prosecutors’ offices, and domestic courts. The ERRC surveyed the evidence showing that Roma and other minorities in Europe had little faith in these institutions and that these institutions were aware of the problem. The ERRC relied in particular on a working paper published by the European Centre for Minority Issues, an NGO, providing the results of a survey among Roma in Albania about their awareness of the justice system and their experiences accessing it. The paper pointed to an institutional failure on the part of the Albanian justice system to provide an appropriate service to Roma, which, in the ERRC’s view, met the definition of institutional racism. The ERRC concluded by urging the Court not to limit itself to examining merely whether an omission had prevented Roma from pursuing justice in a hate-crime case. Such a limited approach ran the risk of implicitly treating the omission as an isolated incident or an accident, when in fact such omissions were part of a broader pattern of racial exclusion; Roma turned to the Court to expose the full extent of that pattern in cases such as these. Instead, the burden was on the Respondent Government to explain precisely how such an omission had happened. In the absence of a satisfactory explanation that the omission was not related to an applicant’s ethnicity, there should be a finding of a violation of Article 14 taken with Article 6 § 1 on the basis that the authorities had deprived Roma of access to justice on grounds of race or ethnicity.

II. Antigypsyism underlies racist violence against and harassment of Roma in Europe

3. When Roma are beaten in the streets, see their homes set on fire, are forcibly evicted, or suffer other less violent, but all-too-common indignities, they feel a link to a broader pattern of historical and ongoing exclusion that can be difficult for many to understand. The Court has already found its own language in which to describe this pattern: “as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority. They therefore require special protection”. See, e.g., *Horváth and Kiss v Hungary* (2013), § 102. Many Roma sum up the pattern in a single word: antigypsyism.¹ The ERRC respectfully submits that the Court must use that word in its case law to describe the significance, under the Convention, of acts and omissions of State bodies that might appear isolated or accidental, but in reality perpetuate a pattern of racial exclusion. The ERRC recalls that Judge Pinto de Albuquerque explicitly used the term “anti-Gypsyism” in his concurring opinion in *Vona v Hungary* (2013) when describing States’ obligations under the Convention to combat antigypsyism. European Union institutions (notably the European Commission² and the European Parliament³) also use the term.
4. The European Commission against Racism and Intolerance (“ECRI”) defines “anti-Gypsyism” as “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” (emphasis added).⁴
5. More recently, the Alliance Against Antigypsyism, a coalition of NGOs supporting the rights of Roma, has introduced its own definition of antigypsyism in “*Antigypsyism – a reference paper*” (June 2016):

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.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.

6. The ERRC respectfully encourages the Court to consider the Alliance’s full paper on antigypsyism, which can be downloaded from www.antigypsyism.eu.
7. States in Europe were allowing antigypsyism to flourish at the time of the events in this case. What follows is a non-exhaustive, country-by-country look at some of the manifestations of antigypsyism in the period 2006-2011.
8. **Austria.** In August 2009, a group of travelling French Sinti were chased from their campsite by at least four people in the village of Ainet in East Tyrol following a concert by a “right-leaning” rock band. The assailants attacked the victims’ caravans with clubs, verbally abusing them and telling them to leave. Police were called and accompanied the Sinti to another site, but reportedly did nothing to bring the perpetrators to justice.⁵

¹ In previous submissions to the Court, the ERRC has spelled the word “anti-Gypsyism”. In this submission, the ERRC follows the spelling introduced by the Alliance Against Antigypsyism, discussed below.

² See, e.g., Commission Staff Working Document, Community Instruments and Policies for Roma Inclusion COM(2008) 420.

³ See, e.g., European Parliament resolution on the situation of the Roma in the European Union, 28 April 2005, P6_TA(2005)0151.

⁴ See General Policy Recommendation No.13, available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n13/e-RPG%2013%20-%20A4.pdf.

⁵ Romano Centro, “Was Geschah in Ainet”, No. 65/66, June/September 2009, p. 12.

9. **Bulgaria.** In 2007, six Roma were attacked by approximately a dozen skinheads in Sofia. Four of the Roma sustained injuries, one of whom had to undergo two life-saving operations. The victims say they called the police for help but their requests for help were refused.⁶
10. **Hungary.** Between January 2008 and July 2010, nine Roma (two of them minors) were murdered in racially motivated, targeted attacks on their homes.⁷ During 2008 and 2009, the murders included a pattern of firebombing houses on the periphery of villages at night, and then shooting at inhabitants as they attempted to escape the burning house. In one such case, in February 2009, a father and son were killed during the attack. Molotov cocktails and guns were used in twelve incidents, hand grenades were used in two, and Roma property was vandalised in at least nine cases. In July 2010, unknown perpetrators shot at the outer front wall of a Roma home while the family was asleep. March 2011 marked the beginning of the trial of four suspected perpetrators of some of the 2008-2009 crimes (resulting in the death of six persons). The crimes were investigated by Hungary's National Bureau of Investigations. The State Prosecutor's charges did not mention racial motivation. Amnesty International and the ERRC have criticised the Hungarian authorities for the "lack [of] procedures for investigating racially motivated crimes" and for not properly investigating all of the attacks which took place in 2008 and 2009.⁸ Eventually, after almost eight years of criminal proceedings, the perpetrators were sentenced in 2016.⁹ The documentary film *Judgment in Hungary* (2013) has drawn attention not only to the crimes but to the climate of antigypsyism in which they took place and were prosecuted; members of the Court would have little difficulty imagining how the process has left many Roma feeling unprotected, particularly given the larger context of antigypsyism in Hungary (including marches by racist paramilitary groups) that emerges from cases such as *R.B. v Hungary* (2016).
11. **Poland.** In July 2010, a mob of local residents attacked a Roma family in the southern town of Limanowa after a dog belonging to the family had allegedly attacked a pregnant woman living in the neighbourhood. Armed with stones and Molotov cocktails, between 40 and 100 people gathered outside the family's apartment and attempted to drag them outside but were prevented from doing so by riot police. Although some 30 people were questioned by the police, no one was ever charged with the attempted lynching.¹⁰
12. **Russia.** In 2006, a Romani man and a non-Roma woman were killed by 20 skinheads at a family gathering. Nine assailants were detained; the prosecutor investigated eight for murder and one for assault but indicted only two as having been "motivated by national, racial or religious hatred".¹¹ The same year a Romani woman was attacked by her neighbours, who left obscene graffiti on her home, used racial slurs, and beat her. In July 2006, she filed criminal charges for racially motivated assault; the complaint was rejected.¹² In 2008, a 24-year-old Romani man and his infant daughter were brutally shot in their home; the suspects were detained the next day and reportedly confessed, but three days later one was released and went on to threaten other local Roma, saying "We will burn you all while you sleep".¹³
13. **Slovakia.** In 2009, after being arrested by police on suspicion of robbing and causing injury to an elderly woman, six Romani minors were brought to the police station in Košice, where they were physically abused, ordered to hit and kiss each other, and finally ordered to strip naked. Six years after the incident took place, after severe delays in proceedings, as well as obstruction caused by the defendants, a change to the judicial formation deciding the case, and dismissal of a relevant video as evidence, the District Court

⁶ ERRC, Romani Baht, Bulgarian Helsinki Committee, "Skinhead Attack of Roma Sparks Unrest", 20 November 2007.

⁷ ERRC, "Attacks against Roma in Hungary: January 2008-July 2010", last updated 6 July 2010.

⁸ Amnesty International, "Hungary trial over Roma attacks set to begin", 24 March 2011; and Amnesty International, "Violent attacks against Roma in Hungary, time to investigate racial motivation", November 2010.

⁹ See information available at: <http://www.reuters.com/article/us-hungary-roma-killing-sentence-idUSKCN0UQ1YZ20160112>.

¹⁰ Tegnerowicz J. "Poland: Anti-Roma mob attack legitimised", Institute of Race Relations, 2 September 2010.

¹¹ ERRC, "Two Roma killed in racist pogrom in Russia", 14 April 2006, available at: <http://www.errc.org/article/two-roma-killed-in-racist-pogrom-in-russia/2587>.

¹² ERRC, "Written Comments of the European Roma Rights Centre concerning the Russian Federation for consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 73rd Session, 28 July-15 August 2008", p. 8.

¹³ *Ibid.*, p. 9.

Košice II acquitted the policemen.¹⁴ The Appellate Court found flaws in the proceedings and referred the matter back to the first-instance court, where it is still pending. Since 2012, several Romani settlements in Slovakia have been raided by police (Moldava nad Bodvou, Stráne pod Tatrami, Huncovce, Podhorany, Vrbnica).¹⁵ The intervening police officers entered houses situated in settlements and searched them. Some of the Romani residents were physically and verbally abused, including children. In spite of the evidence of police misconduct, none of the criminal proceedings led to identification or punishment of those responsible. The Court will also be aware of an application recently lodged with the Court (application no.655/16) about the murder of members of a Romani family targeted by an off-duty police officer, who came to their home and shot them; the murders happened in June 2012.

14. **Turkey.** In 2006, a crowd of non-Roma attacked a Roma family and burned down several Roma homes in Afyon province. No one has ever been arrested for the crimes committed against the local Roma.¹⁶
15. Space constraints make it impossible to provide exhaustive detail, even on the issue of hate crimes. It would be overwhelming to provide a full tableau of the indignities Roma have faced. The critical point is that these are not isolated incidents. Anyone – State authorities, NGOs, or courts – that treat them as such have no hoping of securing the confidence of Roma. See, *mutatis mutandis*, *M.C. and A.C. v Romania* (2016), § 111 (“*Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State’s maintenance of the rule of law*”).
16. **Antigypsyism has also been able to flourish in Albania.** The Roma population in Albania ranges from 1,300 to 120,000 people,¹⁷ and the Roma are recognised there as ethno-linguistic minority. The many Egyptians in Albania are also targets of antigypsyism. According to an ECRI report from 2015, the Albanian police have not recorded any other hate crime incidents than the one before the Court in this case, and the courts have never made use of Article 50 of the Criminal Code which provides for increased punishment for racist motivation. However, civil society representatives interviewed by ECRI consider that the use of violence by the police against Roma in Fier on 13 December 2013 was racially motivated.¹⁸ The Albanian Media Institute reported cases of cyber hate speech targeting Roma in Albania.¹⁹ In 2011, the UN Committee on the Elimination of Racial Discrimination, in its Concluding Observations, expressed concerns that “*members of the Roma minority, especially the young, face ethnic profiling and are subjected to ill-treatment and improper use of force by police officers*” and recommended Albania to take measure to end such practices.²⁰ As ECRI highlighted, it has been difficult to obtain precise data in relation to racially motivated violence due to the fact that there had been no comprehensive statistics as to the application of the relevant provisions of the Criminal Code, and lack of disaggregated data available more generally.²¹ The ERRC’s main efforts in Albania in recent years have related to school segregation and the overrepresentation of children in care institutions.

III. The obstacles Roma face in securing access to justice, particularly in hate crime cases, are one aspect of antigypsyism and, specifically, institutional discrimination against Roma

¹⁴ Poradňa, “*Court acquitted police of torturing Romani boys from Lunik IX*”, available at: <http://poradna-prava.sk/wp-content/uploads/2015/02/PDF-70-KB1.pdf>.

¹⁵ See information available at: <http://spectator.sme.sk/c/20056808/roma-allege-police-brutality-in-eastern-slovak-village.html>.

¹⁶ Edirne Roma Association, ERRC, Helsinki Citizens Association, “*We Are Here! Discriminatory Exclusion and Struggle for Rights of Roma in Turkey*”, Istanbul, April 2009, p. 88.

¹⁷ This significant discrepancy relates to the fact that until 2011, no official census in Albania mentioned Roma, while the results of the 2011 census (despite its limitations and contestations) indicated that they represented 0.3% of the total population (approximately 8,500 persons). See *Civil society monitoring report on the implementation of the National Roma Integration Strategy and Decade Action Plan in 2012 in Albania*, Decade of Roma Inclusion Secretariat Foundation, Open Society Foundation, Hungary, 2013, p. 27.

¹⁸ ECRI Report on Albania (fifth monitoring cycle), p.20, para. 48.

¹⁹ Albanian Media Institute: Hate speech in online media in South East Europe, Tirana, 2014.

²⁰ Committee on the Elimination of Racial Discrimination: Concluding observations: Albania, CERD/C/ALB/CO/5-8, 14 September 2011, para.15.

²¹ ECRI Report on Albania (fourth monitoring cycle), p. 26, para. 75.

17. The many unresolved hate crimes and botched investigations against Roma that took place in the period discussed above (roughly 2006 to 2012) might have been expected to give rise to a large number of cases pending before the Court. Indeed, several cases have emerged against Romania and Hungary. In the ERRC's view, the absence of more cases about hate crimes (and, indeed, other issues) brought by Roma is a symptom of larger problems with access to justice for Roma in general.
18. The Court will have noted that ECRI's definition of antigypsyism ("anti-Gypsyism") includes "institutional racism" (see above, § 4). The term has been defined most precisely in the United Kingdom, as "*the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin*".²² 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. As the Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe put it: "*Institutional racism does not mean that all officers working in the institution have racist behaviour, but that racism lies in the procedures and culture of the institution*".²³ The Alliance Against Antigypsyism refers to "*the habitual acquiescence of majorities to discrimination of Roma*", and notes that accumulation of disadvantage "*can even happen without anybody involved in the process specifically or consciously intending the discriminatory outcomes*".²⁴
19. When it comes to hate crimes, institutional racism can be seen in police forces, prosecutors' offices, and courts.
20. The best available evidence of institutional racism are the attitudes of Roma towards the institutions responsible for protecting them. According to the EU-MIDIS survey conducted by the European Union's Fundamental Rights Agency ("FRA"), Roma and other minorities are likely not to report in-person crimes: 69% of minorities did not report assaults or threats they had experienced and 84% did not report serious harassment. According to FRA, the lack of trust Roma have in the police results, inter alia, from excessive police stops of Roma and other minorities and disrespectful treatment; this lack of trust explains the underreporting of in-person crimes. FRA also emphasised this lack of trust in the police in its 2010 report on "Police Stops and Minorities"²⁵: "*Every second minority victim of assault, threat or serious harassment said they did not report these incidents to the police because they were not confident the police would do anything about them.*" The ERRC sees these data as evidence of the continued impact of antigypsyism on Roma communities throughout Europe and as evidence of problems of institutional antigypsyism that need to be addressed at the European level. By the time the Court considers the present case, the results of the follow-up EU-MIDIS II survey, carried out by FRA in 2015, should be available.²⁶
21. The presence of institutional racism in police forces in Europe is already overwhelmingly recognised by those called upon to tackle it. According to a recent survey of professionals, mostly police officers, prosecutors and judges, carried out by FRA, three-quarters believe that victims of hate crime

are discouraged from reporting because they do not believe that the police would treat them in a sympathetic and non-discriminatory manner. Accordingly, four out of five interviewed professionals believe that it is necessary to enhance victims' trust in the police; and three fourths of interviewees view as necessary measures that tackle discriminatory attitudes within the police. [...] About two thirds of all interviewees believe that the police and judiciary need to take hate crime more seriously. This finding per se raises concerns. Interviewees indicated that

²² 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>.

²³ Committee on Equality and Non-Discrimination, Parliamentary Assembly, Council of Europe: Tackling racism in the police, 10 January 2014.

²⁴ The paper can be found at www.antigypsyism.eu.

²⁵ The report is available at <http://fra.europa.eu/en/publication/2010/police-stops-and-minorities-understanding-and-preventing-discriminatory-ethnic>.

²⁶ The report is available at <http://fra.europa.eu/en/project/2015/eu-midis-ii-european-union-minorities-and-discrimination-survey>.

*two factors underlie this assessment: first, a lack of profound understanding of the legal concepts and categories that define the phenomenon of hate crime; and, second, a lack of commitment to identify, prosecute and impose sentences for hate crime.*²⁷

22. The Organization for Security and Cooperation in Europe (OSCE), in a 2010 report entitled “*Police and Roma and Sinti: Good Practices in Building Trust and Understanding*”, underlined the increase of (what the ERRC sees as) antigypsyism in the OSCE area.²⁸ According to the report, “*Challenges faced by Roma and Sinti in their relations with the police range from ethnic profiling, disproportionate or excessive use of force by police against Roma to failure by the police to respond effectively to Roma victims of crime and racist violence*”. The report also emphasises the lack of trust in police and the need for police to invest more in building up relations with Roma. The report concludes that the police need to improve their relationship with Roma and more effectively secure their rights.
23. In the ERRC’s experience, Roma often do not have faith in the institutions meant to protect them from hate crimes or other forms of abuse. When Roma do assert their rights, by making complaints to police, prosecutors, or courts, and those institutions fail them, the effect is to confirm the intuition Roma have that these institutions are not accessible to them. Those responsible (including perhaps those police officers, prosecutors, or judges directly responsible for the failing) may see nothing more than an isolated incident or an accident; Roma see the confirmation of a historical and ongoing pattern of exclusion. For Roma, the importance of justice being seen to be done could not be more important.
24. **Research has recently been done on Roma perceptions of justice in Albania in particular.** In order to find out how accessible the Albanian justice system is from the perspective of Roma, the European Centre for Minority Issues (“ECMI”), an NGO, conducted research in 2013 published in a 2015 working paper.²⁹ The research targeted Roma aged 19 years and above, and was conducted in nine districts of Albania: Tirana, Durres, Vlora, Fier, Elbasan, Korça, Pogradec, Gjirokastra, and Saranda. The research included questions regarding knowledge of the law, legal rights, knowledge about the justice system, individual perceptions regarding the access to justice and justice institutions, and access to legal aid and to the Ombudsman. The answers were mixed. Few respondents had a precise understanding of what “law” means, as separate from politics, government, or the State. Respondents had varied answers to a question about what the justice system is, and were more likely to associate it with police than with the courts. Most respondents who had been to court did not report having legal representation. Around half of participants reported receiving help from the police in due time when they needed it, while the other half reported they did not. Interestingly, virtually every respondent listed as one of her/his rights the right to equal treatment (99.4%). However, when those who said they had not approached judicial institutions were asked why, their answers reflected serious doubts about that promise of equality: they thought those institutions do not treat people equally (21.9%), are bureaucratic and/or corrupt (13.2%), or that going to them would be a waste of time (11%). Most respondents had not heard about (or were unsure if they had heard about) the availability of free legal aid; many of those who had heard of it did not feel they were in a position to benefit from it or had concerns about its quality. The paper also revealed that the combination of limited access to legal aid and steep hikes in court fees between 2008 and 2010 had left Roma particularly exposed to high costs if they go to court. The working paper concludes as follows:

This paper shows that despite a good will to support people in need such as the Roma minority, the justice system in Albania is weak and far from understanding of the Roma community’s context, needs and problems. Its accessibility is hampered by multi-level procedural, economic and conceptual barriers leading to denied justice or delivery of poor justice for them. A low level of information and a knowledge gap about the law and justice system combined with unclear legal procedures and insufficient funds available for the proper functioning of legal aid service have negatively influenced their ability to fully exercise their

²⁷ EU Fundamental Rights Agency, *Ensuring justice for hate crime victims: professional perspectives* (April 2016) available at: <http://fra.europa.eu/en/publication/2016/ensuring-justice-hate-crime-victims-professional-perspectives>.

²⁸ The report is available at: <http://www.osce.org/odihr/67843?download=true>; see, especially, pages 15 and 20.

²⁹ Merita Meçe, *Accessible Justice System for All: The Case of the Roma Minority in Albania*, ECMI, February 2015, available at: http://www.ecmi.de/uploads/tx_lfpubdb/ECMI_Working_Paper_84.pdf.

rights granted by the Constitution and recognized by law. Having a low level of legal emancipation they remain victims of a vicious circle which in many cases does not help them get justice done. Moreover, lack of consistent coordination, collaboration and communication among various justice system institutions and public agencies hampers the quality of service delivery. It leaves room for service overlapping, low coverage service, corruption, long bureaucratic procedures and bribery. The private solution provided for a public concern such as legal aid service has pushed aside many vulnerable and disempowered Roma citizens highly exposing them to exorbitant legal fees increasing their dilemma and reluctance to approach justice system. (emphasis added)

IV. States bear the burden of showing why Roma were denied access to justice and demonstrate that it was not the result of discrimination

25. When police, prosecutors, or courts were responsible for an omission that prevented Roma from asserting their rights in the context of legal proceedings for hate crimes, one way for the Court to handle the case is to find that omission, on its own, to amount to a breach of Article 14, taken with Article 6 § 1 of the Convention, based on the inability of Roma to assert their claim.
26. That is an appropriate, but incomplete, analysis under the Convention, because it implicitly treats the omission as the kind of isolated accident or incident; Roma themselves know that what is going on is part of a broader pattern, and they turn to the Court to expose the full extent of what has happened to them.
27. Shifting the burden of proof is a common concept in discrimination law (see, e.g., Article 8 of EU Directive 2000/43), including in the Court's case law under Article 14. See, e.g., *E.B. v France* (Grand Chamber 2008), § 74. In the ERRC's view, in the light of the complex ways in which antigypsyism undermines the confidence that Roma have in the justice system, and the ways in which States such as Albania have failed to ensure that Roma enjoy equal access to justice, in cases where police, prosecutors, or courts were responsible for an omission that prevented Roma from asserting their rights in legal proceedings for hate crimes, the burden falls on the Respondent Government to explain precisely how the omission happened. In the absence of a satisfactory explanation that the omission was not related to the applicant's ethnicity, there should be a finding of a violation of Article 14, taken with Article 6 § 1, on the basis that the authorities deprived Roma of access to justice on grounds of race or ethnicity.

The European Roma Rights Centre
22 July 2016