IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 53461/15

Kósa

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 leave to intervene granted by the President of the Section.

2. In order to assist the Court in summarising the intervention for inclusion in its judgment, the ERRC has prepared the following summary:

> The ERRC made three points in its intervention. The first was that school segregation is a persistent manifestation of anti-Gypsyism throughout Europe and appears in many perversely creative forms. In connection with this first point, the ERRC submitted that the Court had to use the term anti-Gypsyism to describe the significance, under the Convention, of the separation of Romani pupils into different schools, school buildings, or classrooms. The ERRC then gave a non-exhaustive overview of various ways in which Romani children are segregated in schools throughout Europe, with a particular focus on Hungary. The ERRC's second point was that the domestic courts in Hungary have failed to provide effective sanctions against school segregation. In order to support this point, the ERRC provided an overview of school segregation cases litigated in Hungary and the consistent findings of the civil courts (before which anti-discrimination cases must be brought) that they lacked jurisdiction to impose specific remedies on the public bodies responsible for school segregation. The ERRC's last point was that actio popularis litigation is a uniquely important means of challenging discrimination against Roma in Europe. In this respect, the ERRC pointed to the very low number of cases concerning discrimination against Roma that have reached the Court, as well as the Court of Justice of the European Union and domestic courts, despite widespread discrimination against Roma. The ERRC attributed this to anti-Gypsyism, and in particular, the effects of anti-Gypsyism on access to justice for Roma. The ERRC noted that in this bleak context, the ability of NGOs to take anti-discrimination "actio popularis" claims in their own name was a precious resource. Indeed, according to the ERRC, such procedures might provide the only possibility for discrimination issues to be aired properly at domestic level. The ERRC noted that in individual cases (such as *V.C. v Slovakia* (2011)), the Court had difficulty establishing a violation of Article 14, because the complaint was tied to the individual circumstances of a particular case. Actio popularis cases allowed the Court and applicants to avoid this dilemma by ensuring that the full range of issues arising under anti-discrimination legislation were considered at domestic level before reaching the Court. Allowing individual victims of discriminatory practices to apply to the Court following the exhaustion of actio popularis proceedings concerning those practices was essential for guaranteeing the development of the Court's case law under Article 14 and Protocol 12.

II. The Persistence and Variety of Forms of Segregation of Romani Pupils in Hungary and Elsewhere as a Manifestation of Anti-Gypsyism

3. When Romani parents see their children placed in separate schools, school buildings, or classes – in visibly inferior physical conditions, with less effective teaching, and/or poorer results compared to non-Roma – they feel a link to a broader pattern of historical and ongoing exclusion. The Court has recognised this pattern, finding that: "*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 deep-rooted structural prejudices they face in a single word: anti-Gypsyism. The ERRC respectfully submits that the Court must use that word in its case law to describe the significance, under the Convention, of the separation of Romani pupils into different schools, school buildings, or classrooms. The ERRC recalls that Judge Pinto de Albuquerque explicitly used the term when describing the requirements of States under the Convention to react to anti-Gypsyism in his concurring opinion in *Vona v Hungary* (2013). State authorities have a central role in protecting Roma from anti-Gypsyism and not taking measures based on and/or perpetuating stereotypes of Roma. See, mutatis mutandis, *Konstantin Markin v Russia* (2012), §§ 141-143.

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 dehumanization and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatization and the most blatant kind of discrimination*" (emphasis added).[1] Recently, a coalition of NGOs supporting the rights of Roma has introduced its own definition of antigypsyism (spelled without a hyphen) 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*.

The ERRC respectfully encourages the Court to consider the alliance's full paper on anti-Gypsyism, which can be downloaded from www.antigypsyism.eu.

5. Segregation of Romani pupils is one of the most visible and widespread manifestations of anti-Gypsyism in Europe today. The Court is already familiar with several ways in which Romani children are segregated. This section seeks to provide an overview of the perverse creativity applied in segregating Romani pupils in Hungary and elsewhere in Europe today. This overview is not exhaustive.

6. **Segregating Romani children alongside children with disabilities.** The Court is deeply familiar with the dynamics of this form of segregation, from cases such as *D.H. and others v the Czech Republic* (Grand Chamber, 2007), and *Horváth and Kiss v Hungary* (2013). The ERRC continues to litigate such cases, including a case we are litigating on behalf of a misdiagnosed pupil in Slovakia, and actio popularis litigation we are pursuing alongside the Chance for Children Foundation (hereinafter "CFCF"), a Hungarian NGO, in the Hungarian courts concerning segregation in Heves County. The ERRC notes here that such segregation is not only contrary to the Convention, but is also parasitic on another form of discrimination – based on disability – which is prohibited by the UN Convention on the Rights of Persons with Disabilities (see Article 24). The ERRC celebrated the Court's statements about inclusive education in *Çam v Turkey* (2016), § 64. The phenomenon

[1] 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.

of segregating Romani pupils alongside those with disabilities is not limited to the Czech Republic, Hungary, and Slovakia. In 2014 the ERRC published a report exposing the overrepresentation of Romani children in special schools in Serbia.[2] Since 2015, the ERRC, alongside national NGOs, has been undertaking litigation in Macedonia challenging the constitutionality of a provision of primary legislation allowing children diagnosed with educational neglect and delinquent behaviour to be placed in special schools for children with disabilities. As the Ombudsman of Macedonia noted in his 2013 report, Romani children are disproportionately categorised as suffering from educational neglect and delinquent behaviour and thus end up overrepresented in special schools.[3]

7. **Segregating Romani children based on provision of minority education.** The ERRC has seen various examples where Roma are channelled into minority education as a means of segregating them. It is similar to – but slightly different from – the form of segregation the Court observed in *Oršuš and others v Croatia* (Grand Chamber 2010): children are placed into a separate class or school ostensibly to enable them to study in a minority language (such as Romani), but the education is inferior and the effect (and arguably the purpose) is to separate Romani children from non-Roma. In Kaposvár (southern Hungary), Romani children have been placed in a segregated school which provides Roma with what is referred to in Hungary as "minority education". Uniquely in Hungary, the children received some instruction in a language specifically spoken by Roma (Beash). Following litigation brought by CFCF, the courts found that the fact that the school provided Roma this form of minority education did not justify segregating them. CFCF is now pursuing what it calls the "Kaposvár II" litigation about the same school because, despite the successful first case, the school has not been desegregated. In October 2016, the appeal court took the unusual step of ordering the desegregation of the school; the decision is still subject to appeal. The ERRC is also representing Romani litigants in a police brutality case in Vojvodina (Serbia) who were educated entirely in Slovak; although they do not belong to the Slovak minority in Vojvodina, they were enrolled in a Slovak-minority school and then, alongside the other Romani children enrolled there, they were diagnosed as having intellectual disabilities, separating them from the non-Roma (ethnic Slovak) students in the school. Part of their police-brutality case centres around the fact that they have been forced by police to sign documents in Serbian, a language they cannot understand because of the education they received.

8. **Creating and upholding segregated catchment areas along the lines of residential segregation.** Gerrymandering catchment areas is a common practice in Europe, notably in Central European countries including the Czech Republic, Hungary, and Slovakia. In Miskolc (north-east Hungary), Hungary's fourth-largest city, CFCF brought actio popularis litigation against the local council in June 2005 claiming that by completely reforming its school system (integrating the schools into independent economic entities), it failed to redesign the school districts, and as a result, the local council had contributed to maintaining the segregation of Roma and/or socially disadvantaged pupils. CFCF alleged that the municipality committed indirect discrimination, as its apparently neutral decision disproportionately placed Roma and/or indigent pupils in a disadvantageous situation. CFCF also argued that the local council's failure to take effective measures to make sure that the schools implement their pedagogical plan aimed at the integration of disadvantaged pupils amounted to direct discrimination. In its final judgment, the Debrecen Appeal Court found that as a result of the decision to integrate the schools without simultaneously re-drawing the school districts, Miskolc had maintained the segregation of Roma children in violation of those children's right to equal treatment based on ethnic origin. The court found that the legal provision regulating the reversal of the burden of proof placed the burden on the defendant to justify what appeared to be indirect discrimination. In Győr (northwest Hungary), CFCF filed an actio popularis case against the municipality asking the court to rule that the municipality segregates Roma and socially disadvantaged children by setting school catchment areas along the

[2] Available at http://www.errc.org/cms/upload/file/serbia-education-report-a-long-way-to-go-serbian-13-march-2014.pdf.
[3] The report of the Ombudsman is available at: http://ombudsman.mk/upload/documents/2013/Izvestaj-Posebni%20ucilista-2014.pdf.

lines of residential segregation. CFCF asked the court to order the municipality to prohibit the establishment of new classes in the primary school where Roma and socially disadvantaged children are overrepresented. The Supreme Court of Hungary (hereinafter "the Kúria") upheld the findings of the first-instance local court establishing segregation. In the absence of a desegregation order, the school was not desegregated.

9. **Maintaining separate or supplementary school buildings for Romani children.** The Court is already familiar with these practices from cases such as *Sampanis and others v Greece* (2008), *Sampani and others v Greece* (2012), and *Lavida and others v Greece* (2013). Earlier this year, the ERRC, acting with local NGOs on behalf of communities in Albania, secured positive findings from the Equality Commissioner and Ombudsman in two cases of this kind in Albania.[4] In one case, an "annex" to a school was built inside a Romani settlement within a larger catchment area, avoiding having the Romani children attend the catchment area's school alongside non-Roma. Following these successful findings, the authorities have now agreed to close the annex school and bus the Romani children to the main school.[5] The ERRC is investigating similar cases in Kosovo, Macedonia, Serbia, and Turkey, with a view to taking legal action. The ERRC is also involved as a plaintiff, alongside national NGOs, in a case challenging the segregation of recently-arrived Romani children in Ris-Orangis, a suburb of Paris (France); the children were placed in a separate non-school building, supposedly because they could not speak French, despite the fact that the local schools had teachers specialised in working with non-francophone children. In Hajdúhadház (Hungary) in 2006, CFCF initiated an actio popularis claim against the municipality and its primary schools on the grounds that the proportion of Romani students educated in the schools' central buildings was low (28% and 22%), whereas in those schools' separate supplementary buildings it reached 86% and 96% per cent for one school, and 100% for the other. In both schools, the central buildings were much better equipped than the supplementary buildings, which lacked many facilities, including libraries, computers, and specialised classrooms. In its final ruling on the matter, the Kúria upheld the findings of the first-instance court and established a violation of the principle of equal treatment resulting from the segregation of Romani children. No desegregation was ordered.

10. **Teaching Romani children in separate classrooms or floors.** In 2011 in Gyöngyöspata (north-east Hungary), the Ombudsman investigated anti-Roma paramilitary groups marching in the village and the responsibility of law enforcement bodies for allowing such demonstrations. The Ombudsman extended his investigation to the local primary school since several complaints from local Romani parents had been submitted about segregation. In his report, the Ombudsman established that Romani children were physically segregated from non-Roma in the primary school of Gyöngyöspata. This report served as basis for litigation, and CFCF submitted an actio popularis claim to the Court of Eger in 2011. CFCF challenged the physical separation of children in the school and has also argued that children in the segregated classes received an education of inferior quality. The courts at all levels of jurisdiction found that there was segregation, including direct discrimination resulting from the lower quality of education provided for the Roma. The courts ordered the municipality and the school to adopt a non-discriminatory method for channelling children into classes. The reason why the courts, unusually, agreed to order the termination of the unlawful situation was because segregation existed within a school and not between schools, and so no "public law relationship" was affected by the order (i.e. there was no need to order the closure of a school, which the civil courts believe is beyond their competence).

11. **Creating publicly-sponsored private schools for non-Roma pupils.** This phenomenon has only come to the ERRC's attention in Hungary so far. In Jászladány (north-east Hungary), the only

[4] See ERRC publications about this available at http://www.errc.org/blog/its-happening-here-too-school-segregation-in-albania-and-what-were-doing-about-it/74 and http://www.errc.org/article/school-segregation-of-roma-and-egyptian-communities-in-albania/4429.

[5] See Decision no.95, "On a change to decision no. 84, dated 29 July 2016 of the municipality council on the approval of the transport lines for teachers and students for the academic year 2016" (16 September 2016), and the ERRC's letter to the authorities, available at http://www.errc.org/cms/upload/file/albania-letter-of-concern-about-school-segregation-27-september-2016.pdf.

school in town had a renovated central building and another supplementary building in poor condition. Children from grades one to four attended classes in the central building, while children form grades five to eight studied in the supplementary building. Many children (mostly non-Roma) attended primary schools in the nearby towns (as a result of "white flight"). On the initiative of the mayor of Jászladány, a private school – maintained by a foundation of which the mayor was a board member – was established to educate children who "wished to study". The overwhelming majority of students in the foundation school were non-Roma. The municipality and the foundation concluded a rental agreement and the municipality let one part of the central, newly renovated building to the foundation in order to open the private school. The municipality asked for a symbolic rental fee only, while providing the private school with significant financial support. The foundation school imposed a tuition fee of HUF 3,000 to HUF 4,000 (€10 to €13) on the students (the minimum wage at the time was about HUF 50,000 or €170). As a result of the lease agreement and the opening of the new private school, Roma and socially disadvantaged children – who could not afford to pay the tuition fee – remained in the State school, while better-off (non-Roma) children enrolled in the private school. Since the private school was operating in the central building, more Roma students had to attend classes in the supplementary building. In 2007 CFCF, together with a local Roma NGO, JRPSZ (Jászsági Roma Civil Rights Association), lodged an actio popularis claim against the municipality of Jászladány and the foundation. CFCF asked the court to quash the rental contract concluded between the municipality and the foundation, to find that segregation existed between the public school and the private school, and to establish direct discrimination with regard to the quality of education and its physical conditions in comparison to the foundation school. In its final ruling, the Kúria established that the municipality segregated Roma and socially disadvantaged students from the overwhelmingly non-Roma and socially advantaged students of the private school. The court found that the students of the public school had been segregated from students in the private school on the basis of their Romani ethnic origin and social status. The court ruled that the public and the private school were in a comparable situation because both schools were operating in a building owned by the municipality. Therefore the municipality's ownership of the school buildings created the necessary ground for comparison between the schools. The Kúria did not specify how the unlawful situation should be remedied; it merely ordered the court of first instance to restart its procedure to determine how the segregation could be stopped. CFCF has submitted a desegregation plan developed by an expert to be ordered by the court. The private foundation which operated the school for non-Roma went bankrupt during the new proceedings and closed its school, and as a result the courts found that CFCF no longer had a legal interest to challenge the validity of the contract establishing the school between the foundation and the municipality. In September 2013 the Catholic Church opened a school in Jászladány for the former students of the foundation (again, mostly non-Roma). The State agency responsible for granting permission to new schools did not prevent the establishment of the church school. Segregation – now through a church school – persists in Jászladány.

12. **Segregating Romani children into schools or classes to provide "social catch-up" for them.** This kind of segregation is also similar to the logic behind the segregation the Court condemned in *Oršuš and others v Croatia* (Grand Chamber 2010). It has reached its most sophisticated point in Hungary, although the ERRC is also representing a pupil send to a "second chance" school in Albania, populated only by Roma. (Following our complaint, he was immediately transferred back to the ordinary school.) In Hungary, the Government introduced new terminology, the so-called "social catch-up", to justify the separation of Romani children. Indeed, the National Strategy on Roma Inclusion is translated into Hungarian as the "National Strategy for Social Catch-up", and social catch-up has been incorporated into the Fundamental Law (i.e. the Constitution) at Article XV § 4, and into the preamble of the Equal Treatment Act ("the ETA"). However, there is no definition in any legislative text of this term. On 29 March 2013, the Minster for Justice submitted a proposal to Parliament for the amendment of the ETA. The proposal includes amending the provisions on positive measures (exceptions from discrimination) to allow discrimination (and segregation) for the aim of social catch-up. CFCF and many other Hungarian NGOS wrote a letter to all MPs urging them not to adopt the proposal. While the amendment has not been adopted, the importance of social catch-up as opposed to anti-discrimination has been emphasised in many cases by the current minister (Zoltán Balog) responsible for education. The national body responsible for

maintaining state schools (the Klebelsberg School Maintainer Centre, "the KLIK") now openly relies on these justifications. The KLIK has justified its proposal to reorganise a segregated Roma-only school elsewhere (in Piliscsaba) by reference to the minister's opinion on social catch-up. The reorganisation aimed at extending the activities of the Roma-only school to accommodate children with intellectual disabilities, instead of closing it down. CFCF and the Mental Disability Advocacy Centre, another NGO, called on the minister in a joint statement to stop the reorganisation. These advocacy efforts were successful: as of 1 September 2015 the school stopped taking in new classes of students. The case nonetheless shows how social catch-up now serves as a justification for maintaining separate education facilities for Roma children. This has been openly criticised by the Hungarian Ombudsman in a recent report[6] on school segregation.

III. The Failure of the Domestic Courts in Hungary to Provide Effective Sanctions against School Segregation

13. When the domestic courts in Hungary have found breaches of anti-discrimination law resulting from school segregation, they have failed to go beyond the establishment of a violation; that is, they do no more than order the defendant, in the most general possible terms, to stop the impugned practice (*abbahagyásra kötelezés*). According to the Kúria, specific desegregation measures cannot be a subject of an execution order, because the civil courts do not have the power to impose these kinds of orders on public bodies.[7] In the "Kaposvár I" case, CFCF asked the court to order the respondent municipality to place children from the segregated school into integrated schools. The Kúria rejected CFCF's claim, as it would cause "unforeseen consequences" and could not be implemented through an execution order.[8] In the Győr case (see above, § 8), CFCF asked the court to order the respondent municipality to prohibit the segregated school from creating new classes in which Roma and socially disadvantaged children form a majority. While the Kúria found that the municipality segregated Roma and socially disadvantaged children, it again rejected CFCF's request for an order to eliminate segregation. The Kúria found that such an order could not be made in civil proceedings, as it would go beyond the authority of the civil court.[9] As a result, segregated schools remain intact even in localities where a Kúria judgement has found segregation. Without an order to eliminate segregation, neither the KLIK nor any local body will put an end to the unlawful segregation of Roma children.

14. Similarly, in the Kaposvár II case, CFCF asked the court to order the implementation of a complex desegregation plan designed by an expert in order to eliminate the segregation of Roma children that the Kúria already found in the Kaposvár I case. The Court of Kaposvár claimed that the plan CFCF proposed could not be implemented and invited CFCF to rephrase it. On 13 May 2015, CFCF asked to Court to refer questions to the Court of Justice of the European Union for a preliminary ruling, in order to clarify whether EU law permits national courts to confine the sanction to a mere finding of a breach of that prohibition. The Court of Kaposvár rejected CFCF's request on 1 July 2015, but in October 2016 the appeal court ordered the desegregation of the school. A judicial review before the Kúria will inevitably take place.

15. In brief, the Hungarian civil courts, before whom anti-discrimination cases are litigated, believe that domestic law prevents them from ordering remedies in response to the segregation of Roma pupils. The ERRC and CFCF have long complained about this situation, including to the European Commission, because of our belief that it is contrary to Hungary's obligations under Article 15 of EU Directive 2000/43 ("the Race Equality Directive"):

> *Article 15. Sanctions. Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise*

[6] Report no.AJB-6010/2014.
[7] Pfv.IV.21.568/2010/5. p.10.
[8] Ibid.
[9] Pfv.IV.20.068/2012/3.

the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

In May 2016, the European Commission announced[10] it was taking the first steps in bringing infringement proceedings against Hungary for violations of the Race Equality Directive related to the segregation of Romani pupils in schools in Hungary.

16. It is possible to secure a legally-binding desegregation plan in Hungary by avoiding the civil courts. In 2008 CFCF made a complaint to the Hungarian Equal Treatment Authority ("the EBH") against the municipality of Tiszavasvári (northeast of Hungary) for maintaining segregated schools. The EBH found against the municipality of Tiszavasvári in a decision dated 19 February 2010. The EBH ordered the municipality to elaborate a desegregation plan with the assistance of an expert in public education. Following legal challenges by the municipality before the administrative courts that went to the Kúria, the defendant approved the decision of the ETA on 29 May 2012. However, despite CFCF's continuous efforts to make the EBH enforce its decision, the desegregation plan has still not been implemented and the segregated school is still operating.

17. Without wishing to comment on the facts of the present case, the ERRC notes that the Kúria designated judgment no.Pfv.IV.20.241/2015/4 as having binding principle-setting status (*elvi határozat*) beyond its individual facts. This gives the judgment the status of binding precedent, ensuring that it will be followed, and applied by analogy, in subsequent school segregation cases in Hungary.

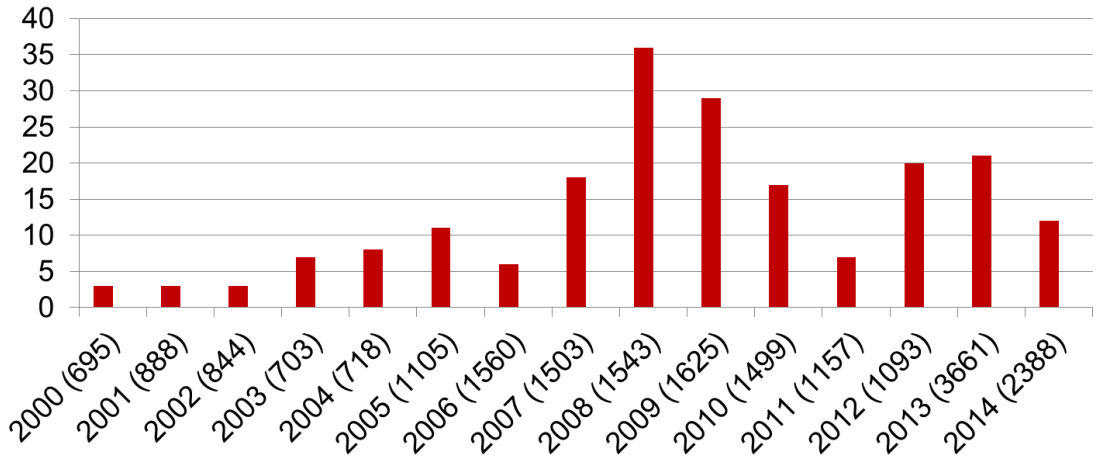
IV. The Unique Importance of Actio Popularis Litigation as a Means of Challenging Discrimination against Roma in Europe

18. Discrimination cases brought by Romani litigants are relatively rare in courts around Europe, despite the widespread observation at local, national, European, and international levels that discrimination against Roma is systemic. The reasons for this are due to anti-Gypsyism, and what the Court has termed the "turbulent history" of the Roma: Roma are particularly less likely than other members of society to have the resources – including education, money, and faith in the justice system – needed to pursue claims in court.

19. The consequences can be seen in the Court's own case law. The Court very rarely receives applications which disclose a violation of Article 14, read in conjunction with other articles, as the table[11] below shows:

[10] The announcement is contained in a press release available at http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm.

[11] The data from 2011 onwards is taken from the Court's "facts and figures" publications. The data from before 2011 was extracted from HUDOC.



20. The total number of judgments in a given year is next to the year in brackets; the bar indicates the number of judgments in any year finding a violation of Article 14. The percentage of cases in which a violation of Article 14 (on any ground) has been found is very small and highly inconsistent (i.e. the number of such judgments does not regularly rise or fall with the total number of Court judgments in a given year); in this fifteen-year period, the percentage of judgments finding a violation of Article 14 out of the total number of judgments delivered ranges from 0.3% to 2.6% in any given year. Of course an even smaller number of these concern Roma. The ERRC does not seek to draw any scientific conclusions from this data, but for Roma (and other minorities), the finding of a violation of Article 14 remains a rare event, at odds with their daily, lived experience of discrimination and their unsuccessful struggle to secure justice in domestic courts.

21. The experience in Strasbourg is reflected within the European Union legal order and in Luxembourg (at the Court of Justice of the European Union) in particular. Despite widespread violations of Roma rights and the rights of other ethnic minorities by public bodies in the EU, and the difficulties domestic courts have in applying anti-discrimination law, there have been only two cases referred by national courts to the Court of Justice of the EU about race and ethnicity discrimination by public bodies:[12]
    a. Case C-391/09 (finding that decisions restricting the way names could be entered into State registries do not fall within the scope of the EU's Racial Equality Directive).
    b. Case C-571/10 (confirming that discrimination against someone on the basis of his status as a third-country national does not fall within the scope of the EU's Racial Equality Directive).

    The only case about discrimination against Roma (Case C-83/14) referred to the Court of Justice concerned unequal treatment of Roma in Bulgaria by the monopoly electricity provider in a particular region. The Court of Justice found that the facts – denying residents of a Romani neighbourhood access to their electricity meters when people in other neighbourhoods could access theirs easily – disclosed discrimination under EU law. It is noteworthy that the litigant in that case was not herself Romani, but claimed discrimination because of being in a Romani neighbourhood (discrimination by association). The issue of school segregation may now reach the Luxembourg Court through other means: the European Commission has recently taken the first steps in infringement proceedings, under Article 267 of the Treaty on the Functioning of the

[12] There have, however, been more cases referred under Directive 2000/78 about employment discrimination, generally by private employers.

European Union, against the Czech Republic, Slovakia, and (as mentioned above) Hungary for school segregation.[13]

22. The instrument of EU law that governs discrimination by public bodies is the Race Equality Directive, which requires Member States to prohibit race discrimination in a range of areas (including housing, education, and social protection) by public and private actors. EU Directive 2000/78 also requires Member States to prohibit discrimination in employment on a wider range of grounds, including race. The EU's Fundamental Rights Agency ("FRA") has found the application of the EU's Race Equality Directive problematic. In a 2012 report,[14] FRA found that awareness of the anti-discrimination framework among minorities was low, making cases where victims pursue justice rare. FRA found that various factors contribute to the reluctance to use complaints procedures: "*legal costs; fear of negative consequences; a perception that the situation would not alter; a tolerance of or failure to recognise discrimination*". In a 2014 report,[15] the European Commission also described ongoing "challenges" with "implementation and application" of the EU's non-discrimination directives with transposition of the Race Equality Directive. The Open Society Justice Initiative, an NGO, submitted extensive comments to the European Commission in 2012 on problems with application of the Directive.[16] Naturally, when domestic courts thwart attempts by Roma and other minorities to assert such rights, for example by ignoring discrimination claims against a public body, they exacerbate these problems.

23. In this bleak context, the possibility for NGOs to take cases in their own name to challenge discrimination is a precious resource for Roma. Not all jurisdictions in the Council of Europe offer the possibility, but in some 24 European states it is available in some form or another.[17] The principle also forms part of EU anti-discrimination law. The Race Equality Directive provides as follows at Article 7(2):

> *Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.*

24. While this provision does not require states to allow actio popularis actions of the kind that exist in Hungary, it is a formal recognition of the positive obligation on States to ensure that victims of discrimination can secure special support from NGOs in legal proceedings.

25. The ERRC has seen first-hand the importance of actio popularis-type procedures in empowering Romani litigants. Because of their particularly vulnerable position, Roma are often naturally

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[13] See ERRC publications about this available at http://www.errc.org/blog/segregation-in-hungary-the-long-road-to-infringement/106 and http://www.errc.org/article/commission-takes-tougher-stance-on-member-states-discriminating-roma/4359.

[14] "The Racial Equality Directive: applications and challenges", available at http://fra.europa.eu/en/publication/2012/racial-equality-directive-application-and-challenges.

[15] The report is available at http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf.

[16] The document can be found at http://www.opensocietyfoundations.org/sites/default/files/europe-discrimination-20120501.pdf.

[17] European Commission, "A comparative analysis of non-discrimination law in Europe" (2015), available at http://www.equalitylaw.eu/downloads/3824-a-comparative-analysis-of-non-discrimination-law-in-europe-2015-pdf-1-12-mb: "*Actio popularis is permitted by national law for discrimination cases in 18 European countries including Austria, Bulgaria, Croatia, France, the former Yugoslav Republic of Macedonia, Germany, Hungary, Italy, Liechtenstein, Luxembourg, Montenegro, the Netherlands, Norway, Portugal, Romania, Serbia, Slovakia, Spain. In further four countries Malta, England, Wales and Turkey judicial interpretation is required. In Cyprus, whereas there is no such a law allowing actio popularis claims, the equality body accepts and investigates complaints from organisations acting in the public interest on their own behalf without a specified victim*" (page 89). Actio popularis is also available in Albania.

reluctant to be the named litigants in cases against powerful public bodies. They fear repercussions. This was the case, for example, in our recent work in Albania (see above, § 9) on behalf of families subject to school segregation. When ERRC staff first met the affected communities in February 2015, there was a clear reluctance to challenge powerful local figures (including school headmasters) enforcing segregation. This changed dramatically after the ERRC brought complaints in its own name to the Equality Commissioner and Ombudsman: at an event in November 2015, after some of the findings had been made, Roma and Egyptians spoke out, asserting their rights directly to those present (including the Deputy Minister for Education). We have seen this pattern repeated around Europe: when NGOs assert rights on behalf of discriminated communities, those communities then feel empowered to pursue their cases. This is particularly important in cases where the victims are impossible to enumerate, which is a frequent condition (as it is in Hungary) for enabling an NGO to bring a claim in its own name.

26. The ERRC appreciates that only in extremely unusual circumstances will an NGO be able to pursue an application before the Court on behalf of a natural person or persons. However, in the light of the specific difficulties that victims of discrimination face in taking their cases before domestic courts, the ERRC respectfully submits that it is crucial and in keeping with the purpose of the Convention to allow a natural person who is a victim of discrimination to pursue her/his case before the Court after the matter has been ventilated in domestic proceedings in actio popularis proceedings. See, mutatis mutandis, *Bagdonavicius and others v Russia* (2016), § 62. The Court should also pay particular attention to the precedent-setting value of the judgment reached in a particular actio popularis case when examining whether it amounts to exhaustion of domestic remedies with respect to an individual victim affected by the practice concerned.

27. Indeed, actio popularis proceedings may provide the only possibility for discrimination issues to be aired properly at domestic level so as to enable the Court to deal with them. The ERRC has noticed that in individual cases it has been very difficult for the Court to establish a violation of Article 14, because the complaint is tied to the individual circumstances of a particular case. See, e.g., *V.C. v Slovakia* (2011). Actio popularis cases allow the Court and applicants to avoid this dilemma by ensuring that the full range of issues arising under anti-discrimination legislation are dealt with at domestic level before they reach the Court. Allowing individual victims of discriminatory practices to apply to the Court following the exhaustion of actio popularis proceedings concerning those practices is essential for guaranteeing the development of the Court's case law under Article 14 and Protocol 12.

The European Roma Rights Centre
19 October 2016