

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No.14800/18

Edmond BALKASI and Others

APPLICANTS

v

Albania

RESPONDENT STATE

EUROPEAN ROMA RIGHTS CENTRE – THIRD-PARTY INTERVENTION

I. The time has come for the Court to recognise “antigypsyism” and “institutional racism” and use those terms in its case law.

1. Roma have a word to describe what is happening when police officers target Romani people for abuse and then victimise them for complaining about it: antigypsyism. It is a word that also describes many other experiences which would be extraordinary in the lives of most Europeans, but are all too common for Roma: forced evictions; refusal of treatment by healthcare providers; housing and school segregation; and many other human rights violations. Roma are targeted and profiled by public officials across Europe and subjected to inferior treatment based on the stereotypes that characterise antigypsyism.
2. The Committee of Ministers of the Council of Europe used the term “anti-Gypsyism” eight times in its recent Recommendation to member States on improving access to justice for Roma and Travellers in Europe (CM/Rec(2017)10). The term is also used in official documents by the European Parliament¹ and the Council of the European Union.² The Court should likewise use the term directly in its case law to describe the specific forms of discrimination that Roma face in Europe. See, e.g., *Aydarov v*

¹ See, e.g., European Parliament resolution of 25 October 2017 on fundamental rights aspects in Roma integration in the EU: fighting anti-Gypsyism (2017/2038(INI)).

² See, e.g., Council recommendation on effective Roma integration measures in the member states, OJ C 378, 14.12.2013, 01, § 2.4.

Bulgaria (decision, 2018), § 78. The Court, we respectfully submit, should not distance itself from the word antigypsyism, for example, by placing the phrase “so-called” before it. See *Levakovic v Denmark* (2018), § 32.

3. According to the European Commission against Racism and Intolerance (“ECRI”), “anti-Gypsyism” (which ECRI, like other European bodies, spells with a hyphen) is “*a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination*”.³ The Alliance Against Antigypsyism, an NGO alliance of which the ERRC is a member, defines the concept as follows:

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

1. *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.*⁴

4. As the UN Special Rapporteur on Minority Issues put it, “*While ... the reasons for the marginalization of Roma are complex..., an overreaching factor is the deeply embedded social and structural discrimination Roma face worldwide, including anti-Gypsyism*”.⁵
5. ECRI’s definition of antigypsyism includes the term “institutional racism”, which has been defined notably 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*”.⁶

³ See General Policy Recommendation No.13, CRI(2011)37.

⁴ The Alliance’s paper, published in June 2016 and updated in June 2017, can be downloaded at www.antigypsyism.eu.

⁵ UN General Assembly, A/HRC/29/24, 11 May 2015: “Comprehensive study of the human rights situation of Roma worldwide, with a particular focus on the phenomenon of anti-Gypsyism”.

⁶ The Stephen Lawrence Inquiry, Report of an inquiry by Sir William MacPherson of Cluny (The MacPherson Report): Chapter 6, February 1999.

6. The ERRC urges the Court to acknowledge the existence of antigypsyism in Europe and to use that term to describe the specific nature of the discrimination Roma face.
7. When, for example, officials discourage Roma from making complaints about police brutality and/or when Roma are victimised for making such complaints by being prosecuted themselves, these are symptoms of institutional antigypsyism among police. It is imperative for the Court to be sensitive to and to name institutional antigypsyism when it appears in the facts of cases pending before the Court.

II. Antigypsyism is rife in Albania.

8. It would take up far too much space here to document the extent of antigypsyism in Albania. To give the Court a sense of the breadth of the problem, we note the Roma and Egyptians in Albania face: a particularly high risk of statelessness, due in large part to disproportionate refusals by authorities to register the births of Romani children;⁷ unemployment rates about twice as high as those of ethnic Albanians;⁸ school segregation;⁹ rates of school drop-out about four times higher than the majority population;¹⁰ particularly poor housing conditions;¹¹ and a high risk of forced evictions, resulting from the fact that some 30% of Roma in the country live in undocumented housing.¹²

III. Antigypsyism among police is disturbingly common in Europe.

9. Many Roma in Europe feel that they cannot count on police or prosecutors to protect them. Why is this? The EU Fundamental Rights Agency (“FRA”) offered some answers in their European Union Minorities and Discrimination Survey (EU-MIDIS), conducted in 2008.¹³ They asked 23,500 people with a

⁷ ERRC, “Roma Belong: Statelessness, Discrimination and Marginalisation of Roma in Albania”, February 2018.

⁸ UNDP et al., “Roma and Egyptians in Albania: a socio-demographic and economic profile based on the 2011 census”, April 2015, page 31.

⁹ See two applications pending before the Court: application numbers 49516/17 and 73548/17.

¹⁰ CRI(2015)18, § 61.

¹¹ CRI(2015)18, § 76.

¹² CRI(2015)18, § 72.

¹³ The statistics that follow are taken from FRA’s EU-MIDIS (“European Union Minorities

minority background about their experiences of discrimination and criminal victimisation in everyday life. According to the survey, 18% of all Romani respondents reported being victims of at least one “in-person crime” (assault, threat, or serious harassment) in the previous year which they thought was racially motivated in some way. Depending on the country where they were surveyed, between 69% and 84% of Roma did not report in-person crimes they suffered. According to FRA, 72% of Romani respondents who had not reported in-person crime said the reason was that they were “*not confident the police would be able to do anything*”. As FRA put it, “*The implications of high contact discriminatory policing for Roma communities do not bode well for the development of good police-community relations, and help to explain low levels of victimisation reporting to the police by the Roma*”.

IV. Antigypsyism among police is a particular problem in Albania.

10. According to ECRI’s report on Albania from 2015 (CRI(2015)18, § 48, covering the period in which the incident in the present case occurred), police have recorded only one hate crime incident ever.¹⁴ ECRI also noted that the domestic courts in Albania have never made use of Article 50 of the Criminal Code, the provision which allows for enhanced penalties in cases of hate crimes. The report goes on as follows: “*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*”.¹⁵
11. In 2011, the UN Committee on the Elimination of Racial Discrimination, in its Concluding Observations on Albania, expressed concern 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

and Discrimination Survey”) report, published in 2009 and available at http://fra.europa.eu/sites/default/files/fra_uploads/413-EU-MIDIS_ROMA_EN.pdf.

¹⁴ That incident is now the subject of another complaint pending before the Court: *Hysenaj v Albania*, application number 78961/11.

¹⁵ CRI(2015)18, § 48.

practices.¹⁶ The UN Human Rights Committee echoed these concerns in 2013: “*the Committee is concerned at the large number of complaints against law enforcement officials of ill-treatment of persons deprived of their liberty, including Roma detained in the context of forcible evictions from their homes in 2012*”.¹⁷ As ECRI highlighted in its 2015 report,¹⁸ it has been difficult to obtain precise data in relation to racially motivated violence due to the fact that there are no comprehensive statistics about the application of the relevant provisions of the Criminal Code and due to a lack of disaggregated data more generally. But several individual cases illustrate the larger trend noted by the UN bodies.

- a. On 14 May 2018, a man of Egyptian ethnic origin, Enea Ftoj, was arrested by police in Korça. After three days in police custody, he was found dead. His family have engaged a lawyer with support from NGOs. They claim there were marks of violence on his body, which the official forensic investigation denied.¹⁹
- b. The ERRC is working closely with a Roma-led NGO in Albania, the Roma Women’s Rights Centre (Qendra për të Drejtat e Gruas Rome), to provide free legal services to Romani people facing discrimination. In the course of this project, which began in early 2018, the Roma Women’s Rights Centre have noted multiple cases of rights violations by police, such as an Egyptian man being held for two months in police custody in Korça and facing regular police brutality, and a Romani woman violently attacked by municipal police for selling roasted corn on the street.
- c. There is a history of police officers (particularly municipal police in Tirana) violently attacking Roma and Egyptians who are engaged in

¹⁶ CERD/C/ALB/CO/5-8, § 15.

¹⁷ CCPR/C/ALB/CO/2, § 12.

¹⁸ CRI(2015)18, § 53, note 73, and page 9.

¹⁹ News articles about the case can be found at <https://www.gazetaexpress.com/lajme-nga-shqiperia/del-ekspertiza-nga-se-vdiq-27-vjecari-enea-ftoj-539038/?archive=1> and <http://www.hapur.al/2018/06/20/nuk-ishte-dhunuar-reagojne-familjaret-e-enea-ftojit-kerkojme-zhvarrosjen-e-trupit-kishte-krahun-e-thyer/>.

collecting and recycling waste.²⁰ In 2017, the ERRC supported several Romani people to bring civil litigation under the country's anti-discrimination law against the Municipality of Tirana in response to this violence. The litigants, with our support, claim that there has been a practice of municipal police targeting Roma and Egyptians for physical assault and racial abuse to stop them from collecting and recycling waste. The practice accelerated after the municipality privatised waste and recycling services. The case is pending before the Administrative Court of First Instance in Tirana.

V. The Court must name and condemn institutional antigypsyism among police.

12. How should the Court respond to individual cases of police violence against Roma, in the light of the current case law on the subject? One response, which the ERRC would reject, is to decide that this is a matter of “well-established case law” and turn the cases over to three-judge committees, under Article 28 § 1(b) of the Convention. See, e.g., *Fogarasi and others v Romania* (2017). The ERRC respectfully submits this would simply give rise to ever more applications before the Court on the same subject matter. Instead, when allegations of racially-motivated police brutality continue to come to the Court in a context where there is evidence of institutional racism (as there is in Albania), the Court should take this context into account in deciding whether there has been a breach of Article 3 taken with Article 14.
13. Roma applicants have had difficulty, when they were victims of a violation of the procedural limb of Article 3 taken with Article 14, convincing the Court that they were also victims of a violation of the substantive limb of Article 3 taken with Article 14. This is because the Court's previous case law has required an applicant alleging discrimination to demonstrate it “*beyond reasonable doubt*”. *Nachova and others v Bulgaria* (Grand Chamber, 2005), § 147. Vulnerable victims alleging racially-motivated police brutality are of course

²⁰ A news article about an incident – one of many – which took place in July 2012 is available at <http://www.gazetatema.net/2012/07/11/policia-bashkiake-reprezalje-ndaj-romeve-keshilltaret-e-majte-te-ndalet-dhuna-dhe-veprimet-e-paligjshme/>.

unlikely to be able to discharge this burden of proof when they are also victims of a failure on the part of the authorities to investigate what happened to them: because of the State's failings, the evidence of discrimination the Court expects to see is simply not available. This is frustrating: the failure of the authorities to investigate police brutality properly leaves such victims unable to establish a violation of the substantive limb of Article 3 taken with with Article 14. See, e.g., *Nachova and others*, § 147. The ERRC has argued in the past that the Court should reconsider the way it applies the burden of proof in cases involving allegations by Roma that they have been victims of violations of the substantive limb of Article 3 taken with Article 14. We limit ourselves here to endorsing the comments of Judges Gyulumyan and Power in *Carabulea v Romania* (2010), §§ 9-16 of their Opinion; to noting that it is now a general principle of anti-discrimination law in Europe that the burden of proof shifts to the defendant once the person claiming to be a victim of discrimination has made a prima facie case of discrimination (see, e.g., EU Directive 2000/43, Article 8 § 1), which is very different from the "beyond reasonable doubt" standard; and to proposing that in respect of States such as Albania which have ratified Protocol no.12 to the Convention, a different, more searching approach is appropriate. What follows focuses on the question of how to approach allegations by Roma that they have been victims of violations of the procedural limb of Article 3 taken with Article 14 when there is evidence of institutional antigypsyism in the country concerned.

14. Without naming it as such, the Court has frequently dealt with institutional antigypsyism in police and prosecutors' offices. See, e.g., *Nachova and others v Bulgaria* (Grand Chamber, 2005) and *Šečić and others v Croatia* (2009). In those cases, the Court found violations of the procedural limb of Article 2 or Article 3 taken with Article 14, resulting from the failure to unmask racist motives behind violence against Roma.
15. Such a finding only targets part of the problem of institutional antigypsyism. For example, in *Nachova and others* (Grand Chamber, 2005), the Court found, first, that there had been a failure adequately to investigate the deaths of two Romani men (a violation of the procedural limb of Article 2) (§§ 114-

119). The Court then separately found a violation of Article 14 taken with the procedural limb of Article 2 because of the failure to investigate racist motives behind the killings (§§ 162-168). This second finding was a truism: it is difficult to imagine an investigation into the death or ill-treatment of a Romani person that was ineffective in general yet effective in unmasking any racist motive. See also *Šečić and others v Croatia* (2009) (finding, first, a violation of the procedural limb of Article 3 and then, separately, a violation of the procedural limb of Article 3 taken with Article 14).

16. The ERRC respectfully submits that there is another question the Court must ask when considering complaints from Romani people about police brutality: whether the failure to carry out an effective investigation, and whether any victimisation the applicants faced, such as prosecution for allegedly lying in their accusations against police, are manifestations of institutional antigypsyism. The Court was not called upon to answer this question in *Nachova* or in *Šečić*, where it limited its consideration of the Article 14 complaints to the narrower question of whether the authorities had failed to unmask a racist motive when there were indications of a hate crime. Where there is evidence of institutional antigypsyism among police in a country generally, and a related individual failure adequately to investigate police brutality against Roma, the ERRC submits that there is a presumption under Article 14 taken with the procedural limb of Article 3 that the failures in the investigation are themselves a form of discrimination. See, *mutatis mutandis*, *D.H. and others v Czech Republic* (Grand Chamber, 2007), § 209. Such a finding recognises that institutional antigypsyism deprives Roma of access to the evidence needed to prove a violation of the substantive limb of Article 3 taken with Article 14 in cases of police brutality. Such a finding is also more likely to ensure that the Court's judgments lead to the systemic changes that will make it unnecessary to take similar cases to Strasbourg in the future.
17. The Court has already conducted similar exercises in uncovering institutional discrimination in police forces. For example, in *Opuz v Turkey* (2009), the Court concluded "*that domestic violence is tolerated by the authorities*" (§ 196), also noting that "*the general and discriminatory judicial passivity in*

Turkey created a climate that was conducive to domestic violence” (§ 197). In other words, the Court found institutional sexism in the Turkish institutions responsible for protecting women from gender-based violence. The Court should not hesitate to find the same in Albania when it comes to institutional antigypsyism among police.

18. While we will of course not comment on the individual facts of the present case, we have set out above the evidence of institutional antigypsyism within the Albanian police, including authoritative findings from ECRI and UN bodies. In an individual case of police brutality against Roma, the existence of such authoritative findings shifts the burden of proof onto the Respondent State to show that an individual incident of what appears to be discriminatory police brutality and the failure to investigate were not the result of institutional antigypsyism among police and/or prosecutors. Discharging that burden of proof must involve producing data to show that the police and prosecutors are providing an appropriate response to police brutality and other violent crimes against Roma. See *E.B. v France* (Grand Chamber, 2008), § 74.
19. We also note with concern that victimisation is extremely common when Romani people complain about police violence. Roma who dare to challenge the police who brutalise them are often themselves prosecuted, for example, on trumped up charges of making false complaints or endangering the safety of the officers who abused them. We urge the Court to be particularly alert to such situations and use the term “victimisation” to describe them. Victimisation is defined in EU anti-discrimination law as “*any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment*”.²¹ When Roma have complained about police brutality and the result is that they are prosecuted, for example, for perverting the course of justice, we respectfully submit that the burden is on the Respondent Government to show an absence of discrimination; otherwise, the protection against victimisation in anti-discrimination law will be meaningless.

²¹ EU Directive 2000/43, Article 9.

VI. Summary

20. In order to assist the Court in summarising the intervention for inclusion in the judgment, we have prepared the following summary:

The European Roma Rights Centre (“the ERRC”) said the time had come for the Court to recognise “antigypsyism” and “institutional racism” and use these terms in its case law. The ERRC noted the use of the term “anti-Gypsyism” in official documents by the Committee of Ministers of the Council of Europe, the European Parliament, and the Council of the European Union. The ERRC noted that antigypsyism was rife in Albania, for example, in housing and education. The ERRC set out the evidence of institutional antigypsyism among police in Europe. There was Europe-wide evidence that Roma faced higher rates of violent crime and do not trust the police to protect them or investigate, because of racially discriminatory policing practices. The ERRC set out the evidence of antigypsyism among police in Albania in particular. The ERRC included materials from United Nations bodies and the European Commission against Racism and Intolerance, as well as its own experience supporting Romani people to complain about incidents and patterns of police brutality in Albania. The ERRC addressed how the Court should respond to police brutality against Roma in the light of established case law on the matter and evidence of institutional antigypsyism. The ERRC urged the Court not to treat such cases as repetitive and turn them over to three-judge committees. This, the ERRC submitted, would result in an ever-increasing number of cases in Strasbourg. Instead, the ERRC encouraged the Court to take into account the evidence of institutional antigypsyism in the country concerned. The ERRC reiterated its long-standing view that the Court should not apply a “beyond reasonable doubt” test to determine whether there was a violation of the substantive limb of Article 3 taken with Article 14 in such cases; the burden of proof should shift to the Respondent State once the applicant had made a prima facie case. The ERRC also submitted that where there was a failure to carry out an effective investigation, where there appeared to be victimisation of (i.e. retaliation against) those complaining, and where there was evidence of institutional antigypsyism, the failure to investigate and the victimisation should be characterised as manifestations of discriminatory conduct. The ERRC pointed in particular to *Opuz v Turkey* (2009), §§ 196-197 (concerning what the ERRC described as institutional sexism among police), and submitted that the Court should not hesitate to make a similar finding in the present case: that there is an institutional failure in Albania to deal with police brutality against Roma. According to the ERRC, the burden is on the Respondent State to show that any individual case where a Romani person claims to have been subjected to discriminatory police brutality and victimised for complaining did not amount to a case of discrimination.

The European Roma Rights Centre
7 November 2018