

IN THE EUROPEAN COURT OF HUMAN RIGHTS

DŽELADIN

Applicant

v

MACEDONIA

Respondent State

and two other applications

Application Numbers 43440/15, 44027/16, and 16460/17

Third-Party Intervention of the European Roma Rights Centre

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 set out the extensive evidence that Macedonian border guards have been racially profiling Macedonian citizens of Roma ethnic origin and stopping many of them from leaving the country. That evidence includes: the ERRC’s own non-exhaustive data collection based on interviews with people affected, covering 422 Roma stopped from leaving the country; a situation-testing exercise the ERRC carried out in December 2013 and which led to litigation that is still ongoing; an admission by the Interior Minister in late 2016 that the practice had been taking place; a power-point presentation delivered by a Ministry of Interior official to international colleagues in Strasbourg in 2014 describing the “profile” of the typical returned failed asylum seeker (including that such a person is most likely to be Romani) and saying that people who fit this profile are stopped at the border when trying to leave the country; documents from the European Union identifying most asylum seekers from Macedonia as Roma and urging the Macedonian government to take action, which the ERRC believes amounts to a clear indication to engage in racial profiling; and conclusions from Council of Europe bodies, UN bodies, and the national Ombudsman identifying and condemning the practice. The ERRC gave an overview of cases that the organisation has supported in the domestic courts on the issue, showing inconsistencies and misunderstandings by domestic judges. The domestic cases have taken divergent approaches, with some courts finding no violations, some finding violations only of the constitutional right to leave the country, and some finding discrimination in the individual case but without identifying a larger pattern. The ERRC went on to say that the time had come for the Court to use the term “antigypsyism” in its case law. The ERRC set out widely accepted definitions of the terms “antigypsyism” and “institutional racism” and urged the Court to use the term “institutional antigypsyism” to describe the practice of racial profiling of Roma at the border in Macedonia. The ERRC identified three consequences of the existence of institutional antigypsyism for the Court’s consideration of these complaints: the burden of proof was on the Respondent Government to show that there was no discriminatory practice (see *E.B. v France* (Grand Chamber, 2008), § 74); the Court was not required to examine the individual cases of applicants who suffered the same discriminatory practice (*D.H. and others v the Czech Republic* (Grand Chamber, 2007), § 209); and it was appropriate for the Court to make an indication of the general measures that must be taken to put an end to the institutional antigypsyism that gave rise to this practice, including clear, written directives to border police, training, and measures for data collection.

A. There has been a widespread practice of racially profiling Roma at the Macedonian border and stopping Roma from leaving the country

3. The Statement of Facts in application no.44027/16 sets out the data the ERRC has collected on the ground in Macedonia suggesting that Roma are racially profiled by their country's border guards. Here is an update. Since 2011, we have documented 145 cases including 442 Romani individuals (322 adults and 120 children) who were denied exit from Macedonia. In 20 of those cases (14%), the border guards referred explicitly to the Roma ethnic origin of the people concerned as part of the explanation given for refusing to allow them to leave the country. In 98 of the cases (68%), border officials asked the people they subsequently prevented from leaving the country to show that they fulfilled the requirements of the Schengen Borders Code (EU Regulation 562/2006) for entering the EU. In 18 of the cases (12%), the Romani people stopped from leaving were not asked anything at all, but simply prevented from leaving the country.
4. Our data collection was never designed to be exhaustive. It has been conducted by a Skopje-based colleague who proactively seeks out cases and interviews the people concerned. There may be many more cases of Roma stopped at the border. But the practice seemed so widespread that we were convinced there was a pattern of racial profiling. Seeking more evidence, in December 2013 we designed and carried out a situation-testing exercise. On 5 December 2013, we trained pairs of materially identical Roma and non-Roma testers and on the following three days we observed as they crossed various border points, including land crossings to Serbia and Bulgaria. None of the non-Roma were stopped or questioned at the border; in half the cases, the Romani testers were stopped from leaving. A case arising from this exercise is currently pending before the domestic courts. See below, § 21.
5. Since 2011, we have also documented 75 cases in which Macedonian border officials revoked the passports of Romani people who had been returned from EU Member States as failed asylum seekers. We have become aware of another 155 such cases. The legal provisions allowing for these revocations was subsequently declared unconstitutional (see below § 15). Many more Roma may have faced this practice before it stopped: according to a letter we received from the Ministry of Interior, between 1 October 2011 and 1 July 2014, a total of 1,734 Macedonian citizens had their passports revoked in accordance with Article 37 of the Law on Travel Documents. Additionally, the ERRC has documented cases where Roma, after being returned to Macedonia from Western European countries and having their passports confiscated by the Macedonian authorities, faced a ban on using their ID card to cross the border (see below § 22).
6. The Ministry of Interior does not maintain data disaggregated by ethnicity about those who are stopped at the border from leaving the country. The Interior Minister nonetheless admitted to the existence of the discriminatory practice on 2 November 2016, when he announced that the

practice would end: “There are already several verdicts on the matter that are a burden on the Ministry and on the Republic of Macedonia. With the civic groups we agreed that there needs to be a notification sent out to the border posts on the way in which they will act towards the citizens, avoiding discrimination based on gender, race, political orientation, religion, and other criteria. Our goal is to reduce the number of lawsuits that damage the reputation of the country”.¹

7. To be clear, not all Roma were stopped from leaving Macedonia. However, those who were prevented from leaving the country were almost exclusively Roma. Racially profiling Roma and stopping those who appeared (based on additional, unknown arbitrary criteria) from leaving the country appears to be rooted in the stereotypical view that Roma are inherently likely to travel abroad to seek asylum. We believe that this stereotypical view results from a mixture of tropes common to antigypsyism, the fact that the “profile” developed by the authorities indicates that the most common ethnicity of failed asylum seekers returned to Macedonia is Roma, and data from Sweden and Germany and publicised by the EU indicating that most asylum seekers from Macedonia are Roma. We note that those who are stopped from leaving the country have a stamp placed in their passport with two lines struck through it. While people are told this means they are prohibited from leaving the country only for 24 hours, in practice it seems that people who have this unusual stamp in their passport are marked out and are particularly likely to be stopped from leaving the country again.

8. A profile of returned asylum seekers appears in a slide from a presentation given by a Ministry of Interior official to EU colleagues in Strasbourg on 15 May 2014, reproduced here (to the right).

PROFILE OF RETURNED ASYLUM SEEKERS

Returned from	Germany
Returned on border crossing point	BCP Airport Alexander the Great
ethnicity	1. Roma; 2. Albanian; 3. Macedonian
age	1. Up to 20; 2. between 30-40; 3. between 20-30 years old
gender	male
Vehicle used	1. bus; 2. van
BCP of exit from the Republic of Macedonia	BCP Tabanovce
Hometown	Kumanovo, Bitola, Suto Orizari

9. A later slide explicitly states that “[The p]rofile of people who were not allowed to exit the Republic of Macedonia coincides with the profile of Macedonian citizens who were forcibly returned from the EU countries and with the profiles obtained by exchange of information with the relevant authorities of foreign countries”. In other words, the authorities stopped people from leaving the country if they matched this profile of returned asylum seekers, which includes

¹ Macedonian Information Agency, “Interior Minister Spasovksi says he will end border police discrimination of Roma citizens”, 2 November 2016, available at <http://www.mia.mk/en/Inside/RenderSingleNews/289/133415230>.

stopping Roma more than people of other ethnicities. This of course relies on a fallacy: the fact that the most prominent ethnicity of failed asylum seekers may be Roma, for example, does not mean that most Roma exiting the country are asylum seekers or that profiling people based, inter alia, on their ethnicity is legitimate, proportionate, or effective. Indeed, those caught up in this practice and who spoke with the ERRC told us they were travelling to visit family or to go on holiday, and were often travelling not to the EU but to Kosovo, Montenegro, or Serbia.

10. The factual basis for the conclusion that most Macedonian asylum seekers in Sweden are Romani people is based on the registration of the mother tongue of asylum seekers: according to the European Commission, four-fifths of asylum seekers from the Western Balkans in Sweden indicated that Romani was their first language.² The European Commission likewise stated that 80% of people from the region seeking asylum in Germany were Romani, without explaining how that data was collected. These data were supplemented in May 2015 by a

Measures to counter the abuse of visa-free travel channel: the case of the former Yugoslav Republic of Macedonia

Operational measures

1. *Strengthened exit controls continued in 2013: check of necessary financial means, conducting interviews in reference to their destination, the purpose and the motives for the travel. Should there be indications that the real intention for the travelling is to abuse the right to asylum, the person is refused exit in accordance with Article 15 of the Law on Border Control.*

2. *Improved profiling of persons likely to abuse asylum in the EU: this includes identifying municipalities from where they most failed asylum seekers come from. Such updated analysis is delivered monthly to all Regional Centres for Border Affairs, as well as to all BCPs.*

In 2013, the number of refusals of exit was 6 700 or 41% more compared to 2012.

3. *Strengthened repressive measures: in 2013, authorities detected three times more criminal offences of 'abuse of visa-free regime with the Member States of the European Union and the Schengen Agreement', and doubled the number of convicted perpetrators.*

report³ from the European Asylum Support Office (an EU agency) indicating that “*the ethnic composition of applicants from the former Yugoslav Republic of Macedonia mainly consists of Roma*”.

11. Frontex, the EU’s external border agency, made clear in February 2014 that the EU supports the notion that Macedonian border guards should stop people who meet the profile of failed asylum seekers from leaving the country. In its “annual risk analysis” of the Western Balkans, Frontex included the text box on the left. Why would “*identifying municipalities from where they [sic] most failed asylum seekers come from [sic]*” help identify potential false asylum seekers? Logically, this

² European Commission, COM(2013) 836 final, “Fourth Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries”, 28 November 2013, available at <http://europeanmemoranda.cabinetoffice.gov.uk/files/2014/03/17144-131.pdf>, page 16.

³ EASO, “Asylum Applicants from the Western Balkans: comparative analysis of trends, push-pull factors, and responses – Update”, May 2015, available at https://www.easo.europa.eu/sites/default/files/public/Asylum-Applicants-from-the-Western-Balkans_Update_r.pdf, page 13.

makes little sense, although due to widespread residential segregation, it is often possible to assume a person's ethnicity from her municipality. For example, 90% of the population of Shuto Orizari – the third most common municipality of origin of false asylum seekers according to the Ministry of Interior's profile (see above, § 8 and the slide) – is Romani.

12. The Court may also be aware of a telegram issued by the Ministry of Interior's Bureau for Security Affairs on 28 April 2011 (n°1677) to various police agencies, including the border police. The telegram noted the increase in the number of asylum seekers in the EU from Macedonia and set out various measures to be taken. These measures included strengthening border controls for those leaving the country, including for "*organised groups of citizens, potential asylum claimants*". The ERRC submits that in the context set out above, this would clearly have been understood as an instruction to question Romani passengers in particular, or simply to stop Roma from travelling abroad altogether.
13. Racial profiling of Roma at the borders in Macedonia has been acknowledged and condemned by the Council of Europe Commissioner on Human Rights (who said it was "clear" that a profile is being used),⁴ the UN Human Rights Committee,⁵ the European Commission on Racism and Intolerance,⁶ and the Macedonian Ombudsman's Office.⁷
14. The European Union has hardly reacted to the overwhelming evidence of racial profiling. As mentioned above, EU institutions have spread the notion that asylum seekers from Macedonia are mostly Romani; the EU has also encouraged the use of profiling at the border to stop would-be asylum seekers from leaving the country. On 10 November 2015, the European Commission, in its "progress report" concerning Macedonia's eventual accession to the EU,⁸ noted that "*Complaints have been registered by Roma prevented from leaving the country and of mistreatment of Roma who have returned after unsuccessfully seeking asylum abroad*". Yet one year later, the Commission stated that "*The country should also maintain its efforts to decrease the number of unfounded asylum applications lodged by its nationals in EU Member States*".⁹ It is hard to imagine that the Macedonian authorities took this as anything other than encouragement to continue profiling Roma at the border, especially given the context of the recommendation: an assessment of Macedonia's prospects for joining the EU.

⁴ CommDH(2013)4, § 101.

⁵ CCPR/C/MKD/CO/3.

⁶ CRI(2016)21 § 83

⁷ Republic of Macedonia Ombudsman, Annual Report 2013, available (in English) at <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2013-Ang.pdf>, page 66; Republic of Macedonia Ombudsman, Annual Report 2014, available (in English) at <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2014/GI%202014-Ang.pdf>, page 12; Republic of Macedonia Ombudsman, Annual Report 2015, available (in English) at <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2015/GI%202015-Ang-za%20pecat.pdf>, page 82.

⁸ SWD(2015) 212 final.

⁹ SWD(2016) 362 final, page 6.

15. Yet, as mentioned above (see § 6), it was around the time the Commission published that statement (November 2016) that the Interior Minister announced racial profiling would have to stop because of the large number of cases the Ministry of Interior had lost in court. Since the Minister's statement, made some fifteen months ago, the number of cases of racial profiling appears to have declined significantly. We are nonetheless still logging new cases of racial profiling of Roma at the border, the most recent one having taken place on 29 September 2017.

B. Litigation in the Domestic Courts

16. The Court is already aware¹⁰ of a judgment of Macedonia's Constitutional Court on 25 June 2014, declaring provisions of the domestic Law on Travel Documents unconstitutional because they violated the right to freedom of movement. That case was taken under Macedonia's "initiative" procedure, by which anyone can challenge the constitutionality of a provision of law in the abstract. The Constitutional Court found that the authorities cannot restrict someone's right to leave the country in order to protect the reputation of Macedonia or to protect the immigration laws of another country.
17. Many Roma affected by the racial profiling described above have also taken their cases to the domestic courts in Macedonia. These cases have led to the verdicts referred to in the Interior Minister's statement quoted above (see § 6). There have been over 40 cases in the domestic courts brought by Roma who faced racial profiling at the border; the cases have been brought before civil courts in Skopje, Bitola, and Kochani. Sixteen of those cases were taken by Romani people supported by the ERRC and the Macedonian Young Lawyers' Association ("MYLA") in a specific project that began in 2015, designed to provide access to justice for Roma whose rights were violated through this particular practice. The Interior Minister was right when he said in November 2016 that the cases have largely been successful and have resulted in the Ministry of Interior being ordered to pay damages. However, the course of these cases has not run smoothly and the courts have been inconsistent in their conclusions.
18. The cases have focused on two legal claims: that Roma who were racially profiled were victims of race discrimination; and that their right to leave the country, protected under the domestic constitution, was violated. Out of a total of 16 cases, nine have led to a final judgment at domestic level. The other seven cases are still pending before the domestic courts. Of the nine final cases, the courts found a violation of both the right to leave the country and the anti-discrimination law in only three of the cases; in one case they found only a breach of the anti-discrimination law; in two of the cases they found only a breach of the right to leave the country; and in the remaining three cases no violation was found at all. Of the five cases that are still pending, one has not yet had a first-instance judgment; in the other four, there was a finding at first instance of a violation of the right to leave the country, and in two of those cases the first-

¹⁰ The judgment can be found at Annex 13 to application no.44027/16 (*Abedinov*).

instance court also found that there was a breach of the anti-discrimination law. The different outcomes on the issue of a violation of the right to leave the country are not the result of significantly different factual circumstances, but instead hang largely on a legal issue. The courts which did not find a violation of the right to leave the country concluded that the individuals concerned did not meet the conditions under the Schengen Borders Code to enter the EU. This was the principal argument put forward by the Ministry of Interior despite the Constitutional Court decision of 25 June 2014 (see above, § 16). Those courts which found in favour of the plaintiffs on this point either found that there was no reason to single out the plaintiffs or ruled that the Schengen Borders Code is not part of Macedonian domestic law, meaning that the Ministry of Interior could not rely on it. This conflict remains unresolved at domestic level. Notably, in Skopje, the same court (Skopje Basic Court 2) delivered contradictory judgments in different cases, depending on which judge was sitting.

19. The divergent reasoning on the question of discrimination is particularly confusing. For example, in one case, the first-instance court did not seem to address the issue of discrimination at all. The plaintiff appealed; the appellate court acknowledged that there was discrimination but then inexplicably lowered the amount of compensation.¹¹ Although domestic law provides for a shift in the burden of proof in discrimination cases, the issue is handled awkwardly in these domestic judgments, with judges, sometimes ambiguously, concluding that a prima facie case has not been made and/or not clearly recognising how the shift of the burden of proof works. In all of those cases supported by the ERRC and MYLA, the evidence collected by the ERRC about the widespread nature of the problem was submitted to the domestic courts yet was hardly taken into consideration in the reasoning of the judgments.
20. In the cases the ERRC and MYLA supported, the plaintiffs generally sought between 170,000 and 200,000 MKD as compensation for non-pecuniary damage (between approximately 2,750 and 3,250 EUR). When plaintiffs have been successful, they have generally been awarded between 30,000 and 60,000 MKD (between approximately 490 and 975 EUR). In one of the cases the plaintiffs were awarded the full amount requested: 180,001 MKD. In another case the full amount of 180,001 MKD was awarded but this was reduced to 60,000 MKD on appeal.
21. Another case has been brought, with the ERRC's support, by the Romani testers in the situation-testing exercise we set up in December 2013 (see above, § 4). The first-instance court found in favour of the plaintiffs on 4 April 2017, although awarded the plaintiffs less than half of what they requested in compensation. The first-instance judgment was overturned on appeal and sent back for a re-trial. The case was re-heard in the autumn and on 1 November 2017 the

¹¹ The Court is aware of this case: the plaintiff, represented by the ERRC, complained to the Court but her complaint was rejected by a single judge. *Kjazimova v Macedonia*, application number 20780/17, decision of 18 May 2017.

first-instance court delivered a similar, favourable judgment for the plaintiffs. Another appeal is now pending.

22. The ERRC also supported a Romani family forcibly returned to Macedonia after unsuccessfully claiming asylum in the EU. Upon return, a decision was made prohibiting them from using their identity cards to travel to neighbouring countries. (Normally, Macedonian citizens are able to use their ID cards to travel to Albania, Kosovo, Montenegro, and Serbia.) On 11 September 2017 the first-instance court found that the decision was discriminatory. On 5 December 2017 the judgment was overturned and sent back for a re-trial, which has not yet taken place.
23. Despite the Constitutional Court judgment of 25 June 2014 (see above, § 16), which entered into force on 14 July 2014, the authorities did not return the passports of Roma who had their passports confiscated, except for those who approached the authorities and specifically asked for their passports to be returned. The ERRC and ten Romani people affected initiated litigation on 16 February 2017, claiming that this failure to return *ex officio* the passports amounted to discrimination. On 29 January 2018 we received the first-instance judgment, in which the complaints were partially accepted. There will be an appeal.

C. The Court should identify the racial profiling that has been happening at the border as “institutional antigypsyism”

24. Roma have a word to describe what is happening when they are racially profiled by their own country’s border guards and stopped from leaving: antigypsyism. It is a word that also describes many other experiences which would be extraordinary in the lives of most Europeans but are all too common among Roma: police brutality; forced eviction; refusal to provide healthcare; housing and school segregation; segregated maternity wards; 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 common to antigypsyism.
25. The word “antigypsyism” (which is spelled with or without a hyphen) is now widely used by intergovernmental institutions to describe the specific forms of discrimination Romani people face. The Committee of Ministers of the Council of Europe used the word eight times in its recently approved recommendation to the member States on improving access to justice for Roma and Travellers in Europe.¹² The time has come for the Court to use the term as well. The Alliance Against Antigypsyism, 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.¹³*

¹² CM/Rec(2017)10, adopted on 17 October 2017.

¹³ The Alliance’s paper, published in June 2016 and updated in June 2017, can be downloaded at www.antigypsyism.eu.

26. According to the European Commission Against Racism and Intolerance (“ECRI”), “anti-Gypsyism” (which they spell with a hyphen) is “*a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination*”.¹⁴ This definition includes the term “institutional racism”. The term institutional racism was defined, notably, in the United Kingdom in the context of the murder of Stephen Lawrence: “*the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin*”.¹⁵
27. The ERRC urges the Court to describe the situation of racial profiling at the border in Macedonia using the term “institutional antigypsyism”. The three cases before the Court are not isolated. They are part of a persistent administrative practice of identifying people at least in part if not entirely by their Roma ethnicity, subjecting them to increased scrutiny, and preventing many from leaving the country. This failure has been aggravated by:
- a. the fact that the practice continued long after various authoritative national and international actors, including the Council of Europe Commissioner for Human Rights, UN bodies, ECRI, and the national Ombudsman, had identified and publicly denounced it;
 - b. the failure of the domestic courts in Macedonia to address the issue consistently and clearly, including by making clear findings of violations of the anti-discrimination law, awarding appropriate damages, and insisting in all cases that the Schengen Borders Code is not a justiciable instrument of domestic law;
 - c. the failure of the authorities, despite the national and international outcry about this practice, to keep data disaggregated by ethnicity “*which alone could provide an accurate picture of administrative practice and establish the absence of discrimination*” (*E.B. v France* (Grand Chamber, 2008), § 74); and
 - d. the ambivalent approach of the European Union which has acknowledged the existence of discrimination whilst also encouraging the Macedonian authorities to continue this practice.
28. The ERRC notes with concern the way the case law in Macedonia has developed on the subject, and notes that in cases of institutional racism such as this, when the domestic courts prove incapable of dealing with the claims in a manner consistent with the Convention and each other, there is a risk that large numbers of people affected will eventually be forced to take their cases to Strasbourg.

¹⁴ See General Policy Recommendation No.13, CRI(2011)37.

¹⁵ 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>.

29. A finding that there is institutional antigypsyism within the border police in Macedonia has, the ERRC submits, the following consequences for the Court's consideration of whether there has been discrimination contrary to Article 14 taken with Article 2 § 2 of Protocol No.4:
- a. The burden of proof is on the Respondent Government to show that there was no discriminatory practice, including by producing statistical evidence to that effect. See above, § 27.c.
 - b. The Court is not required to examine the individual cases of applicants who suffered the same discriminatory practice. See, *mutatis mutandis*, *D.H. and other v the Czech Republic* (Grand Chamber, 2007), § 209.
 - c. It is appropriate for the Court to make an indication, in order to assist the Respondent State in complying with its obligations under Article 46 § 1 of the Convention and to reduce the need for further litigation before the Court, that general measures must be taken to put an end to the institutional antigypsyism that gave rise to this practice. In this case, these include:
 - i. clear, written directives to border police not to engage in racial profiling;
 - ii. training for border guards on discrimination; and
 - iii. measures to collect data disaggregated by ethnicity (and depersonalised, to ensure compliance with data protection principles) about those prevented from leaving the country.

European Roma Rights Centre
5 February 2018