

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application Nos.21314/15, 21316/15,
21317/15, and 21321/15

Róbert Kovács Id., Krisztián Kovács, Róbert Kovács Ifj., and Márió Kovács
APPLICANTS

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 permission to intervene granted by the President of the Chamber.
2. The Court will notice that this intervention is similar (but not identical) to third-party interventions we have submitted in other cases, particularly against Hungary and Romania. As similar cases about police brutality against Roma continue to come before the Court, we believe it is increasingly important for the Court to take into account the evidence of antigypsyism among police in Europe in general and in the particular countries where these incidents occur. Treating these as repetitive cases would, we respectfully submit, be an error. The persistence of police brutality against Roma in a State which has already been condemned by the Court represents an exacerbating situation, which and should be treated as such by the Court.

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

3. Roma have a word to describe what is happening when they are abused by police officers who target them for being Romani: 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.

4. The Committee of Ministers of the Council of Europe used the term “antigypsyism” 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 Court should likewise use the term in its case law.
5. 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*”.¹ 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.*²

6. As the UN Special Rapporteur on Minority Issues has 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*”.³

¹ See General Policy Recommendation No.13, CRI(2011)37.

² The Alliance’s paper, published in June 2016 and updated in June 2017, can be downloaded at www.antigypsyism.eu.

³ 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”.

7. 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.

III. Antigypsyism Among Police in Europe

8. In 2012, the ERRC released a report⁴ about violence against Roma in Slovakia, Hungary, and the Czech Republic. The report showed a worrying pattern of attacks across the region. The ERRC recorded more than 120 attacks against Romani people and their property between January 2008 and July 2012, including shootings, stabbings, and throwing Molotov cocktails. Out of these 120 crimes, 14 were perpetrated by police officers.
9. Many Roma feel that they cannot count on the police to protect them from attacks, or on police and prosecutors to get justice after attacks happen. Why is this? The EU Fundamental Rights Agency (FRA) offered some answers in their European Union Minorities and Discrimination Survey (EU-MIDIS), conducted in 2008.⁵ They asked 23,500 people with a minority background about their experiences of discrimination and criminal victimisation in everyday life. According to the survey, 18% of all Romani respondents (like 18% of all sub-Saharan African 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. Roma and sub-Saharan Africans are the groups most likely to experience in-person crime and in some places they are four times more likely to be victims of such crime than the majority population. Roma and other minorities are also likely not to report in-person crimes: 69% of minorities did not report assaults or threats they had experienced and 84% did not report serious harassment. In Hungary, 22% of Roma surveyed said that they had been victims of serious harassment, assault, or threats, and 85% of those victims did not report these

⁴ Attacks against Roma in Hungary, the Czech Republic and the Slovak Republic 2008-2012, available at: <http://www.errc.org/article/attacks-against-roma-in-hungary-the-czech-republic-and-the-slovak-republic/3042>.

⁵ The statistics that follow are taken from FRA’s EU-MIDIS (“European Union Minorities 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.

in-person crimes. According to FRA, there is a link between minorities' lack of trust in the police (resulting, for example, from excessive police stops of Roma and other minorities and disrespectful treatment of them by police officers) and this underreporting: 72% of the respondents who had not reported the in-person crime they had suffered said that the reason was that they were "*not confident the police would be able to do anything*". We see these data as evidence of the continued impact of antigypsyism on Roma communities throughout Europe and the strong need to recognise and address antigypsyism at a European level.

IV. Antigypsyism Among Police in Hungary

10. The evidence set out below has been covered in previous third-party interventions we have submitted to the Court in cases involving Hungary. We respectfully submit that the Court needs to take account of this evidence more fully in its judgments concerning police brutality against Roma in order to ensure that victims no longer need to bring their cases to Strasbourg.
11. As the Court will note, the definition of antigypsyism given by ECRI includes "institutional racism" (see above, § 5). The term institutional racism was defined, notably, in the United Kingdom in the context of the murder of Stephen Lawrence 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 The evidence of the general situation in Hungary shows that there is institutional racism against Roma (i.e. institutional antigypsyism) within the police in Hungary.
12. In the past few years, international monitoring bodies and national NGOs have expressed concern about the rise in anti-Roma rhetoric and racism and about physical violence against Roma in Hungary.
13. In 2012, in his report on Hungary, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related

⁶ 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>.

intolerance expressed his concern “*at the growth of paramilitary organisations with racist platforms which [were] target[ing] Roma*” at that time.⁷ The Court is familiar with this phenomenon. See *R.B. v Hungary* (2016). Racist paramilitary organisations of this kind did not flourish in Hungary by chance. They proliferate when State bodies, especially those responsible for protecting minorities, fail to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin, leaving racists free to act.

14. In 2013, FRA issued a thematic report looking at racism, discrimination, intolerance, and extremism in Hungary (as well as Greece), giving their assessment of the response provided by the Hungarian authorities.⁸ The report noted widespread violence against Roma and the lack of effective implementation of the laws for investigating and prosecuting racially biased crimes. The report noted that “*police often overlook*” hate crimes, and possible explanations for this included “*the latent climate of intolerance and prejudice that also exists within the police force*” and the fact that “*proving hate crime is more complex, resource intensive and time consuming than proving other types of crime*”.⁹ FRA also concluded, after meeting with the Hungarian authorities, that “*recognising bias motivation requires special knowledge and training which police officers do not always have*”.¹⁰ These findings amount, in the ERRC’s view, to the kind of collective failure in respect of Roma covered by the definition of institutional racism.
15. In December 2014, Nils Muižnieks, the Council of Europe Commissioner for Human Rights, issued a report of his visit to Hungary from 1 to 4 July 2014 (Council of Europe document number CommDH(2014)21). He expressed concern about the deteriorating situation of racism and intolerance in

⁷ See UN Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, 23 April 2012, available at:

http://www.ohchr.org/Documents/Issues/Racism/A.HRC.20.33.Add.1_en.pdf.

⁸ FRA, Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary, 2013, available at:

http://fra.europa.eu/sites/default/files/fra-2013-thematic-situation-report-3_en_1.pdf.

⁹ *Ibid.*, page 37.

¹⁰ *Ibid.*, page 38.

Hungary. He noted in particular that antigypsyism is the most widespread and blatant form of intolerance in Hungary today and that Roma continue to be the main targets of manifestations of intolerance (§§ 66, 70). The Commissioner expressed his concern over the widespread presence of racist and extremist organisations and movements in Hungary. He was concerned in particular about continued paramilitary activities, such as torch-lit, uniformed rallies, advocacy for racially-motivated policies, and the “patrolling” of neighbourhoods with significant Roma populations (§§ 66, 70). The Commissioner noted that according to civil society monitoring, the number of bias-motivated crimes has been on the rise in recent years in Hungary, and the Hungarian authorities have been criticised for failing to identify and respond effectively to hate crimes (§ 85). The Commissioner “*call[ed] upon the Hungarian authorities to be much more vigilant and proactive and use all available means to end impunity and combat all kinds of hate crimes...*” (§ 92).

16. In the ERRC’s view, the Commissioner’s comments are further evidence of institutional antigypsyism among police in Hungary.
17. The ERRC also notes that, according to statistics obtained by the Hungarian Helsinki Committee (“the HHC”),¹¹ image and sound recording is made in only 10.2% of the police rooms for short-term arrestees, and recording is still not mandatory under domestic law, leaving those arrested vulnerable to police abuse. The HHC also notes that police training remains inadequate and does not cover the Court’s case law.
18. We limit these observations to the situation as it was approximately at the time of the facts of the present cases, but the situation remains largely the same. In brief, the ERRC is of the view that little has changed in Hungary since the events that have given rise to similar cases, such as *Balogh v*

¹¹ The material is included in a Rule 9 submission the HHC made to the Committee of Ministers on 7 January 2015 concerning a group of cases involving police misconduct and which is available at https://helsinki.hu/wp-content/uploads/HHC_Rule_9_communication_Gubacsi_group_of_cases_against_Hungary_ADDENDUM.pdf.

Hungary (2004), *Borbála Kiss v Hungary* (2012), and, most recently, *M.F. v Hungary* (2017).

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

19. We are submitting this intervention because we believe the Court's case law on police misconduct against Roma in Hungary must evolve.
20. How should the Court respond to individual cases of police violence against Roma when there is already established case law concerning the relevant State? 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, the Court should take this context into account in deciding whether there has been a breach of Article 14 taken with the Article 3.
21. Roma applicants have had difficulty, when they were victims of a violation of Article 14 taken in conjunction with the procedural limb of Article 3, convincing the Court that they were also victims of a violation of Article 14 taken in conjunction with the substantive limb of Article 3. This is because the Court requires 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 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 is not available. This is frustrating: the failure of the State to investigate the crime properly leaves such victims unable to establish a violation of Article 14 taken with the substantive limb of Article 3. 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 Article 14 taken with the substantive limb of Article 3. We limit ourselves here to endorsing the comments of Judges Gyulumyan and Power in *Carabulea v Romania* (2010), §§ 9-16 of their Opinion, and 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. See, e.g., EU Directive 2000/43, Article 8 § 1. What follows focuses instead on the question of how to approach allegations by Roma that they have been victims of violations of Article 14 taken with the procedural limb of Article 3 in the light of the existence of institutional antigypsyism.

22. 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 Article 14 taken in conjunction with the procedural limb of Article 2 or Article 3, resulting from the failure to unmask racist motives behind violence against Roma.
23. 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 Article 14 taken with the procedural limb of Article 3).
24. The ERRC respectfully submits that there is another question the Court must ask when considering complaints from Romani people about police brutality under Article 14 taken with the procedural limb of Article 3: whether the failure

to carry out an effective investigation in general was the result of institutional antigypsyism. The Court should ask this question whenever there is evidence that a particularly vulnerable minority group is not receiving an appropriate level of service from the authorities responsible under the Convention for protecting them from violence. The Court was not called upon to answer this question in *Nachova* or in *Šečić*, where it limited its consideration of the Article 14 complaint 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 and a related individual failure adequately to investigate police brutality against Roma, the ERRC submits that Roma are entitled to a finding 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 will provide recognition that institutional antigypsyism deprives Roma of access to the evidence needed to prove a violation of Article 14 taken with the substantive limb of Article 3 in cases of police brutality. Such a finding is also more likely to ensure that the Court's judgments lead to the systemic changes at national level that will make it unnecessary to take similar cases to Strasbourg in the future.

25. 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 Hungary when it comes to the failure of the authorities to protect Roma from police brutality.
26. While the ERRC will of course not comment on the individual facts of the present cases, we have set out above the evidence of institutional antigypsyism within the Hungarian police. In an individual case of police brutality against Roma, that should shift the burden of proof onto the

Respondent State to show that the underlying incident and the failure to investigate were not the result of institutional antigypsyism.

VI. Summary

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

The European Roma Rights Centre (“the ERRC”) submitted a third-party intervention similar (but not identical) to interventions they had submitted in previous cases involving police brutality against Roma. The ERRC believes such cases should not be treated as repetitive; when similar cases of police brutality against Roma come before the Court from the same State, this represents an exacerbating situation which should be treated as such. 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 in particular the use of the term “antigypsyism” by the Committee of Ministers of the Council of Europe in official documents. The ERRC set out the evidence of antigypsyism among police in Europe in general, noting Europe-wide evidence that Roma face higher rates of crime and do not trust the police to protect them or investigate. The ERRC set out the evidence of antigypsyism among police in Hungary in particular, characterising it as evidence of institutional antigypsyism. The ERRC included materials from the United Nations, the EU Fundamental Rights Agency, the Council of Europe Commissioner for Human Rights, and a national NGO. The ERRC concluded by asking how the Court should respond to police violence against Roma in the light of established case law on the matter concerning a particular State. One response, which the ERRC rejected, was to treat such cases as repetitive and turn them over to three-judge committees (Article 28 § 1(b) of the Convention). This, the ERRC submitted, would result in an ever-increasing number of cases coming to Strasbourg. Instead, the ERRC encouraged the Court to take into account the evidence of institutional antigypsyism. 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 Article 14 taken with the substantive limb of Article 3 in such cases; the burden of proof should shift to the Respondent State. The ERRC also submitted that where there was a failure to carry out an effective investigation into such incidents, and there was evidence of institutional antigypsyism, the failure to investigate should be characterised as a form of discrimination in itself. 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 here: that there is an institutional failure in Hungary to deal with police brutality against Roma.

The European Roma Rights Centre
28 March 2018