

IN THE EUROPEAN COURT OF HUMAN RIGHTS

BALÁZS v HUNGARY (Application no. 15529/12)

R.B. v HUNGARY (Application no. 64602/12)

M.F. v HUNGARY (Application no. 45855/12)

**WRITTEN COMMENTS OF
THE EUROPEAN ROMA RIGHTS CENTRE
SUBMITTED PURSUANT TO ARTICLE 36 § 2
OF THE CONVENTION**

I. Introduction

1. The European Roma Rights Centre (“ERRC”) submits these comments in accordance with the permission to intervene granted by the President of the Chamber.
2. This intervention addresses States’ positive obligations towards members of the Roma community under Article 14 of the Convention, taken in conjunction with Article 3.
3. The intervention can be summarised as follows:
 - a. The ERRC urges the Court explicitly to acknowledge the phenomenon of anti-Gypsyism,¹ as defined and recognised by other Council of Europe bodies. The problem of racist violence against Roma is recognised at European level as an expression of anti-Gypsyism. The ERRC also stresses that the definition of anti-Gypsyism encompasses institutional racism. The ERRC then sets out for the Court the scope of the problem of racist violence against Roma in Europe.
 - b. The ERRC surveys recent evidence that the national bodies in Hungary responsible for protecting Roma against violence suffer from institutional racism, particularly institutional anti-Gypsyism. The ERRC relies on a widely-recognised definition of the term “institutional racism”: “*the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin*”.
 - c. The ERRC urges the Court to integrate the notion of institutional anti-Gypsyism into its analysis of whether there has been a violation of Article 14 taken with the procedural limb of Article 2 or 3 in cases concerning violence against Roma. The Court should consider whether an investigation into anti-Roma violence was ineffective due to institutional racism (i.e. due to a failure to provide an appropriate and professional service to Roma) and, if so, find a violation on that basis.
 - d. The ERRC insists that a substitute private prosecution is not an effective remedy under the Court’s case law and that the fact that Roma have begun and then abandoned a private

¹ The ERRC recognises that not all Roma embrace the term “Anti-Gypsyism”, which incorporates a word many consider a racist epithet. The ERRC nonetheless relies on the term, particularly in the light of its adoption by various Council of Europe bodies, as capturing the ideology we exist to combat.

prosecution is irrelevant to the question of whether they have exhausted domestic remedies in hate-crime cases.

II. Anti-Gypsyism and violence against Roma in Europe

4. The European Commission against Racism and Intolerance (ECRI) defines “anti-Gypsyism” as “a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination” [emphasis added]. The ERRC encourages the Court explicitly to acknowledge the phenomenon of anti-Gypsyism, and, like ECRI and the Committee of Ministers of the Council of Europe,² to see anti-Roma violence as an expression of it. See *Vona v Hungary* (2013), Concurring Opinion of Judge Pinto de Albuquerque.
5. In recent years, anti-Gypsyism has increased in Europe, evidenced inter alia by an increase in recorded instances of violence against Roma. A recent report³ by Amnesty International indicates that violence against Roma in Europe is increasing alarmingly. The report concentrates on the Czech Republic, France, and Greece, and explains in detail the attitude of State authorities and members of the public towards Roma. The report recommends that governments adopt measures to combat hate crimes.
6. 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 anti-Roma 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 concerned police brutality.
7. The EU Fundamental Rights Agency (FRA) carried out its European Union Minorities and Discrimination Survey (EU-MIDIS) in 2008.⁵ They asked 23,500 individuals with a minority background about their experiences of discrimination and criminal victimisation in everyday life. According to the survey, 18% of all Roma 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.⁶ 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 in-person crimes.⁷ 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.⁸ 72% of the respondents who had not reported in-person crime they had suffered said that the reason was that they were “*not confident the police would be able to do anything*”.⁹ The ERRC sees these data as evidence of the continued impact of anti-Gypsyism on

² Declaration of the Committee of Ministers on the Rise of Anti-Gypsyism and Racist Violence against Roma in Europe, 1 February 2012.

³ Amnesty International, “We ask for Justice”, Europe’s Failure to Protect Roma from Racist Violence, report of 2014, available at: <http://www.amnesty.org/en/library/asset/EUR01/007/2014/en/7c3cc69e-e84d-43de-a6a93732b4702dff/eur010072014en.pdf>.

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 See <http://fra.europa.eu/en/project/2011/eu-midis-european-union-minorities-and-discrimination-survey?tab=publications>.

⁶ See http://fra.europa.eu/sites/default/files/fra-2012-eu-midis-dif6_0.pdf.

⁷ See http://fra.europa.eu/sites/default/files/fra_uploads/413-EU-MIDIS_ROMA_EN.pdf, page 8.

⁸ See http://fra.europa.eu/sites/default/files/fra_uploads/1132-EU-MIDIS-police.pdf.

⁹ See http://fra.europa.eu/sites/default/files/fra_uploads/413-EU-MIDIS_ROMA_EN.pdf, page 9.

Roma communities throughout Europe and the strong need to recognise and address anti-Gypsyism at a European level.

III. Institutional racism against Roma (i.e. institutional anti-Gypsyism) among those responsible for protecting Roma against violence in Hungary

8. As the Court will note, the definition of anti-Gypsyism given by ECRI includes “institutional racism” (see above, § 4). 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*”¹⁰. In the ERRC’s view, institutional racism does not necessarily imply that individual members of affected institutions espouse a racist ideology. Institutional racism can be the unconscious by-product of a society, such as Hungary’s, where anti-Gypsyism is allowed to flourish.
9. The evidence of the general situation in Hungary shows that there is institutional racism against Roma (i.e. institutional anti-Gypsyism) within the State bodies responsible for protecting Roma against violence in Hungary.
10. In the past few years, international monitoring bodies and national NGOs have expressed particular concern about the rise in anti-Roma rhetoric and racism and about physical violence against Roma in Hungary.
11. In particular, in his report on Hungary, Githu Muigai, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, expressed his deep concern “*at the growth of paramilitary organisations with racist platforms which target Roma [...]*”¹¹. It is the ERRC’s view that racist paramilitary organisations of this kind do not flourish 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 and segregationists free to act.
12. In 2013, FRA issued a thematic report looking at racism, discrimination, intolerance and extremism in Hungary (and Greece), giving their assessment of the response provided by the Hungarian authorities.¹² 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*”.¹³ 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*”.¹⁴ 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.
13. In December 2014, Nils Muiznieks, the Council of Europe Commissioner for Human Rights, issued a report of his visit to Hungary from 1 to 4 July 2014.¹⁵ In his report he expressed concerns about

¹⁰ 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>.

¹¹ 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

¹² See http://fra.europa.eu/sites/default/files/fra-2013-thematic-situation-report-3_en_1.pdf

¹³ See *Ibid.*, page 37.

¹⁴ See *Ibid.*, page 38.

¹⁵ The report is available at:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2662996&SecMode=1&DocId=2218468&Usage=2>.

the deteriorating situation of racism and intolerance in Hungary. He noted in particular that anti-Gypsyism 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.¹⁶ 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.¹⁷

14. 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.¹⁸ In this respect the Commissioner “*calls 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...*”¹⁹ In the ERRC’s view, the Commissioner’s comments are evidence of institutional anti-Gypsyism in Hungary. The authorities are not in a position to provide an appropriate and professional service to Roma who are, have been, or are at risk of becoming victims of racially-motivated violence.
15. In 2014, civil society organisations formed a working group on hate crimes: the Gyűlölet-bűncselekmények Elleni Munkacsoport (GYEM, the Working Group Against Hate Crime). Using a standardised method, GYEM examined several hate crime cases, paying particular attention to the State response. GYEM identified several shortcomings on the part of the State authorities including, inter alia, misclassification of the crime, absence of any law enforcement intervention, and the failure to take investigative steps.²⁰

IV. The assessment of Article 14 in cases involving institutional racism (specifically, institutional anti-Gypsyism)

16. 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. The ERRC understands the Court’s logic. The Court requires an applicant alleging discrimination to demonstrate it “*beyond reasonable doubt*”. *Nachova and others v Bulgaria* (Grand Chamber, 2005), § 147. However, vulnerable victims alleging racially-motivated violence are naturally 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. The Court will appreciate the particular frustration for Roma victims of racist violence: the failure of the State to investigate the crime properly leaves them unable to establish a violation of Article 14 taken with the substantive limb of Article 3 if, for example, the impugned act was one of police brutality. See, e.g., *Nachova*, § 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. 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 racism.

¹⁶ See §§ 66,70.

¹⁷ See §§ 66, 80.

¹⁸ See § 85.

¹⁹ See § 92.

²⁰ GYEM’s findings are available at <http://gyulotellen.hu/aktualitasok/jogalkalmazasi-problemak-gyulot-buncselekmennyekkel-kapcsolatos-eljarasokban>.

17. Without naming it as such, the Court has frequently dealt with institutional racism affecting Roma (i.e. institutional anti-Gypsyism) 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.
18. Such a finding only targets part of the problem of institutional anti-Gypsyism. For example, in *Nachova and others* (Grand Chamber, 2005), the Court found, firstly, that there had been a failure adequately to investigate the deaths of two Romani men (a violation of the procedural limb of Article 2, taken on its own) (§§114-119). The Court then separately found a violation of Article 14 taken in conjunction with the procedural limb of Article 2, because of the failure to investigate the racist motives behind the killings (§§ 162-168). This second finding was, in effect, a truism: it would be difficult to imagine an investigation into the death or ill-treatment of a Romani person that was ineffective in general (violation of the procedural limb of Article 2 taken on its own) 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).
19. There is another question the Court can and should ask when considering a complaint from Roma under Article 14, taken in conjunction with the procedural limb of Article 2 or 3: whether the failure to carry out an effective investigation in general was the result of institutional racism. The Court should ask this question when 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. The approach the ERRC advocates to dealing with Article 14 complaints of this kind will more comprehensively deal with the problems of anti-Roma hate crime. Where there is evidence of institutional anti-Gypsyism and a related individual failure adequately to investigate a violent crime against Roma, Roma are entitled to a finding that the failures in the overall investigation are due to discrimination. Such a finding will provide recognition that institutional racism deprives Roma of access to the evidence needed to prove a violation of Article 14 taken with the substantive limb of Article 3 (for example, in a case 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 future.
20. The Court has already conducted similar exercises in uncovering institutional racism or sexism in police forces, but in relation to the substantive limb of Articles 2 and 3. 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.
21. While the ERRC will of course not comment on the individual facts of the present cases, the ERRC has set out above (Part III) the recent evidence of institutional anti-Gypsyism within the Hungarian bodies responsible for protecting Roma against violence.

V. Exhaustion of domestic remedies in cases of racially-motivated violence

22. The ERRC submits that Roma cannot be expected to pursue a private prosecution in order to exhaust domestic remedies in cases involving failures by domestic authorities to investigate hate crimes against them.

23. This is in line with the Court's consistent case law. See *Borbála Kiss v Hungary* (2012), §§ 24-27; *Gubacsi v Hungary* (2013), §§ 30-33.
24. Finding otherwise risks exacerbating institutional anti-Gypsyism, in two respects:
- a. If the Court requires Roma to exhaust a private prosecution before they can bring their case to Strasbourg, it risks giving the impression that public authorities have a lesser duty to investigate such crimes, which may be seen as condoning the provision of an inadequate level of service to Roma (i.e. institutional racism). A requirement for Roma to exhaust a private prosecution is particularly unfair for Roma, a disadvantaged group who will often be unable to carry out the investigative activities needed to identify the accused and prove their guilt. The fact that someone has taken a private prosecution generally implies that she has been refused the support of the public investigative and prosecuting authorities.
 - b. If the failure to conduct an adequate investigation is due to institutional racism, requiring Roma to bring a private prosecution exposes Roma to the consequences of challenging an entrenched aspect of anti-Gypsyism. There are risks, in particular, of reprisals from elements within these institutions seeking to defend the status quo. The ERRC regularly deals with cases where Roma who challenge police brutality, for example, are in turn accused of criminal offences in an apparent attempt to intimidate and silence them. See, e.g., *Borbála Kiss v Hungary* (2012), §§ 13-16.
25. The ERRC insists that whether a Romani victim of an alleged hate crime has begun and then abandoned a private prosecution makes no difference to the assessment of whether she has exhausted domestic remedies. The suggestion that beginning and then abandoning a private prosecution amounts to a failure to exhaust domestic remedies confuses two separate categories. Under the Convention, a private prosecution against those who commit racist violence is not an effective remedy (see above, § 23) and so a private prosecution can, at best, only be viewed as way of resolving the matter (Article 37 § 1(b)). The ERRC respectfully submits that Roma should not be penalised for attempting to resolve a matter as serious as a hate crime through a private prosecution but then abandoning that attempt, particularly when faced with structures at national level contaminated by institutional racism.