

Roma expulsions and discrimination: the elephant in Brussels.

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Words:

Abstract

This article will critically examine the treatment of migrant Roma in Western Europe, particularly Italy and France, in the light of the obligations under the EU Citizenship Directive 2004/38. The role of the political institutions will be considered, especially the European Commission, who have yet to take a decisive position on the Roma expulsions and on the wider issue of Roma discrimination in Europe. It is argued that the focus on non-discrimination cannot address the entrenched inequality which characterises the Roma’s situation in Europe. Furthermore, that the comparative disadvantage experienced by Europe’s Roma communities constitutes a major human rights crisis which has so far been side-lined by Brussels. A European strategy is urgently required which demands leadership from the Commission and the full participation of Roma representatives.

Introduction

This article will examine the response of the European Union to the treatment of migrant Roma, particularly in France and Italy. In theory the Roma with their nomadic tradition should fit perfectly within the paradigm of free movement, particularly since it’s de-coupling from economic status. However, their migration has elicited a particular response; one of exclusion and expulsion. In so doing it has revealed a deep paradox at the route of European identity. Several western European states have depicted these migrants collectively as security threats, whose presence has the potential to undermine the established, settled way of life. The intransigence of the European Commission reflects a construct of European identity which views the Roma as outsiders who have no legitimate claim to the bundle of rights given to true European citizens².

Whilst the European parliament has expressed criticism of these measures, member states have been reluctant to express clear condemnation. They are perhaps mindful that Europe’s largest and most disadvantaged minority see no reason to remain subjected to poverty and discrimination in central and eastern Europe (‘CEE’) and the opportunity to migrate afforded by EU law means that many may chose to migrate west.

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² Thomas, Dominic “Sarkoy’s law. The institutionalisation of xenophobia in the new Europe” 2009 135 *Radical Philosophy* 7.

The Council of Europe has been extremely vocal regarding the issue of Roma rights. In its recommendation on policies for Roma and Travellers in Europe, the Committee of Ministers specifically recognised the Roma's unique history of "widespread and enduring discrimination, rejection and marginalisation all over Europe". The committee called on states to adopt strategies aimed at addressing legal and/or social discrimination and to promote equality of Roma and traveller peoples³. The Council of Europe's Commissioner for Human Rights and the OSCE's counterpart have consistently raised issues of Roma discrimination, poverty, unemployment and general conditions of deprivation. The European Committee on Social Rights has upheld Roma complaints concerning housing and discrimination against Italy, France and Bulgaria with subsequent resolutions from the Committee of Ministers. Most recently, the European Roma Rights Centre submitted a complaint to the Committee against Portugal.

The issue of Roma discrimination in Europe is not new but its profile has now been raised by the French and Italian expulsions. Until this time, Roma discrimination was perceived as predominately a central and eastern European issue but the extension of free movement rights forced the issue into the political landscape of western Europe. It is worth pointing out that with the proposed accession of Turkey to the Union an additional 500,000 Roma will become Union citizens⁴.

Concerns about the economic and social inequality of the Roma were routinely raised during the accession monitoring process. Yet it seems that this subject was often sidelined as it did not sit comfortably with the enlargement agenda. There has been considerable investment and support for Roma projects from the EU Structural Fund and PHARE programmes and from private philanthropists such as George Soros, yet there has been limited success beyond the local level⁵. Such projects tend to be characterised by problems of engagement with the targeted beneficiaries. In the past, the Roma have typically been presented as passive recipients and were seldom given the opportunity to take an active role in determining their needs.

The scale of the problems facing Europe's Roma also reveals questions about the application and relevance of the formal non-discrimination approach found in the

³ CM/Rec(2008)5

⁴ This is an estimate provided by a number of bodies including EurasiaNet, *Roma rights organizations work to ease prejudice in Turkey*, 22 July 2005, available at: <http://www.unhcr.org/refworld/docid/46ef87ab32.html>

⁵ Ringold, Dina "Tackling Roma exclusion in Europe" (World Bank Institute, 2006). In 200-2006 for example the European structural Fund devoted EUR 275 million to projects specifically targeted at Roma (Com (2008) 450)

Race Equality Directive. In 2003 the EU Network of Independent Experts on Fundamental Rights described Europe's Roma as suffering from an 'apartheid situation' and exclusion in respect of every right contained within the (now legally binding) Charter of Fundamental Rights⁶. The report observes that Roma experience endemic unemployment, police violence and harassment, educational segregation, pervasive discrimination and conditions of extreme poverty throughout Europe. The Roma are specifically singled out in the EU's Non-Discrimination survey which found that one-quarter of respondents would 'feel uncomfortable' with having a Roma neighbour (compared to 6% for neighbours from other ethnic groups)⁷. In Italy and the Czech Republic almost half of the respondents registered their specific discomfort towards Roma neighbours. In 2008 the Commission recognised the urgent need to tackle Roma exclusion and pledged to continue financial support for inclusion projects⁸. Yet the absence of a focussed strategy beyond implementation of the Race Equality Directive, coupled with the principle of subsidiarity has meant that policies which could promote social equality in fields such as employment and education have been left to Member states.

At the same time the extreme poverty which characterises many of Europe's Roma communities is now being used against them to justify measures of expulsion⁹. The prevalent security rhetoric depicts Roma migrants as a threat to the fabric of society in both the French and Italian political discourse, with the solution presented as the liquidation of encampments and collective deportations. Similar arguments surfaced in Europe seventy years ago when between one-quarter and one-third of all Europe's Roma and Sinti were exterminated in the porrajmos¹⁰. Yet, when Justice Commissioner, Viviane Reding, drew parallels with the Vichy regime's expulsions during the Second World War she drew angry responses from French politicians and a lukewarm response from the president of the Commission¹¹. The difference today is perhaps that the Roma are perceived to be the architects of their fate. Their place, if

⁶ EU Network of Independent Experts on Fundamental Rights *Report on the situation of fundamental rights in the European Union and its Member States in 2002* EU CFR-CDF at 176.

⁷ 'Discrimination in the EU' Special Eurobarometer Survey 296 (European Commission Brussels July 2006)

⁸ European Commission *Community Instruments and Policies for Roma Inclusion* (COM (2008) 420)

⁹ UN Development Programme "At risk: Roma and the displaced in SouthEast Europe" (UNDP, New York 2006)

¹⁰ Hancock, Ian "Responses to the Porrajmos: The Romani Holocaust," in Rosenbaum, Rosenbaum, Alan S., ed *Is the Holocaust Unique?* (Boulder and Oxford: The Westview Press, 1996) at 39-64.

¹¹ BBC News "French ministers fume after Reding rebuke over Roma" 15th Sept 2010.

there is one, is on the outskirts of civil society and they remain, as David Sibley once described them ‘Outsiders in urban society’¹².

This article will begin by providing an overview of the events leading up to the collective expulsions of Roma in Italy and France before examining their context in terms of EU enlargement and the resultant extension of Union citizenship rights to an estimated three million Roma living in Bulgaria and Romania¹³. Two particular themes will emerge for further discussion; namely the political rhetoric of security used to justify the exclusions and the legal reality whereby expulsions must conform to the principles of non-discrimination and proportionality. Finally the response of the European political institutions will be critically assessed in light of these legal obligations.

Collective expulsions: an overview

The events which form the background to this article commenced early in 2008 when the Italian government began to destroy Roma settlements on the outskirts of large cities.

As part of an emergency decree, powers were given to local police to collect data, including the fingerprints, of camp residents. These initiatives culminated in the expulsion of many non-Italian Roma¹⁴. There was condemnation from international humanitarian sources and the European Parliament but the Commission declined to take enforcement action under Article 226 (now 258 TFEU)¹⁵. The international media gaze was soon directed elsewhere as the number of expulsions appeared to diminish. However, in 2009 the Italian government embarked on a new ‘Nomad decree’ which saw the destruction of more temporary camps with the result that many Roma and Sinti became homeless¹⁶. Furthermore, law 94/2009 made undocumented stay in Italy punishable with a fine of up to 10,000 euros and facilitated the

¹² Sibley, David *Outsiders in Urban Society* (Basingstoke: Palgrave, 1981).

¹³ This figure is an estimate based on statistics collated by non-governmental organisations in the region. Official census data suggests the figure is much lower but the reliability of such data has been questioned in numerous studies eg Clark, Colin “Counting Backwards. The numbers game in central and Eastern Europe” *Radical Statistics* 1998, 69 35-46.

¹⁴ Precise data on the number of Roma expelled from Italy is unavailable but there are estimates suggesting several thousand, BBC News *EU Nations and Roma repatriation* 17th Sept. 2010.

¹⁵ European Parliament resolution *On the census of the Roma on the basis of ethnicity in Italy* 10th July 2008 P6_TA-PROV(2008)0361; “Italy risks legal battle over expulsion of EU citizens” EUObserver.com 24th Sept 2008.

¹⁶ Amnesty International “Italian authorities urged to stop forced evictions of Roma” 11th March 2010. Available at: <http://www.amnesty.org/en/news-and-updates/report/italian-authorities-urged-stop-forced-evictions-roma-2010-03-11>.

‘anagrafe’, a nationwide register of homeless residents¹⁷. Serious doubts must be raised about the compatibility of this law with the EU Charter of Fundamental Rights.

The issue resurfaced in the summer of 2010 when the French government began to target an estimated 12,000 migrant Roma with similar policies including collective expulsions with the offer of a small cash payment of 300 euros to those prepared to leave ‘voluntarily’. Again, the European Parliament issued a highly critical resolution¹⁸. The Commission’s Justice Minister followed up the resolution with the threat of enforcement action, describing the French actions as ‘a disgrace’¹⁹. Yet, despite a brief war of words between the Commission and the French Government which culminated in assurances to the effect that the measures were not intended to target a specific minority, no concrete enforcement action was commenced²⁰. In both instances the Commission accepted the responses of the respective Governments to the effect that, despite evidence to the contrary, there was no intention to target a specific ethnic group; suggesting both a lack of political will and a genuine commitment to the legal principles informing the Citizenship Directive and the Charter of Fundamental rights.

Monitoring the route to accession

There can be no doubt that the focus of European law has changed markedly from the original objectives in the 1957 Treaty of Rome. Human rights were then seen as relevant only to the extent that they supported economic rights, for example in the fields of employment and equal pay. However, as the community morphed into the Union, the construction of the European citizen became a priority and human rights, particularly the right to non-discrimination, have become central to the competences of the law making machinery. Human rights are now listed with democracy and the rule of law as core values in Article 6 of the Treaty on European Union (TEU)²¹. The Race Equality Directive and Article 18 TFEU, prohibiting discrimination on the

¹⁷ Law 94 GU n. 170 dated 24/07/2009.

¹⁸ Sept 9th 2010 P7_TA-PROV(2010)0312

¹⁹ Viviane Reding Press release *Statement on the latest developments on the Roma Situation* Brussels 14th Sept 2010 Speech 10/428.

²⁰ European Commission Press Release *European Commission assesses recent developments in France, discusses overall situation of the Roma and EU law on free movement of EU citizens* IP/10/1207 29th Sept 2010.

²¹ Consolidated Version of the Treaty on the Functioning of the European Union C115/49.

grounds of nationality, are independent of any employment context²². Furthermore, the Charter on Fundamental Rights is now given legal status by the Treaty on the Functioning of the European Union (hereafter 'TFEU') and it is to be expected that the case-law on human rights before the ECJ will grow accordingly²³.

It would be inaccurate however to assume that the Community was uninterested in human rights concerns. Since 1993 the Copenhagen criteria were applied to all countries requesting accession to the Community²⁴. Under the political dimension, respect for the rule of law, democracy, human rights and the protection of minorities must be guaranteed. As Europe's largest ethnic minority and particularly given the proportion of Roma in South-Eastern Europe, the human rights situation of the Roma should have been central to this assessment. Yet, it would appear that minority rights were not always given significant or sufficient attention. For example, Slovakia with an estimated population of 500,000 Roma, failed to meet the political criteria due to a number "of shortcomings in the 'functioning of democracy'"²⁵. However, the same assessment found that Slovakia sufficiently recognised minority rights²⁶. In the presence of the aforementioned shortcomings it is difficult to appreciate how respect for minorities could have been guaranteed²⁷. The former Slovak Prime Minister, Vladimir Mečiar, made public his dislike of the Roma during this period with pronouncements, describing them as 'socially un-adaptable' and 'backward'²⁸. Meanwhile, most Slovak Roma lived in isolated, segregated accommodation whilst their children were educated in special schools for mentally disabled pupils²⁹. Violence and harassment of Roma were commonplace. The European Parliament expressed their concerns over the protection of minorities during and after the Mečiar regime and the Commission raised the issue of Roma discrimination as a priority in

²² Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin *Official Journal* L 180 , 19/07/2000 P. 0022 – 0026.

²³ Charter of Fundamental Rights of the European Union 2000/C 364/01.

²⁴ European Council in Copenhagen 21-22 June 1993 Conclusions of the Presidency SN 180/1/93 REV 1

²⁵ European Commission Agenda 2000: Commission Opinion on Slovakia's application for Membership of the European Union 15/07/1997, DOC/97/20 at p130. Available at :

http://ec.europa.eu/enlargement/press_corner/key-documents/index_archive_en.

²⁶ Topidi, Kyriaki, *EU law, Minorities and Enlargement* (Intersentia: Antwerp, 2010) at 150.

²⁷ Slovak Helsinki Committee *Minority Rights in the Slovak Republic* (Bratislava: Helsinki Committee, Sept 1999).

²⁸ Kohn, M. *The Race Gallery: the Return of Racial Science* (London: Vintage, 1996)

²⁹ The reports on discrimination and violence towards Roma in Slovakia are numerous, see for example Amnesty International Submission to the UN Periodic review 5th session of the UPR Working groups of the Human Rights Council May 2009; Joseph, Sarah "The right to housing, discrimination and the Roma in Slovakia" HRLR 2005 Vol.5, 2 347-349.

1999. Yet within a few months the accession criteria were seen to have been satisfied³⁰. The experiences of Slovak Roma had been side-lined.

Unsurprisingly post accession monitoring has seen little improvement for the Slovak Roma with the number living in isolated ghettos increasing dramatically and violence towards Roma continuing³¹.

The European Union did direct resources towards numerous Roma and other minority initiatives through the PHARE programme for local democracy and cross-border cooperation. Yet such projects were seldom scaled up from the local level and there was limited opportunity for an integrated multicultural approach within and outside the CEE area. As Topidi notes “the ‘regional’ experience in the promotion of diversity in CEE did not achieve a blending of top-down and bottom-up approaches so as to enhance the multicultural added value of diversity”³².

Furthermore, the primary focus on economic advancement meant that the full extent of Roma exclusion was underplayed in the accession process. The paradox of minority rights protection in this process has been well documented but it is worth recalling that much of the initial concern with minority rights centred on ‘external’ security issues. Yet as the enlargement process saw the Union expand from 15 to 27 states, these ‘external’ issues have now been internalised as part of the fabric of the new Union³³. The recent Roma expulsions also serve to demonstrate this paradox. It is now evident that questions of minority rights should never have been formulated as purely a CEE matter.

The monitoring process did result in some favourable policy changes in the field of Roma rights, most notable being the repeal of the contentious Czech Citizenship Law which had effectively denied citizenship to thousands of Slovakian Roma present on Czech soil at the time of dissolution³⁴. This serves to demonstrate the potential positive effects of such scrutiny and it is regrettable that the same pressure was not applied successfully elsewhere. The carrot of EU membership offered a real

³⁰European Commission 1999 *Accession Partnership for Slovakia* at 4. Available at: http://ec.europa.eu/enlargement/archives/key_documents/reports_1999_en.htm; European Commission 1999 *Regular Report on Slovakia's progress towards Accession* at 18. Available at: http://ec.europa.eu/enlargement/archives/key_documents/reports_1999_en.htm.

³¹Radio Prague “New study shows alarming rise in creation of Roma ghettos” 14th Sept. 2006 . Available at: <http://romove.radio.cz/en/article/21126>; Mižigárová v. Slovakia App. 74832/01 ECHR 2010; Amnesty International “Slovakia. Still separate. Still unequal. Violations of the right to Education of Romani children in Slovakia” (Amnesty International: London, 2007).

³² Topidi, supra n26 at 133.

³³ Ibid. at 80.

³⁴ Guy, Will “The Czech lands and Slovakia: another false dawn?” in Guy (ed) *Between past and future; The Roma of Central and Eastern Europe* (Univ. of Hertfordshire Press: Hatfield, 2002).

opportunity to address structural inequalities. In the event this was insufficiently realised with the result that millions of Roma continue to live in poverty.

In 1997, the European Commission's Agenda 2000 report indicated that the situation of Roma was a significant cause of concern in a number of applicant states, including Romania, Bulgaria and Hungary³⁵. Two years later the Commission again found deep-rooted prejudice and discrimination towards Roma in many candidate countries³⁶. Will Guy accuses the Commission of contradictory messages on minority rights in which they had implied that the criteria could be interpreted as merely aspirational³⁷. He argues that such contradictions reflected a 'deep ambivalence' on this subject and predicted that other political and economic factors would be given greater priority than the situation of an 'impoverished and powerless minority'³⁸. Guy's prediction became a reality when all CEE candidate states were subsequently granted EU membership. Within three years, the full consequence of this apparent failure to fully engage with the human and minority rights dimensions of the Copenhagen criteria has become apparent.

The value of European citizenship

The application of free movement rights to citizens of the new European states, most notably to Romania and Bulgaria in 2007, has meant that these citizens are entitled to exercise rights of movement and residence in other EU states³⁹.

Article 20 and 21 TFEU ascribe EU citizenship to nationals of one of the twenty-seven EU states and this in turn enables the citizen to access a number of special rights found in the Citizenship Directive 2004/38⁴⁰. The latter provides that European citizens and their family members have rights to reside in other EU states up to three months without restrictions⁴¹. Rights of residence for longer than three months are provided for, inter alia, workers; self-employed persons and for those with sufficient resources to support themselves and their family members without becoming a

³⁵ European Commission Opinion on the application for membership *Agenda 2000* (Brussels: European Commission 1997).

³⁶ European Commission *Enlargement Briefing: EU support for Roma communities in central and Eastern Europe* (Brussels: European Commission 1999).

³⁷ Guy "Romani identity and post-Communist policy" in Guy *supra* n34 at 16.

³⁸ *Ibid* at 19

³⁹ However, several states including France and the UK have temporarily restricted the rights of A8 and A2 migrants who wish to stay longer than three months so that a work permit is required.

⁴⁰ 2004/

⁴¹ Article 6 Dir 2004/38.

burden on state funds⁴². In addition, those actively seeking work cannot be expelled if they are continuing to look for work and have a genuine chance of being engaged⁴³. These provisions will apply equally to nationals of Romania and Bulgaria throughout the EU from 2014.

The ECJ have gone further still in linking the rights of migrant residents to the rights of migrants. The prohibition of discrimination on the grounds of nationality in Article 18 TFEU has been interpreted in a string of cases to allow Union citizens to request financial support from host states providing it is proportionate and they do not constitute an unreasonable burden on the state purse⁴⁴. The longer the period of residence and the greater the link with the host state, the more likely the individual will have established a real link and therefore it will become disproportionate to refuse small levels of support. This reasoning will apply even in cases where the citizen has not shown significant financial independence as in *Trojani* where the applicant for the Belgium *Minimex* was resident in a reintegration hostel having previously been homeless⁴⁵.

Although the directive appears to tie longer term residency rights with economic independence, the ECJ does not appear so constrained. In *Vatsouras and Koupatantze*, financial benefits which were intended to enable access to the labour market could not be regarded as ‘social assistance’ and therefore denied under Article 24(2) of Directive 2004/38⁴⁶.

Migrants who are not economically active may also acquire rights of residence as primary carers of children in education. This has been held to apply even where the Union citizen parent has divorced the child’s primary carer and where the child is not a Union citizen⁴⁷. This has now been incorporated into Article 12 (3) of Directive 2004/38. The cases of *Ibrahim* and *Teixeira* have since established that rights of residence can be based upon the children’s right to education in Article 12 of Regulation 1612/68 and that the exercise of such rights does not require self-sufficiency⁴⁸.

⁴² Article 7 Dir 2004/38.

⁴³ Article 14(4) Directive 2004/38 and *R v SSHD exp Antonissen* Case C-292/89 [1991] 2 CMLR 373

⁴⁴ *Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; *Maria Martinez Sala v Freistaat Bayern* [1998] ECR I-2691; Case C-224/98 *D’Hoop* [2002] ECR I-6191.

⁴⁵ *Michel Trojani v Centre public d’aide sociale de Bruxelles* C456/02.

⁴⁶ *Vatsouras and Koupatantze v Arbeitsgemeinschaft Nürnberg* 900 C-22/08

⁴⁷ *Baumbast v SS Home Dept* [2002] ECR-I-7091 C413/99, para.83.

⁴⁸ *Teixeira v Lambeth BC* C-480/08 Feb 23rd [2010] PTSR 1913 ECJ (Grand chamber); *Harrow LBC v Ibrahim* C-310/08 [2010] ELR 261 as discussed by Starup, Peter and Elsmore, Matthew “Taking a logical step forward? Comment on Ibrahim and Teixeira” ELR [2010] 3594) 571-588

In summary, the ECJ's approach in these different contexts has made it extremely difficult for a Member State to lawfully justify a removal purely on the basis of a Union citizen's limited resources. Furthermore, interpretation of the Directive suggests that the requirement for sufficient resources in Article 7 does not need to be evidentially demonstrated if the citizen has made a declaration to the effect that they or a family member offering support have such resources⁴⁹.

Yet the Citizenship directive has not been uniformly applied across the EU with the Commission receiving more than 1800 individual complaints about its application⁵⁰. Twelve states, including Italy, have reportedly transposed the 'sufficient resources' requirement either incorrectly or incompletely. Additionally, there are problems with local implementation where registration procedures have been imposed frustrating the directive's intentions⁵¹. Roma migrants may suffer disproportionately from the incorrect implementation of this requirement as due to their work in the informal economy, they may be more likely to be presumed economically inactive⁵². The Commission has issued guidelines for states to apply when considering the proportionality assessment for state support which requires the state to balance the duration of the benefit, the personal situation of the applicant and the amount involved⁵³. It is emphasised that the mere fact that an individual needs to rely on a state benefit should not lead to automatic expulsion⁵⁴. Article 14(3) Dir 2004/38 states that "an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family members' recourse to the social assistance system of the host Member State".

European citizens can be expelled if they constitute a threat to public policy, public security or public health. However, all three grounds have been narrowly defined by Articles 27-29 of the Directive and ECJ case-law. The derogations are predicated on individual, rather than collective, threats. The French authorities have tried to justify recent Roma expulsions with reference to public security but the European law is

⁴⁹ *Grzelczyk* supra n44 para.40.

⁵⁰ European Commission *Report on the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member states* COM (2008)840 final, Brussels 2008.

⁵¹ EU Agency for Fundamental Rights *The situation of Roma EU Citizens Moving to and Settling in other EU Member States* (EU Agency for Fundamental rights: Vienna, November 2009) at 36.

⁵² O'Higgins, Nial and Ivanov, Andrey "Education and employment opportunities for the Roma" *Comparative Economic Studies* 2006, 48 p6-19

⁵³ European Commission *Communication from the Commission to the European Parliament and the Council on Guidance for better Transposition and Application of Directive 2004/38* COM(2009)313/4 final as 2.7.2009

⁵⁴ *Ibid.*

clear in that this derogation cannot be invoked for economic reasons or to serve economic ends. Article 27(2) further requires that any removal must be proportionate and be based exclusively on the conduct of the individual. In August, the Administrative tribunal in Lille affirmed this by overturning seven Roma deportation orders on the grounds that there was no individual threat to public order⁵⁵.

The ECJ were given the opportunity to interpret the residency limitations in the *Oulane* case. The Advocate General reasoned that an undocumented union citizen discovered in another member state had a right to reside under Article 49 EC as a recipient of services of that state⁵⁶. Whilst the ECJ did not adopt this reasoning they found the removal of the French citizen was unlawful. The Belgian authorities' justification for the expulsion, that he did not have an identity card to prove his nationality, constituted discrimination on the grounds of nationality⁵⁷. But the decision does not resolve the fundamental question of whether an EU citizen can be expelled without reference to Article 27 of the directive⁵⁸. In any event, it is important to recognise that any expulsion would demand the application of the protection offered by Articles 30 and 31 of the Directive, including notification of the decision and the right to appeal⁵⁹.

The Commission have emphasised that a case by case assessment must be undertaken before any decision is taken to expel an individual and that any expulsion must be proportionate and be based on the exclusive conduct of the individual concerned⁶⁰. Yet questions have remained over the legality of state measures which enforce the expulsion of Community citizens who, inter alia, do not meet the conditions for residing in a member state⁶¹. The issue of expulsion outside the three specific limitations in Article 27 has not been specifically addressed despite the recognition in 2008 that thirteen member states used expulsion following recourse to the social

⁵⁵ European Parliament Resolution Sept 9th 2010 P7_TA-PROV(2010)0312.

⁵⁶ *Oulane v Minister voor Vreemdelingenzaken en Integratie* C-215/03. Opinion of Advocate General Léger para 39.

⁵⁷ *Ibid.* para44.

⁵⁸ Weiss, Adam "Unqualified persons: the lawfulness of expelling homeless EEA nationals from the UK" *J.I.A.N.L.* 2010, 24 (3) 246-256; Guild, Elspeth "Citizens without a constitution, Borders without a state: EU free movement of persons" in *Whose Freedom, security and Justice? EU immigration and Asylum Law and Policy* (Hart publishing 2007).

⁵⁹ Articles 31(1),(2),(3) Directive 2004/38

⁶⁰ European Commission *On the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* Report to the European Parliament and the Council, Brussels, 10.12.2008 COM(2008) 840 final.

⁶¹ Written question by Carlo Fidanza MEP E-5962/09.

assistance system⁶². In 2009, the Commission again emphasised its position and clarified that automatic expulsion was unlawful:

“Grounds extraneous to the personal conduct of an individual cannot be invoked. Automatic expulsions are not allowed under the Directive.

Individuals can have their rights restricted only if their personal conduct represents a threat, i.e. indicates the likelihood of a serious prejudice to the requirements of public policy or public security.

A threat that is only presumed is not genuine. The threat must be present. Past conduct may be taken into account only where there is a likelihood of reoffending. The threat must exist at the moment when the restrictive measure is adopted by the national authorities or reviewed by the courts”⁶³.

The principles seem clear but the absence of specific clarity on the question of expulsion outside of article 27 remains a deficiency. It has enabled member states to rely on a grey area to justify expulsions without formally demonstrating a specific threat. In France the offer of payment was used to suggest that the departures were voluntary and in Italy the absence of financial independence seems to have been construed as establishing a sufficient, albeit generalised threat, to public policy and security.

Member States were given until 30 April 2006 to transpose Directive 2004/38. In 2008, the Commission drew up a report pursuant to Article 39(1) examining its implementation to date which painted a disappointing picture⁶⁴. So far the Commission have initiated infringement proceedings against 19 Member States for their failure to communicate the text of the provisions of national law adopted to transpose the Directive⁶⁵. Not one article had been correctly transposed by all member states. Specific action has been commenced against France and Italy concerning the expulsion of Union citizens which suggests that there is some political will to use

⁶² European Commission “Free movement and residence rights of EU citizens and their families: the Commission gives guidance for better transposition and application of Directive 2004/38/EC for the benefit of Member States and EU citizens” IP/09/1077(Brussels, 2 July 2009) at 11.

⁶³ Communication from the Commission to the European Parliament and the Council *On guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* Brussels, 2.7.2009 COM(2009) 313 final at 12.

⁶⁴ Ibid.

⁶⁵ European Commission “The Directive on the right of EU citizens to move and reside freely in the European Union / The Commission issues report on the application of the Directive” MEMO/08/778 (Brussels, 10 December 2008)

enforcement powers⁶⁶. However the Roma expulsions have not met with the same response.

The application of non-discrimination provisions

Europe's Roma may also benefit from the Race Equality Directive which grants rights to equality before the law and non-discrimination in a range of contexts including employment, education, social protection and access to services including housing⁶⁷. It enables states to take positive measures to redress entrenched inequality. However, implementation of the directive has suffered from a range of problems across the Member States and the Commission has again been required to take enforcement action⁶⁸. It has been suggested that there is a culture of indifference to the provisions in several new member states⁶⁹. The Fundamental Rights Agency has observed that discrimination against Roma is downplayed by both employers and trade union activists who perceive their lack of success in accessing the labour market as attributable to individual characteristics⁷⁰. This problem goes to the heart of the obligations under the Directive which are based on the formal equality approach. There is no specific requirement for states to take active steps to redress entrenched structural inequality thus it is comparatively easy for an employer to reject a Roma applicant, for example by reference to inferior educational qualifications⁷¹. Discrimination becomes difficult to prove as the Roma applicant has no hypothetical comparator due to such profound structural inequities.

Roma migration and Union citizenship

As of 2008, Eurostat estimates suggest that around eight million EU citizens were exercising their treaty rights to freedom of movement and residence⁷². Many Roma

⁶⁶ European Commission "Free movement of people: Commission decides to pursue infringement cases against France and Italy" IP/98/1123 (Brussels, 16 December 1998)

⁶⁷ supra n22, Article 3

⁶⁸ Anoush der Boghossian "Implementing the EU Race Equality Directive" *Equal Opportunities Review* 1/08/2004, issue 132.

⁶⁹ European Commission *Continuing the Diversity Journey: Business Practices, Perspectives and Benefits*, Luxembourg: Office for Official Publications of the European Communities, 2008 p. 4.

⁷⁰ Fundamental Rights Agency "The impact of the Race Equality Directive. Views of trade unions and employers in the European Union" (EU Luxembourg 2010).

⁷¹ Gil-Robles, A., *Final Report on the Human Rights Situation of Roma, Sinti, and Travellers in Europe*, (Strasbourg, Council of Europe, Office of the Commissioner for Human Rights, 15 February, 2006) p. 19.

⁷² EU Network of Independent Experts on Fundamental Rights, 'Thematic Comment No. 3: The protection of minorities in the European Union', 25 April 2005, p. 23, Available at: http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf#search=%22roma%20minorities%20thematic%20comment%20no3%20eu%20network%20of%20independent%20experts%20%22

⁷² European Commission Fifth report on Citizenship of the Union 1st May 2004-30th June 2007 COM (2008) 85.

have taken the opportunity afforded by Union citizenship to migrate west. Key ‘push’ factors in the decision to migrate are unemployment and segregation but the defining aspect mentioned by Roma migrants is the experience of poverty⁷³. Contrary to the image portrayed of Roma migrants in the French and Italian political discourse, interviews conducted by the EU’s Fundamental Rights Agency reveal an overwhelming desire amongst respondents to escape conditions of poverty and welfare dependency through formal employment and self-sufficiency⁷⁴. Inevitably, structural factors such as poor education and language barriers mean that much of this work tends to be in the poorly-paid and low-skilled sectors which are particularly vulnerable in times of economic downturn⁷⁵. This, coupled with discriminatory attitudes and policies across the EU, has helped keep the Roma on the margins of society in the host states. The research found little evidence of national measures aimed at supporting migrant populations, including the Roma⁷⁶. The recent European Roma summit in Cordoba was attended by only three ministers from Member states despite its emphasis on regional Roma inclusion policies and the opportunity for developing a European Roma strategy⁷⁷. Given the national reluctance to engage with these issues it is surprising and disappointing that the European Commission has not taken a decisive position in developing such a strategy in keeping with the objectives of the Treaty.

Pacts of security, fingerprinting and expulsion in Italy

The problems faced by Roma and other travellers in Italy are not new⁷⁸. In 2004, the European Committee on Social Rights unanimously found the Italian government to be in breach of a range of obligations under Article 31 of the Social Charter including adequate housing; non-discrimination and the prohibition on forced evictions⁷⁹.

The same year, a Veronese court found a group of Northern League members guilty of inciting racial hatred having plastered walls with posters demanding the expulsion

⁷³ supra n51 at 6.

⁷⁴ Ibid at 18-22.

⁷⁵ Ibid. at 47.

⁷⁶ Ibid. at 63.

⁷⁷ European Parliament resolution of 25 March 2010 on the Second European Roma Summit P7_TA-PROV(2010)0085.

⁷⁸ Colacicchi, Piero “Ethnic Profiling and Discrimination against Roma in Italy: New Developments in a Deep-Rooted Tradition” 2008 2 *Roma Rights Journal*.

⁷⁹ *ERRC v Italy* 27/2004 Article 31(1), (2) and (3).

of nomadic Roma⁸⁰. The appeal court reduced the sentence of the perpetrators from six to three months. During the trial, the head of the Verona Northern League, Flavio Tosi, declared that “we must aim to make our city thoroughly inhospitable for Gypsies”. He was subsequently elected mayor.

Discrimination against Roma migrants and Italian Sinti intensified following the election of extremist coalition partners, the far-right ‘Northern League’ and the pro-fascist ‘National Alliance’. Umberto Bossi of the Northern League campaigned with the actively anti-Gypsy slogan: “Se non volete zingari, marocchini e delinquenti a casa vostra, se volete essere padroni a casa vostra in una città vivibile, votate Lega Nord” (if you don’t want Gypsies, Moroccans and delinquents in your home, if you want to be the masters of your own homes in a liveable city, then vote for the Northern League)⁸¹. When Roma camps were firebombed in 2008, Bossi publically declared: “The people do what the political class isn't able to do”⁸².

Later in 2008 the actions of the Italian Government caught the attention of the international media with the announcement of a state of emergency and the planned census including compulsory fingerprinting of camp inhabitants, predominately Roma⁸³. This policy apparently stemmed from the killing of an Italian woman by a Romanian Rom in the previous November. The murder led to a number of violent attacks against Roma, culminating in a mob arson attack on a Roma settlement in Naples⁸⁴. On 30th May 2008, the President of the Council of Ministers adopted three Presidential Ordinances implementing the emergency decree for the regions of Lombardia, Lazio and Campania, thereby giving the prefects of Rome, Milan and Naples the responsibility for carrying out the necessary interventions for their regions. The Implementing Orders state that they receive these powers “derogating from the rules of law in force.” The specific powers include the monitoring of formal and informal camps, the census (including photographs) of all inhabitants, the expulsion and removal of persons with irregular status and measures aimed at clearing camps nomads and evicting their inhabitants.

⁸⁰ Institute of Race Relations Press Briefing 4th May 2004. Available at: <https://www.irr.org.uk/cgi-bin/news/open.pl?id=6812>.

⁸¹ Toninato, Paola *Reluctant Multiculturalism: the case of Romani Minorities in Italy* University of Warwick. Available at: <http://www2.warwick.ac.uk/fac/arts/italian/staff/paolatoninato/romaniminoritiesinitaly/>

⁸² Kington, Tom “68% of Italians want Roma expelled – poll” *The Guardian* 17th May 2008 p30; Nadeau, Barbie “Italy’s unwanted” *Newsweek* May 28th 2008.

⁸³ Nomad Emergency Decree 21st May 2008 Published in the Official Gazette No 122 of 26 May 2009.

⁸⁴ ODIHR *Assessment of the Human Rights situation of Roma and Sinti in Italy* (OSCE: Warsaw, March 2009).

The European Parliament condemned the census in July 2008 and urged the Commission to investigate whether the measures contravened EU law⁸⁵. Yet the Italian authorities continued to allow local administrations to conduct the census over the next two years and violence towards Roma and Sinti escalated across Italy⁸⁶. Legislation was subsequently introduced enabling the expulsion of Roma migrants without reference to the provisions of the Citizenship Directive⁸⁷. Scores of illegal settlements were closed and their residents evicted without any alternative accommodation⁸⁸.

Distinguishing itself from the Parliamentary resolution, the European Commission found however, that the Italian government had not carried out the census on ethnic grounds⁸⁹. This conclusion is somewhat surprising on two counts. Only two months earlier the commission had felt obliged to warn the Berlusconi government against expelling Roma⁹⁰. Furthermore, evidence provided by the Italian Red Cross who assisted in the data collection suggests that the census was ethnically motivated with almost all camp inhabitants being of Romani origin and the census procedure being uniformly applied irrespective of residence permits or nationality⁹¹. In the majority of cases no consent was sought from the inhabitants and in other cases inhabitants were deliberately misled about the nature of the census so that any consent could not be described as informed⁹². The European Roma Rights Centre expressed concern that the Commission's endorsement of the Italian policy could create a dangerous precedent⁹³.

⁸⁵ European Parliament resolution *On the census of the Roma on the basis of ethnicity in Italy* 10th July 2008 P6_TA-PROV(2008)0361; see also "ENAR Welcomes the European Parliament resolution of 10th July 2008 on the Census of Roma on the basis of ethnicity in Italy" European Network Against Racism 15th July 2008. Available at: <http://cms.horus.be/files/99935/MediaArchive/pdfpress/2008-75%20EP%20resolution%20on%20Italian%20Roma%20census.pdf>

⁸⁶ Scicluna, Henry "The life and death of Roma and Sinti in Italy: A modern Tragedy" 2008 2 *Roma Rights Journal* 9.

⁸⁷ Binannchi, G and Dinmore, G "Italy pushes law driven by Roma influx" *Financial Times* September 10th 2010.

⁸⁸ European Roma Rights Centre "Security al a Italiana. Fingerprinting, extreme violence and harassment against Roma in Italy" 2008 ERRC, Budapest.

⁸⁹ Kubosova, Lucia "EU gives blessing for Italy's Roma fingerprint scheme" EU Observer 5th Sept 2008; Owen, Richard "EU clears Berlusconi over Roma Gypsies" The Times Online Sept 4th 2008.

⁹⁰ EurActiv "Commission warns Italy not to expel Roma" 21st May 2008 EurActiv News.

⁹¹ ERRC interview with Ms Deidda Rosa in Camp Via Tenuta Piccirilli, Rome, 10 October 2008.

⁹² ERRC interviews which are documented by EERC, Open Society Institute and Osserv Azione *Memorandum to the European Commission violations of EC law and the fundamental rights of Roma and Sinti by the Italian government in the implementation of the census in "nomad camps" 4 MAY 2009* ECD-0902-5-EC Joint Submission-RS-5.4.09. Available at: <http://www.soros.org/initiatives/justice/litigation/ec-v-italy-20100910/memorandum-to-the-european-commission-20090504.pdf>

⁹³ ERRC "Rights groups demand European Commission clarify its position on Fingerprinting Roma in Italy" 9th Sept 2008 ERRC, Budapest.

The utility of sensitive data collection on the Roma is undeniable but, as the OSCE recognised, the Italian actions were disproportionate to the scale of the security threat. Moreover, they considered that the measures had contributed to the “stigmatization of the Roma and Sinti community in Italy”⁹⁴.

The Council of Europe’s Commissioner for Human Rights considered the conduct of the census to be a breach of the Data Protection Directive 95/46/EC which prohibits the collection of sensitive data such as that pertaining to ethnicity⁹⁵. The three specific exceptions listed in Article 8(2) namely: where the individual consented, where the issue is in the vital interest of an individual who is incapable of giving consent, or where it is required for medical reasons, cannot be seen to apply.

The collection of sensitive data including fingerprints and DNA samples was found to contravene Article 8 of the European Convention of Human Rights in the recent case of *S and Marper v United Kingdom*⁹⁶. The Italian government may attempt to justify the data collection under Article 8(2) as a proportionate response to a pressing social need, but it is difficult to see how any justification could be regarded as in ‘accordance with the law’. It is now well established in Strasbourg jurisprudence that such a law must be sufficiently accessible and its application foreseeable⁹⁷. It is highly unlikely that measures taken pursuant to the emergency decrees could be regarded as in accordance with the law, particularly given the Government’s own recognition that the provisions derogate from ‘the rules of law in force’.

The lack of strong condemnation and follow-up action from the European Commission did nothing to discourage similar initiatives elsewhere, including the expulsion measures in France but also in Portugal, Germany and Denmark. The Roma, lacking any political voice are easy scapegoats in times of economic instability and uncertainty. Plans to remove Roma migrants enable governments to portray themselves as tough on immigration whilst responding to public fears about security and crime. President Sarkozy reportedly gained revived support from the French electorate after embarking on his security crackdown. Polls published in *Le Figaro* revealed that between 69% and 79% of the public were in favour of the

⁹⁴ ODHIR supra n 84 at 8.

⁹⁵ Directive 95/46/EC. See Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe following his visit to Italy on 13-15 January 2009,” Strasbourg, 16 April 2009, para. 59. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1428427&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>

⁹⁶ *S and Marper v United Kingdom*, ECtHR, Judgment of 4 December 2008, App. 30562/04.

⁹⁷ See for example *Gillan v UK* 2010 [2009] ECHR 28.

demolition of the camps and 65% were in favour of Roma deportations⁹⁸. Laurent Dubois, a professor at Paris's Institute of Political Studies, contends that his revival in popularity marks a radicalization of public opinion on security and immigration⁹⁹. Such demonization is of course unlikely to yield the desired results. It is doubtful that the removal of the Roma will result in economic stability and negligible crime rates. Berlusconi described foreign criminals in Italy as "an army of evil" yet, contrary to the security rhetoric, crime statistics in Italy do not suggest that there has been any upsurge in crime since the arrival of Roma migrants¹⁰⁰. At the same time, security measures increase ethnic tension by fuelling misconceptions and pandering to the extremist agenda¹⁰¹. Discriminatory attitudes and intolerance have become legitimised as common-sense responses to a perceived threat¹⁰². It is relatively easy to regard current events as simply another aspect of Italian nationalism. Yet the face of racism has changed in Italy as anti-Roma sentiment is increasingly used as a tool to manipulate the electorate into believing that their way of life is under threat. This is no longer exclusively the prerogative of the far-right¹⁰³.

The logical acceptability of racism

Alluding to security concerns is one method deployed by politicians attempting to justify overtly discriminatory policies. Charges of racism can also be refuted by politicians who strip the victims of their ethnicity and focus purely on a social/cultural attribute that is presented as the reason for the security risk. In Italy the Roma and other travellers are seen primarily in terms of nomadism and it is this nomadism that seems uncomfortably juxtaposed with the values of settled Italian society.

Yet, as the European Social Committee have recognised, the vast majority of CEE Roma are no longer nomadic and have no wish to live in temporary encampments¹⁰⁴. In some cases this move from nomadic roots has occurred naturally and in other

⁹⁸ "Sarkozy's Roma deportations backed by 69% of French voters" August 27th 2010 and "Expulsions of Roma get Public Nod in Sarkozy's France" August 13th 2010 reported in *Business Week*, Bloomberg.com.

⁹⁹ "Expulsions of Roma get Public Nod in Sarkozy's France" *Business Week* August 13th 2010.

¹⁰⁰ Kington supra n82; Aradau, Claudia "The Roma in Italy. Racism as usual?" 2009 153 *Radical Philosophy* 2.

¹⁰¹ ODIHR Supra n84; Kington supra n82.

¹⁰² Iganski, Paul *Hate Crime and the City* (Policy Press: Bristol., 2008)

¹⁰³ Van Dijk, Teun A "Political discourse and racism. Describing others in Western Parliaments" in In S. H. Riggins (eds.), *The Language and Politics of Exclusion: Others in Discourse*. (Thousand Oaks, CA: Sage 1997) 31-64

¹⁰⁴ Committee of Ministers Resolution ResChS (2006)4 Collective Complaint No. 27/2004 by the European Roma Rights Centre against Italy (Adopted by the Committee of Ministers on 3 May 2006 at the 963rd meeting of the Ministers' Deputies) Council of Europe.

cases state policies aimed at assimilation have made the travelling lifestyle difficult to sustain. Such was the case in the UK when the statutory duty on local authorities to provide caravan sites, established in the Caravan Sites Act 1968, was repealed in 1994¹⁰⁵. Successive policies aimed at criminalising unauthorised camping have made it extremely difficult for travelling people to continue their lifestyle. Those travellers who do purchase their own land typically encounter problems with planning laws. The lack of legal status afforded to minority rights means that they are often outweighed by wider societal interests such as environmental considerations. In *Buckley v UK*¹⁰⁶, the ECtHR considered the questions of the Gypsy applicant's home and family life under Article 8 in planning cases. While special consideration should be given to the applicant's travelling heritage and lifestyle, the Court found that this could be outweighed by the rights and freedoms of others and the need to maintain a rigorous system of planning control.

Most CEE Roma have been sedentary for decades. Residential isolation and temporary camps have largely arisen due to discriminatory policies of local administrations. It is no coincidence that Roma unemployment levels are far greater than experienced by non-Roma populations (REF). Roma education levels have similarly suffered¹⁰⁷. In many CEE states, segregated education has added to the residential isolation and the perception of immutable difference. In the case of *DH v Czech Republic* the Grand Chamber of the European Court of Human Rights found the state to have breached the applicants' right to non-discrimination in education by administering a special school system which effectively operated a reduced curriculum and deprived the targeted children (predominately Roma) of equal educational opportunities¹⁰⁸. Yet, three years later educational segregation of Roma pupils remains commonplace in the Czech Republic and on average Roma pupils are twelve times more likely to be sent to schools for children with learning disabilities¹⁰⁹.

To view the Roma as purely and inherently nomadic is evidently inaccurate but has been a convenient tool for states trying to avoid engaging with these complex issues.

¹⁰⁵ Criminal Justice and Public Order Act 1994

¹⁰⁶ 20348/92; O'Nions H "The right to respect for family and home life: the first in a series of 'Gypsy cases' to challenge UK legislation" 1996 5 *Web JCLI*.

¹⁰⁷ O'Nions, H *The Protection of Minority Rights: The Roma in Europe* Ashgate 2007

¹⁰⁸ O'Nions, H "Divide and teach. Educational inequality and the Roma" 2010 14 *IJHR* 3 464.

¹⁰⁹ "Czech Government flouts court ruling on Roma education" Press release, *Open Society Justice Initiative* 10th November 2010

It enables states to reject claims of minority status, as in Italy where Roma and Sinti are excluded from the law on the protection of historical and linguistic minorities on the grounds that they are ‘nomads’ who prefer to live in camps¹¹⁰. Segregation and expulsion measures appear to be a rational response to a particular lifestyle choice which is seen to represent criminality, poverty and deprivation. Colacicchi argues that the focus on nomadism consolidates stereotypes of Roma and Sinti into something official:

“a very real and scary “nomad” so that from then on all people living in a trailer, in an open area, whether in an official or unofficial camp, *were* and still are “nomads””¹¹¹.

The question of ethnic identity is lost and the discriminatory effects of such measures are obscured in the security rhetoric. The UN Human Rights Committee and the Council of Europe’s Commissioner for Human Rights, Thomas Hammarberg, have expressed concern over this categorisation and associated policies directed at containing nomadism¹¹².

The inherent association with nomadism presents the typical Rom as inherently different and Roma culture is thus portrayed as intrinsically alien and inferior to the values of settled society. McVeigh describes the ideology of sedentarism as privileging a fixed abode and denigrating a nomadic form of life¹¹³. We can see this clearly played out in Italy and France. Roma migrants are assumed to be nomadic and dangerous, with criminality and poverty seen as cultural characteristics of a transient lifestyle. Media stories of Roma criminality, begging and petty theft are common despite the fact that such stories are rarely substantiated by evidence and the ethnicity of perpetrators is seldom recorded¹¹⁴.

Ten years ago, the UN Committee on the Elimination of Racial Discrimination expressed concern about the use of such camps and the extent of residential segregation for Roma communities in Italy¹¹⁵. More recently, the European

¹¹⁰ Law 482/1999; Council of Europe Committee of Ministers Resolution RecCMN(2006)5 *On the implementation of the Framework Convention for the Protection of National Minorities by Italy* 14/06/2006.

¹¹¹ Colacicchi *supra* n78 at 40.

¹¹² Human Rights Committee Concluding Observations. Italy. CPTR/C/ITA/CO/5 24th April 2006; Commissioner for Human Rights Memorandum Council of Europe Strasbourg, 28 July 2008 CommDH(2008)18

¹¹³ McVeigh, R “Theorising sedentarism: the roots of anti-nomadism” in Acton, T ed *Gypsy politics and Traveller Identity* (Hertfordshire Press: Hatfield, 1997).

¹¹⁴ EU *supra* n51 at 50.

¹¹⁵ United Nations Committee on the Elimination of Racial Discrimination, “Concluding Observations-Italy,” CERD/C/54/Misc.32/Rev.3. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/68a4f853997e075e802567a80036bf81?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/68a4f853997e075e802567a80036bf81?Opendocument).

Commission Against Racism and Intolerance observed that one-third of Roma now live in such camps typically in adverse conditions of poverty and deprivation¹¹⁶. The Italian response to the European Committee of Social Rights' findings in 2005 and the renewed complaint made to the same Committee in 2009 suggest that there is no political will at the national level to address these problems¹¹⁷.

The Italian public are understandably wary of the Roma depicted in the emergency decrees. Opinion polls from 2008 demonstrate that the rhetoric of politicians is accepted by the vast majority of Italians with 92% of respondents believing that Roma exploit minors; 92% believing that Roma make a living from petty crimes; and 83% believing that Roma choose to live in camps¹¹⁸.

The security measures initially targeting Roma have now been extended to cover all migrants in the legislative Decree 733 of February 2009¹¹⁹. Irregular migration is now a crime and all foreigners found on Italian territory without permits will be fined up to 10,000 EUR and expelled. In addition, four years in jail awaits foreigners found on the territory after formal expulsion. A fee of between 80 and 200 EUR will now have to be paid to obtain a residence permit and doctors working in state institutions are to denounce undocumented foreigners seeking medical attention to the police. Begging with minors aged 14 years or younger is now punishable by 3 years imprisonment. Finally, in order to ensure that no Roma slip through the net, proof of residence in an official type of housing will be required for a residence permit thus effectively excluding camp dwellers.

Following the Roman road: collective expulsions in France

In August 2010, the collective Roma expulsions of the French government drew widespread condemnation from humanitarian organisations and prompted calls in some sectors for France to be expelled from the EU¹²⁰.

Allegedly responding to security concerns, the government destroyed unauthorised encampments and expelled over 1000 Roma to Bulgaria and Romania. The deportees

¹¹⁶ European Commission against Racism and Intolerance. "Second Report on Italy." 23 April 2002. http://hudoc.ecri.coe.int/XML/Ecri/ENGLISH/Cycle_02/02_CbC_eng/02-cbc-italy-eng.pdf. 42.

¹¹⁷ *Complaint (No 27/2004)* filed by the ERRC against Italy for violations of the Right to Housing of Roma from 7th December 2005.

¹¹⁸ Istituto per gli Studi sulla Pubblica Opinione. Italiani, Rom e Sinti a confronto: una ricerca qualitativa. Conferenza Europea sulla popolazione Rom. Rome 22-23 January 2008.

¹¹⁹ Law 94/2009; discussed by Colacicchi supra n78 at 43.

¹²⁰ Doughty, Louise "France deserves to be kicked out of the EU for deporting Roma people" *Guardian Unlimited* 1st Sept 2010.

being reported paid 300 euros per adult and 100 euros per child¹²¹. International criticism intensified when a leaked government circular revealed that the Roma had been targeted solely on the basis of their ethnicity rather than because of proven security concerns¹²².

The European political institutions were a little quicker to respond. The Parliament took the lead with a resolution condemning the deportations with a majority of 337 to 245¹²³. The resolution expressed deep concern at the measures which were considered to specifically target Roma and travellers and to be prohibited by European law. It also recognised how the rhetoric of French politicians had led credibility to racist statements and actions. The parliament then turned its attention to the other European institutions and was particularly critical of the Commission's failure to respond as 'guardian of the Treaties' by preparing a European Strategy on Roma inclusion, in cooperation with the Member States¹²⁴. Indeed the head of the Commission, Jose Manuel Barroso, seemed to be appeasing President Sarkozy when the two met by suggesting that freedom of movement should not be interpreted as an absolute right¹²⁵.

In a policy communication adopted on 7 April 2010, the Commission outlined an ambitious program to meet the biggest challenges for Roma inclusion, including the mobilisation of structural funds such as the European Social Fund and harnessing the potential of Roma communities to support inclusive growth as part of the Europe 2020 strategy¹²⁶. Yet the actions of the French authorities, in their blatant disregard for such initiatives, were not met with authoritative condemnation from the Union's executive branch.

The EU Justice Minister, Viviane Reding was particularly outspoken in her criticism of the French expulsions describing them as a 'disgrace' and 'deeply disturbing'¹²⁷. Her comparison with the Vichy expulsions in the second world-war attracted criticism from fellow commissioners¹²⁸. The Commission did issue a formal notice to the French government requesting that they comply with the Citizenship Directive

¹²¹ Pop, Valentina "EU questions legality of French Roma deportations" *EU Observer* 2nd Sept 2010; Traynor, Ian "EU says Roma deportations by France a disgrace" *The Guardian* Sept 14th 2010.

¹²² Wilsher, Kim "Orders to police on Roma expulsions from France leaked" *The Guardian* 13th Sept 2010.

¹²³ Sept 9th 2010 P7_TA-PROV(2010)0312.

¹²⁴ Para 13.

¹²⁵ Ricardo Martínez de Rituerto "La libertad de circulación en la UE no es absoluta" *El Pais* 9th Sept 2010.

¹²⁶ European Commission (COM(2010)133)

¹²⁷ Viviane Reding Press release *Statement on the latest developments on the Roma Situation* Brussels 14th Sept 2010 Speech 10/428.

but further enforcement action was not forthcoming¹²⁹. Again, despite the evidence in the form of an internal government circular which was quickly annulled once revealed, the commission found that the policy had not been intentionally directed towards an ethnic group¹³⁰. Meanwhile, the European Roma Rights Centre has successfully intervened to challenge the collective deportation of ten Roma by the Danish Immigration service¹³¹ and the German government has recently denied rumours of a similar expulsion initiative. As the parliamentary resolution of 2010 suggests, there remains significant questions as to whether the Commission is able to act independently of the interests of these big-players.

The effects of Union inaction may have contributed to the stigmatization of Roma across Europe and could be seen as helping to fuel the fire of racism in the newer member states. In Hungary for example, the third largest political party, Jobbik, which has recently acquired 17% of parliamentary seats, has embarked on a ‘Movement for a Better Hungary’ with numerous initiatives directed towards ‘Gypsy crime’ (sic) including the use of compulsory boarding schools for Roma children¹³². Their leaders view the Italian and French expulsion measures as legitimate benchmarks for the treatment of Roma. Anti-Roma violence which was common following the breakdown of Communist regimes appears to be again increasing in the region. In August, four men with ties to the Hungarian security services went on trial accused of the murders of six Roma, including a child, in addition to the destruction of Roma homes across nine villages¹³³.

The European Parliament and Commissioner Reding concluded that it was difficult to see how the expulsions could comply with the Citizenship Directive 2004/38 and established case-law which, it has been noted, makes no provision for collective expulsions or automatic bans¹³⁴. Additionally, the targeting of Roma on grounds of ethnicity alone must raise significant legal issues, as recognised by the European Parliament, under the Race Equality Directive; under Article 18 of the TFEU and the Charter on Fundamental Rights.

¹²⁸ Voice of America News “France defiant on Roma expulsions” 16th Sept 2010.

¹²⁹ ¹²⁹ European Commission Press Release *European Commission assesses recent developments in France, discusses overall situation of the Roma and EU law on free movement of EU citizens* IP/10/1207 29th Sept 2010.

¹³⁰ Ibid.

¹³¹ “ERRC challenges Danish expulsion of EU Roma” (ERRC: Budapest, 6th Sept 2010); ERRC “Danish authorities reverse decisions in Roma expulsions” (ERRC: Budapest, 18th April 2011).

¹³² Jobbik party “Gypsy Voivod confronts PM Orban at a Gypsy crime debate” 21st Oct 2010. Available at: <http://www.jobbik.com/>.

¹³³ “Felettesei mozgatták a tartótisztet” Magyar Hírlap 19th October 2010.

¹³⁴ See for example *Donatella Calfa* C348/96.

The destruction of the camps and expulsions is also prohibited under international humanitarian law. The rights to housing and freedom of movement are protected by Article 5(d) and (e) of the International Convention on the Elimination of All forms of Racial Discrimination and Article 4, Protocol 4 of the European Convention on Human Rights which specifically prohibits the collective expulsion of aliens. The Commission on the Elimination of Racial discrimination has already expressed concerns about the treatment of France's indigenous traveller population and the incoming East European Roma. Indeed, the French response to the migrant Roma could be seen as continuing the discriminatory theme that has been applied to indigenous French travellers. The latter have experienced a severe shortage of authorised stopping places and a considerable escalation of criminal sanctions aimed at unlawful encampments. These laws on "Interior Security" and the "Prevention of Delinquency" again place Roma discrimination in the context of a security discourse have fuel the perception that there is something inherently wrong with both migrant Roma and French travellers¹³⁵.

In 2009 the European Committee on Social Rights upheld a complaint against France under the European Social Charter¹³⁶. The Committee found that both migrant Roma and French travellers had been denied rights to effective housing resulting from an absence of sufficient halting places, conditions of deprivation and a lack of security of tenure. In addition, the complaint was upheld under Article E of the revised charter which is concerned with discrimination. The Committee held that treating travellers identically to the settled community when allocating housing constituted discriminatory treatment as it failed to take sufficient account of their difference. Furthermore, specifically relating to Roma migrants, the Committee upheld a complaint under Article 19(4)c that they had been treated less favourably than nationals of the host state¹³⁷.

The 2000 Besson Act¹³⁸ had included an obligation on municipal authorities to provide sufficient stopping places for travelling people coupled with extended

¹³⁵ ERRC "Submission of critical issues for Roma and Travellers in France" to the UN Human rights Commission 26th March 2008.

¹³⁶ European Committee on Social Rights Decision on the merits *ERRC v France* 51/2008 19th Oct 2009; see the similar findings of the European Committee on Social Rights in *International centre for the legal protection of Human Rights v Greece* 49/2008 28th March 2008; and *ERRC v Italy* 27/2004 7th Dec 2005. In addition the admissibility decision in *Centre on Housing Rights and Evictions v Italy* 58/2009 Dec 2009 and the collective complaint *ERRC v Portugal* 61/2010 29th April 2010 awaiting a decision on admissibility.

¹³⁷ *Ibid.* para 119.

¹³⁸ Reception and Accommodation of Travellers Act No 2000-614 5th July 2000 as amended

enforcement powers over unauthorised encampments. However, many authorities had refused to comply with this duty. As a result there remained a considerable shortfall of authorised halting places for nomadic travellers leading to overcrowding which itself generated problems of crime and security.

The French action to remove Roma migrants cannot be dissociated from their treatment of native French travellers. The two groups have been bundled together in various news items on the expulsion story with ministers referring to on-going problems posed by nomadic people. In this debate, as in Italy, native travellers along with Roma migrants are constructed as outsiders with different and opposing values to those of the settled, French population. There is very little to separate the Italian and French responses to the arrival of Roma migrants and the rhetoric of security which has been used to disguise discrimination towards both migrants and native travelling peoples. For example, French MP Jacques Myard argues that the Besson Act prevented integration by enabling the continuation of a different, ‘Asian’ and ‘medieval’ lifestyle¹³⁹. Confusing integration with assimilation he went on to suggest that there was no place in France for nomadism with its inherent criminality¹⁴⁰.

The rhetoric of security and crime means that the expulsion of Roma does not appear to conform to typical understandings of racism. As Aradau has argued, the government’s measures are part of the ordinary fabric of modern liberal society whereby “insidious and entrenched racism...have been largely neutralized by the rhetoric of security”¹⁴¹. This may explain in part the Commission’s reluctance to decisively condemn such policies but it cannot excuse it. Following condemnation from the Parliament regarding the Italian measures, the Commission issued a statement informing the Berlusconi government that the Italian security package may be incompatible with the Citizenship Directive 2004/38 and threatening enforcement proceedings. Yet the census was regarded as consistent with European law as it applied to all persons of nomadic origin – even though it was evidently being overwhelmingly directed at Roma and Sinti camp residents¹⁴². The Parliament made repeated calls to the Commission to commence enforcement action against both member states. This action could serve as an expedient reminder that repeated

¹³⁹ Huub van Baar “Expulsion Fever in Europe. The case of the Roma” Association for the Study of Nationalities 26th Sept 2010.

¹⁴⁰ Interview “Stigmatizing travelling people?” on *France24*

¹⁴¹ Aradau, Claudia “The Roma in Italy. Racism as usual?” 2006 153 *Radical Philosophy* p2 at 3.

¹⁴² Scicluna supra n86 at 27.

breaches of European law will not be tolerated and it could prevent the proliferation of such policies elsewhere. Unfortunately however the opportunity to take such decisive action may well now have passed. The Commission could perhaps be more constructively deployed in developing its pan European Roma inclusion strategy to address the comparative disadvantage of Roma across Europe and to promote genuine equality of treatment.

This strategy is presently in its infancy but the Platform for Roma Inclusion is expected to provide a forum for greater cooperation amongst all interested parties. Basic foundational principles have been delineated, including the active participation of the Roma community. Yet the framework at present lacks legal teeth and it remains unclear how this will translate to achievable objectives¹⁴³.

The Non-discrimination paradigm

A central problem faced by Roma advocates is that the acquisition of rights for minorities in Europe is still based squarely within the negative non-discrimination paradigm. This approach has not sufficiently addressed centuries of discrimination and structural inequality for the Roma. During the incitement trial of members of the Northern League, the Veronese Court of Cassation reasoned that discrimination against the Roma because they were thieves was not unlawful¹⁴⁴. As the defendants were motivated by the Roma's criminality rather than cultural or biological differences, their prejudice was deemed not to constitute unlawful racial discrimination. Similarly the fingerprinting measures, which disproportionately affected Roma as camp inhabitants camps were declared not to constitute racial discrimination by the then European Commissioner for Justice, Freedom and Security¹⁴⁵. These approaches represent narrow readings of the law particularly on indirect discrimination whereby an apparently neutral measure (such as fingerprinting all camp residents) disproportionately adversely affects a particular ethnic group (ie the Roma). It is contended that this position is also contrary to the approach taken by the majority of the Grand Chamber of the European Court on Human Rights to the

¹⁴³ European Commission *Roma in Europe: The implementation of European Union instruments and Policies for Roma Inclusion- Progress report 2008-2010* 7th April 2010 (COM(2010)133).

¹⁴⁴ *Supra* n86., at28.

¹⁴⁵ Aradau *supra* n141 at 4.

issue of segregated schooling in *DH*¹⁴⁶. At the very least the census would appear to constitute harassment which is prohibited by Article 2 of the Race Equality Directive: “... when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States”¹⁴⁷.

The European reluctance to move beyond formal non-discrimination discourse and strategy towards a more encompassing approach to equality which highlights structural challenges and engages with minority rights claims is a significant bar to the realisation of Roma equality. It is hampered further by the rhetoric of security which pervades the current expulsion justifications. Governments are only too aware that expulsions on purely economic or ethnic grounds will be deemed unlawful, yet the added security dimension seems to tilt the scales in favour of such policies and leaves the Commission in a position of indecision. As Aradau concludes:

“What the Italian case should highlight is a more insidious and less striking form of racism that is already at work in Europe and whose effects remain unnoticed: the increasing use of ‘security’ discourse to divide humanity with the commonsensical measures of a need for social protection”¹⁴⁸.

Measures of exclusion are thus presented as preventative essentials for protecting society and securing its way of life¹⁴⁹.

The problems experienced by the Roma are complex and cannot singularly be attributed to racial discrimination. There is a need for an intersectional approach addressing “both the problems of racial discrimination and socio economic marginalisation simultaneously”¹⁵⁰. Using the *DH* case Goodwin views the non-discrimination approach as counter-productive, suggesting that even if discriminatory testing and special schools were prohibited, Romani children would still face enormous barriers to educational inequality due to interacting layers of socio-economic problems. It is difficult to disagree with her unoptimistic conclusion as the

¹⁴⁶ *D.H. and Others v. Czech Republic*, 57325/00, Council of Europe: European Court of Human Rights, 7 February 2006, available at: <http://www.unhcr.org/refworld/docid/469e020e.html>.

¹⁴⁷ Article 2(3) Directive.

¹⁴⁸ Aradau supra n141 at 4.

¹⁴⁹ *Ibid.* at 6.

¹⁵⁰ Goodwin, Morag “Multidimensional exclusion. Viewing Romani marginalisation through the nexus of race and poverty” in Schiek and Chege (eds.) *European Union Non-discrimination law* (Routledge Cavendish: Abingdon, 2009) pp137-162 at 147.

track record of the non-discrimination focus has not yielded positive results¹⁵¹. Her solution is presented as a complementary dialogical strategy whereby separated communities are encouraged to cooperate to promote a common good in order to enable further integration (rather than focusing and emphasising difference which she regards as central to the non-discrimination approach. Inherent in her strategy is the desire to avoid the incidental promotion of victim status which is disempowering for victims and disruptive to the dialogical relationship. There is of course merit in this local solution and many small-scale projects have been successful in fostering better understanding between Roma and non-Roma, suggesting that the boundaries between communities are not immutable. However, these issues also demand attention on a bigger stage, particularly when the political discourse centres on questions of crime and security. In the current political climate, the Roma are typically presented as threats to the security of the nation. It is perhaps unrealistic to expect such charges to be resolved through local, dialogical avenues.

The rights of minorities, including the Roma, have not been adequately understood or advanced by the EU to date and minority protection remains largely a domestic affair¹⁵². There are many reasons for this reticence which encompass both theoretical and practical objections. The emphasis on non-discrimination in Art 18 and 19 TFEU and equality in Article 8 TFEU provide limited scope for concepts such as affirmative action which may be necessary to ensure de facto equality for minorities¹⁵³. In a series of cases involving planning law and British Gypsies the European Court on Human Rights reasoned that the right to private, family and home life contained in Article 8 of the Convention demanded a positive obligation be placed on states to protect the Gypsy way of life¹⁵⁴. The simple non-discrimination approach was considered unlikely to provide sufficient protection for the Gypsy lifestyle being predicated on sedentary values which were not shared by the minority community.

Topidi also rejects the formal non-discrimination solution. A process of cultural revivalism demands measures that achieve protection from discrimination and foster the development of pluralisation and ethnic identification. The low levels of political participation cannot simply be addressed through the fundamental rights approach

¹⁵¹ Ibid. at 153.

¹⁵² Zielonka (ed) *Europe unbound: enlarging and reshaping the boundaries of the European Union* (Routledge: London, 2002) pp117-136; Topidi supra n 26 pp115-147.

¹⁵³ O'Nions supra n107.

¹⁵⁴ *Buckey v UK* App 20348/92; *Chapman v UK* App 27238/95 para. 96; *Connors v UK* App 66746/01.

currently promulgated by the EU¹⁵⁵. The EU's own Network of Experts on Fundamental Rights has echoed these sentiments. They found that the history and pervasive nature of direct and indirect discrimination made a focus on simple non-discrimination inadequate¹⁵⁶.

Conclusion

There is now some recognition that European anti-discrimination law needs clearer definition. At present there is a hierarchy of such provisions privileging nationality above other forms of discrimination. The Commission has recognised that discrimination is increasing in their public consultation 'Equality and non-discrimination in an enlarged EU' and the resultant framework document¹⁵⁷. The Roma expulsions demonstrate that the current focus is ill-equipped to respond to multi-layered structural disadvantage. A broader human rights policy needs to engage with questions of minority rights, particularly for the Roma¹⁵⁸.

There can be no doubt that the Roma are a heterogeneous people whose historical migratory experiences have influenced their cultural values. The absence of a defined political voice presents a further difficulty in assessing the values and needs of the Roma community. The enlargement of the EU therefore constitutes an invaluable opportunity for Roma to campaign extra-territorially on the European stage. Since 2007 the profile of Roma issues has been raised significantly by the election of two Roma to the European Parliament¹⁵⁹. On her electoral victory in 2005 Livia Járóka, a Hungarian Romani, described her Herculean task of representing the Hungarian people whilst simultaneously, uniquely representing an estimated fifteen million European Roma¹⁶⁰.

Many Roma projects have received funding from the EU's PHARE programme and SOCRATES initiatives but there remains a sense that there is no clear, lobbying focus. Furthermore, even when there is a voice it is not clear that those in a position

¹⁵⁵ Topidi supra n26 at 177-178.

¹⁵⁶ EU supra n51 at 176.

¹⁵⁷ European Commission Press release "Commission canvasses opinion on further direction of anti-discriminatory policy" IP/04/709 Brussels 3rd June 2004; European Commission *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Non-discrimination and Equal Opportunities for All – a Framework Strategy* COM ("005)224 final Brussels 1 June 2005.

¹⁵⁸ Topidi supra n26 at 245.

¹⁵⁹ There are currently two Hungarian Romani MEP's. The first Romani MEP was Juan de Dios Ramírez Heredia of Spain who served from 1994-1999

¹⁶⁰ BBC News Online "First Roma MEP on a mission" 11th January 2005

to respond are listening¹⁶¹. This conspicuous absence of significant political representation of Europe's largest ethnic minority remains a serious barrier to the effective integration of Roma people across Europe.

The issue of Roma inequality has been on the EU agenda for some considerable time yet this may be the first time that the scale of inequality has been apparent to politicians in the west. Free movement and residence rights have facilitated Roma migration to Western Europe and this has meant that it is no longer possible to view the issue as the responsibility of CEE states. Member states should not be given the opportunity to violate European citizenship provisions using unsubstantiated security rhetoric as they pander to increasingly conservative electorates. A European strategy for Roma integration and equality is urgently needed as recognised by the European Parliament. On one level there has been engagement with the Roma issue across Europe for decades but this has often lacked coordination and direction. More significantly and for reasons beyond the scope of this paper it lacks real contribution from the Roma themselves. It is unclear whether the platform for Roma inclusion will be just the latest instalment of such initiatives. Political pondering cannot be a substitute for the enforcement of legal rights. So far, the Commission, by burying its head in the sand, has been exposed as less than effective in its first real human rights test.

¹⁶¹ See for example the attendance of Ministers at the 2nd European Roma summit discussed above p14.