Duty to apply fairness in decision-making

■ **Secretary of State for the Home Department v Thakur**

[2011] UKUT 00151 (IAC), 23 March 2011

■ **Patel and Patel v Secretary of State for the Home Department**

[2011] UKUT 00211 (IAC), 6 June 2011

These two cases make interesting reading on the common law principle of fairness which is usually seen as more within the remit of the Administrative Court than of the tribunal. In both cases, the tribunal found that the Home Secretary had failed to comply with the common law duty to act fairly in the context of refusals of further leave to remain as Tier 4 (General) Student Migrants where their sponsors' licences had been withdrawn without the students' knowledge and they had not been given adequate opportunity to enrol at another college or to make representations. The tribunal found that the decisions were not in keeping with the law.

EU citizen and family member must show continuity of residence

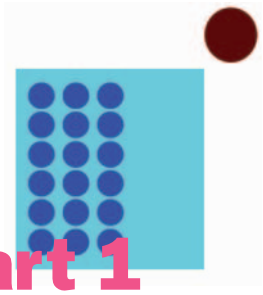
■ **EN v Secretary of State for the Home Department**

[2011] UKUT 55 (IAC), 1 February 2011

The tribunal confirmed that in order to acquire a permanent right of residence under I(EEA) Regs reg 15(1)(b), a family member of an EU citizen must show that both s/he and the EU citizen have resided in the UK, in keeping with the I(EEA) Regs, for a continuous period of five years.

Nicola Braganza, Grace Brown, Rebecca Chapman, Leonie Hirst, Glen Hodgetts, Rita Sethi, Alexis Slatter, Abi Smith, Hugh Southey QC, Amanda Weston and Chris Williams are barristers at Tooks Chambers, London.

Using EU law to tackle anti-Roma discrimination – Part 1



Marc Willers and **Siobhán Lloyd** consider how Roma have been able to address the discrimination they face and assert their rights at a European level. This article focuses on Roma experience of taking complaints to the European Court of Human Rights (ECtHR) and the European Committee of Social Rights ('the committee'). Part 2 will be published in December 2011 *Legal Action*.

There are now an estimated 10–12 million Roma living in Europe.[1] Roma make up the largest ethnic minority and evidence has clearly shown that they are more likely to face discrimination and social exclusion than other groups living in Europe.

Roma can challenge the discriminatory treatment they face by using the conventions and treaties adopted by the Council of Europe and the EU. Before examining instances where such challenges have been made, this article will examine the functions of these European institutions in a little detail.

The Council of Europe

The Council of Europe is a pan-European human rights organisation. Its principal aims are to promote respect for democracy, the rule of law and human rights through its treaties and monitoring bodies. It has 47 member states and encompasses nearly every country in Europe, including Russia and Turkey.

The founding members of the Council of Europe adopted the European Convention on Human Rights ('the convention') in 1950 to promote civil and political rights. The convention sets out legally binding obligations on contracting parties to guarantee the rights enshrined in it to everyone within their jurisdiction. All member states are party to the convention. The ECtHR reviews the implementation of the convention by member states when it determines cases brought against them.

The European Social Charter (ESC) is a Council of Europe treaty that guarantees social and economic rights. It was adopted in 1961 and revised in 1996. The committee is the body responsible for monitoring member states' compliance with the ESC in its original and revised form. Every year contracting states submit a report indicating how they have implemented the ESC in law and in practice. In contrast to the ECtHR, individuals cannot make complaints. Rather, the committee receives 'collective complaints' from organisations such as trade unions or non-governmental organisations (NGOs) on alleged violations of the rights protected by the original ESC and the revised ESC, and pronounces decisions on the merits of those complaints.

The European Union

By contrast, the EU is an economic and political union comprised of 27 member states. Its work is undertaken by a number of institutions:

■ the European Commission, which proposes new laws and is generally responsible for implementing EU policies;

■ the Council of the European Union, which is comprised of ministers from member states who meet to adopt the European Commission's proposals;

■ the European Parliament, which is able to vote on all proposed changes of EU law; and

■ the European Court of Justice, which is responsible for interpreting EU law and ensuring that it is applied uniformly across member states.

All 27 member states of the EU are also members of the Council of Europe and the two institutions work together on issues relating to human rights.

Discrimination faced by Roma in Europe

The extensive discrimination faced by Roma was formally recognised by the Council of Europe as long ago as 1969. Since then there has been no shortage of commitments, declarations and expressions of good intentions by member states aimed at improving the lives of Roma in Europe. However, progress has all too often been thwarted at the stage where policies are to be implemented at a national or local level and, as a consequence, there has been little real improvement.

A report by the EU Agency for Fundamental Rights (FRA) found that many Roma experience poor housing conditions, face the highest levels of discrimination in access to housing, education, employment and health care; and that, as a result, their chances in the labour market are diminished.[2] Faced with high levels of discrimination in their countries of origin, many Roma from the newer members of the EU decide to exercise their right to freedom of movement within the EU and head towards other member states. However, another report by FRA found that Roma encounter problems registering their residence and, as a result, they face similar difficulties in accessing health care, public housing and work in their new countries of residence.[3]

Meanwhile, as far-right groups have gained political ground in recent years across Europe, hate speech against Roma has increased markedly, to the extent that it has been adopted by mainstream political parties. This worrying trend was highlighted in July 2010, when controversially the French government used Roma migrants from Eastern Europe as scapegoats for a rise in criminality and civil unrest in the country. President Sarkozy said that Roma camps were a source of 'illicit trafficking, profoundly unfit living conditions, the exploitation of children for the purposes of begging, prostitution or crime' and announced that the government would dismantle Roma camps and repatriate irregular migrants from Eastern Europe.[4]

It was against this backdrop that, on 20 October 2010, the Council of Europe issued *The Strasbourg Declaration on Roma*, which recognised the fact that Roma across Europe continued to be 'socially and economically marginalised', and indicated that its member states had adopted a list of priorities and steps aimed at securing non-discrimination, social inclusion and the empowerment of Roma.[5]

In April 2011, the European Commission followed suit by publishing *An EU framework for national Roma integration strategies up to 2020*, which set goals for Roma inclusion in education, employment, health and housing.[6] In addition, each EU member state has been asked to submit a national Roma inclusion strategy to the European Commission explaining how it will reach the goals set out in the framework.[7]

Roma and convention rights

Roma have been able to use the ECtHR in order to secure their rights. Complaints have most frequently involved alleged violations of the following:

- right to life (article 2);
- prohibition of torture, inhuman or degrading treatment or punishment (article 3);
- right to liberty (article 5);
- right to a fair trial (article 6);
- right to respect for private and family life (article 8);
- right to education (article 2 of Protocol No 1);
- prohibition of collective expulsion of aliens (article 4 of Protocol No 4) (see *Čonka v Belgium* App No 51564/99, 5 February 2002; (2002) 34 EHRR 54); and
- the right not to be discriminated against with respect to the enjoyment of the other rights and freedoms guaranteed by the convention (article 14).

Of course, on occasions Roma have also brought cases before the ECtHR in which they have alleged the violation of other rights protected by the convention, such as freedom of speech (article 10) and freedom of association (article 11) (see, for example, *Gypsy Council and others v UK* App No 66336/01, 14 May 2002).

The convention's prohibition of discrimination

Article 14 has no independent existence and for the discrimination to be actionable it must occur within the context of another substantive right, such as the right to respect for family life or the right to freedom of speech.

Although article 14 is an ancillary right, as long as the complaint engages another substantive convention right, the court does not need to conclude that the underlying substantive convention right has been breached for it to find that a violation of article 14 has actually occurred (see *Abdulaziz, Cabales and Balkandali v UK* App Nos 9214/80, 9473/81 and 9474/81, 28 May 1985).

Similar treatment for persons in similar situations; different treatment for persons in different situations

In essence, article 14 guarantees that persons in similar situations should be treated in a similar manner with respect to convention rights.

■ Muñoz Díaz v Spain

App No 49151/07,
8 March 2010

In this case the Spanish state had refused to recognise a Roma woman's marriage, which had been solemnised in keeping with Roma customs and cultural traditions. This meant that she was not entitled to her survivor's (widow's) pension, to which she would otherwise have been entitled had she been married in keeping with Spanish law.

The ECtHR held that there had been a violation of article 14 taken together with article 1 of Protocol No 1 (protection of property). Article 14 therefore guarantees that different lifestyles should be taken into consideration.

■ Chapman v UK

App No 27238/95,
18 January 2001

In this decision the Grand Chamber specifically recognised the different lifestyle of the Roma and indicated that states have a positive obligation to facilitate that lifestyle. In certain circumstances, this would require the state to treat Roma differently:

> *... the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases ... To this extent, there is thus a positive obligation imposed on the contracting states by virtue of article 8 to facilitate the Gypsy way of life* ... (para 96).

Objective and reasonable justification

Freedom from discrimination under article 14 is a qualified, rather than an absolute, right and therefore can be lawfully interfered with in certain circumstances. However, any different treatment must have an objective and reasonable justification. In other words, the different treatment must have a legitimate goal and be a means proportional to achieving that goal.

■ Todorova v Bulgaria

App No 37193/07,
25 March 2010

The ECtHR held that the refusal to suspend a sentence of three years' imprisonment imposed on a Roma woman breached article 14 in conjunction with article 6. The sentencing court had noted the applicant's ethnic origin among the personal details used to identify her, and then refused to suspend the sentence on the ground that there was 'an impression of impunity, especially among members of minority groups, who consider that a suspended sentence is not a sentence at all'. The ECtHR found that the applicant had been treated differently and that the reasons given by the sentencing court contained no objective justification for so doing.

The court confers a considerable margin of appreciation on member states concerning what constitutes an objective and reasonable justification. Whether that margin of appreciation is wide or narrow depends on:

- the nature of the right involved (member states are given more leeway in social and economic fields, whereas the margin with respect to fundamental rights is very narrow);

■ the level of interference (if the right would be eliminated completely, there is unlikely to be an objective and reasonable justification for the measure. For example, in *Aziz v Cyprus* App No 69949/01, 22 June 2004; (2002) 35 EHRR CD 14, the applicant was a Turkish Cypriot living in the Greek part of Cyprus. He was unable to vote because the Cypriot Constitution required Turkish Cypriots to be registered on the Turkish voting rolls and Greeks to be on the Greek ones, thus completely depriving him of his right to vote);
■ the public interest involved in the category of discrimination (it was held in *Timishev v Russia* App Nos 55762/00 and 55974/00, 13 December 2005, that weighty reasons would have to be put forward before the court could regard a difference in treatment which was based exclusively on the ground of ethnic origin as being compatible with convention rights).

Discrimination, education and the decisions in DH, Sampanis *and* Oršuš

There is widespread discrimination against Roma in education across Europe. Roma children are often treated less favourably than children from other communities. The ECtHR has delivered a number of judgments in relation to violations of article 14, read in conjunction with article 2 of Protocol No 1 (the right to education), concerning Roma which highlight the application of the doctrine of margin of appreciation.

■ DH and others v Czech Republic

App No 57325/00,
13 November 2007

The Grand Chamber held that the Roma applicants had been the victims of indirect discrimination. Statistical evidence demonstrated that in 1999, 50.3 per cent of Roma children went to special schools in the town of Ostrava whereas only 1.8 per cent of non-Roma children were placed in these schools. It also showed that Roma children made up 56 per cent of all children who had been assigned places in a special school in Ostrava in 1999. This was a significantly high proportion given that Roma only represented 2.26 per cent of pupils of primary school age in the town (para 18).

The Grand Chamber concluded that the selection tests for special schools in the Czech Republic were biased and did not take into account the special characteristics of Roma children (paras 200–201). The parents were not in a position to give informed consent (para 203); and even if they had been in a position to give consent, 'no waiver of the right not to be subjected to racial discrimination can be accepted' (para 204).

In reaching its conclusion, the Grand Chamber commented on the margin of appreciation in the following terms:

> *… whenever discretion capable of interfering with the enjoyment of a convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent state has, when fixing the regulatory framework, remained within its margin of appreciation …* (para 206).

■ Sampanis and others v Greece

App No 32526/05,
5 June 2008

A number of Roma applicants complained of discrimination where a local school had, first, failed to enrol their children at all for a year, and then, once places were provided, taught Roma children in separate special 'preparatory classes'. Greece accepted that the children had missed the school year 2004/2005, but maintained that there had been no breach of the convention because the applicants had only approached the school to enquire about enrolment rather than making a formal application. The court rejected the argument. It found that in approaching the school, the parents had explicitly expressed their wish to enrol their children. It held that given the vulnerability of the Roma community and the requirement to pay particular attention to their needs, the school should have facilitated their children's enrolment.

Subsequently the children were admitted into the school for the 2005/2006 intake. However, at the beginning of the school year, non-Roma parents protested about their admission, blockaded the school and demanded that the Roma children be transferred to another building. The Roma parents then signed a statement, which had been drafted by the teachers, to the effect that they wished their children to be transferred to another building and taught there. Shortly thereafter the Roma children began receiving 'preparatory classes' in an annexe and the blockade was lifted.

Greece argued that the applicants' children had been placed in 'preparatory classes' so that they could attain the level of education that would enable them to be transferred to 'ordinary classes'. The court examined whether the state had shown that the difference in treatment was as a result of objective factors, unrelated to the ethnic origins of the children. It noted that the school had not adopted any clear criterion or suitable tests of ability/learning difficulties that could be used objectively to choose which children should be placed in 'preparatory classes' or in 'ordinary classes'. Furthermore, the state was unable to provide any examples of Roma children being transferred to 'ordinary classes' despite the fact that the applicants' children had been attending lessons in the 'preparatory classes' for two years.

The court was able to infer from the facts of the case that the decision to place the Roma children in the annexe was influenced by the protests mounted by the parents of non-Roma children. It concluded that the state had discriminated against the applicants' children and that consequently there had been a violation of article 14 taken together with article 2 of Protocol No 1 of the convention.

The court recognised that the applicants had signed the statement indicating that they wished their children to be transferred to the annexe. However, it reiterated the point made in DH that the waiver of the right not to be discriminated against was unacceptable and would be incompatible with the convention.

■ Oršuš and others v Croatia

App No 15766/03,
16 March 2010

A number of Roma children attending mainstream primary school had been placed into separate classes, ostensibly on account of their inadequate command of the Croatian language. The Grand Chamber indicated that the temporary placement of children from ethnic minorities in separate classes on the basis of linguistic differences did not necessarily entail a breach of article 14 and there may be circumstances under which it would be permissible. For example, where the purpose of segregation was to improve the separated children's command of the Croatian language to an adequate level after which they were transferred to the mixed class. However, where such measures disproportionately or exclusively affect members of a specific ethnic group, such a system would have to be attended by adequate safeguards to protect those children (para 157).

The Grand Chamber examined the facts of the case in order to determine whether such safeguards existed. It noted that the test designed to separate the children did not assess their command of the Croatian language. Furthermore, no programme had been established in order to address the special needs of Roma children lacking in language skills that included a time frame for addressing those needs and transferring the children back into the mainstream classes.

The state was also criticised for not taking positive measures to address issues such as poor school attendance and a primary school drop-out rate of 84 per cent among Roma

pupils (the statistic demonstrated the rate for Medimurje County) (paras 176–7).

The court held that the state had exceeded the margin of appreciation. There had been:

... no adequate safeguards in place capable of ensuring that a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued was achieved and maintained' (para 184).

It followed that placing the applicants in Roma-only classes had no objective and reasonable justification. Accordingly, there had been a violation of the applicants' rights protected by article 14 taken together with article 2 of Protocol No 1 (it should be noted that the Grand Chamber also found that there had been a violation of the applicants' rights protected by article 6 of the convention, having regard to the length of the proceedings before the domestic courts).

The standard and burden of proof in discrimination cases

In article 14 cases the standard of proof applied is 'beyond reasonable doubt'. This has led to some unsatisfactory outcomes.

■ Anguelova v Bulgaria

App No 38361/97, 13 June 2002

The applicant's son, a Romani man, died while in police custody. The court found the applicant's claim that he was tortured because of his ethnicity raised 'serious arguments' (para 168) and noted that the state had not provided any other plausible explanation. Nonetheless, the court could not conclude 'beyond reasonable doubt' that the death and lack of a meaningful investigation into it were motivated by racial prejudice. This conclusion led Judge Bonello in a strong dissenting opinion to comment that: 'Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the court is not persuaded that their race, colour, nationality or place of origin has anything to do with it' (para 3).

■ Nachova and others v Bulgaria

App Nos 43577/98 and 43579/98, 6 July 2005

The court's traditional approach to the burden and standard of proof was challenged in *Nachova*. The applicants and interveners argued that the 'beyond reasonable doubt' standard of proof was simply too high a threshold to meet. They pointed to a growing trend by other courts to shift the burden of proof in discrimination cases.

The Grand Chamber noted that the 'beyond reasonable doubt' standard had been adopted by the court, but that it had never been the intention of the court to borrow the approach of national legal systems. It pointed out that the role of the court is 'not to rule on criminal guilt or civil liability but on contracting states' responsibility under the convention' (para 147). Therefore, in proceedings before the court 'there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment' (para 147).

The court reiterated a point made in earlier cases that:

... proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the convention right at stake (para 147 and see also *Salman v Turkey* App No 21986/93, 27 June 2000).

In article 14 cases it was clear that once an applicant had established that a measure was discriminatory, the burden of proof shifts on to the respondent. This point was made by the Grand Chamber in *DH*: 'Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent state, which must show that the difference in treatment is not discriminatory' (para 189).

In order to create this rebuttable presumption, the Grand Chamber in *DH* stated that:

... statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence (para 188).

The procedural obligation to investigate possible racist motives

In *Nachova* it was found that the Bulgarian state had failed in its duty, under article 14 read in conjunction with article 2 of the convention, to take all possible steps to investigate whether or not discrimination may have played a part in the events that led to the killing of two Romani men who had been shot dead by a military police officer. The Grand Chamber laid out the following principles that states must apply in order to fulfil their procedural obligation to investigate possible racist motives for acts of violence:

... States have a general obligation under article 2 of the convention to conduct an effective investigation in cases of deprivation of life.

That obligation must be discharged without discrimination, as required by article 14 of the convention ... [W]here there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Compliance with the state's positive obligations under article 2 of the convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin ...

... [W]hen investigating violent incidents and, in particular, deaths at the hands of state agents, state authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with article 14 of the convention (see, mutatis mutandis, Thlimmenos v Greece *... [App No] 34369/97 ...). In order to maintain public confidence in their law enforcement machinery, contracting states must ensure that in the investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing.*

Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent state's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute ... The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of ... racially induced violence (para 160).

The Grand Chamber added that:

… the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under article 2 of the convention, but may also be seen as implicit in their responsibilities under article 14 of the convention taken in conjunction with article 2 to secure the enjoyment of the right to life without discrimination (para 161).

(In *Stoica v Romania* App No 42722/02, 4 March 2008, the court not only found the state to have committed a substantive and procedural breach of article 3 but also, having adopted the principles spelt out by the Grand Chamber in *Nachova*, a violation of article 14.)

Protocol No 12

Protocol No 12 to the convention was adopted in 2000 and provides for a general prohibition of discrimination. Article 1 of Protocol No 12 expands the protection contained in article 14 so that: 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground'. In effect, it makes article 14 freestanding and not dependent on establishing an interference with another convention right.

While potentially the underlying goal of Protocol No 12 (a general ban on discrimination) is radical, it is difficult to predict how effective a tool it will be for the protection of Roma. It only came into effect in 2005 and the ECtHR has only considered Protocol No 12 in relation to discrimination against Roma in one case, namely, that of *Sejdić and Finci v Bosnia and Herzegovina* App Nos 27996/06 and 34836/06, 22 December 2009. There, the Grand Chamber found that both article 14 and article 1 of Protocol No 12 had been breached in circumstances where constitutional provisions prevented anyone other than individuals from the three 'constituent peoples' (Bosniaks, Croats or Serbs) from standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina. In particular, this violated the rights of the Jewish and Roma applicants.

Unfortunately, the majority of member states have not yet ratified the Protocol, including those with sizeable Roma populations (Czech Republic, Greece, Hungary and Slovakia). Bulgaria, France and the UK have yet to sign let alone ratify the Protocol. Thus, at present, article 14 remains the only viable tool for many of Europe's Roma to challenge discrimination under the convention.

Roma rights and the European Social Charter

The rights guaranteed by the ESC concern housing, health, education, employment, legal and social protection, free movement of persons and non-discrimination. As such it complements and is essentially the social and economic counterpart to the convention. Not all member states of the Council of Europe have ratified the original ESC, let alone the revised ESC.[8]

Cases brought by NGOs on behalf of Roma before the committee have involved allegations of violations of the following:

- the right to protection of health (article 11 of the original and revised ESC);
- the right to social and medical assistance (article 13 of the original and revised ESC);
- the right of the family to social, legal and economic protection (article 16 of the original and revised ESC);
- the right of children and young persons to social, legal and economic protection (article 17 of the revised ESC);
- the right of migrant workers and their families to protection and assistance (article 19 of the original and revised ESC);
- the right to protection against poverty and social exclusion (article 30 of the revised ESC);
- the right to housing (article 31 of the revised ESC); and
- non-discrimination (article E of the original and revised ESC).

Article E and prohibition of discrimination

Article E of the revised ESC is akin to article 14 of the convention in that it prohibits discrimination in the enjoyment of one or more of the other rights guaranteed by the ESC. Article E provides that: 'The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.' It prohibits two forms of discrimination: first, where persons or groups of people in an identical situation are treated differently; and, second, where differences are not taken into account. In *International Association Autism Europe v France* Complaint No 13/2002, 4 November 2003 at paragraph 52, the committee held that discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.

Right to housing

■ European Roma Rights Centre v France

Complaint No 51/2008, 19 October 2009

The committee found that there had been a breach of article 31 paragraph 1 (the right to social housing) because under French legislation a caravan does not constitute housing as a building permit is not required for one. As a result, people living in caravans are ineligible for housing allowances and other housing loans in order to be able to purchase caravans. The committee accepted that the government's policy of giving housing allowances and loans was meant to apply to all without discrimination. However, the way in which this had to be accessed failed to take into account the caravan lifestyle of settled Roma. Merely guaranteeing identical treatment as a means of protection is not enough. Article E imposes an obligation to take due account of the relevant differences and act accordingly. Therefore, there was a violation of article 31 paragraph 1 in conjunction with article E.

Right to protection of health

■ European Roma Rights Centre v Bulgaria

Complaint No 46/2007, 3 December 2008

The committee held that article 11 taken in conjunction with article E imposed a positive duty on states to address inequalities in health care provision. The health status of Roma in Bulgaria was found to be inferior to that of the general population in Bulgaria. The failure by the authorities to take positive measures to address exclusion, marginalisation and problems accessing health care amounted to a violation of article 11 in conjunction with article E.

Forced evictions

■ European Roma Rights Centre v Bulgaria

Complaint No 31/2005, 18 October 2006

Roma are very often vulnerable to forced evictions. The committee has made a number of rulings on the minimum standards that should be applied in these circumstances. The committee recognised that the:

… illegal occupation of a site or dwelling may justify the eviction of the illegal occupants. However, the criteria of illegal occupation must not be unduly wide, the eviction should take place in accordance with the applicable rules of procedure and these should be sufficiently protective of the rights of the persons concerned (para 51).

The law must also establish eviction procedures, specifying when they may not be carried out (for example, at night or during winter), provide legal remedies and offer legal aid to those who need it to seek redress from the courts. Compensation for illegal evictions must also be provided for (*European Roma Rights Centre v Italy* Complaint No 27/2004, 7 December 2005).

■ European Roma Rights Centre v France (see above)

Complaint No 51/2008, 19 October 2009

The committee found that the way in which the law enforcement agencies had carried out expulsions from sites violated the dignity of the persons concerned. Roma had been victims of unjustified violence during the expulsions. The actions of the authorities amounted to a violation of article 31 paragraph 2 of the revised ESC, which provides that in order to ensure the right to housing, state parties undertake to prevent and reduce homelessness.

■ European Roma Rights Centre v Greece

Complaint No 15/2003, 8 December 2004

Greece has not yet ratified the revised ESC but is party to the original ESC. Article 16 of the ESC encompasses the right to housing within the right of the family to economic, social and legal protection. The complainant argued that 100,000 Roma were living in substandard housing conditions. The committee found that Greece had failed to take sufficient measures to improve the living conditions of Roma. There had been a violation of article 16 of the ESC on the grounds that there were insufficient permanent dwellings available for Roma and a lack of temporary stopping facilities, which meant that Roma were living in conditions that did not meet the minimum standards.

The committee also found that there had been a further violation of article 16 because Roma were often forcibly evicted without access to adequate legal remedies or alternative accommodation.

Comment: These criticisms were reiterated in I*nternational Centre for the Legal Protection of Human Rights (INTERIGHTS) v Greece* Complaint No 49/2008, 11 December 2009, where the committee found that Greece had not done enough to remedy the situation of Roma since the ruling in *European Roma Rights Centre v Greece* in 2004, and a great number of Roma families continue to live in conditions that fail to meet minimum standards.

Conclusion

The cases brought before the ECtHR and the committee by Roma provide a snapshot of the appalling discriminatory treatment that they still suffer in Europe today and the extent to which their plight has contributed to the fashioning of European jurisprudence on discrimination (although the execution of such judgments by member states has been lamentable).[9] The question of whether or not EU law can also be used effectively to tackle such discrimination is one which will be addressed in Part 2 of this article.

1 The term 'Roma' used in this article should be read as including Roma, Sinti, Kale, and other related groups in Europe, as well as ethnic minorities that identify themselves as Romani Gypsies and Irish Travellers.
2 *Data in focus report: the Roma* (01, EU Minorities and Discrimination Survey, 2009), FRA, available at: http://fra.europa.eu/fraWebsite/eu-midis/eumidis_roma_en.htm.
3 *The situation of Roma EU citizens moving to and settling in other EU member states*, FRA, 2009, available at: http://fra.europa.eu/fraWebsite/attachments/Roma_Movement_Comparative-final_en.pdf.
4 *Recent rise in national security discourse in Europe: the case of Roma*, Parliamentary Assembly of the Council of Europe, 2010, available at: http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12386.pdf.
5 In the Strasbourg Declaration the term 'Roma' is also used to refer to Roma, Sinti, Kale, and other related groups in Europe, including ethnic minorities that identify themselves as Romani Gypsies and Irish Travellers. It is available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1691607&Site=CM.
6 Available at: http://ec.europa.eu/commission_2010-2014/reding/pdf/news/1_en_act_part1_v11.en.pdf.
7 The framework was adopted by the Council of the European Union on 19 May 2011, see: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/122100.pdf.
8 Liechtenstein, Monaco, San Marino and Switzerland have not ratified either the original or the revised ESC. Croatia, Czech Republic, Denmark, Germany, Greece, Iceland, Latvia, Luxembourg, Poland, Spain, the former Yugoslav Republic of Macedonia and the UK have not yet ratified the revised ESC. See: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp.
9 See: www.errc.org/popup-article-view.php?article_id=3613.


Marc Willers is a barrister at Garden Court Chambers, London. He is co-editor, with Chris Johnson, of *Gypsy and Traveller Law*, 2nd edn, LAG, 2007, £30. Siobhán Lloyd is a practising barrister.