

Combatting barriers for exit
MACEDONIAN ROMA
at the borders

RIGHT TO EQUALITY, FREEDOM OF MOVEMENT AND LEGAL PROTECTION



European
Policy
Institute.
Skopje



*"All human beings are born free and equal in dignity and rights.
They are endowed with reason and conscience and
should act towards one another in a spirit of brotherhood."*

Universal Declaration of Human Rights, Article 1

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Preface

This analysis has been prepared under the Project entitled Combating Barriers for Exit: Macedonian Roma at the Borders, implemented by the European Policy Institute in Skopje and the KHAM NGO from Delcevo. The Project's objective is to contribute to changing the public discourse, founded on policies and practices that portray Roma as a threat to the visa-free regime for Macedonia. The Project examines how the visa liberalization process, as an instrument for Europeanization, results in adoption of policies, which limit the freedom of movement of ethnic Roma in the case of Macedonia. This Analysis takes into consideration the hitherto experiences in court cases instituted by persons returned from border crossing points and is based on data available to the KHAM NGO, KHAM being one of the key importance organizations offering assistance in such cases.

Background

On 24 October 2009, the European Union (EU) introduced to so called visa liberalization¹ for nationals of several Balkan countries, including for nationals the Republic of Macedonia. Following the visa liberalization, EU Member-States were faced with an (expected) influx of asylum seekers- nationals of the Republic of Macedonia. Most of these people were identified as "economic migrants".² The percentage of rejected applications is very high. Hence, in 2014, out of more than 7,000 asylum applications filed by nationals of Macedonia only 1% were granted. The number of granted applications to nationals from other countries from the so called "Western Balkans"³ is similar. This is a result of the fact that in pursuance with international law, the bad socio-economic situation in the country of origin is not considered to be one of the criteria for granting asylum, being also a result of the fact that countries which received the largest number of asylum applications filed by Macedonian nationals consider Macedonia to be a "safe country of origin".⁴

Thus, EU Member-States requested the country to improve the socio-economic situation of its nationals, in order to prevent the influx of so called "bogus asylum seekers". Such requests were specifically relating to the Roma. Hence, as regards the influx of asylum seekers at that period, the media extensively reported, and politician gave numerous public statements claiming that the largest part (if not all) of the persons seeking asylum and thus "abusing the visa-free regime" were persons belonging to the Roma ethnic community. This type of reporting, i.e. discourse prevailed to the extent that this entire ethnic community was in advance "convicted" as the "guilty party" for the possible future abolishment of the visa-free regime. The labelling of Roma as "bogus asylum seekers" in the context of the relations with the EU is of great relevance owing to other reasons, as well.

¹ The visa liberalization entered into force on 19 December 2009, following the adoption of Council Regulation No. 15521/09. Under this Regulation, nationals of Macedonia who have biometric passports were allowed to travel without having to possess a Schengen visa to the 25 EU Member-States and to another three countries, which are part of the Schengen zone, and stay in those countries, without any special authorizations, up to 90 days within a six-month period. Source: Council of the European Union, Council Regulation No. 15521/09 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, website of the Council of the European Union <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015521%202009%20INIT>, all websites were last accessed to on 9 August 2016.

² The category of "economic migrants" still does not exist in international law.

³ See Commission reports on visa-free travel from the Western Balkans and FRONTEX reports. Source: European Commission, Commission Report on the Post-Visa Liberalisation Monitoring for the Western Balkan, website of the European Union, http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20150225_5th_post-visa_liberalisation_report_with_western_balkan_countries_en.pdf FRONTEX, Western Balkans Annual Risk Analysis 2016, website of the European Union, http://frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2016.pdf

⁴ According to the revised Directive 2005/85/EC on asylum procedures "A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict." Sources: Directive 2005/85/EC on asylum procedures, Annex II; Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Article 9 (paragraph 1 regarding the grounds relating to the Geneva Conventions and paragraph 2 regarding the additional grounds recognized by the EU).

Namely, in its regular annual reports on the progress of the country in fulfilling criteria for EU membership, the European Commission (EC) has always presented the remarks that the Roma ethnic community is one of the most discriminated against and one of the most vulnerable communities in the country, especially as regards education, employment and housing. Such a situation results with Roma still facing extensive socio-economic exclusion.⁵ Hence, the EC has always also presented the recommendation to improve the situation of the Roma in the country with a view to their social integration.

Instead of implementing the said recommendations, the state authorities have opted to increase the number of obstacles for the Roma in exercising their fundamental human rights and freedoms, by limiting their freedom of movement, i.e. the right to leave the territory of Macedonia, and overtly institutionalized racial discrimination by openly applying racial profiling at border crossing points. According to the Report of the Council of Europe Commissioner for Human Rights, from December 2009 until the end of November 2012, about 7,000 Macedonian citizens were not allowed to leave the country, and the Commissioner underlined that Roma were clearly disproportionately affected by the exit control measures.⁶ The measure of preventing exit from the country is also observed by the European Commission and by FRONTEX, and they have established that in 2013 the percentage of persons prevented from exiting the country was increased by 41%.⁷ This measure is also mentioned in United States Department of State human rights reports, in which it is stated that from April to October, 2011 more than 1,500 Macedonia citizens, mostly Roma, were refused exit from the country on the basis of being potential asylum seekers in the EU.⁸ According to the US Department of State, from 2012 through April, border authorities denied exit to 8,322 persons.⁹

Amendments to the Law on Travel Documents of Nationals of the Republic of Macedonia, adopted in 2011, additionally limited the freedom of movement. According to the said amendments, nationals who have been deported or returned from another country are to be impounded their travel documents for a one-year period.¹⁰ Processing the motion filed by the KHAM NGO for assessment of the constitutionality of Articles 37 and 38 of the said Law, on 25 June 2014, the Constitutional Court of the Republic of Macedonia adjudicated that the said articles were unconstitutional and thus annulled and made void the disputed articles of the Law.¹¹

⁵European Commission, 2009 Country Progress Report, website of the European Union, http://ec.europa.eu/enlargement/pdf/key_documents/2009/mk_rapport_2009_en.pdf; European Commission, 2010 Country Progress Report, website of the European Union, http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mk_rapport_2010_en.pdf; European Commission, 2011 Country Progress Report, website of the European Union, http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/mk_rapport_2011_en.pdf; European Commission, 2012 Country Progress Report, website of the European Union, http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/mk_rapport_2012_en.pdf

⁶Council of Europe Commissioner for Human Rights, Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to the former Yugoslav Republic of Macedonia, from 26 to 29 November 2012, website of the Council of Europe, <https://wcd.coe.int/ViewDoc.jsp?p=δid=2052823&direct=true>

⁷European Commission, Commission Report on the Post-Visa Liberalisation Monitoring for the Western Balkan, website of the European Union, http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20150225_5th_post-visa_liberalisation_report_with_western_balkan_countries_en.pdf

⁸United States Department of State, Country Reports on Human Rights Practices for 2012 – Macedonia <http://www.state.gov/documents/organization/186589.pdf>

⁹United States Department of State, Country Reports on Human Rights Practices for 2013 – Macedonia <http://www.state.gov/documents/organization/220516.pdf>

¹⁰Law Amending and Supplementing the Law on Travel Documents of Nationals of the Republic of Macedonia, Official Gazette of the Republic of Macedonia No. 135/2011.

¹¹Constitutional Court of the Republic of Macedonia, Ruling of the Constitutional Court, website of the Constitutional Court,

<http://www.ustavensud.mk/domino/WEBSUD.nsf/ffc0feee91d7bd9ac1256d280038c474/20e4ff2a9c9e1265c1257d150029ab27?OpenDocument>

Fear of Victimization

Before the Constitutional Court adopted the above referred to ruling, the KHAM NGO had already registered more than 80 cases of Roma who suffered from unequal treatment at border crossing points and who sought legal assistance. In large number of these cases, the damaged parties (speedily) renounced further pursuing any proceedings due to their fear of victimization upon their next attempt to cross the state border. Therefore, much of the efforts of the KHAM NGO in those years were invested in motivating as large number of citizens as possible to institute court proceedings complaining against discrimination and requesting damages from the Ministry of the Interior, and to persist in their determination to protect their rights. The experiences and knowledge that the KHAM NGO gathered at that period will be elaborated in another publication.

The objective of this publication is to present and share the experiences that the KHAM NGO gathered in providing support in court proceedings pursued until 2015. It is matter of 20 court cases against discrimination perpetrated by the Ministry of the Interior, some of which are presented in this publication as case studies. Out of these cases, nine cases ended in a legally valid judgment in favour of the plaintiff, in four cases the plaintiff renounced further pursuing the proceedings, 2 cases ended in a judgment in favour of the defendant, i.e. Ministry of the Interior. The analysis first presents a brief review of international and of the national law, including mechanisms to protect the two rights elaborated upon in this analysis, i.e. the right to freedom of movement and the right to equality. Then there is a presentation of the case studies and the publication closes with conclusions drawn based on the experiences described, as well as related recommendations.

International Legal Framework

Human rights are universal and inalienable, indivisible, interdependent and interrelated and everyone is born with and possesses the same rights. Owing to their character, human rights may not depend on the will of states and governments, or their respective national legal and political systems. Instead, all states are under the obligation to protect and enable the exercise of fundamental human rights. This publication is focused on two particular human rights: violation of the principle of equality and non-discrimination and violation of the freedom of movement.

The principle of equality is the overarching human rights principle. It applies at all times. The state may not consider that this principle does not apply at any given moment, nor it may on any discriminatory grounds, regardless of the circumstance in the given society, limit, deny or violate anyone's human rights. The right to freedom of movement is also a fundamental human right set forth under international law, which may be limited, but under precisely defined conditions, and certainly not in a manner that would lead to violation of the principle of equality, i.e. in a manner that would result in discrimination.

Table No. 1 presents a brief review¹² of most important international law provisions, relevant for these two rights, i.e. provisions of relevant human rights law from universal, i.e. the UN instruments, as well as provisions from regional or European level instruments, i.e. Council of Europe instruments.

Table No. 1: review of relevant international human rights law provisions according to their source; provisions relating to the right to equality and provisions relating to the right to freedom of movement

International Law Source	Right to Equality	Right to Freedom of Movement
Universal Declaration of Human Rights	Article 2, Article 7	Article 13
International Convention on the Elimination of All Forms of Racial Discrimination	International Anti-Discrimination Instrument	Article 5 (paragraph d, subparagraphs I and ii)
International Covenant on Civil and Political Rights	Article 2, Article 26	Article 12
Convention for the Protection of Human Rights and Fundamental Freedoms	Article 14, Protocol No. 12 (anti-discrimination instrument)	Article 2 of Protocol 4

¹² The objective, focus, and resources for preparation of this analysis do not allow making a complete and comprehensive analysis of relevant international law and inclusion of findings in this respect in this publication. Therefore, only a brief review of relevant provisions and their content has been presented

Major UN documents (i.e. documents at the global level) are the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Civil and Political Rights (ICCPR).

According to the UDHR, everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as inter alia race, colour, or other status (Article 2). The right to freedom of movement is one of the rights guaranteed under the Declaration. Thus, the UDHR envisages that everyone has the right to freedom of movement and residence within the borders of each state, as well as that everyone has the right to leave any country, including his own, and to return to his country (Article 13). It is important to underline that this document also envisages prohibition of discrimination and underlines the importance of the principle of equality, including the principle of equal protection under the law. (Article 7)

The CERD is an international instrument against discrimination, which prohibits racial discrimination, making it thus one of the most important international law instruments as regards Roma rights. Under the Convention, the term "racial discrimination" means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. (Article 1) This Convention prohibits racial discrimination in the enjoyment and protection of specifically referred to rights, including the right to freedom of movement. CERD envisages that the prohibition of racial discrimination shall apply both to the right to freedom of movement and residence within the border of the State and to the right to leave any country, including one's own, and to return to one's country (Article 5, paragraph d, subparagraphs i and ii).

According to the ICCPR, the state has the obligation to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as inter alia race, colour or any other status (Article 2, paragraph 1). In addition, the ICCPR sets forth the obligation for states to ensure the equal right of men and women to the enjoyment of all civil and political rights (Article 3). The ICCPR furthermore has provisions according to which all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, including effective protection against discrimination on any ground such as race, colour or any other status (Article 26). As regards the right to freedom of movement, the ICCPR envisages that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence and that everyone shall be free to leave any country, including his own. This right shall not be subject to any restrictions except those, which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant (Article 12, paragraphs 1-3).

At the regional European level or more specifically at the CoE level the major importance instrument of relevance to this analysis is the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This Convention prohibits racial and ethnic discrimination (Article 14, Protocol No. 12), prohibiting as well violation of the right to freedom of movement (Protocol No. 4, Article 2). Pursuant

to the case law of the European Human Rights Court (ECtHR), racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. The ECtHR is of the opinion that no difference in treatment, which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.¹³ Furthermore, Protocol No. 4 to the ECHR stipulates that everyone shall be free to leave any country, including his own (Article 2). This Protocol furthermore sets forth the conditions under which this right may be limited such as inter alia the maintenance of public order, the protection of health or morals, security, or for the protection of the rights and freedoms of others.

International human rights law provisions clearly demonstrate that the treatment of individuals in the enjoyment of the right to freedom of movement and the (in)equality of Roma in their treatment at Macedonian border crossing points run contrary to international human rights law. Such a conclusion is confirmed by UN human rights bodies. Some of them have closely considered the issues elaborated upon in this analysis and have given recommendations to remedy the situation. Thus, the Human Rights Committee, which monitors the honouring of obligations by State Parties that have ratified the ICCPR, underlines its concern that the State party denies its nationals, most often Roma, to freely leave the country, recommending that the State party should take measures to ensure that the right to freedom of movement in the State party is fully respected, in compliance with article 12 of the Covenant.¹⁴

There are similar recommendations of the Committee on the Elimination of Racial Discrimination, which monitors the honouring of obligation by States Parties, which have ratified the CERD. This Committee underlines its concern about cases of racial profiling of Roma wishing to leave the country and recommends to the State Party to fully respect the right of citizens to freely exit and return to the country and to undertake relevant measures to prevent the questioning and arrests on grounds of the ethnic origin of the individual concerned.¹⁵

¹³Judgment of the Grand Chamber of the ECtHR in the case of D.H. and others v. the Czech Republic No. 57325/00.

¹⁴ Human Rights Committee, Concluding observations on the third periodic report of the former Yugoslav Republic of Macedonia, website of the Office of the United Nations High Commissioner for Human Rights, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/MKD/CO/3&Lang=En

¹⁵ Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination the Former Yugoslav Republic Of Macedonia, website of the Office of the United Nations High Commissioner for Human Rights, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/MKD/CO/7&Lang=En

National Legal Framework

The national legal framework sets forth and protects both human rights analyzed in this document, i.e. the right to freedom of movement and the right to equality. Provisions regulating these rights are contained in the highest-ranking legal instrument of the country, i.e. the Constitution of the Republic of Macedonia (the Constitution), and in laws and secondary legislation. This analysis presents a short review of key importance provisions of relevance to the above referred to rights, these being the provisions that the KHAM NGO invoked in court proceedings versus the Ministry of the Interior.

The Constitution defines the basic freedoms and rights of the individual and citizen, recognized in international law and set down in the Constitution as fundamental values of the constitutional order of the Republic of Macedonia. According to the Constitution, every citizen of the Republic of Macedonia has the right of free movement on the territory of the Republic and freely to chose his/her place of residence, as well as the right to leave the territory of the Republic and to return to the Republic. The exercise of these rights may be restricted by law only in cases where it is necessary for the protection of the security of the Republic, criminal investigation or protection of people's health. (Article 27) Furthermore, the Constitution envisages that the freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution and that the restriction of freedoms and rights cannot discriminate on grounds of inter alia race, colour of skin, national or social origin. These provisions are further strengthened with the provision on equality, according to which citizens of the Republic of Macedonia are equal in their freedoms and rights and are equal before the Constitution and law, regardless of inter alia race, colour of skin, national and social origin. (Article 9)

The Constitution also contains guarantees for human rights protection. Thus, Article 50 envisages that every citizen may invoke the protection of freedoms and rights determined by the Constitution before the regular courts, as well as before the Constitutional Court of Macedonia, through a procedure based upon the principles of priority and urgency (Article 50, paragraph 1). Citizens are also guaranteed the right to appeal against individual legal acts issued in first instance proceedings by a court, administrative body, organization or other institution carrying out public mandates. (Article 15) Judiciary power is exercised by courts. Courts are autonomous and independent. Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. (Article 98)

Laws must be in accordance with the Constitution and all other regulations in accordance with the Constitution and law. Everyone is obliged to respect the Constitution and the laws. (Article 51) Furthermore, international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law (Article 118). The following are laws relevant to this analysis: Law on Border Control, Law on the Prevention of and Protection against Discrimination and the Law on the Police.

The Law on Border Control is important for this analysis since this Law defines the goals of border controls, then how border controls are to be performed, stipulating furthermore the conditions to be

fulfilled in order that relevant services do not violate human rights while performing their duties. Provisions of this Law do not leave any leeway for the authorities to apply any discriminatory practices against the Roma, nor to conduct institutionalized racial profiling. On the contrary, the Law precisely defines the goals of border controls, principles upon which border controls are to be conducted, that include protection of human dignity, equality and proportionality. In addition, the Law defines the procedures and the competences, the application of which prevents encroachment on human rights and freedoms, except in envisaged cases and under defined conditions, and to the extent allowed by the Constitution and international human rights law.

Namely, this Law envisages that the goals of border controls are: (1) prevention and detection of crimes and misdemeanours and detection and apprehension of perpetrators of such crimes and misdemeanours; (2) prevention and detection of illegal migration and trafficking in human beings; (3) protection of citizens' life and health, personal safety, the property, the environment and nature; and (4) prevention and detection of other threats to the public order, legal order, national security and international relations. In addition, the Law stipulates that border controls must be conducted in accordance with principles of respect for human dignity, proportionality and the principle of prohibition of discrimination *inter alia* on grounds of race, colour or ethnic origin (Article 8) and in line with precisely legally defined competences of border police officers.¹⁶ The Law sets forth that all persons crossing the border shall be subject to minimal controls, while the manner of conducting controls, procedures, and rights and obligations relating to such controls are clearly defined.¹⁷ Finally, this Law envisages deferral of the application of the Convention Implementing the Schengen Agreement, i.e. the Convention shall become part of the national legal order and shall be applied following the accession of Macedonia to the EU (Article 3, paragraph 1, sub-paragraph 12). Hence, nothing contained in this Law may be regarded as legal grounds for the below described treatment by the border police.

The same applies to the Law on the Police. Thus, according to this Law, the basic function of the police is protection and respect for the fundamental freedoms and rights of the human being and the citizens, guaranteed by the Constitution of the Republic of Macedonia, the laws and the ratified international agreements, protection of the legal order, prevention and detection of punishable acts, undertaking measures for prosecution of the perpetrators of such crimes, as well as, maintenance of the public order and peace in the society (Article 3). The Law defines the term police affairs,¹⁸ as well as the conditions

¹⁶ Article 13 stipulates that in conducting border controls, border police officers shall have the following authorizations: to ask for a valid travel document or another document which in accordance with the law may be used to cross the state border; to establish the identity of the person intending to cross the state border; to check whether conditions for exit from and entry into the Republic of Macedonia as laid down by law have been fulfilled; to give guidelines and orders for purposes of unimpeded and swift conduct of border controls; in case there are indications, i.e. grounds for suspicion that a crime or a misdemeanour has been perpetrated, to make second line border controls, which also include checks or search of the person and his/her belongings or the transportation vehicle the concerned person has; to check the validity of the travel document, i.e. of another document which in accordance with the law may be used to cross the state border; to check fingerprints or palm prints and other biometric data in relevant records; to check operative (requested) and other records and electronic databases for persons, items and vehicles; to hold the person in custody for the time necessary and required for conducting border checks, but not longer than 24 hours. Sources: Law on Border Control, Official Gazette of the Republic of Macedonia Nos. 171/2010, 41/2014, 148/2015 and 55/2016.

¹⁷ Article 13 stipulates that in conducting border controls, border police officers shall have the following authorizations: to ask for a valid travel document or another document which in accordance with the law may be used to cross the state border; to establish the identity of the person intending to cross the state border; to check whether conditions for exit from and entry into the Republic of Macedonia as laid down by law have been fulfilled; to give guidelines and orders for purposes of unimpeded and swift conduct of border controls; in case there are indications, i.e. grounds for suspicion that a crime or a misdemeanour has been perpetrated, to make second line border controls, which also include checks or search of the person and his/her belongings or the transportation vehicle the concerned person has; to check the validity of the travel document, i.e. of another document which in accordance with the law may be used to cross the state border; to check fingerprints or palm prints and other biometric data in relevant records; to check operative (requested) and other records and electronic databases for persons, items and vehicles; to hold the person in custody for the time necessary and required for conducting border checks, but not longer than 24 hours. Sources: Law on Border Control, Official Gazette of the Republic of Macedonia Nos. 171/2010, 41/2014, 148/2015 and 55/2016.

¹⁸ Such minimal border controls are conducted with respect to all persons who cross the state border in order to check and establish the identity based on the presented travel document or another document, which in accordance with the law may be used to cross the state border, by making fast and simple checks using relevant technical devices and by checking the relevant records or electronic databases, with the sole purpose of establishing whether the travel document or another document, which in accordance with the law may be used to cross the state border has been stolen, misused, lost or is expired, to check its validity and to check for signs on the travel document that indicate its misuse, forgery or that it has been tampered with. Such controls are made for nationals of Macedonia, and for persons who enjoy the Community right to free movement. In addition, the border police officer may make random checks of relevant records and electronic databases in order to establish whether persons wanting to cross the border are considered a threat to the national security, public safety, international relations or a threat to the public health (Article 15). Source: Law on Border Control, Official Gazette of the Republic of Macedonia Nos. 171/2010, 41/2014, 148/2015 and 55/2016.

under which human rights and freedoms may be limited,¹⁹ stipulating also the right to file a complaint in cases of violations of rights and freedoms in the exercise of police authorities (Article 8). Under no conditions set forth under this Law, in the Constitution, other laws or international treaties the police may not and must not perform their duties in a discriminatory manner.²⁰ This leads to the conclusion that the legislators have clearly envisaged that police duties may not be fulfilled in any circumstances or under any conditions in a discriminatory fashion. Accordingly, this Law too does not offer any legal grounds for the manner Roma are treated at border crossing points.

A special anti-discrimination law was adopted in 2010. The Law on the Prevention of and Protection against Discrimination envisages prevention of and protection against discrimination in the enjoyment of rights guaranteed under the Constitution of the Republic of Macedonia, laws and ratified international treaties, both in the private and in the public sector, and in all areas of social life²¹ offering protection as well against discrimination by natural and legal persons,²² setting forth an open-ended list of discriminatory grounds, which include race, colour, belonging to a marginalized group or ethnic origin.²³ The substantive and personal scope of the Law defined in such manner does not leave any room for legalizing, i.e. legitimizing the treatment by the Ministry of the Interior, which violates the right to freedom of movement and the right to equality, nor does it leave any room to presume that such treatment by the Ministry of the Interior could possibly be considered as allowed.

control; providing assistance and protection to the citizens in case of utmost necessity; protection of specific persons and facilities and other affairs determined by law. Source: Law on the Police, Official Gazette of the Republic of Macedonia Nos. 114/2006, 6/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016 and 120/2016, Ruling of the Constitutional Court: 5 November 2008

¹⁹ Article 32 (paragraph 1) envisages that the police may limit the fundamental human and citizens' freedoms and rights only under conditions and in a procedure determined by the Constitution of the Republic of Macedonia and by law. Source: Law on the Police, Official Gazette of the Republic of Macedonia Nos. 114/2006, 6/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016 and 120/2016, Ruling of the Constitutional Court: 5 November 2008, Article 32, paragraph 1.

²⁰ According to this Law discrimination is any unjustified legal or actual, direct or indirect differentiation or unequally acting i.e. omission (excluding, limitation or giving priority) related to persons or groups on the grounds of sex, race, skin colour, gender, belonging to marginalized group, ethnic origin, language, citizenship, social origin, religion or confession, education, political belonging, personal or social status, intellectual and body disability, age, family or marital status, property status, health condition or on any other grounds. Source: Law on the Prevention of and Protection against Discrimination, Official Gazette of the Republic of Macedonia Nos. 50/2010, 44/2014, 150/2015 and 31/2016, Ruling of the Constitutional Court: 15 September 2010.

²¹ Law on the Prevention of and Protection against Discrimination, Official Gazette of the Republic of Macedonia Nos. 50/2010, 44/2014, 150/2015 and 31/2016; Ruling of the Constitutional Court: 15 September 2010, Article 4.

²² Law on the Prevention of and Protection against Discrimination, Official Gazette of the Republic of Macedonia Nos. 50/2010, 44/2014, 150/2015 and 31/2016; Decision of the Constitutional Court: 15 September 2010, Article 2.

²³ Law on the Prevention of and Protection against Discrimination, Official Gazette of the Republic of Macedonia Nos. 50/2010, 44/2014, 150/2015 and 31/2016; Decision of the Constitutional Court: 15 September 2010, Article 3.

Protection Mechanisms

The main mechanisms that can be applied to protect rights of citizens when their right to freedom of movement has been violated in their attempts to leave the country, or in cases of unequal treatment are: filing an application with the Commission for the Prevention of and Protection against Discrimination or with the Ombudsman's Office, instituting proceedings against violation of the right to equality (discrimination) and claim damages with the court of original jurisdiction and filing a motion with the Constitutional Court for protection of freedoms and rights.

According to the Law on the Prevention of and Protection against Discrimination, the person that considers that he/she has been subjected to discrimination may submit a complaint to the Commission, in written or orally with minutes. The thus far practice of the Commission calls into question the effectiveness of this mechanism, considering how passive this body is with respect to the discriminatory practices of the Ministry of the Interior against the Roma ethnic community, including the lack of any reaction by the Commission in the media against such treatment.²⁴ The only visible step undertaken by the Commission was its decision establishing discrimination in one of the cases of unequal treatment in 2015.²⁵

The Ombudsman's Office is an independent body, which according to the Law on the Ombudsman is a body of the Republic of Macedonia that shall protect the constitutional and legal rights of citizens and all other persons when these are infringed by acts, actions and omissions by the state administration bodies and by other bodies and organizations that have public authority, and that shall undertake actions and measures for protection of the principle of non-discrimination. Anyone may put forward an application to the Ombudsman when he/she assesses that his/her constitutional and legal freedoms and rights have been infringed or when the principle of non-discrimination has been breached in the public sector. The Ombudsman may raise a case upon his/her own initiative.

In processing applications against discrimination at border crossing points and against limitation of the right to freedom of movement, filed by citizens belonging to the Roma ethnic community, the Ombudsman has established that it is a matter of a discriminatory practice by the Ministry of the Interior against the Roma. In four consecutive annual reports in the period from 2012 to 2015,²⁶ the Ombudsman repeated the same conclusion. In addition, in newer reports,²⁷ it is stated that there is an

²⁴This has been clearly stated in the analysis of the implementation of the Roma Decade, prepared by the Helsinki Committee for Human Rights of the Republic of Macedonia. Namely, the analysis contains the following information: "We have received communication from the Commission for Protection against Discrimination in which the Commission states that it has received one application on this issue, filed by a Roma Association. However, the Commission has not established discrimination due to insufficient facts and evidence. The Commission states that in respect of the issue at hand members of the Commission participate in various forums and debates for support to the overcoming of the present situation of alleged discrimination of these persons, and that it is evident that the situation regarding the presentation of evidence, i.e. gathering facts and evidence underlines the specific problems of proving discrimination in this case". Source: Helsinki Committee for Human Rights of the Republic of Macedonia The Implementation and the reality of the National Strategy for Inclusion of Roma- Roma Decade 2005- 2015, website of the Helsinki Committee for human Rights of the Republic of Macedonia, http://www.mhc.org.mk/system/uploads/redactor_assets/documents/629/Romi_Analiza_Helsinki.pdf

²⁵Commission for Protection against Discrimination, 2015 Annual Report of the Commission for Protection against Discrimination, Akademik, <http://www.akademik.mk/wp-content/uploads/2016/04/diskriminacija.pdf>

²⁶ Ombudsman's Office of the Republic of Macedonia, 2012 Annual Report of the Ombudsman's Office, webpage of the Ombudsman's Office, <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2012/GI-2012.pdf>; Ombudsman's Office of the Republic of Macedonia, 2013 Annual Report of the Ombudsman's Office, webpage of the Ombudsman's Office, <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2013.pdf>; Ombudsman's Office of the Republic of Macedonia, 2014 Annual Report of the Ombudsman's Office, webpage of the Ombudsman's Office, <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2014/GI%202014.pdf>; Ombudsman's Office of the Republic of Macedonia 2015 Annual Report of the Ombudsman's Office, webpage of the Ombudsman's Office, http://ombudsman.mk/upload/Godisni%20izvestai/GI-2015/GI_2015-za_pecat.pdf

²⁷As for example in the 2014 Annual Report of the Ombudsman's Office. Source: Ombudsman's Office of the Republic of Macedonia, 2014 Annual Report of the Ombudsman's Office, website of the Ombudsman's Office, <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2014/GI%202014.pdf>

increased number of applications on this ground. Furthermore, in these reports, the Ombudsman informs that the Ombudsman's recommendations for respect for national and international standards regarding the prohibition of discrimination and freedom of movement are not applied. Thus, the Ombudsman recommends that with a view to improving the situation and ensuring comprehensive legal procedure, it is necessary to upgrade the legal framework and to enhance the legal security of citizens as regards the right to freedom of movement, especially by envisaging that written decisions must be issued in cases in which an individual has not been allowed to cross the border, i.e. leave the country. The Ombudsman has included all these considerations in the Information submitted to the Government, in which in fact it is confirmed that there is a systemic practice of racially motivated discrimination against the Roma at border crossing points.

Court protection may be requested by instituting proceedings against violation of the right to equality (discrimination) and claiming damages with the court of original jurisdiction.

Under the proceedings, the plaintiff may petition the court to: establish that the defendant has violated the plaintiff's right to equal treatment, i.e. that the action the defendant has undertaken or omitted to undertake could directly result in a violation of the right to equal treatment; to ban the undertaking of actions that violate or could potentially violate the right of the plaintiff to equal treatment, i.e. to perform actions which eliminate discrimination or its consequences; compensation for the material and non-material damage incurred by the violation of the rights protected under the law; publication in the media of the judgment establishing a violation of the right to equal treatment of the plaintiff, for which costs are to be covered by the defendant.

Finally, proceedings may be instituted with the Constitutional Court, inter alia, against violation of the prohibition of discrimination of citizens on grounds of race or national origin by an individual action, within two months from the date on which a legally valid decision has been submitted or as of the date on which the person has learned about the action that violates the right to equality, but not later than five years from the date the disputed action has been undertaken. Such cases are processed with priority and urgency. Hence, the legally prescribed terms for processing the case are shorter. At the end of the proceedings, the Constitutional Court issues a ruling in which it establishes whether there has been a violation. In case the Constitutional Court establishes that there has been no violation, the petition for protection is denied. On the other hand, in case the Constitutional Court establishes that there has been a violation, the Court may annul the disputed action, i.e. document, and prohibit the action causing the violation.

Case Studies

Despite the constitutional guarantees for protection of the right to freedom of movement and of the non-discrimination principle, as of 2011 there has been a systemic discrimination of persons belonging to the Roma ethnic community by police officers of the Ministry of the Interior, who in fact prevent Macedonian nationals belonging to the Roma community from exiting the country solely on the grounds of the suspicion that they will abuse the visa-free regime and will file an asylum application in some EU Member-State. This is a practice that continued in the following years, and in fact deteriorated in 2014. The explanation offered by police officers is that these citizens do not meet the conditions for entry into EU Member-States, in light of the risk that they will abuse the visa-free regime by applying for asylum in some EU Member-State. In this context, it is important to underscore that no person that has been denied exit from the country has received any document in writing or any official document providing reasoning for the decision not to allow the person to exit the country, which prevents affected people to exercise their right to an effective legal remedy.

The fact that only citizens belonging to the Roma ethnic community have been subjected to such discriminatory treatment evidently confirms that this practice amounts to racial discrimination, coupled with racial profiling. In addition, as shown by the case studies below, border police officers have either limited the right of citizens to leave their country or have treated affected persons differently compared to citizens belonging to other ethnic communities,²⁸ solely on the grounds of their ethnic origin, i.e. their being Roma, who “will apply for asylum” in the EU.²⁹ Even more, the practice shows that such treatment is applied not necessarily only when the destination of travel is an EU Member-State. Instead people are limited their freedom of movement and their right to equality is violated even when they travel to a neighbouring country, which is not an EU Member-State,³⁰ as shown by the below explained case studies.

A review of positively and negatively completed cases part of the hitherto case law is given below. These are cases in which the KHAM-Delcevo NGO has provided support. In the case studies, there is a description of the case, and the legal actions undertaken by the KHAM NGO and their outcome are also stated. What follows is a review of experiences gathered in working on these cases, along with considerations and experiences of other associations, which pursue strategic litigation in cases of discrimination of Roma at border crossing points: The Macedonian Young Lawyers' Association and the Helsinki Committee for Human Rights of the Republic of Macedonia.

²⁸ The Helsinki Committee for Human Rights of the Republic of Macedonia conducted a situation testing at border crossing points in order to collect evidence for the serious reasonable suspicions that there is racial profiling of Roma, i.e. that there is a discriminatory practice against the Roma ethnic community, and not only against individual Roma. Situation testing is a method used in cases of discrimination in which it is difficult to collect facts and evidence and which are difficult to be proven. This situation testing involved five testers in all: three Roma, one Macedonian (control tester), and one Albanian (control tester). The situation testing was individual and was repeated twice. The situation testing proved that border police officers conduct racial profiling at border crossing points, i.e. the situation testing proved that only Roma are told to get off the bus, only Roma are requested to present documents for their intended stay abroad (for example letter of support), only Roma are requested to provide evidence of how much money they have with them. Based on the results of the situation testing, but also taking into consideration all previous cases, analysis and reports, legal proceedings were instituted against the Mol and the court was petitioned to establish discrimination against the Roma ethnic community. The court proceedings in this case are still pending.

²⁹ See below examples from the practice.

³⁰ This is confirmed by cases reported with a number of NGO's that work on non-discrimination, and by the situation testing organized by the Helsinki Committee (on situation testing see footnote 28 above).

Positively Completed Cases- Cases in which discrimination has been established

Case No. 1: S.J. from Kocani versus the Republic of Macedonia, Ministry of the Interior

On 27 June 2014, S.J., an individual belonging to the Roma ethnic community, national of Macedonia, wanted to leave the country, to go to Sweden, and visit his relatives for a period of three months. He wanted to leave the country using the border crossing point at the Alexander the Great Airport in Skopje and he had a return airplane ticket to Gothenburg, Sweden. However, immediately before the airplane was to take off, and following the control, border police officers all of a sudden stopped him and did not allow him to board the airplane. His airplane ticket was taken away by the border police officers, along with the letter of support his relative sent him. Border police officers affixed a stamp with two diagonal lines on his passport and he was accompanied by border police officers out of the Airport. Very much surprised by such treatment by the border police officers, S.J. asked for an explanation as to why he was not allowed to leave the Republic of Macedonia and why border police officers had not returned his documents, using which he had previously travelled to the same destination four times already. The reply by the border police officers was that he was not allowed to cross the border because he was Roma and that he was going abroad with the intention of applying for asylum.

S.J. instituted proceedings with the Kocani First Instance Court, petitioning the court to establish that the defendant, i.e. the Ministry of the Interior of the Republic of Macedonia (Mol) had violated his right to equality, stating his damage claims as well. The Kocani First Instance Court adopted a judgment accepting the statement of claim of the plaintiff, i.e. the Court established that there had been discrimination on grounds of national origin.³¹ The defendant, i.e. the Mol appealed against this judgment with the Stip Appellate Court, which however confirmed the judgment of the Kocani First Instance Court. In the enforcement stage of the case, the plaintiff was awarded MKD 30,000 as compensation for non-material damage for suffered mental anguish due to violation of his right to equality.

Case No. 2: D.J. from Kocani versus the Republic of Macedonia, Ministry of the Interior

On 27 June 2014, an individual belonging to the Roma ethnic community, national of Macedonia, wanted to travel by bus to Germany, accompanied by his brother and his sister-in-law, trying to cross the border at the Tabanovce Border Crossing Point. After they arrived at the border crossing point and after police officers completed the control of all passengers, they told D.J. to get off the bus and he was not allowed to leave the Republic of Macedonia with the explanation that he did not meet the conditions required for leaving the country, i.e. he did not have a letter of support and a return ticket. He was told that as other Roma, he too travelled in order to apply of asylum in Germany.

D.J. instituted proceedings with the Kocani First Instance Court petitioning the court to establish that the defendant, i.e. the Mol had violated his right to equality, stating his non-material damages claim as well. The Kocani First Instance Court adopted a judgment accepting the statement of claim of the plaintiff, i.e. the Court established discrimination on grounds of national origin. The defendant, i.e. the Mol appealed this judgment with the Stip Appellate Court, but the Stip Appellate Court confirmed the first instance judgment of the Kocani First Instance Court. In the enforcement stage of the case, D.J. was awarded MKD 30,000 for non-material damage.

³¹It is underlined that in the legal action it is stated that the person is "of Roma nationality" and the same term is used in the judgments. In the presentation of the closing arguments it is precisely stated "person belonging to the Roma ethnic community", when precisely stating the discriminatory ground.

Case No. 3: Gj. A. from Vinica versus the Republic of Macedonia, Ministry of the Interior

Gj. A. is a national of Macedonia belonging to the Roma ethnic community. On 22 November 2014, using the Tabanovce Border Crossing Point, she wanted to go to Slovenia to attend a wedding of her relatives. She had a return ticket and a letter of support. After border police officers inspected her passport she was not allowed to leave the country, and she was told that the letter of support was not clear, that she did not possess sufficient financial means and that she did not have a return ticket. Finally, the border police officers affixed a stamp with two diagonal lines on her passport. After she asked for an explanation why she was not allowed to leave the country, she received the reply that as all Roma she did not intend to go to Slovenia, as she claimed, but to another EU Member-State and that she should not have been on that bus, since the bus was transporting passengers on the Kumanovo-Rome destination.

Gj.A. instituted proceedings with the Vinica First Instance Court petitioning the court to establish that the defendant, i.e. the Mol had violated her right to equality, stating her non-material damages claim as well. The Vinica First Instance Court adopted a judgment accepting the statement of claim of the plaintiff, i.e. the Court established discrimination on grounds of national origin. The defendant, i.e. the Mol appealed this judgment with the Stip Appellate Court, which confirmed the first instance judgment of the Vinica First Instance Court. In the enforcement stage of the case, Gj. A. was awarded MKD 20,000 as compensation for non-material damage.

Case No. 4: E. J. from Vinica versus the Republic of Macedonia, Ministry of the Interior

E. J. is a national of Macedonia belonging to the Roma ethnic community. On 22 November 2014, he wanted to go to Slovenia to attend a wedding of his relatives. He had a return ticket and a letter of support. However, after border police officers inspected his passport he was not allowed to leave the country, and he was told that the letter of support was not clear, that he did not possess sufficient financial means and that he did not have a return ticket. The border police officer's affixed a stamp with two diagonal lines on his passport. After he asked for an explanation why he was not allowed to leave the country, he received the reply that as all Roma he too did not in fact intend to go to Slovenia, as he claimed, but to another EU Member-State and that he should not have been on that bus, since the bus was transporting passengers on the Kumanovo-Rome destination.

E.J. instituted proceedings with the Vinica First Instance Court petitioning the court to establish that the defendant, i.e. the Mol had violated his right to equality, stating his non-material damages claim as well. The Vinica First Instance Court adopted a judgment accepting the statement of claim of the plaintiff, i.e. the Court established discrimination on grounds of national origin. The defendant, i.e. the Mol appealed this judgment with the Stip Appellate Court, which confirmed the first instance judgment of the Vinica First Instance Court. In the enforcement stage of the case, E.J. was awarded MKD 20,000 as compensation for non-material damage.

Case No. 5: E. M. from Delcevo versus the Republic of Macedonia, Ministry of the Interior

E.M. is a national of Macedonia belonging to the Roma ethnic community. On 12 December 2012, he wanted to travel to the Republic of Bulgaria, using the Delcevo Border Crossing Point, to visit his relatives. He travelled using a passenger motor vehicle, property of his friend V.K. from Delcevo, ethnic Macedonian, who was travelling together with him. After border police officers at the border crossing point checked their passports, E.M. was taken out of the vehicle and brought to the police station. He was searched with the explanation that he was hiding an airplane ticket for a flight to some European country in order "to apply for asylum as all Roma do". The border police officers affixed a stamp with two diagonal lines on his passport, he was denied exit from the country and was returned. On 31 October 2014, he intended to travel to Germany together with his cousin, driving a passenger motor vehicle, wanting to use the Tabanovce Border Crossing Point. Border police officers checked his passport, then they took him out of the vehicle and took him to the captain of the police station, who ordered the border police officers not to allow him exit from the country based on the fact that he was Roma and therefore a potential asylum seeker, which was confirmed, as the captain claimed, with the stamp affixed on his passport on 12 December 2012.

E.M. instituted proceedings with the Delcevo First Instance Court petitioning the court to establish that the defendant, i.e. the Mol had violated his right to equality. The Delcevo First Instance Court adopted a judgment accepting the statement of claim of the plaintiff, i.e. the Court established discrimination on grounds of national origin of the plaintiff. The defendant, i.e. the Mol appealed this judgment with the Stip Appellate Court; the second instance decision is pending as of May 2016.

Negatively Completed Cases- Cases in which discrimination has not been established

Case No. 6: D. M. from Vinica versus the Republic of Macedonia, Ministry of the Interior

On 29 November 2014, a woman belonging to the Roma ethnic community, national of Macedonia, wanted to travel to Germany by airplane to visit her son and therefore she had only one-way ticket. Despite the fact that there is no such prescribed obligation, in addition to her biometric passport and airplane ticket, border police officers requested her to present a letter of support and proof that she possessed sufficient amount of money for her stay in Germany. After this, she was not allowed to leave the country and border police officers affixed onto her passport a stamp with two diagonal lines in the upper left corner of the passport.

D.M. instituted proceedings with the Vinica First Instance Court petitioning the court to establish violation of the right to equality, stating her damages claims as well. The Vinica First Instance Court adopted a judgment rejecting the statement of claim of the plaintiff as unfounded, offering the reasoning according to which the individual had not fulfilled the conditions for exiting the country and for travelling to EU countries and consequently the border police officers at the Skopje Airport were correct in denying the individual D.M. exit from the country.

Dissatisfied with the judgment, the plaintiff D.M. appealed against the judgment with the Stip Appellate Court which adopted a ruling rejecting the appeal and confirming the first instance judgment, offering the reasoning that “Unimpeded exit from the territory of the Republic of Macedonia and entry into a country signatory to the Schengen Agreement, according to Article 5 of the Schengen Borders Code, do not require only possession of a biometric passport, but also require that other conditions are met, i.e. possession of supplementary documents as set forth under Annex 1 to this Regulation, which serve to prove the motive and purpose of the travel and stay in EU Member-States.”³²

Taking into consideration provisions of the Schengen Borders Code, the Court established that the right to equality and the right to freedom of movement of the individual D.M. were not violated. According to the Stip Appellate Court, in the treatment of the said individual, border police officers abided by all applicable regulations in the Republic of Macedonia, and the activities they had undertaken in the specific case, did not amount to a violation of the right to equality (discrimination), nor to a violation of the right to freedom of movement.

Case No. 7: S. I. from Delcevo versus the Republic of Macedonia, Ministry of the Interior

On 15 September 2013, a woman belonging to the Roma ethnic community, national of Macedonia, accompanied by her sister, was supposed to travel to Germany, using the Delcevo Border Crossing Point, to visit her sick mother. The border police officers did not allow her to leave the country under the suspicion that because she was a Roma, she intended to apply to for asylum in Germany, and that she was lying about her intention and purpose of her travel. Border police officers marked her passport by affixing a stamp with two diagonal lines in the upper left corner of her passport. Later the same day, after her uncle gave a statement, confirming that she indeed wanted to travel in order to visits her mother in Germany, she was allowed to cross the state border. In the meantime her mother died.

³² Quotation from the judgment, which is available to the KHAM NGO.

On 27 August 2014, when she wanted to travel to Blagoevgrad (Republic of Bulgaria), accompanied by her father, with the purpose of collecting the personal effects of her dead mother, using the same border crossing point. S.I. was again prevented from leaving the territory of the Republic of Macedonia, with the explanation that the stamp with two diagonal lines on her passport was an indicator that she was already marked as a Roma, which meant a potential asylum seeker. Again after several interventions, she was allowed exit from the country.

S.I. instituted proceedings with the Delcevo First Instance Court petitioning the court to establish that the defendant, i.e. the Mol had violated her right to equality, stating her non-material damages claim as well. The Delcevo First Instance Court adopted a judgment accepting the statement of claim of the plaintiff, i.e. the Court established discrimination on grounds of national origin and ordered the defendant, i.e. the Mol to pay non-material damages to the plaintiff in the amount of MKD 40,000. The defendant, i.e. the Mol appealed this judgment with the Stip Appellate Court.

The Stip Appellate Court found the appeal of the Mol to be founded. Hence, on 7 April 2016, the Court issued a ruling overturning the judgment of the Delcevo First Instance Court ordering retrial. The reasoning of the ruling stated that the decisive factor which the Delcevo First Instance Court allegedly had not established, was whether the Mol discriminated against the plaintiff by applying an unequal treatment, thus placing the plaintiff in a less favourable position compared to other citizens. The reasoning furthermore stated that the first instance court had not established whether the plaintiff suffered any detrimental consequences because of such treatment. In addition, it was stated that the Delcevo First Instance Court had not established whether S.I. possessed all documents required for exit from the country. In conclusion, and this sets a precedent, in the reasoning of its ruling the Stip Appellate Court stated that the first instance court was to establish whether the plaintiff gave false statement as to which country was her destination, and that in the retrial the first instance court was to take into consideration Article 5 and Article 34 of the Schengen Borders Code.

Main Findings

The analysis of these case studies leads to three main findings presented below. Before they are presented, it would be useful to mention that in October 2015, there was a Conference entitled Limiting the Right to Freedom of Movement at Border Crossing Points, organized by the Organization for Security and Cooperation in Europe (OSCE), OSCE Mission in Skopje, the Ombudsman's Office, and the Helsinki Committee. The Conference was aimed at defining concrete recommendations for actions to be undertaken by the state authorities to tackle the issue of discrimination against Roma at border crossing points. Representatives of NGO's working on this problem, but also a representative of the MoI attended the Conference. The below stated findings and the findings presented in the conclusion to this analysis are complementary with the recommendations adopted at the above referred to Conference,³³ which demonstrates that there is a consensus about the steps to be undertaken in order to prevent further violation of the right to freedom of movement of persons belonging to the Roma ethnic community, as well as the violation of the fundamental human rights principle - the principle of equality.

1. Basing judgments upon regulations that are not part of and are not applicable within the legal system of the Republic of Macedonia

According to the findings of the Appellate Court in two of the negatively completed cases, i.e. cases in which no discrimination has been found, the provisions of the Schengen Borders Code³⁴ are to be applied despite the fact that Macedonia is not a signatory country to the Schengen Agreement, nor it is Member-State of the EU. However, the Schengen Agreement, under which the Schengen Borders Code has been adopted, is a legally binding regulation and has direct legal effect only in countries, which are Member-States of the EU.

This regulation is not part of the national law, which is clearly confirmed with Article 3, paragraph 1, item 12 of the Law on Border Control (quoted above in the section National Legal Framework). This Article explicitly envisages deferred application of the Convention Implementing the Schengen Agreement. Hence, the Convention shall become part of the national legal order and shall become applicable following the accession of Macedonia to the EU. In addition to this referral to the Schengen Code that clearly is in contravention of the Constitution of Macedonia, there is also confusion among judges in Macedonia as to the character of this regulation. Some courts consider this regulation to be an international treaty, which it is not, while other courts go as far as not making a difference between this regulation and the Schengen Agreement, these two being two different and separate legal documents. In one of the first instance judgments, one court has even stated "the Republic of Macedonia too is a signatory country to the Schengen Agreement".

³³ The full text of these recommendations can be found at the following website:

http://www.mhc.org.mk/system/uploads/redactor_assets/documents/1064/Roma_Racial_Profiling_Conference_Recommendations_MK.pdf

³⁴ There was referral to Article 5, item C, and Article 34, item C. See: Schengen Borders Code: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:i14514&from=EN>

In the Republic of Macedonia, courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. The Schengen Borders Code is a regulation of the European Union (EU), which establishes rules within the Community, regulating thus the movement of people across the borders. This regulation is legally binding and has direct legal effect on the entire territory of the EU. Hence, this regulation is legally binding for EU Member-States. However, the Republic of Macedonia is not a Member-State of the EU. Accordingly, until Macedonia's accession to the EU, EU regulations are not a source of law in the Republic of Macedonia, and judgments and documents of state bodies and courts may not be based upon such regulations. In addition, this regulation contains provisions regulating the crossing of the EU borders, i.e. it does not envisage rules regarding the exit from a country, which is not a Member-State of the EU. Macedonia has not assumed the obligation to directly apply this regulation in any ratified international agreement signed between the Republic of Macedonia and the EU or in any agreement signed with an EU Member-State.

2. Inconsistent Case Law

In judgments in the which courts accept the statement of claims, i.e. in which courts have established discrimination, the courts accept that possessing a passport is sufficient in order to exit the territory of the country, and that no additional documents³⁵

In judgments, which reject the statement of claims or in rulings, which reverse first instance court judgment on discrimination, courts take the position that the work of border police officers does not amount to unequal treatment of the plaintiffs on grounds of their ethnic origin, i.e. that plaintiffs have not been discriminated against. In such judgements and rulings courts apply to the fullest Article 5, point C of the Schengen Borders Code, which inter alia stipulates that “....the entry conditions for third-country nationals shall be the following:.....they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence...” Article 5 applies to conditions for entry of third-country nationals, which means the article cannot be applied upon exit of nationals from the Republic of Macedonia who intend to travel abroad. In the reasoning of such judgments and rulings, it is always stated that according to the Schengen Borders Code, a condition for exit from the country when travelling to an EU Member-State is the possession of a letter of support. However, Annex 1 - Supporting documents to verify the fulfilment of entry conditions- does not state that possession of a letter of support is one of the conditions.

It is very indicative that courts refer to Article 3 of the Law on Border Control, but put aside the substantive part of this Article, which clearly states that the Schengen regulation is not applicable in the Republic of Macedonia. Such judgments treat the Schengen regulation as a law or as a treaty, although it is a matter of a regulation of the European Council and of the Commission, which is not legally binding upon Macedonia, while the legal effect that courts attach to this regulation is even higher ranking than that of the Constitution and applicable laws regulating this right.

³⁵ These provisions are stated above in the text, in the section called “National Legal Framework”.

3. Limiting the Access to Justice

In some of the first instance judgments adopted by the Skopje II First Instance Court, then by the Bitola First Instance Court and by the Berovo First instance Court, judges have awarded the Mol compensation for Mol's court fees, without any grounds or argumentation.

Namely, in the said proceedings, the Mol was the defendant and was represented by its employees, i.e. lawyers working at the Mol, under a power of attorney granted by the State Attorney. In the judgments, judges refer to Article 148 of the Civil Law Procedure, which relates to compensation of costs for a lawyer, but not compensation for lawyers who are employees of legal entities, which are the plaintiff or the defendant in court proceedings. The Court may grant compensation of court fees only when state institutions, which are parties to the court proceedings, are represented by the State Attorney, as envisaged in Article 17 of the Law on the State Attorney's Office. Hence, this Article stipulates that the costs for legal representation by the State Attorney are set according to the fees for reward and compensation of work performed by lawyers. The money paid for legal representation fees is revenue collected for the state budget of the Republic of Macedonia.

In light of the above stated it could be said that courts unlawfully grant compensation of costs for legal representation of the Mol. This is supported by a judgment of the Bitola First Instance Court, which has rejected claims for compensation of fees for preparation of documents and for legal representation of the Mol, in light of the fact that lawyers who are employees of the Mol have represented the Mol.

Such judgments, which grant the Mol compensation of court fees, are to the detriment of citizens who have decided to institute legal proceedings to protect themselves from discrimination, considering that such judgments limit the already difficult access to justice, especially for socially marginalized groups. Despite the fact that such groups, i.e. persons belonging to some of the vulnerable groups may request free legal assistance under the Law on Free Legal Assistance (Article 12), discrimination as a ground for instituting court proceedings has not been envisaged as one of the grounds for acquiring the right to free legal assistance. In addition, the Law on the Prevention of and Protection against Discrimination does not envisage exemption from payment of court fees for court proceedings against discrimination.

Conclusion

This analysis combines available data and data collected by the KHAM NGO, individually or together with its partners, while providing legal assistance to persons whose rights to equality and to freedom of movement have been violated under the pretext of protecting the visa-free travel for all nationals of Macedonia. The problem of unconstitutional and unlawful treatment in conducting border controls by the border police at the Mol has been persisting and reoccurring and is present as of 2011 to date. On the other hand, it has been proven beyond any doubt that the problem at hand consists of preventing Macedonian nationals from exiting the country, most of whom are Roma, by way of systemic racial discrimination and racial profiling. This is done with the explanation that these are persons who intend to abuse the visa-free regime by applying for asylum in some of the countries in the Schengen zone.

As the brief review of key provisions of international law shows, such treatment runs contrary to international human rights law, especially the CERD, and the ICCPR. This is furthermore confirmed in considerations and reports of UN human rights bodies when reviewing the general human rights situation in Macedonia, but also when considering the issue of violation of rights of Roma upon exit from the country.

Such a conclusion can also be confirmed at the national level by positively completed cases in which courts have established discrimination against Macedonian nationals belonging to the Roma ethnic community perpetrated by the Mol. However, the inconsistent case law shows that not all victims of discrimination are able to get justice before national courts. The latest court judgments granting the Mol compensation of court and legal representation fees, further limit the access to justice for victims of discrimination.

In light of all above stated, there is no doubt that Macedonian authorities violate the Constitution and internationally guaranteed rights to equality and to freedom of movement and the applicable human rights law, violating also the overarching human rights principle, the principle of equality, which no country is allowed to bypass or derogate from. Such discriminatory practice is especially serious since it results with violations of one of the most protected grounds, i.e. race, in respect of which global and European bodies have underlined that there is no situation or circumstance, which could justify racial discrimination.

Accordingly, in addition to being aimed at presenting the experiences and examples of strategic litigation by the KHAM NGO in this area, this analysis is also aimed at appealing yet again to put an end to the practice of systemic racial discrimination and racial profiling of Roma at border crossing points, as well as to harmonize the national legal framework with international standards and to ensure effective and efficient mechanisms for protection of citizens' rights, which will enable enhancement of legal security and which will facilitate the access to justice.

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