IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application Nos. 43440/15, 44027/16 and 16460/17

BETWEEN:

Dženifer Dželadin, Muamet Abedinov and Sejat Zekirov

Applicants

- and -

the former Yugoslav Republic of Macedonia

Respondent

- and -

Minority Rights Group International

Intervener

SUBMISSIONS ON BEHALF OF THE INTERVENER

I. Introduction

1. These Submissions are made by Minority Rights Group International (the "Intervener") in relation to *Dženifer Dželadin v the former Yugoslav Republic of Macedonia*, *Muamet Abedinov v the former Yugoslav Republic of Macedonia* and *Sejat Zekirov v the former Yugoslav Republic of Macedonia* (Application Nos. 43440/15, 44027/16 and 16460/17 respectively) ("*Dželadin and 2 other applications*"), pursuant to leave granted by the President of the Court by letter dated 16 January 2018, in accordance with Rule 44(3) of the Rules of Court. Details of the Intervener are set out at Annex I to these Submissions.

2. *Dželadin and 2 other applications* raise several critical issues in relation to permissible restrictions on rights protected under Article 2(2) of Protocol No. 4 to the European Convention on Human Rights (the "Convention"). Despite the Court's extensive jurisprudence related to respect for freedom of movement, the Court has not yet explored it in the context of restriction of border crossings of the Roma. The cases also raise fundamental issues regarding proving discrimination under Article 1 of Protocol No. 12 to the Convention and under Article 14 of the Convention in conjunction with Article 2(2) of Protocol No. 4.

3. This intervention will provide the Court with relevant comparative and international law material to assist the Court in discharging its function in accordance with "the interests of the proper administration of justice" (Rule 44(3)(a)).

II. Ethnic profiling and restrictions on the Roma's free movement

4. Throughout Europe, the Roma have been subject to widespread practices of ethnic profiling accompanied by restrictions on their freedom of movement, both within States and across State borders. These discriminatory practices, which have been well-documented by regional and international human rights supervisory bodies as set out further below, are also prevalent within Macedonia and at its border crossings.

5. Ethnic profiling and restrictions on free movement exist within a general climate of institutionalised discrimination against the Roma that is "*reflected both in legislation, policies and administrative measures, and in the discriminatory attitudes of State officials.*"[1]

6. In a 2013 issue paper on the right to leave a country, the Council of Europe Commissioner on Human Rights found that "*[i]n a situation where there is such generalised discrimination, racism and social exclusion in evidence, the possibility that some individuals will find themselves singled out for persecution rises substantially. What appears to be happening in the Western Balkans is that as EU member states increase pressure on these states to the effect that if the numbers of their nationals applying for asylum in the EU does not decrease, then all nationals of the state will be subjected to a mandatory visa requirement (again), the authorities of these states are seeking to restrict the departure of individuals who they consider at risk of applying for asylum, that is, the Roma.*"[2]

7. Both the UN Human Rights Committee ("HRC") and the UN Committee on the Elimination of Racial Discrimination ("CERD") have noted their concern regarding freedom of movement and ethnic profiling of Roma at Macedonia's borders. In its concluding observations on the third periodic report of Macedonia, the HRC expressed concern that between 2011 and 2014,

[1] *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai*, A/HRC/17/40, 24 May 2011, para 24.
[2] Council of Europe Commissioner for Human Rights, Issue Paper, *The right to leave a country*, October 2013, page 47 [hereinafter Issue Paper].

thousands of Macedonian nationals were denied exit from the country.[3] The HRC was also concerned about "*allegations of ethnic profiling, particularly of Roma, limiting freedom of movement across the State party's borders*", and requested that the Macedonian government take measures to ensure full respect for the right to freedom of movement.[4] For its part, CERD was troubled by "*reports that citizens belonging to Roma and Albanian communities have been prevented from leaving the country on the grounds that they would apply for asylum in European Union countries, and have had their travel documents confiscated. The Committee notes the 2014 ruling of the Constitutional Court that abolished restrictive provisions of the Law on Travel Documents, but remains concerned by the ethnic profiling of these communities by border police officers*".[5] CERD recommended that the Macedonian government fully respect the right to freedom of movement, including the right of citizens to leave and return to the country, and stated that belonging or appearing to belong to an ethnic group is not a sufficient reason, in law or in fact, to restrict the right to movement.[6]

8. Despite these UN treaty bodies' recommendations to the Macedonian government, more recent reports indicate that ethnic profiling at the border that prevents Roma from leaving the country continues unabated. In December 2016, the Advisory Committee on the Framework Convention for the Protection of National Minorities published its Fourth Opinion on Macedonia, stating as follows: "*Repeated independent surveys point to an established practice of not allowing Roma to exit the country, despite having valid travel documents. The Ministry of the Interior confirmed the practice to the Advisory Committee as a procedure that, in an apparent effort to comply with the EU visa-liberalisation agreement, is based on 'risk-analysis' and the established profile of so-called 'fake asylum-seekers'. This practice reportedly continues despite an increasing number of court decisions that have condemned it and despite the Ministry of the Interior having been ordered to pay compensation to affected individuals. According to officials, the court decisions were prompted by the failure of individual police officers, who have since been reprimanded, rather than the result of a systematic practice.*"[7] The Advisory Committee has recommended the immediate end to ethnic profiling practices and the implementation of relevant court decisions.[8]

III. Freedom of movement under Article 2 of Protocol No. 4

9. Article 2 of Protocol No. 4 provides:

> 1. 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.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national

[3] Human Rights Committee, *Concluding observations on the third periodic report of the former Yugoslav Republic of Macedonia*, CCPR/C/MD/CO/3, 17 August 2015, para 16.
[4] *Ibid*.
[5] Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined eighth to tenth periodic reports of the former Yugoslav Republic of Macedonia*, CERD/C/MKD/CO/8-10, 21 September 2015, para 14.
[6] *Ibid*, para 15.
[7] Advisory Committee on the Framework Convention for the Protection of National Minorities, *Fourth Opinion on "the former Yugoslav Republic of Macedonia", adopted on 24 February 2016*, ACFC/OP/IV(2016)001, 20 December 2016, para 27 (footnotes omitted).
[8] *Ibid*, para 30.

security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.[9]

IV. International standards on freedom of movement

A. The content of freedom of movement under international law

10. Freedom of movement as a human right was first declared in the Universal Declaration of Human Rights[10] 70 years ago and since then it has been enshrined in several international human rights treaties both at the international and regional level.[11]

11. Article 12 of the International Covenant on Civil and Political Rights (the "ICCPR") sets out the right to freedom of movement. The Court has recognised that Article 12 of the ICCPR was a basis for the drafting of Article 2 of Protocol No. 4.[12] Indeed, the wording of the provisions as a whole is very similar and paragraphs 1 and 2 of each provision are identical.

12. In its General Comment No. 27, the HRC has provided an authoritative interpretation of the scope and content of Article 12, which is relevant to the right to freedom of movement both in general and in the context of the European regional human rights framework. In the Committee's view, "*[l]iberty of movement is an indispensable condition for the free development of a person.*"[13] With respect to the freedom to leave any country, including one's own, the Committee stated that "*[f]reedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee.*"[14]

13. The HRC's approach to freedom of movement has been adopted by other regional human rights systems. In the Inter-American system of human rights, for example, the right to freedom of movement is protected by Article 22 of the American Convention on Human Rights (the "American Convention").[15] The Inter-American Court of Human Rights (the "Inter-American Court") has held that liberty of movement is essential for a person's free development[16] and has accepted the HRC's views in that respect: "*The Court endorses the comments made by the Human Rights Committee in its General Comment No. 27, in the sense*

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[9] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art 2, 16 September 1963, ETS 46.

[10] *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art 13 [hereinafter UDHR).

[11] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, art 12 [hereinafter ICCPR]; *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), art 12; *American Convention on Human Rights*, 22 November 1969, TS No 36, art 22.

[12] *Riener v Bulgaria*, Application No. 46343/99, Judgment 23 May 2006, para 81.

[13] Human Rights Committee, *General Comment No. 27: Freedom of movement (article 12)*, CCPR/C/21/Rev.1/Add.9, 1 November 1999, para 1 [hereinafter HRC, *General Comment No. 27*].

[14] *Ibid*, para 8.

[15] The relevant parts of Article 22 state as follows: "*1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. 2. Every person has the right to leave any country freely, including his own. 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.*"

[16] *Case of the Moiwana Community v Suriname*, Judgment 15 June 2005, Series C No. 124, para 110; *Manuel Cepeda Vargas v Colombia*, Judgment 26 May 2010, Series C No. 213, para 197.

that the right to freedom of movement is the right of all persons to move freely from one place to another and to establish themselves in the place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or stay in a place. This is an essential condition for an individual to be able to live his life freely."[17]

14. The Court has already developed extensive case law on Article 2 of Protocol No. 4 and has analysed the content of this right in its jurisprudence. In *Baumann v France* the Court made the following statement, which has often been cited since: "*[T]he right of freedom of movement as guaranteed by paragraphs 1 and 2 of Article 2 of Protocol No. 4 is intended to secure to any person a right to liberty of movement within a territory and to leave that territory, which implies a right to leave for such country of the person's choice to which he may be admitted*".[18] In *Riener v Bulgaria* the Court restated that Article 2 of Protocol 4 to the Convention "*guarantees to any person a right to liberty of movement, including the right to leave any country for such other country of the person's choice to which he or she may be admitted.*"[19] The Court has reiterated the same principle in subsequent case law, including in *Bartik v Russia*,[20] *Gochev v Bulgaria*,[21] *Nalbantski v Bulgaria*,[22] *Stamose v Bulgaria*[23] and *De Tommaso v Italy*.[24]

B. <u>The scope of restrictions on freedom of movement under international law</u>

15. It is well-recognised that restrictions to the right to freedom of movement are permitted as a matter of law. However, the scope of such restrictions is not unlimited. This notion has been explored by the HRC in its jurisprudence and in its legal interpretation.

16. In General Comment No. 27, the HRC stated that "*[t]he permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity...and by the need for consistency with the other rights recognized in the Covenant.*"[25] Importantly, the HRC noted that restrictions on freedom of movement must "*not impair the essence of the right*" and that laws authorising the restrictions should not allow implementing authorities to exercise unfettered discretion.[26] The HRC also underscored the importance of respect for the principle of proportionality, "*not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.*"[27] Moreover, the HRC stated that restrictions must conform to the principles of equality and non-discrimination; thus, any restriction on the right to freedom of movement will constitute a violation if its application is based on an individual's race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[28]

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[17] *Case of Ricardo Canese v Paraguay*, Judgment 31 August 2004, Series C No. 111, para 115.
[18] *Baumann v France*, Judgment 22 May 2001, *Reports of Judgments and Decisions 2001-V*, para 61.
[19] *Riener v Bulgaria*, *supra* note 12, para 109 (citing *Baumann v France*, *supra* note 18, para 61).
[20] *Bartik v Russia*, Application No. 55565/00, Judgment 21 December 2006, para 36 (citing *Napijalo v Croatia*, Application No. 66485/01, 13 November 2003, para 68).
[21] *Gochev v Bulgaria*, Application No. 34383/03, Judgment 26 November 2009, para 44 (citing *Baumann v France*, *supra* note 18, para 61; *Riener v Bulgaria*, *supra* note 12, para 109).
[22] *Nalbantski v Bulgaria*, Application No. 30943/04, Judgment 10 February 2011, para 60.
[23] *Stamose v Bulgaria*, Application No. 29713/05, Judgment 27 November 2012, para 30.
[24] *De Tommaso v Italy*, Application No. 43395/09, Judgment 23 February 2017, para 104 (citing *Khlyustov v Russia*, Application No. 28975/05, 11 July 2013, para 64; *Baumann v France*, *supra* note 18, para 61).
[25] HRC, *General Comment No. 27*, *supra* note 13, para 2.
[26] *Ibid*, para 13.
[27] *Ibid*, para 15.
[28] *Ibid*, para 18.

17. The HRC has applied this approach to its jurisprudence. In *Zoolfia Batyrova v Uzbekistan*, whilst reaffirming that freedom of movement is vital for individuals' free development, the HRC recalled that the right is not absolute.[29] Rather, the HRC noted that free movement may be restricted in "exceptional cases", only as long as the restrictions are both necessary and proportional.[30]

18. The Inter-American Court has acknowledged that freedom of movement, including the right to leave a country, may be restricted.[31] Nonetheless, such restrictions must comply with the corresponding requirements of legality, necessity and proportionality.[32] The Inter-American Commission on Human Rights, noting the significant impact on personal liberty of a restriction to free movement, has summarised the Inter-American Court's findings on legality as follows: "*the State must: 1. Spell out, by law and in clear and unambiguous language, the supposed exceptions under which a measure such as a restriction on the right to leave the country would be permissible; and 2. Ensure that when a restriction is established by law, its regulation has no ambiguities, so as not to leave any room for doubt among those charged with enforcing the restriction, since such ambiguity might allow for abuse or discretion, enabling them to interpret the restriction broadly, which would be particularly undesirable in the case of measures that severely affect fundamental rights, such as liberty.*"[33] To meet the requirement of necessity, there must be sufficient evidence that the restriction on the right to freedom of movement is reasonable.[34] As for proportionality, the restriction must be proportionate to the legitimate aim sought.[35] Moreover, the restriction should only be applied where less restrictive measures are unavailable and for the amount of time "*strictly necessary to serve its purpose*."[36]

19. The Court has considered and interpreted restrictions on the freedom of movement under Article 2(3) of Protocol No. 4 on numerous occasions. In *Timishev v Russia*, the applicant was an ethnic Chechen who moved to Nalchick, Kabardino-Balkar Republic of Russia, after his property in the Chechen Republic was destroyed in a military operation. At a state checkpoint, he was denied entry into Kabardino-Balkaria based on an oral instruction from that republic's Ministry of Interior to prohibit entry of persons of Chechen ethnic origin. The applicant claimed, among others, violations of Article 2 of Protocol No. 4 and Article 14 taken in conjunction with Article 2 of Protocol No. 4. The Court held that impugned restrictions must be in accordance with the law and pursue a legitimate aim that is necessary in a democratic society.[37] As the oral instruction in the case was not "*properly formalised or recorded in some other traceable way, enabling the Court to carry out an assessment of its contents, scope and legal basis*", the Court found that the restriction was not in accordance with the law, and thus held that Article 2 of Protocol No. 4 had been violated. The Court's approach is therefore in line with other international standards, particularly those of the HRC, as discussed above.

20. The requirement of being in accordance with the law has been considered by the Court in other cases. In *De Tommaso v Italy*, the applicant was placed under special police supervision

[29] Communication No. 1585/2007, *Zoolfia Batyrova v Uzbekistan*, CCPR/C/96/D/1585/2007, views adopted 30 July 2009, para 8.3.
[30] *Ibid*.
[31] *Case of Ricardo Canese v Paraguay*, *supra* note 17, para 117.
[32] *Ibid*, paras 117, 123.
[33] Inter-American Commission on Human Rights, *Human Mobility: Inter-American Standards*, Doc. 46/15, 31 December 2015, para 260.
[34] *Ibid*, para 261 (citing *Ricardo Canese v Paraguay*, para 129).
[35] *Ibid*, para 263 (citing *Ricardo Canese v Paraguay*, para 133).
[36] *Ibid*.
[37] *Timishev v Russia*, Application Nos. 55762/00 and 55974/00, Judgment of 13 December 2005, para 45.

for two years, and a compulsory residence order was imposed on him during that time as a preventive measure due to his alleged previous convictions. The Court reiterated the requirements that a restricting measure must comply with, namely that it must be in accordance with law, pursue one of the legitimate aims found in Article 2(3) of Protocol No. 4 and fairly balance the public interest and the rights of the individual.[38] The Court found that the measure restricting a person's right to freedom of movement must not only be based in domestic law, but must also be both accessible and foreseeable.[39] A foreseeable rule will allow an individual to reasonably foresee the consequences of a given action, so as to regulate his or her conduct.[40] Importantly, the Court has held that a rule is "foreseeable" when it "*affords a measure of protection against arbitrary interferences by the public authorities*".[41] In this case, the legislation in question, which pertained to the imposition of preventive measures on the applicant, was deemed vague and excessively broad, thus failing to satisfy the requirements of foreseeability and constituting a violation of Article 2 of Protocol No. 4.[42]

21. The Court has also ruled in detail on the requirement that a restriction should be necessary in a democratic society. In a variety of contexts, the Court has held that "*general and virtually automatic restrictions cannot be regarded as justified under Article 2 of Protocol No. 4*".[43] In *Riener v Bulgaria*, the applicant, who held both Bulgarian and Austrian nationality, was accused of having incurred a significant debt of unpaid taxes. She was prohibited from leaving Bulgaria and her Austrian passport was seized by the Bulgarian border control authorities when she tried to leave the country. The Court stated that, in relation to alleged violations of Article 2 of Protocol No. 4, it must be established whether there was an interference with the right. Such interference should also be lawful and pursue one of the legitimate aims in Article 2(3), including whether it strikes a fair balance between the public interest and the individual's rights – that is, if it is proportional.[44] According to the applicable law it was irrelevant "*whether or not the fiscal authorities made efforts to secure payment by other means, the debtor's attitude and his or her potential ability to pay*".[45] The fiscal authorities merely informed the passport police on a yearly basis that the applicant had not paid, which had "*the automatic consequence of the travel ban remaining in place, without examination of its justification and proportionality*".[46] Therefore, the Court found that the travel ban was an automatic measure of indefinite duration as it could have only been lifted if the applicant had paid the debt or submitted sufficient security, or if the debt had been extinct by prescription. The Court reiterated that the principle of proportionality must be applied when freedom of movement is restricted.[47]

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[38] *De Tommaso v Italy*, *supra* note 24 (citing *Battista v Italy*, Application No. 43978/09, ECHR 2014, para 37; *Khlyustov v Russia*, *supra* note 24, para 64; *Raimondo v Italy*, Series A No. 281-A, 22 February 1994, para 39; *Labita v Italy*, Application No. 26772/95, ECHR 2000-IV, paras 194-5).
[39] *Ibid*, para 106 (citing *Khlyustov v Russia*, *supra* note 24, para 68; *X v Latvia*, Application No. 27853/09, ECHR 2013, para 58; *Centro Europa 7 S.r.l. and Di Stefano v Italy*, Application No. 38433/09, ECHR 2012, para 140; *Rotaru v Romania*, Application No. 28341/95, ECHR 2000-V, para 52; *Maestri v Italy*, Application No. 39748/98, ECHR 2004-I, para 30).
[40] *Ibid*, para 107.
[41] *Ibid*, para 109 (citing *Centro Europa 7 S.r.l. and Di Stefano v Italy*, *supra* note 39, para 143; *Khlyustov v Russia*, *supra* note 38, para 70).
[42] *Ibid*, para 125.
[43] *Stamose v Bulgaria*, *supra* note 23, para 35 (citing *Riener v Bulgaria*, *supra* note 12, paras 127-8; *Bartik v Russia*, *supra* note 20, para 48; *Gochev v Bulgaria*, *supra* note 21, paras 53, 57; *Nalbantski v Bulgaria*, *supra* note 22, paras 66-7).
[44] *Riener v Bulgaria*, *supra* note 12, para 109 (citing *Baumann v France*, *supra* note 18, para 61).
[45] *Ibid*, para 127.
[46] *Ibid*.
[47] *Ibid*, para 128.

22. In *Földes and Földesné Hajlik v Hungary*, the applicant's passport was confiscated for an indefinite period without a review by the Hungarian authorities. The Court determined the confiscation to be disproportionate: "*even where a restriction on the individual's freedom of movement was initially warranted, maintaining it automatically over a lengthy period of time may become a disproportionate measure, violating the individual's rights*".[48]

23. In *Bartik v Russia,* the applicant's request for a travel passport to visit his ill father in Germany was rejected by the state authorities due to a temporary travel restriction that was imposed on him, as he was aware of certain state secrets and signed some undertakings that contained a clause restricting his right to leave the country. The Court found that the restriction was in accordance with the law[49] and that the interests of national security may be a legitimate aim for an interference with the freedom of movement, but that the measures were not proportionate. It stated that "*the Russian law on international travel by persons with knowledge of State secrets imposed an unqualified restriction on their right to leave Russia, whatever the purpose or duration of their visit*".[50] According to the Court, the restriction on the applicant's right to leave his own country was not therefore "necessary in a democratic society". Thus, the Court found a violation of Article 2 of Protocol 4.[51]

24. In *Gochev v Bulgaria*, the authorities had indefinitely withdrawn the applicant's passport based on a law that imposed travel restrictions on persons owing a certain amount of debt to creditors. The Court determined that the measure was of an automatic nature, lacking both scope and duration, particularly in light of the authorities' failure to examine the applicant's personal circumstances regarding his debts. The measure could not therefore be justified or proportionate.[52]

25. In *Nalbantski v Bulgaria*, the Court determined that the revocation of the applicant's international passport, after his conviction for theft but prior to his rehabilitation, was done without "*[examining] his individual situation or [explaining] the need to impose such a measure on him"*.[53] Thus, the Court held that the authorities had not discharged their obligation to assess the proportionality of the restriction on his right to travel or to justify such a restriction.[54] Similarly, in *Stamose v Bulgaria,* the applicant was banned from leaving Bulgaria for a period of two years based on having previously infringed the conditions of his visa in the United States. The Court stated that within the test for "necessary in a democratic society" is an implicit requirement of proportionality.[55]

V. International standards on the prohibition of discrimination

26. The prohibition on discrimination is a fundamental element of human rights protection and is at the heart of a number of international human rights instruments. The Universal Declaration of Human Rights holds that everyone is entitled to all the rights and freedoms it sets forth, "*without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*",[56] while the ICCPR requires States to respect and ensure the rights it recognises without distinction based on these

[48] *Földes and Földesné Hajlik v Hungary*, Application No. 41463/02, Judgment 31 October 2006, para 35.
[49] *Bartik v Russia*, *supra* note 20, para 41.
[50] *Ibid*, para 48.
[51] *Ibid*, para 52.
[52] *Gochev v Bulgaria*, *supra* note 21, paras 53, 57.
[53] *Nalbantski v Bulgaria*, *supra* note 22, para 66.
[54] *Ibid*.
[55] *Stamose v Bulgaria*, *supra* note 23, para 32.
[56] UDHR, *supra* note 10, art 2.

same grounds.[57] Article 26 of the ICCPR, which entitles all persons to equal protection of the law, has been recognised by the HRC as "*[prohibiting] discrimination in law or in fact in any field regulated and protected by public authorities.*"[58] The International Convention on the Elimination of All Forms of Racial Discrimination places a duty upon States parties to combat racial discrimination, which includes ensuring that public authorities and institutions act in conformity with this obligation.[59]

27. The Court has extensive jurisprudence with respect to Article 14 of the Convention, which prohibits discrimination in conjunction with other rights protected by the Convention. It is well-acknowledged that discrimination will not result from every distinction or difference in treatment.[60] In the seminal case *DH and Others v the Czech Republic*, the Court reiterated that "*discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations*".[61] Relying on its own well-established jurisprudence, the Court stated that a difference in treatment is discriminatory if it does not pursue a legitimate aim or if there is a lack of reasonable proportionality between the means and the aim.[62] Moreover, the Court noted that "*[w]here the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.*"[63] The Court further reiterated that any difference in treatment based exclusively or to a decisive extent on an individual's ethnic origin cannot be objectively justified in a democratic society.[64]

28. The HRC has found that ethnic profiling constitutes unlawful discrimination. In *Rosalind Williams Lecraft v Spain*, the complainant was subject to an identity check by the national police, who on account of her skin colour believed she may have been in the country illegally. The Committee found that while identity checks carried out for public security, crime prevention or immigration control did serve a legitimate purpose, a person's physical or ethnic characteristics should not be the basis upon which to suspect their illegal immigration status.[65] The Committee also stated that the checks should not target individuals with specific physical or ethnic characteristics, for "*[t]o act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.*"[66]

29. The Court has also examined the concept of indirect discrimination, by noting that discrimination may arise in circumstances where a particular group is disproportionately prejudiced by a general policy or measure, albeit couched in neutral terms.[67] This kind of situation may amount to indirect discrimination, which does not necessarily require

[57] ICCPR, *supra* note 11, art 2(1).
[58] Human Rights Committee, *General Comment No. 18: Non-discrimination*, 10 November 1989, para 12.
[59] *International Convention on the Elimination of All forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, art 2(1)(a) [hereinafter ICERD].
[60] Council of Europe, Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000, para 18 [hereinafter Explanatory Report].
[61] *DH and Others v the Czech Republic*, Application No. 57325/00, Judgment 13 November 2007, para 175 (emphasis added).
[62] *Ibid*, para 196.
[63] *Ibid*.
[64] *Ibid*, para 176 (citing *Timishev v Russia*, *supra* note 37, para 58).
[65] Communication No. 1493/2006, *Rosalind Williams Lecraft v Spain*, CCPR/C/96/D/1493/2006, views adopted 27 July 2009, para 7.2.
[66] *Ibid*.
[67] *DH and Others v the Czech Republic*, *supra* note 61, paras 184-6.

discriminatory intent; in cases of alleged indirect discrimination, less strict evidential rules should apply so as to effectively protect the rights of those concerned.[68]

30. Article 1 of Protocol No. 12 to the Convention broadens the prohibition on discrimination to "*any right set forth by law*". This includes cases in which a person is discriminated against "*i. In the enjoyment of any right specifically granted to an individual under national law; ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; iii. by a public authority in the exercise of discretionary power...; [and] iv. by any other act or omission by a public authority*".[69]

31. In *Sejdić and Finci v Bosnia and Herzegovina* ("*Sejdić and Finci*"), the first case in which Article 1 of Protocol No. 12 was considered, the Court ruled that the test for determining whether or not discrimination has taken place under Protocol No. 12 is the same as the test previously applied under Article 14.[70] The Court held in *Sejdić and Finci* that, despite the difference in scope between Article 14 and Article 1 of Protocol No. 12, the meaning and application of the term "discrimination" was intended to be the same.[71] In *Zornić v Bosnia and Herzegovina* ("*Zornić*"), the applicant claimed violations of Article 1 of Protocol No. 12 and Article 3 of Protocol No. 1, alone and in conjunction with Article 14. The Court reaffirmed its approach to the term "discrimination" and noted that "*the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner*"[72] and thus considered the complaint under both provisions simultaneously.[73] It was held that the conduct of the State amounted to a violation of Article 1 of Protocol No. 12 as well as Article 14 in conjunction with Article 3 of Protocol No. 1.

32. In *Case of Savez Crkava "Riječ Života" and Others v Croatia*, the Court took a different approach to examining the prohibition on discrimination. After finding a violation of Article 14 in conjunction with Article 9 with respect to the provision of religious education and the recognition of religious marriages, it did not find it necessary to examine the complaint under Article 1 of Protocol No. 12.[74] However, this case is distinguishable from *Zornić* insofar as it did not involve discrimination based on ethnicity, recognised by the Court as a form of racial discrimination, which is "*a particularly invidious kind of discrimination, and in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.*"[75]

VI. The prohibition on discrimination and freedom of movement

33. The International Convention on the Elimination of All Forms of Racial Discrimination obligates States parties to guarantee that everyone is equal before the law in the enjoyment of a number of fundamental rights, including the right to freedom of movement and residence and the right to leave any country, including one's own, and to return to one's country.[76] In its

[68] *Ibid*, para 184.
[69] Explanatory Report, *supra* note 60, para 22.
[70] *Sejdić and Finci v Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, Judgment 22 December 2009, para 55.
[71] *Sejdić and Finci v Bosnia and Herzegovina*; *Pilav v Bosnia and Herzegovina*, Application No. 41939/07, Judgment 9 June 2016, para 40.
[72] *Zornić v Bosnia and Herzegovina*, Application No. 3681/06, Judgment 15 July 2014, para 36.
[73] *Ibid*, paras 27-8.
[74] *Case of Savez Crkava "Riječ Života" and Others v Croatia*, Application No. 7798/08, Judgment 9 December 2010, paras 114-15.
[75] *Timishev v Russia*, *supra* note 37, para 56.
[76] ICERD, *supra* note 59, art 5.

General Recommendation No. 13, CERD emphasised that States parties have undertaken to "*guarantee the rights listed in article 5 of the Convention to everyone without distinction as to race, colour or national or ethnic origin.*"[77]

34. In the case of the Roma, the Court has held that "*as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority...They therefore require special protection.*"[78]

35. The burden of proof on the State in proving an objective and reasonable justification is especially high in relation to racial discrimination, which as mentioned above, is a particularly invidious kind of discrimination. Direct and explicit racial discrimination by State authorities is considered amongst the most egregious types of discrimination, the prohibition of which is widely accepted as customary international law and even *just cogens*.[79] Thus, a Respondent State will bear a very heavy burden when seeking to establish an objective and reasonable justification for direct, racial and ethnic discrimination against a community which, it is well-established, requires special protection. In the Intervener's view, this burden would extend to cases involving marginalised communities', including the Roma, right to free movement. As discussed above at paragraph 27 of these Submissions, the Court's case law shows that differences in treatment based directly on race or ethnicity are not capable of justification and amount to direct discrimination. The case in which this principle arose was *Timishev v Russia*, in which the applicant claimed a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 4, after being denied entry to the republic in which he lived at state checkpoint.[80] The Court found that the order denying his entry was targeted at individuals of both actual and perceived Chechen ethnicity and ruled that there had been a "*clear inequality of treatment*", based on ethnic origin, to the right of freedom of movement.[81] The Council of Europe Commissioner for Human Rights has posited that this ruling has far-reaching implications as regards freedom of movement and the prohibition on discrimination: "*The reasoning of the Court is clearly also applicable to situations where people are hindered or prevented from leaving a country (including the withdrawal of travel documents or the refusal to issue them) on the basis of their ethnicity, actual or imputed.*"[82]

[77] Committee on the Elimination of Racial Discrimination, *General recommendation XIII on the training of law enforcement officials in the protection of human rights*. 1993, para 1.
[78] *Oršuš and Others v Croatia*, Application No. 15766/03, Judgment 16 March 2010, para 147.
[79] See e.g. International Court of Justice Namibia Case 1971, para 17; Dissenting Opinion of Judge Tanaka in the South West Africa Cases (Second Phase), ICJ Reports (1966), para 298; Advisory Opinion 18/2003 of the Inter-American Court of Human Rights, declaring non-discrimination a principle of *jus cogens,* because the entire legal structure of public order rests on it; Christopher McCrudden, *International and European Norms Regarding National Legal Remedies for Racial Inequality* 251, in DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM (ed. Sandra Fredman 2001).
[80] The applicant claimed violations of a number of provisions of the Convention, which are not discussed here.
[81] *Timishev v Russia*, *supra* note 37, para 54.
[82] Issue Paper, *supra* note 2, page 39.

ANNEX I

Details of the Intervener

Minority Rights Group International ("MRG") is a non-governmental organisation based in London working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide. Over 45 years, MRG has developed significant experience in the fields of minority rights, anti-discrimination and human rights law and as a result has extensive knowledge of relevant international legal standards and jurisprudence. MRG has been involved in human rights litigation in countries ranging from Kenya to Bosnia, including representing Mr Finci in the case of *Sejdić and Finci v Bosnia and Herzegovina* (Application Nos. 27996/06 and 34836/06), and has submitted *amicus* briefs before a range of international bodies, including in the following cases before the European Court of Human Rights (the "Court"): *Yumak and Sadak v Turkey* (Application No. 10226/03), *DH and others v the Czech Republic* (Application No. 57235/00), *Chagos Islanders v the United Kingdom* (Application No. 35622/04), *Pilav v Bosnia and Herzegovina* (Application No. 41939/07) and *Bagdonavicius v Russia* (Application No. 19841/06).