IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 31016/17

BETWEEN:

Fatmir Memedov

Applicant

- and -

the former Yugoslav Republic of Macedonia

Respondent

- and -

Minority Rights Group International

Intervener

SUBMISSIONS ON BEHALF OF THE INTERVENER

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9 November 2018

I. INTRODUCTION

1. This Intervention is made by Minority Rights Group International (the "Intervener") in relation to *Fatmir Memedov v the former Yugoslav Republic of Macedonia* (Application No. 31016/17) ("*Memedov*"), pursuant to leave granted by the President of the Court by letter dated 19 October 2018, in accordance with Rule 44(3) of the Rules of the Court. Details of the Intervener are set out at Annex I to these Submissions.

2. The Intervener makes this intervention on the understanding that the instant case seeks to establish that there exists institutional discrimination within the Macedonian police against members of the Roma community by relying on the discriminatory acts suffered by the Applicant and other members of the Roma community, together with wider evidence of a *de facto* situation in which the Roma community are treated differentially by the Macedonian police.

3. *Memedov* therefore raises the critical issue of how the Court can make a finding of institutional discrimination based on the existing legal framework on the prohibition of discrimination which is contained in Article 1 Protocol 12 ("A1P12") of the European Convention on Human Rights (the "ECHR" or the "Convention"), and Article 14 ECHR.

4. Despite the Court's extensive jurisprudence related to discrimination under Article 14 ECHR, the jurisprudence in relation to claims under A1P12 is very limited, and even more so in relation to institutional discrimination. The Intervention therefore sets out the relevant legal principles that underpin the prohibition of discrimination that are relevant to the Applicant, and the relevant case law and literature on institutional discrimination. In so doing it is anticipated that the Intervention will assist the Court in discharging its function in accordance with "the interests of the proper administration of justice" (Rule 44(3)(a)).

II. PROHIBITION OF DISCRIMINATION

A. International Standards

5. 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*",[1] while the International Covenant on Civil and Political Rights ("ICCPR") requires States to respect and ensure the rights it recognises without distinction based on these same grounds.[2] Article 26 of the ICCPR, which entitles all persons to equal protection of the law, has been recognised by the Human Rights Committee as "*[prohibiting] discrimination in law or in fact in any field regulated and protected by public authorities*."[3] 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.[4]

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1 *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art 2.

2 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, art 2(1).

3 Human Rights Committee, *General Comment No. 18: Non-discrimination*, 10 November 1989, para 12.

4 *International Convention on the Elimination of All forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, art 2(1)(a).

B. ECHR

6. Article 14 ECHR provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

7. A1P12 provides:

> 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

C. Relationship between Article 14 ECHR and A1P12

8. The Court has developed extensive jurisprudence with respect to Article 14 ECHR, which prohibits discrimination in conjunction with other rights protected by the Convention. Article 14 ECHR explicitly limits the scope of its protection to "*the enjoyment of the rights and freedoms set forth in [the] Convention*". As such, Article 14 ECHR is accessory in scope, and its application is contingent upon the facts of the case falling within the ambit of another Convention provision. Article 14 ECHR is therefore reviewed in conjunction with other Convention provisions.

9. In contrast, A1P12 is a general non-discrimination clause which does not have the constraints of Article 14 ECHR. Article 1(1) of A1P12 extends the prohibition on discrimination to "*any right set forth by law*",[5] while Article 1(2) of A1P12 quite simply prohibits discrimination "*by any public authority*".[6] A1P12 therefore acts as a prohibition on discrimination provision which "*encompasses, but is wider in scope than the protection offered by Article 14 of the Convention*."[7]

10. In *Sejdić and Finci v Bosnia and Herzegovina* ("*Sejdić and Finci*"), the first case in which A1P12 was considered, the Court ruled that the test for determining whether or not discrimination has taken place under A1P12 is the same as the test previously applied under Article 14 ECHR.[8] The Court held in *Sejdić and Finci* that, despite the difference in scope

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5 Elsewhere, the Court has interpreted that the word "law" encompasses not only to statutory law but also to common law, customary law, and case law. *See, e.g., SW v the United Kingdom*, Application No. 20166/92, Judgment 22 November 1995, para 46. The Explanatory Report explains that the word "law" may also extend to international law. 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 29 [hereinafter Explanatory Report].

6 The term "public authority" covers not only administrative authorities but also courts and legislative bodies. *Ibid*, para 30.

7 *Ibid*, para 33.

8 *Sejdić and Finci v Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, Judgment 22 December 2009, para 55.

between Article 14 and A1P12, the meaning and application of the term "discrimination" was intended to be the same.[9]

11. As such, A1P12 and Article 14 ECHR are intended to be identical and will likely be interpreted in concert on all issues other than those related to the clear difference in scope between them.[10] In other words, where the scope of material protection under A1P12 coincides with Article 14 ECHR, the Court should take existing Article 14 ECHR case law as the starting point.

12. The Explanatory Report to Protocol No. 12 (the "Explanatory Report") explains that the Committee of Ministers adopted the text of Protocol 12 in June 2000 to stem the alarming resurgence of racism and intolerance across Europe by strengthening the protection from discrimination afforded by the Convention, and in particular Article 14 ECHR.[11]

13. The Explanatory Report also clarifies that it broadens the scope of protection to cover instances where a person faces discrimination:

> i. In the enjoyment of any rights specifically granted to an individual under national law;
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> 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;
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> iii. By a public authority in the exercise of discretionary power (for example, granting certain subsidies);
>
> iv. By any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot). [12]

14. Article 1(1) and Article 1(2) of A1P12 are complimentary and their combined effect is that the material scope of A1P12 extends to the four scenarios set out above.[13]

D. Burden of proof

15. The operation of Article 14 ECHR and A1P12 require an applicant to establish a *prima facie* case of discrimination pursuant to which the burden of proof shifts to the respondent State to prove that the discrimination (in whatever form) was justified.[14]

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9 *Ibid*, para 55; *Pilav v Bosnia and Herzegovina*, Application No. 41939/07, Judgment 9 June 2016, para 40.

10 Oddny Mjöll Arnardóttir, EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2003), p. 41. In particular, regarding how the Court interprets the term "discrimination". In its Opinion to the draft of Protocol 12, the Court noted that "[a]s regards the substantive content of the protocol, [the Court] notes, in relation to Article 1, that the draft explanatory report (see paragraph 18) refers to the notion of discrimination as consistently interpreted in the case-law of the Court, namely that a difference of treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised." Parliamentary Assembly of the Council of Europe, Communication from the Committee of Ministers Doc. 8608, *Opinion of the European Court of Human Rights on draft Protocol No. 12 to the European Convention on Human Rights*, 5 January 2000, para. 5.

11 *See* Explanatory Report, *supra* note 5, paras 7-10, 14.

12 *Ibid*, para 22.

13 *Ibid*, para 23.

16. In *DH and others v Czech Republic*, the Court clarified that in cases of indirect discrimination, an applicant does not need to establish discriminatory intent before the burden of proof shifts to the respondent.[15] As such, the Court found that indirect discrimination may arise following a difference in treatment which:

> may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminated against a group.[16]

17. In reaching this finding the Court relied on, *inter alia*, the European Commission against Racism and Intolerance ("ECRI") General Policy Recommendation No. 7 which identifies indirect racial discrimination as occurring in cases where:

> an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification.[17]

18. Council Directive 2000/43/EC implementing the principle of equal treatment irrespective of ethnic origin (the "EC Race Directive") sets out a similar definition:[18]

> (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
>
> (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[19]

19. In cases of indirect discrimination, the reasons for the difference in treatment may be unwitting or covert as the policy or practice is facially neutral. Accordingly, institutional forms of structural discrimination often take the form of indirect discrimination, only discernible through the racist outcomes of the institution's policies or practices.[20]

20. For this reason, the Court has recognized that in cases of indirect discrimination, statistical evidence of the disparate impact of a policy or practice is sufficient to establish a *prima facie* case of discrimination, which then has the effect of shifting the burden of proof on to the respondent State. In *DH and others v Czech Republic*, the Court clarified that:

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14 See, among other authorities, *Chassagnou and Others v. France*, Application Nos. 25088/94, 28331/95 and 28443/95, Grand Chamber Judgment, paras 91-92; Timishev v Russia, Application Nos. 55762/00 and 55974/00, para 57.

15 *DH and others v Czech Republic*, Application No. 5732/00, Grand Chamber Judgment 13 November 2007 para 184 (citations omitted).

16 *Ibid* (citations omitted).

17 European Commission against Racism and Intolerance, *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, 13 December 2002 (as amended on 7 December 2017), Definitions, para 1(c) [hereinafter ECRI General Policy Recommendation No. 7].

18 While EC law does not extend to discrimination with respect to civil and political rights, the evil that they seek to address and the principles for which they stand are applicable across fields of discrimination.

19 Council Directive 2000/43/EC of 29 June 2000 implementing the principles of equal treatment of persons irrespective of race or ethnic origin, art 2(2) [hearinafter EC Race Directive].

20 See *infra* Section III.

> In these circumstances, the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however mean that indirect discrimination cannot be provided without statistical evidence. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts onto the respondent State, which must show that the difference in treatment is not discriminatory. Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case, it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.[21]

21. The Court in *Hoogendijk v The Netherlands* explained the logical justification for the operation of the shifting burden of proof:

> [i]f the onus of demonstrating that a difference in impact . . . is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.[22]

22. There is a close relationship between the standard of proof required to establish a *prima facie* case of discrimination and the effective protection of victims of discrimination. The higher the standard of proof and the more rigidly it is applied, the more alleged violators are protected, and the more difficult it is for victims to access redress. This is all the more concerning in cases involving allegations of racial discrimination, which courts recognize is a particularly insidious form of discrimination that merits strict scrutiny.[23]

23. Courts and international bodies have recognized the evidentiary difficulties associated with racial discrimination claims and have adjusted their evidentiary standards by way of adopting an expansive approach to the prohibition on discrimination. Although the Court has maintained that applicants must prove a Convention breach beyond a reasonable doubt, it has clarified that it has never intended to adopt the approach of national legal systems that use that standard. The Court has adopted a flexible approach noting that:

> its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 . . . conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof

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21 *DH and others v Czech Republic*, *supra* note 15, paras 188-189.

22 *Hoogendijk v. the Netherlands*, Application No. 58641/00, Decision on Admissibility 6 January 2005, p 22.

23 *See, e.g.*, *DH and others v Czech Republic*, *supra* note 15, para 176.

> are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.[24]

24. The case law of the Court is consistent with the position of the ECRI which acknowledges that the law should facilitate proof of discrimination given "*the difficulties complainants face in collecting the necessary evidence in discrimination cases*."[25] Therefore the ECRI has recommended that if a victim of discrimination establishes "*before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination*."[26] In addition, the ECRI recommends that intent is not required to establish a *prima facie* case of either direct or indirect discrimination.[27]

25. The EC Race Directive similarly provides that where a person establishes "*facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*"[28] Pursuant to the EC Race Directive many EU Member and Accession States have introduced—and all must introduce—legislation to shift the burden of proof in race discrimination cases.[29] The EC Race directive recognizes that statistics may be used to establish indirect discrimination.[30]

III. INSTITUTIONAL DISCRIMINATION

A. Jurisprudence

26. The Court's decision in *Opuz v Turkey* is perhaps the closest that the Court has come to considering a claim of institutional discrimination. Although the Court did not expressly

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24 *Nachova v Bulgaria*, Application Nos. 43577/98 and 4359/98, Grand Chamber Judgment 6 July 2007, para 147.

25 ECRI Policy Recommendation No. 7, *supra* note 17, p. 17 para 29.

26 *Ibid*, p. 7 para 11.

27 *See ibid*, p. 17 para 29.

28 EC Race Directive, *supra* note 19, art 8. A similar provision is made in Council Directive 2002/73/EC of 23 September 2002 amending the Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Equal Treatment Directive).

29 Legislation to this effect has been adopted in: Belgium, Article 19(3) 2003 Act; Bulgaria, Article 9 Protection Against Discrimination Act; Croatia, Article 20 Anti-discrimination Act (entered into force on 1 January 2009); Czech Republic, Code on Civil Court Procedure through Amendment No. 151/2002; Denmark, Section 7 Act on Ethnic Equal Treatment; Article 7 Law on equal treatment (racial or ethnic origin) N. 59(I)/2004; Estonia, Article 8 Equal Treatment Act; Finland, Article 17 Equality Act; France, Article L 122-45 Labour Code (only in labour-related discrimination cases); Greece, Article 9 of Equal Treatment Law 4443/2016; Hungary, Article 19 ETA; Italy, to limited extent Article 3(4) Decree 215/2003; Ireland, Articles 38 and 64 Equality Act 2004; Latvia, Article 29(3) Labour Law, Articles 103(2) and 150 Administrative Procedure Law (entry into force 2004); Lithuania, Article 4 Law on Equal Treatment; Luxembourg, Article 5 Law of 28 November 2006; the Netherlands, Article 10.1 Algemene Wet gelijke behandeling; Montenegro, Article 29 Law on the Prohibition of Discrimination; Poland, only in employment cases: Articles 183(b) Labour Code, included in draft bill on the General Inspectorate for Counteracting Discrimination; Portugal, Article 25(5) of the Labour Code; Romania, 2013 amendments to Articles 20 and 27 Anti-discrimination Law; Slovakia, section 13(5) new Labour Code; Slovenia, Articles 6(4) and 45(3) Employment Relationship Act; Spain, Articles 32 and 36 Law 62/2003; Sweden, Act on Measures Against Ethnic Discrimination in Working Life, Act on the Prohibition of Discrimination 2003: section 307, Equal Treatment of Students at Universities Act; Turkey, Articles 5(7) and 18c and read with Article 20(2) new Labour Code; United Kingdom, Section 136 Equality Act 2010.

30 EC Race Directive, *supra* note 19, para 15.

refer to institutional discrimination in its judgment, it did rely on evidence of unwitting structural discrimination at an institutional level in concluding that Turkish authorities had breached Article 14 ECHR in conjunction with Articles 2 and 3 ECHR. While the Court did not expressly refer to it as a case of indirect discrimination, it nevertheless applied the relevant anti-discrimination principles set out in *DH and others v Czeck Republic* (a case of indirect discrimination).[31] It concluded, based on statistics adduced by the applicant, that both overt and unconscious gender biases in the Turkish criminal justice system had disadvantaged the applicant and her mother, as victims of gender violence (a form of gender discrimination), vis-à-vis men. The statistical evidence relied on by the applicant revealed a widespread pattern of conduct and attitudes held by members of the police and the judiciary that created a climate that was conducive to domestic violence. This climate of institutional tolerance toward domestic violence meant that legal remedies available to victims of domestic abuse were ineffective. In particular, the reports showed that when victims reported domestic violence to police stations, rather than investigate the crimes, police officers acted as mediators, trying to convince victims to drop the charges and go home. Evidence also showed excessive delays by courts issuing protective injunctions and a tendency to issue mitigating sentences on the grounds of custom, tradition, or honour.[32]

27. The Court held that the applicant was:

> able to show, supported by unchallenged statistical information, the existence of a prima facie indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey [albeit unintentionally] created a climate that was conducive to domestic violence.[33]

28. In so doing, the criminal justice system in Turkey had failed to adequately deter gender-based crimes. The pattern of institutional conduct (which mainly affected women) and "*the ineffectiveness of domestic remedies in providing equal protection under the law*" amounted to a violation of Article 14 ECHR in conjunction with Articles 2 and 3 ECHR.[34]

29. The Court's decision in *Opuz v Turkey* therefore confirms that the legal principles related to standard of proof and evidence involved in determining a claim of indirect discrimination apply equally to claims of structural discrimination at an institutional level. That is to say, the Court accepts statistical evidence of disparate impact as sufficient to establish a *prima facie* case of structural discrimination, pursuant to which the burden of proof is passed to the public authority to prove that the *de facto* structural discrimination is not discriminatory.

30. Similarly, in the Inter-American system on human rights, the Inter-American Commission on Human Rights (IACHR) found institutional racism in the way Brazilian authorities, and in particular, criminal justice institutions, failed to apply anti-discrimination laws in Brazil.[35] In coming to this conclusion the IAHCR found prejudice

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31 *Opuz v Turkey*, Application No. 33401/02, Judgment 9 June 2009, para 183.

32 *Ibid*, paras 195-198.

33 *Ibid*, para 197.

34 *Ibid*, paras 199-202.

35 *Simone André Diniz v Brazil*, Inter-American Commission of Human Rights, Report No. 66/06, 21 October 2006, para 84 (citations omitted) (Free English translation). Referring to information provided by the applicant, the Commission emphasised that the discriminatory treatment of racially-motivated crimes in

against black people in the areas of witness evidence, police investigations, and decisions of the justice system.[36] The IACHR pointed to the discriminatory treatment of racially-motivated crimes in Brazil, both in the investigatory and judicial phase, noting that it reflected public officials' racial biases as evidenced in the way they treated such claims.

31. The IACHR found that the practice by public officials had the effect of constituting indirect discrimination because it prevents the recognition of the right of a black citizen not to be discriminated against, and the exercise or enjoyment of that same citizen's right to access justice as a means to seek redress for that violation. The IACHR found that this practice had a negative effect on the population Afro-descendant population in general terms.[37]

32. In coming to these findings of institutional discrimination, the IACHR relied on a wide variety of statistical evidence that demonstrated differential treatment by the black population in Brazil. These included, *inter alia*, higher rates of poverty,[38] illiteracy,[39] child mortality,[40] illegal detentions,[41] and police violence[42] experienced by black people in Brazil, together with an underrepresentation of the black population in the job market.[43]

B. Literature

33. The most relevant authoritative definition on institutional discrimination is provided by the MacPherson Report into institutional discrimination within the UK Metropolitan Police. Also known as the Stephen Lawrence Inquiry in the UK, it was published following the public inquiry into matters arising from the death of Stephen Lawrence.

34. The MacPherson Report found, *inter alia*, that the British Metropolitan Police was institutionally racist. It defined institutional discrimination through the prism of institutional racism as:

> [t]he collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.[44]

Brazil, whether in the investigatory or judicial phase, noting that it reflected public officials' racial biases as evidenced in the way they treated these claims. Public officials often pointed to the absence of elements that typified the crime and the difficulty in proving discriminatory intent whenever the perpetrator denied intending to discriminate against the victim as factors for not prosecuting claims. According to the Commission, there was also a tendency to minimize the racial animus of perpetrators, making it seem like a misunderstanding. *Ibid*, para 85.

36 *Ibid*, para 85.
37 *Ibid*, para 86.
38 *Ibid*, para 45.
39 *Ibid*, para 46.
40 *Ibid*, para 47.
41 *Ibid*, para 50.
42 *Ibid*, paras 51-52.
43 *Ibid*, para 53.
44 *The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny, advised by Tom Cook, the Right Reverend Dr. John Sentamu, Dr. Richard Stone, presented to Parliament by the Secretary of State for the home Department*, February 1999, para 6.34 [hereinafter Macpherson Report].

35. In reaching the finding of the existence of institutional racism within the Metropolitan Police, the MacPherson Report adopted a holistic approach to the factors that it considered. These factors were:

> (a) in the actual investigation including the family's treatment at the hospital, the initial reaction to the victim and witness Duwayne Brooks, the family liaison, the failure of many officers to recognise Stephen's murder as a purely "racially motivated" crime, the lack of urgency and commitment in some areas of the investigation.
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> (b) countrywide in the disparity in "stop and search figures". Whilst we acknowledge and recognise the complexity of this issue and in particular the other factors which can be prayed in aid to explain the disparities, such as demographic mix, school exclusions, unemployment, and recording procedures, there remains, in our judgment, a clear core conclusion of racist stereotyping;
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> (c) countrywide in the significant under-reporting of "racial incidents" occasioned largely by a lack of confidence in the police and their perceived unwillingness to take such incidents seriously. Again we are conscious of other factors at play, but we find irresistible the conclusion that a core cause of under-reporting is the inadequate response of the Police Service which generates a lack of confidence in victims to report incidents; and
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> (d) in the identified failure of police training; as evidenced by the HMIC Report, "Winning the Race" and the Police Training Council Report, and the clear evidence in Part 1 of this Inquiry which demonstrated that not a single officer questioned before us in 1998 had received any training of significance in racism awareness and race relations throughout the course of his or her career.[45]

36. In citing submissions made by the UK's Commission for Racial Equality, the MacPherson Report concluded that institutional racism is a concept that refers to the way in which:

> an institution or organisation may systemically or repeatedly treat, or tend to treat, people differently because of their race.[46]

37. Importantly, the MacPherson Report found that institutional racism can exist irrespective of the subjective intent of the individuals carrying out the activities of the institution:

> If racist consequences accrue to institutional laws, customs or practices, the institution is racist whether or not the individuals maintaining those practices have racial intentions.[47]

38. In his submissions to the Inquiry, Doctor Robin Oakley, Honorary Research Fellow at the Centre for Minority Studies, Royal Holloway, University of London, submitted that in the context of law enforcement, institutional racism can be evidenced by differential outcomes in policing that disproportionately impact members of a minority group.[48]

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45 *Ibid*, para 6.45.

46 *Ibid*, para 6.28. *See also* para 6.32.

47 *Ibid*, para 6.30 (citing Commission for Racial Equality Submission).

48 *See* Robin Oakley, *Supplemental Submission to the Stephen Lawrence Inquiry Commission: Note on the Meaning of "Institutional Racism"*, September 1998, paras 3.3-3.4.

39. This was supported by Doctor Benjamin Bowling, Professor of Criminology and Criminal Justice, King's College London, who submitted to the Inquiry that:

> policing can be discriminatory without this being acknowledged or recognised, and in the face of official policies geared to removal of discrimination. . . . Institutional racism affects the routine ways in which ethnic minorities are treated in their capacity as employees, witnesses, victims, suspects and members of the general public.[49]

40. The MacPherson Report also found that institutions such as police services can "*operate in a racist way without at once recognising their racism*"[50] and clarified that there was no evidence to support the conclusion that "*an accusation that institutional racism exists...implies that the policies...are racist*".[51]

41. The principles identified by the MacPherson Report in the context of identifying institutional discrimination by the British Metropolitan Police are reflected in the views of ECRI in relation to the treatment of the Roma. The ECRI considers that the Roma face a form of entrenched structural discrimination across Europe that is deeply rooted in a historical and social context that reproduces and perpetuates their social disadvantage vis-à-vis the majority population.

42. ECRI defines this form of structural discrimination, or "anti-gypsyism", as:

> a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination.[52]

43. The importance of identifying and providing guidance in relation to cases of institutional discrimination is emphasised by Edward Telles, a scholar the Inter-American Commission, who in relation to the finding on institutional discrimination by the IACHR concluded that:

> . . . conscious and explicit racism, in the form of racial insults . . . is less significant in maintaining racial inequality that the subtle practices of individuals and institutions, commonly referred to as 'institutional racism' . . . such practices derive in a way of thinking that naturalizes racial hierarchy and probably cause more harm . . .[53]

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49 Macpherson Report, *supra* note 44, para 6.33 (citing Benjamin Bowling, *Violent Racism: Victimisation, Policing and Social Context*, July 1998, pp. 3-4, paras 21-22).

50 *Ibid*, para 6.23.

51 *Ibid*, para 6.24

52 European Commission against Racism and Intolerance, *General Policy Recommendation No. 13 on Combating Anti-Gypsyism and Discrimination against Roma*, September 2011, p. 3. *See also* European Parliament resolution of 15 April 2015 on the occasion of International Roma Day — anti-Gypsyism in Europe and EU recognition of the memorial day of the Roma genocide during World War II, 15 April 2015 (recognizing the phenomenon of anti-gypsyism as defined in ECRI General Policy Recommendation No. 13); Concurring Opinion of Judge Pinto de Albuquerque in *Vona v Hungary*, Application No. 35943/10, 9 July 2013 (acknowledging the rise of anti-gypsyism across Europe).

53 *Simone André Diniz v Brazil*, *supra 35*, para 88 (citing Edward Telles, *Racismo á Brasileira*, *Uma Nova Perspectiva Sociológica*, 2003, p. 236) (Free English translation).

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. For 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).