THESIS

Rights on the Fringe - A Study of Discrimination, Expulsions and Protections of Roma at European Borders

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Table of Contents

Introduction

With 12 million on the continent overall and 6 million in the European Union, the Roma are Europe's largest ethnic minority group. An umbrella term covering hundreds of subgroups, including Romani, Sinti, and Traveller populations across the continent, individual groups have, 'out of policy and terminology convenience', been included within a broad notion of Roma[1]. Facing discrimination in contexts from housing, education, and policing, the Roma have been recognised by the European Court of Human Rights (ECtHR) as a 'uniquely vulnerable group', owing to their history of displacement and persecution[2]. While these abuses are well documented, somewhat inaccurate stereotypes of the Roma as 'nomadic troublemakers 'underscore public perceptions across Europe. Despite this, relatively little comprehensive literature exists on the discrimination faced by Roma in migratory contexts - that is, specifically, at borders. Exploring discrimination at point of entry, exit, and wider issues of status, this thesis will discuss the plight of the Roma in this uniquely fragile context and will assess the effectiveness of the ECtHR and EU mechanisms in offering protection.

This thesis is inspired by two lines of enquiry. Firstly, in light of recent academic attention given to migration and Europe's colonial borders, it is interesting to note the lack of attention given to the issue of Roma migration in this context. Like many former colonial subjects and their descendants, Roma are 'crossed 'by borders in their own countries and regions. This issue will be examined through the theoretical portion of this thesis, which will explore issues underpinning assumptions of Roma migration: namely, racialisation, conceptual statelessness, nomadism, and securitisation. An examination of these concepts will reveal how stereotypes of Roma as a racialized group lead to limitations of their freedom of movement.

The second line of enquiry is on the effectiveness and limitations of the legal protections of Roma movement, and the political considerations that undermine them. Roma migration remains a preoccupation of European states and academics alike, over-emphasised and essentialised, yet failing to become a true priority of human-rights-based policy. This thesis will examine the case law underpinning key areas of protection: freedom of movement and racial profiling through the case study of Northern Macedonia; non-refoulement and individual protections against expulsion through the case study of Germany and Romani returnees to Kosovo; and collective expulsion, through the case study of EU action against French expulsions. I strive to examine the pitfalls of facially neutral law and policy in each of these case studies and to tease out where such neutrality hides not inadvertent exclusion but deliberate tactics to marginalise and securitise.

Methodology

As Roma migration is itself a topic of mammoth proportions, spanning various disciplines, it is important to define the parameters of this thesis from the outset. Firstly, this thesis focuses exclusively on the discrimination faced by Roma in migratory contexts, in specific relation to border control and immigration policy. Additionally, this thesis will be aware of the limitations of generalising Roma as an ethnic group, in light of linguistic and cultural differences as well as the

[1] Ferreira, N, and Kostakopoulou, D, 'The Roma and EU Citizenship: In Search of a Humane Answer From The EU' (2015)
[2] D.H. and Others v Czech Republic (ECtHR) [2007]

differing experiences of Roma in *in situ* and migratory contexts and differing migratory patterns[3]. Therefore, to best demonstrate the legal concepts I wish to discuss, this thesis will primarily focus on case studies involving Balkan and Eastern European Roma.

Owing to the fairly limited impact of the work of the UN on the situation of Roma migration in Europe, these cases will not be discussed in this thesis. The approach of this paper will primarily be sociolegal, using national case studies against which to evaluate regional doctrine. Rather than aiming to 'litigate 'conclusively, I wish to draw on empirical sources to present the 'law in context', which I consider to be especially important in light of the lack of official disaggregated data on the matter. My approach will be based on considering how various case studies involving Roma populations in migratory contexts fit the existing framework of European and EU legal protections and case law, as they continue to shift and develop at a time of increased tensions over national borders.

Throughout this thesis, I aim to contextualise the treatment of Roma in migratory contexts with the political implications and the role of deals controlling migration in international relations. In the ongoing debates over the Schengen Area and further EU expansion, the crisis of solidarity has very much found its roots in who is controlling the borders of Europe, and who is 'abusing' the freedom of movement. Looking at Europe today, a conversation of critical whiteness and European identity is essential to forge a path forward that shapes our idea of European identity on values of inclusion, not what may be deemed as a policy of strategic exclusion. In addition to the post-9/11 phenomena of racial profiling at borders, I believe now is an apt time to consider what protections exist and to examine the justifications of sovereignty and public security that rarely receive sufficient scrutiny. Noting the reality that many of those deported return, this thesis will consider regional politics in contextualising its findings, and will argue that efforts to restrict Roma movement internationally are primarily populist grandstanding, scapegoating Roma on 'law and order 'grounds and trading off Roma rights with those of (typically) white Europeans.

Finally, this thesis will argue that ultimately, while some tools exist to challenge removals and refusals, protections are not sufficient in the case of Europe's Roma populations, in particular in challenging the specific racial elements at the heart of such policies.

[3] Okely, J, 'Nomadism Celebrated by Gypsies and Travellers, But Seemingly Stigmatised By Post-Communist Roma' (2017)

Chapter 1: Context and Theories of Roma Migration in Europe

This chapter will discuss the paradigms of Roma migration and the subsequent associated stigma. These frameworks contextualise the discrimination faced by Roma at borders across Europe, including those to leave and (re)enter their own countries and travel freely in their region, cases of which we shall discuss in later chapters.

The Roma are thought to originate from the Indian subcontinent, with records suggesting arrival in Europe in the 13th Century[4]. While linguistic connections indicate a starting location of Roma migration centuries ago, with 'gypsylorist 'scholars exoticising Roma as 'born wanderers Roma ,[5]' groups have been present in Europe for over seven centuries, outnumbering several presupposed nationalities[6]. From arrival, the freedoms of Roma were tightly restricted: Hancock writes that institutionalised anti-gypsyism began in the fourteenth century, with the slavery of Roma in Romania, and continues to this day[7]. Such discrimination permeates most areas of life, not least including freedom of movement.

Roma migration is chronically misunderstood. According to Cahn and Guild, 'information on Roma migration has, if anything, been over-produced', with the arrival of a few hundred Roma migrants triggering 'front-page coverage', but that 'beyond a few micro-scenarios, reliable statistical data on Romani migration is largely unavailable[8]'. Sardelić writes that 'much of academic literature, like public discourse, gives the impression that Roma are a highly mobile population due to their 'nomadic culture''; that 'on the one hand, historically Roma have not been allowed to settle (…) on the other hand, today's states invent new ways to limit their freedom of movement, contributing to their forced (irregular) mobility.[9]'

Major factors behind flows of Roma migration have shifted and changed in recent decades, from migrant workers to Western Europe in the 1970s (in particular those from former Yugoslavia), to displacement as a result of war and state secession in the Balkans in the 1990s and 2000s, to EU expansion in the late 2000s[10]. Focusing our attention on the international migration of Eastern European and Balkan Roma, the primary push and pull factors in recent years are similar to other migrants from the regions. In a 2013 policy paper from the United Nations Development Programme (UNDP), Roma migration patterns from Southern and Eastern Europe were compared to those of non-Roma from the same regions. The report found that slow population growth and population decline, as well as economic concerns, lead to migration towards Western Europe among Roma and Non-Roma, with the largest outflows between 2001 and 2010 being from Romania and Albania[11]. While 'a better life 'and 'greater work opportunities 'were factors for migration raised by both groups, 'the situation of the Roma tends to be worse', with discrimination in the country of origin being among the most important reasons for labour market exclusion[12]. While less than 1% of Roma surveyed said discrimination was their primary reason for migrating, indirect discrimination leading to inadequate living conditions and impaired access to employment and education are key socio-economic factors that directly link outcomes for Roma with migration.

[4] Augustyn, 'Roma', Encyclopaedia Britannica (accessed via: https://www.britannica.com/topic/Rom)
[5] Ibid.
[6] Yildiz and De Genova, 'Un/Free Mobility: Roma Migrants In The European Union' (2019)
[7] Vadja, 'Nothing About Us Without Us? Roma Participation in Policy Making and Knowledge Production' (2015) p5
[8] Cahn and Guild, 'Recent Migration of Roma in Europe' (2008)
[9] Sardelić, 'How Do Borders 'Cross' Roma?' (2018)
[10] Cherkezova and Tomova, 'An Option of Last Resort? Migration of Roma and Non-Roma from CEE Countries' (UNDP) (2013)
[11] Cherkezova and Tomova, loc.cit. p80
[12] Cherkezova and Tomova, loc.cit. p55

As such, the EU Fundamental Rights Agency (FRA) lists poverty and racism as the two main 'push 'factors for Roma migration[13].

Irregular stay and travel can be a legitimate issue for Roma for various reasons. For EU-citizen Roma, unawareness of complicated residence requirements or lack of resources to register legitimately may be an issue; for others, a distrust of authority may be a factor that leads to avoiding registration[14]. In some cases, statuses granted by authorities force precarity; others lack documentation or are stateless[15]. Nevertheless, it must not be ignored that European states have and do contravene international and European legal standards to impose discriminatory restrictions on Roma freedom of movement. Despite a 'mainstreaming approach 'to Roma policy in both the Council of Europe and the European Union, the issue of protecting Roma groups from discrimination in migratory contexts has fallen by the wayside, with no mention of protection of equal freedom of movement rights in recent EU strategies[16].

In modern times and the age of global capitalism, mainstream conceptions revolve around discriminatory notions of the Roma as 'vagabonds, criminals, untrustworthy and inherently nomad(ic)', characterised as an 'unproductive-surplus population movement Roma on Controls .[17]' are therefore primarily based in one or more of the following theories. All of the below factors are subtly different, but are interrelated and in some instances blur into each other.

Racialisation

Yildiz and De Genova argue that 'there can be no studies into the very meaning of Europeanness or the politics of European identity (…) that (do) not situate these questions of Roma racialisation and subjugation at its centre Critical or Theory Race Critical a through understood Racialisation, .[18]' Romani Studies perspective, involves the Othering (whereby a minority is treated as alien and intrinsically different to the majority population) and subjugation of a minority. Both Roma and non-Roma Europeans are 'equally bound to 'read 'their identities through the lens of race and racism', not merely ethnicity or nationality[19], and hence use race as a marker of belonging. From the South Asian origin story, the exoticisation of Roma lends to their racialisation and perpetual 'foreignness 'in the white-centric notions of European identity. In reflecting on the history of Roma enslavement in Romania, the 'thingification 'of Roma in Europe[20] is evident. Today, Roma remain interiorised, dehumanised, and invisible in the discourse of European identity[21].

While Roma find themselves included in various 'national minority' models, such as that in Hungary, these conceptions distort the fact that Roma are problematised and Othered to the degree that other national minorities are not[22]. Relying on the idea of discrimination on the grounds of ethnic minority may not be wrong per se, but it distorts the historic marginalisation and subjugation, and thus racialisation, of Roma compared to other national ethnic groups.

[13] Parliamentary Assembly Council of Europe 'Roma Asylum Seekers in Europe' (2010)
[14] Cherkezova and Tomova loc.cit.
[15] Sturkenboom, I., '"I Feel That I Belong Too": Stateless Roma In Europe' (European Network on Statelessness) (2017)
[16] European Commission, 'Union of Equality: EU Roma strategic framework on equality, inclusion and participation' (2020)
[17] Okely, 'The Traveller-Gypsies' (1983)
[18] Yildiz and De Genova (2019) loc.cit.
[19] Vajda (2015) loc.cit.
[20] Cesaire, 'Discourse on Colonialism' (1955)
[21] Kóczé and Trehan, 'Racism (neo-)colonialism, and social justice: The struggle for the soul of the Romani civil rights movement in post-socialist Europe' (2009)
[22] Schafft and Ferkovics, 'Roma Political Agency and Spaces of Social Inclusion and Exclusion: The Contradictions of the Roma Self-Governance Amidst the Rise of Hungary's Radical Right' (2017)

Despite the racialisation inherent in the study and policing of Roma, understanding of Roma as a racialized group has been somewhat avoided in policy and academia alike. While Roma-related scholarship has found countless ways to discuss symptoms of Roma racialisation - for example, evoking the 'Roma lifestyle', ethnicized poverty and Othered minority - it is relatively recently that Roma scholarship has begun to draw on the category of race and racialisation. This shift in Roma scholarship and activism from the 'gypsy problem 'discourse to the 'Roma rights 'discourse marks a distinct shift in understanding that identifies racism as the root cause of antiziganism and Roma inequality in Europe[23].

In the context of Roma migration, understanding the racialisation of the group is key, owing to 'the ideological equation of racial difference with foreignness and hence migration'[24]. Today, the theoretical framework of race and nation are linked in the concept of 'racial borders', referring to the 'territorial and political border regimes that deliberately curtail movement and political co-operation on a racial basis'. In her paper, Achime theorises race itself as a border[25], drawing lines of exclusion and citizenship. As such, some have described the control exerted over Roma bodies, including in migratory contexts, as a form of neo-colonialism[26]. Roma subjection shares similarities with the subjection of colonised groups based on racialisation, subjection and forced integration alongside measures that seek to exclude. El-Tayib writes that the 'search for European spirit seems to devolve into an assessment of what or rather who is not European'[27]. Kóczé and Trehan wrote that 'EU accession for the post-socialist countries has regulated a de facto centre and periphery within Europe itself, thus exacerbating the already marginal economic and political position of Roma, whose communities continue to subsist as internal colonies within Europe'. This is similar to the 'nation within a nation' and 'caught between worlds' tropes of other ethnic minority communities in the region[28]. While white Eastern Europeans strive to separate themselves from their Roma countrymen, such efforts to display 'Western' credentials serves to Other Roma further, reinforcing the 'racialized social pecking order and Eastern 'otherness' versus Western 'normality''[29]. In addition, owing to the extraterritorial nature of borders (particularly EU borders), Turner argues that borders are imperial in nature, not national[30], exerting influence and control far beyond their physical location on racialized persons.

Conceptual Statelessness

Beyond the problematic conceptualisation of Europeanness as 'white 'and excluding Roma on a racial basis, is failing to recognise Roma as an integrated part of almost any national/political community in European states. In this theory, a distinction must be drawn between the legal phenomenon of stateless, that is having no recognised nationality of any state, and conceptual statelessness as a 'trans-border nation', a descriptive term for an ethnic group or diaspora that does not have a primary 'state.[31]'
Yildiz explains that 'the Roma are like a nation in excess in Europe which is singled out for hate not only because it is spread across borders but because it invokes the archetype of a stateless people,

[23] Kóczé and Trehan, loc.cit.
[24] Yildiz and De Genova (2019) loc.cit.
[25] Achime 'Racial Borders' (2020)
[26] Kóczé and Trehan, loc.cit.
[27] El-Tayeb, 'European Others: Queering Ethnicity in Postnational Europe' (2011)
[28] Ibid.
[29] Kóczé and Trehan, loc.cit.
[30] Turner, 'The Coloniality of Borders: Race, Intimacy and Empire' (2020)
[31] Sardelić, loc.cit.

resisting norms of territories and cultural normalisation-trans a as cast been have Roma The .[32]' border or non-territorial nation[33] challenging 'Westphalian order 'in Europe, with transnational political and civic solidarities separate from many of the modern European nation states[34]. Balibar argues that 'the Roma may arguably be (…) more European than any of the ostensibly 'official ' national identities 'and states that 'the very substantial pan-European trans-nationality of the Roma directly challenges the contents and destabilises the presuppositions of any nationalism such, As .[35]' Roma are frequently treated as foreigners or outsiders regardless of their legal status and often are blamed for 'failing to integrate[36]'. Imre writes that 'in the general atmosphere of nationalist revival, the Roma communities' 'transnational 'character has continued to be stigmatised as nomadic and backwards.[37]'

This conceptual statelessness and 'Othering 'of Roma in Europe has led to more concrete forms of exclusion in the form of barriers to citizenship. In Germany, barriers to citizenship for Roma continue to be a source of criticism, as the Frida Kraus case revealed 'raw racialized considerations for acquiring proof of German citizenship nationality drafted newly secession, state of cases In .[38]' law provisions have excluded Roma as another 'non-native ethnic group', with barriers to nationality making the Roma 'somebody else's problem'. In the breakdown of the former Yugoslavia, ethno-nationalist conceptions of the new states that sought to exclude 'other 'national groups had a disproportionate impact on Roma, who had no 'new 'state to flee to. This could be seen in the case of *Kuric v. Slovenia*, which deemed Slovenia's restrictive nationality laws as arbitrarily excluding those who Slovenia deemed to be 'undesirable 'national minorities. As a result, de jure statelessness continues to be an issue facing the Roma in the Balkan states[39]. In socialist Czechoslovakia, Roma were 'redistributed 'across both Czech and Slovak regions; in the secession of Czechoslovakia, Czech nationality law led to the exclusion of Roma minority groups, forcing them to seek citizenship in Slovakia, regardless of actual national ties[40]. As national borders have shifted around Roma, very few states have made efforts to ensure that Roma have access to formal nationality, let alone a genuine place in the national community.

Nomadism

Nomadism is defined by the Merriam-Webster dictionary as 'a people who have no fixed residence but move from place to place, usually seasonally and within a well-defined territory While .[41]' Roma migration is deemed to be practically synonymous with nomadism, the connection is greatly overstated. While the significance of Nomadism is debated among Gypsy, Roma and Traveller

[32] Yildiz and De Genova, loc.cit.
[33] Ferreira and Kostakopoulou, loc.cit.
[34] Rovid, 'Cosmopolitanism and Exclusion: On the Limits of Transnational Democracy In Light of The Case of The Roma', CEU Doctoral Thesis (2011)
[35] Yildiz and De Genova (2019) loc.cit.
[36] Amnesty International 'We Ask For Justice: Europe's Failure to Protect Roma From Racist Violence' (2014)
[37] Imre, 'Whiteness in Post-Socialist Eastern Europe: The Time of the Gypsies, the End of Race' (2005)
[38] Cahn, C., 'Minorities, Citizenship and Statelessness in Europe', European Journal of Migration and Law Vol 14 Issue 3 (2012)
[39] 'Roma Belong: Statelessness, Discrimination and Marginalisation of Roma in Western Balkans and Ukraine (2017) ERRC/ENS/ISI Policy Paper
[40] Sardelić (2019) loc.cit.
[41] https://www.merriam-webster.com/dictionary/nomad last accessed: 25/5/2021

communities themselves[42], 'the available data shows that there is only a small percentage of Roma who are actually mobile, especially beyond the borders of their own states.[43]'

While nomadism is a limited part of the reality of Roma life in Europe today, the expectation of nomadic behaviour is one that continues to marginalise Roma. In Montenegro and Serbia, misconceptions of nomadic behaviour served to Other Roma communities and fuelled attacks on Roma settlements that made return following the Yugoslav wars dangerous[44]. Lauritzen writes that 'images of the Gypsy nomad (are) constructed by outsiders 'and are 'externally imposed', as seen in the Race Relations Act in Britain whereby 'it is stated explicitly that Roma must travel in order to be recognised as an ethnic minority'. She continues, 'in some cases, Roma is so closely associated with nomadism that it creates an essentialist discourse.[45]'

As with the conceptual 'statelessness 'and cross-border community of Roma, nomadism and so-called 'unregulated and unrestrained movement 'unnerves the modern nation-state[46]. While efforts to tackle nomadism, both domestically and internationally, may not explicitly refer to Roma, the result is naturally that Roma are often the primary target[47]. Ignorance of this, and the fact that historically, assimilation laws forced Roma communities to become sedentary, continues to perpetuate myths around Roma migration. In reality, Roma migration continues to be fuelled by direct and indirect discrimination in housing, evictions, and deportations[48]. However, many commentators continue to cite nomadism as an intrinsic element of 'Roma culture', as grounds to justify and explain exclusion. The blame for this is typically placed on the Roma themselves, and not on the societies that continue to exclude them. In 1999, European Commission said that the Roma 'have difficulties in defending their basic human and citizenship rights, because of their nomadic way of life .[49]'

Perceptions of racialisation and nomadism may be exasperated through constructivist portrayals of Roma as a diasporic group, separate from the rest of mainstream society. In Italy, 'nomad laws' that purported to protect 'Roma Culture' while Roma were forced into nomadism by evictions and forced movement reinforced the widespread prejudice that Roma were different from non-Roma Italians and 'do not belong' in Italy. Today, Roma movement is deemed 'uniquely visible' compared to other migrants as they typically move as family units[50] and en masse in cases of mass evictions. Linking the concepts of racialisation, statelessness, and nomadism here is useful to understand the forces acting on Roma migration. To draw a comparison with other racialized groups in Europe, El-Tayeb, writing about black and North African migrants in France, noted that 'their racialized difference permanently bars them from full membership (of the community), paradoxically ascribing to them a nomadic state while simultaneously drastically reducing their mobility'. In the case of the Roma in our case studies, this statement could not ring more true.

This deep-rooted association of the Roma and nomadism continues to essentialise Roma culture and experiences, even in circles that may be well-meaning or sympathetic to the Roma's plight. Scholars of EU law have romanticised both the Roma's nomadism and pan-European identity, evoking their

[42] Okely (2017) loc.cit.
[43] Sardelić (2019) loc.cit.
[44] UNHCR Report: 'Roma Asylum-Seekers, Refugees and Internally Displaced Persons' (2000)
[45] Lauritzen, 'Nomadism in Research on Roma Education' Critical Romani Studies Vol. 1 No. 2 (2018)
[46] Turner, (2020) loc.cit.
[47] Lauritzen (2018), loc.cit.
[48] Ibid.
[49] Banai and Kreide, 'Securitisation of Migration in Germany: The Ambivalence of Citizenship and Human Rights' Citizenship Studies Volume 21 Issue 8 (2017)
[50] Simpson, A. 'Europe's Nomads… But Not By Choice', The Guardian (2000)

image as ambassadors for their aims of freedom of movement and EU citizenship; cases such as *Chapman v. UK* subscribe to one idea of 'authentic Gypsy life 'that has nomadism at its core. While pointing out these 'elements 'of Roma culture/identity to draw attention to the particular cruelty of barriers to freedom of movement are often well intentioned, they fail to note that these situations of 'nomadism 'and 'statelessness 'have been borne of a history of discrimination and patterns of forced migration. It also overlooks the fact that genuine 'free movement', both in and out of the EU, is often borne of wealth, status, and whiteness, and that what separates 'responsible individuals ' exercising freedom of movement from 'unwanted insurgences 'is often a question of race and class.

Securitisation

Together, these aspects of racialisation, conceptual statelessness, and real or perceived nomadism have led to the securitisation of the Roma. The notion of security and securitisation has changed over time, beginning with the theories of Machiavelli, Hobbes, and Locke, on 'state's guarantee of basic rights, the protection of goods, persons and public order state implies securitisation ,Today .[51]' protection from an immediate threat of danger, typically violence, and from a long-term threat to social peace and prosperity. This is typically achieved through control of persons, 'including a range of administrative practices such as population profiling, risk assessment (…) and at an EU level, data exchange and activities of Frontex'[52]. Banai and Kreide note the 'dialectical relationship in which securitisation actually leads to more insecurity which in turn demands more security policy'. These policies often have the worst effects on those deemed 'vulnerable and in need of protection', serving to normalise 'political exclusions, surveillance, data collection, encampment, profiling and registration', often on racial grounds[53].

Banai and Kreide note that 'the Roma in Europe are particularly effected by different security measures', and that shortly after the fall of Communism, institutional discrimination and violent attacks by police and ordinary citizens occurred throughout Central and Eastern Europe. The link between securitisation and efforts to curtail Roma travel can be seen plainly in the case studies of this thesis. With the efforts to preserve 'peace, law and order 'and to prevent 'misuse of public services 'being the primary justifications of states, this Othering and presumption of foreignness leads to Roma being viewed with suspicion.

Between European anti-begging laws, historic 'gypsy entry bans 'and the coercive effect of present-day border controls and residence requirements, the negative assumptions they carry with regards to Roma in migratory contexts is clear - they assume that Roma, when not perceived as dangerous, are a burden and exploit the 'generosity 'of the receiving state. Roma movement itself continues to be securitised through 'the criminalising and securitising lens of welfare protectionism and ghettoisation', having purpose of travel scrutinised and documents seized[54].

In a study of securitisation of Roma migration, antiziganist sentiments that portray Roma as criminals and the racialisation of crime more generally takes on a new meaning in light of the theory of crimmigration, whereby European states increasingly treat and discuss immigration offences as criminal rather than civil or administrative matters. El-Tayeb writes that in 'Fortress Europe', 'non-Europeans '(both real and perceived) may break the law and thus be treated as criminals simply by being present[55]. Amidst increased policing of Europe's internal and external

[51] Banai and Kreide (2017) loc.cit.
[52] Ibid.
[53] Ibid.
[54] Yildiz and De Genova (2019) loc.cit.
[55] El-Tayeb (2011) loc.cit.

spaces, borders continue to 'cross 'racialized minorities, including the Roma. While as we shall discuss, 'public order 'and security remains at the heart of member state justifications for securitising Roma at borders, this type of policy works to imply that taking up space in the community is a criminal act - with French and Belgian authorities referring to Eastern European Roma subject to expulsion as 'illegal immigrants of freedom to right same the having despite ,[56]' movement as other EU citizens.

Together, these theories explain and exemplify European attitudes to Roma migration, which are ultimately based on negative stereotypes. The academic study of race and migration from a legal perspective is a difficult topic to unravel, often as a result of European hesitance to record race, owing to the anti-classification argument that introducing classification 'perpetuates, legitimises and entrenches 'racist ideas and behaviours[57]. In a paradox of 'racisme sans races', individual acts of bigotry are seen as the primary, if not only, form of racism recognised in a society, with systemic or institutional racism denied or ignored. Despite this, many immigration policies are indicative of systemic racial considerations. In the case of the Roma, recognising and recording instances of state-sponsored racial discrimination is vital to recognising how Roma may be marginalised in European societies. In the following chapters, we will examine how negative perceptions of Roma migration overlap with government policy and human rights considerations, in examples of racial profiling, forced return, and collective expulsion.

[56] Kóczé, 'Race, Migration and Neoliberalism: Distorted Notions of Romani Migration In Public Discourse', Social Identities Vol 24 Issue 4 (2018)
[57] Möschel, 'The Relevance of Critical Race Theory to Europe' (EUI Doctoral Thesis) (2011)

Chapter 2: Freedom of Movement and Racial Profiling

In protecting Roma in migratory contexts within the Council of Europe framework, key legal provisions include Protocol 4 - particularly Articles 2 and 4 – and Article 14. While Article 14 may be the first provision to come to mind in a discussion on racial discrimination, it is limited as an accessory right, meaning rights to movement and residence must be found elsewhere in the convention material. On the other hand, the EU has mechanisms explicitly targeting racial discrimination, including the non-discrimination clause of the Freedom of Movement Directive and the Race Equality Directive, but these directives, particularly the latter, have had limited application to challenging freedom of movement rights of EU-citizen Roma.

i) ECtHR

a) Freedom of Movement

Freedom of movement (particularly internally), the right to leave any country, and the right to return to one's country are internationally recognised rights enshrined in Article 13 of the Universal Declaration of Human Rights. However, these rights are not without limitation, particularly concerning national security, public order, and, as we have seen recently, public health. Furthermore, the area of immigration law often is considered the last reserve of state sovereignty, and allowing for discrimination on grounds of nationality, if not explicitly race, is a core part of immigration and visa policy in the global north.De Vries and Spikerboer write that 'in the case law of the ECtHR, the right of states to control the entry of non-nationals into their territories emergences as a biblical truth', despite the being incongruous with '(the) racialized effects of international migration .[58]'

The ECtHR's jurisprudence on racial discrimination and immigration began in the early 1980s. In the joint cases of *Abdulaziz, Cabales and Balkandali v. UK [1985]*, Article 14 claims additional to Article 8 were deemed to be manifestly ill-founded, stating that the decision to remove the irregular migrants was 'in no way based on race 'and that 'a state has the right to control the entry of non-nationals into its territory'. In this case, British immigration rules were deemed to be non-discriminatory because they 'did not distinguish between persons on the ground of race', and were 'applicable across the board to intending immigrants irrespective of their race and origin', despite the disparate impact on persons from the global south. This approach, granting a broad margin of appreciation for states and seeming to reject the doctrine of indirect discrimination in the area of immigration law, was later confirmed in *Moustaquim v. Belgium [1991]*. However, this deference to member states is not unlimited, and must be proportionate to a legitimate aim. In *East African Asians v. the United Kingdom [1973]*, the Commission held that direct racial discrimination in immigration control is incompatible with the ECHR, finding that the UK exceeded its right to control borders when the applicants were already citizens of the United Kingdom.

The Court's approach is rather different if the case is framed as nationality discrimination of a person who is otherwise present legally, to which the Court applies strict scrutiny. In *Gaygusuz v. Austria [1996]*, the Court held that 'very weighty reasons would have to be put forward before a court could regard a difference in treatment based exclusively on nationality as compatible with the Convention'. In the case of Roma migrants from non-EU states, visa restrictions may be prohibitory to travel, but would be unlikely to be ruled as racially discriminatory as it would be argued that visa policies are typically aimed at nationality, not race. They may be able to access protection were they able to prove a direct connection to nationality, but several issues exist with

[58] de Vries and Spikerboer, 'Race and International Migration' (2020)

this approach. Firstly, if non-Roma of the same nationality do not face similar discrimination, the rule may be inapplicable, in addition to not recognising the true nature of the racial disparity. Furthermore, the right to movement is not unlimited, and the Court has distinguished the grounds of nationality from immigration status in the case of *Bah v. UK [2011]* where the Court noted 'in general terms, states were entitled to restrict access to 'resource-hungry public benefits 'for immigrants with irregular or temporary status.[59]'

In access to nationality, another area where Roma suffer disproportionately, the Court takes a firmer stance. While the ECHR does not contain a right to citizenship itself, it may raise Article 8 claims if the denial of citizenship is deemed to be arbitrary, as in *Genovese v. Malta [2011]*. In *Kuric v. Slovenia [2007]*, the Court accepted that Article 14 covers situations of indirect discrimination in the case of nationality law, while *Biao v. Denmark [2016]* asserted that an ethnically disparate nationality policy must be subject to strict scrutiny. As nationality law, along with immigration, is an area that states exercise the most discretion over, the Court's statement decisions in *Kuric* and *Biao* perhaps indicate that the Court is ready to acknowledge that neutrally formulated immigration rules can constitute indirect discrimination. However, neither case substantially alters the *Abdulaziz* doctrine, with the cases likely to be deemed insufficiently similar - citizenship and entitlement to citizenship not necessarily leading to a change in the approach to migration control[60].

b) Racial Profiling

Profiling refers to 'the use by law enforcement of generalisations grounded in ethnicity, race, religion, or national origin (…) rather than objective evidence or individual behaviour 'as the basis of their investigation or decision making[61]. Ethnic or racial profiling generally violates the right to non-discrimination (Article 14) as well as the right to privacy (Article 8), as being stopped, searched, and questioned in public is invasive. Depending on the circumstances, racial profiling may also violate the rights to liberty and security (Article 5), to freedom of assembly (Article 11), and to freedom of religion (Article 9). However, it is concerning that Article 6.1 has been held not to cover proceedings regulating a persons citizenship or the entry, stay, or deportation of aliens, giving rise to a significant gap in effective protection[62]. In the case of border control, refusals as a result of racial profiling can infringe upon the right to freedom of movement and to leave any country (Art 2 Protocol 4).

Racial profiling of Roma at borders is deemed a relatively common occurrence throughout Europe. A 2011 report noted that there are 'significant differences in the treatment of Romani EU citizens when it comes to the ability to exercise freedom of movement', including disparate treatment at borders due to 'perceived ethnic identities of many reasons, of variety a for come can Refusals .[63]' which are associated with the stereotypes of Roma and their reasons for migration. In 2001, 47 Latvian Roma were refused entry to Estonia based on 'associating Roma with criminality and maintaining law and order case Macedonia North the in discuss shall we as leave, to Refusals .[64]' study, have been associated with maintaining national reputation or favourable terms of travel for non-Roma citizens, as well as perceptions of Roma as deceitful or abusing the hospitality of other destination states.

[59] de Vries and Spikerboer loc.cit.
[60] Ibid.
[61] Open Society Foundation, 'Ethnic Profiling Report' (2021)
[62] Ktistakis, 'European Immigration Controls Conforming to Human Rights Standards' (2018)
[63] Immigration and Refugee Board of Canada, 'Estonia/EU: Migration of Roma Throughout EU' (2011)
[64] Ibid.

In these ambiguous areas, state jurisdiction is a key concern. In *Amuur v. France [1996]*, the Court clarified that persons in the international transit zones of airports are protected by the ECHR, and in *Hirsi*, the Court found that Article 3 applies on the high seas[65]. On territory, the ruling of *Banković* listed four non-exhaustive situations where actions outside of a state's territory may trigger jurisdiction, including extradition or expulsion cases and cases involving diplomatic, consular, or other state agents abroad[66] - indicating that even in the marginal spaces, jurisdiction and accountability can be placed with the relevant state authority.

Despite granting a wide margin of appreciation concerning 'nationality discrimination 'in immigration policy, racial discrimination and specifically ethnic profiling at borders has not been taken so lightly by the Court. The key case of ethnic profiling at border crossings heard by the ECtHR is *Timishev v. Russia [2005]*. The case, concerning the profiling of the Chechen applicant who was refused entry to Kabardino-Balkaria, unanimously finds violations of Article 2 Protocol 4 with Article 14 of the Convention. While the government argued that additional measures at the border were with a view of preventing persons with 'terrorist or antisocial intentions '- a typical security and public order justification permissible under 2.3 of the Protocol - the oral instructions given to the border guards specifically instructed them to deny entry to travellers of Chechen ethnic origin, which constitutes direct discrimination. The case also asserts that the order not only affected Chechens, but also anyone that was 'merely perceived 'as being Chechen, enforcing the principle of discrimination by association.

ii) Case Study: North Macedonia

Upon the liberalisation of the Macedonian-EU visa regime, allowing visa-free travel for Macedonian citizens to the Schengen Area, Macedonian asylum claims rose, potentially linked to limited economic opportunities and Macedonia's partially-free human rights status[67]. While discrimination against Roma is well documented in North Macedonia as well as in the Balkans overall, and Sweden, Belgium and Germany declaring that most asylum applications from Macedonia had been submitted by ethnic Roma, in 2010 the Belgian Prime Minister stated that his country 'does not give political asylum to economic refugees nedwar EU the year, that Later .[68]' Macedonia that they may end the scheme, as with many claims made on grounds of lack of healthcare, employment, and schooling, Macedonian asylum seekers were perceived as illegitimate[69]. In response, Macedonia introduced an amendment to the criminal code which would make it illegal to seek asylum if 'there are no substantial grounds 'and sought to enhance border checks to screen for 'bogus asylum seekers'. This policy typically targeted Roma: between 2009 and 2012, around 7000 Roma were prevented from leaving Macedonia, frequently having passports marked as 'asylum seeker', despite evidence of a return trip and sufficient funds, or having documentation confiscated altogether[70]. Around 90% of Roma travellers from Macedonia were asked to justify their reasons for travel, 30% were told explicitly they couldn't cross the border due to their ethnicity, and 10% were refused for not fulfilling legal requirements to leave Macedonia[71]. The Council of Europe argued that these measures interfered with the right to leave the country and the right to claim asylum, and the Macedonian Ombudsman's 2013 Report reported an increase in

[65] *Hirsi Jamaa and Others v. Italy (ECtHR) [2012]*
[66] *Banković and Others v. Belgium (ECtHR) [1999]*
[67] Hartley, 'You Shall Not Pass: The Roma "Travel Ban', Racial Profiling in Macedonia, and Remedy Under International Law' (2014)
[68] ERRC Written Comments Concerning Macedonia to CERD Committee 87th Session (2015)
[69] Ibid.
[70] Ibid.
[71] Ibid.

reports of discrimination on the grounds of ethnicity by Macedonian Roma returned from the border[72].

In 2014, the Law on Travel Documents was declared to be unconstitutional by the Macedonian Supreme Court. The law was found to be disproportionate, and the government's justifications illegitimate, as 'protection of morals and national reputation 'does not fall within the scope of national security, criminal proceedings or public health[73]. However, this did not prevent discrimination at the border. In 2016, the European Policy Institute Skopje published a report detailing the ongoing restrictive measures against Roma travel, including requiring unlawful 'conditions 'such as carrying additional documents, 500 Euro in cash, and proof they would not claim asylum. Nevertheless, even travellers who met these 'conditions 'were frequently turned back at border crossings and had travel documents marked, indicating them as bogus asylum seekers[74]. The coverage from Macedonian media outlets shows an acute awareness that this policy, officially or unofficially, is linked to maintaining visa-free travel status for the majority of Macedonians and that the majority of those affected by the policy are Roma, termed at one point as 'unwelcome guests who do not respect the German asylum policy given was doubt the of benefit the if Even .[75]' that this policy is 'facially neutral', its application in practice indicates ethnic profiling and direct discrimination as found in *Timishev v. Russia* - a violation of Article 2 Protocol 4 with Article 14.

The facts of the North Macedonian situation can be compared to those in the UK case *R (ex parte ERRC) v. Immigration Officer at Prague Airport [2002]*. The case concerned the actions of British Immigration authorities in Prague, who requested passenger ethnicity information from Czech airlines ('marked G for Gypsy', according to airline employees[76]) and intensively questioned passengers perceived to be Roma over several years, in an effort to prevent Czech Roma travelling to the UK to claim asylum. The House of Lords ruled that this policy was 'inherently and systematically discriminatory', constituting racial discrimination[77]. It was also added that while the case did not find a right to enter a country to claim asylum, the judges ruled that any motivation for this discriminatory policy was irrelevant, suggesting any 'public good' or 'public order' argument in screening for potential asylum seekers based on race would not be acceptable. While this national case would not bind the Strasbourg court, the similarity to the *ex parte ERRC* case may be a starting place to consider regional consensus on what constitutes racial profiling, and the prevalence of similar cases against Roma across Europe.

Thus far, the ECtHR is yet to rule against North Macedonia on this subject. However, a recent development has occurred in the case of *Dželadin v. North Macedonia* [2020], concerning a Roma Macedonian woman who was prevented from leaving the country. While settled by a unilateral action before the merits of the case could be examined by the Court, the Macedonian government is noted as acknowledging that they had not fulfilled the requirements to protect the applicant's rights under Article 2.2 of Protocol 4. This development is a significant step towards addressing the policy. While the Court warned the government that the case could be reinstated should they fail to comply with the terms of their unilateral declaration, it would be interesting to see in a full case to what extent the court would address the wider systemic issue of barriers to Roma freedom of

[72] Ibid.
[73] ERRC Press Release: 'ERRC CHALLENGES DISCRIMINATION OF ROMA AT THE BORDER BEFORE THE CONSTITUTIONAL COURT OF MACEDONIA' (2014)
[74] European Policy Institute Skopje, 'Life To The Border: Reporting by Macedonian Media Outlets About Roma and Visa Liberalisation' (2016)
[75] Ibid.
[76] ERRC Press Release: '"G" IS FOR GYPSY ON CZECH RECORDS' (1999)
[77] Goodwin-Gill, 'R (ex parte ERRC et al) v. Immigration Officer at Prague Airport', International Journal of Refugee Law Vol 17 Issue 2 (2005)

movement, as the applicant did not make a claim under Article 14. Given the recognition of ethnic discrimination in *Timishev v Russia*, and recognition of racially discriminatory immigration policies against Roma elsewhere in Europe, it is not clear why the applicant chose not to make this claim, as there is arguably enough evidence to suggest that it would be successful. While it may not affect the restitution the court can offer, recognising the underlying racial discrimination of the case is vital to prevent recurrence in North Macedonia and to discourage similar practices across Europe.

iii) EU Protections

A key element of upholding the rights of Roma in migratory contexts is the EU framework. While free-movement advocates observed that 'the Roma, with their nomadic tradition, should fit perfectly within the paradigm of free movement, particularly since its decoupling from economic states', it is accompanied by 'structural and socio-cultural immobility'[78]. Following EU expansion in Central and Eastern Europe in the 2000s, 'progress 'has been at the expense of Roma who have seen their movement restricted and their advancement and quality of life stagnated. The Fundamental Rights Agency (FRA) noted in 2009 that there was a 'disturbingly negative Roma-specific dynamic' in barriers to freedom of movement in the EU, with the arrival of Roma migrants being seen negatively, little effort to support Roma migrants' integration into the local labour market, and the existence of anti-Roma policies, such as limiting Roma EU citizens' access to social benefits[79]. Despite this, the issue of freedom of movement is 'almost invisible in the EU Framework for National Roma Integration Strategies'[80], a trend repeated in the 2020-2030 Roma Strategic Framework[81].

This is exemplified in the case study of France in 2010. While a case of forced, and arguably collective, expulsion which will be described in more detail in the final chapter, the issue of freedom of movement carries particular significance for EU citizens, for whom it is a right to live and work in the single market under the Freedom of Movement Directive 2004/38. This instrument serves as the primary mechanism available to challenge restrictions of Roma freedom of movement within the EU, with Article 31 prohibiting freedom of movement of grounds of race. However, as will be discussed in the final chapter, the EU demonstrates a concerning hesitance to recognise the discriminatory aspects of the case.

In addition to basic protections against non-discrimination in enacting community law, for example, Article 18 TFEU and Article 21 of the Charter of Fundamental Rights, a number of directives and charter measures apply to the situation of free movement of Roma. The most obvious protection in the discussion of anti-discrimination measures on grounds of race or ethnicity is the Racial Equality Directive (RED) 2000/43/EC. For most, the RED would be the starting place for looking for protections in this matter. However, for multiple reasons, the RED is not suitable to challenge border policy. Firstly is that the RED, in addition to other EU fundamental rights measures, only applies when the member state is applying EU law, drastically reducing the applicable scope of the instrument. Additionally is the question of competencies; in this case, the instrument is primarily based on the shared competence of Article 4 (internal market and social policy). The RED is limited to employment, training, working conditions (and) access to supply of goods and services, and so isn't generally applicable to racial discrimination in border policing.

[78] Ferriera and Kostakopoulou (2015) loc.cit. p11
[79] FRA, 'The Situation of Roma EU Citizens Moving to and Settling In Other EU Member States' (2009)
[80] Ferriera and Kostakopoulou (2015) loc.cit.
[81] European Commission (2020) loc.cit.

In the context of racial profiling, developments came in 2021 in the case of Braathens (C-30/19). While the 2000/48 directive was used here, to restitute racial profiling of a Latin American passenger by a Swedish airline, the case has limitations. One, the case concerns discrimination in access to a service, namely a flight, rather than being a matter of immigration controls themselves, an area already covered by the 2000/48 Directive. In addition, as an internal flight, it does not address our international freedom of movement concerns; nor does it address racial discrimination from a freedom of movement perspective for minority ethnic EU citizens. Finally, the focus of the case was primarily procedural, with the question of if the airline could be found to have acted discriminatory after the alleged victim had already accepted compensation. While this of course does have an impact on the ability of racialized minorities to challenge discriminatory treatment when travelling, sharing some similarities to *ex parte ERRC*, the difference between discriminatory treatment by an immigration official (a state agent) versus an airline representative has different legal implications given the scope of the EU directive as well as in regional and international law, as well as being of a different scale entirely. In conclusion, as will be explored further in the context of collective expulsions of Roma from France, the EU's market-based protections bring some value, but do little to ensure Roma freedom of movement, particularly within the EU understanding of the term.

Conclusion

In conclusion, while the Court grants a broad margin of appreciation on immigration policy in general, measures concerning the equal treatment of legal residents and access to citizenship are subject to strict scrutiny, although the focus on nationality rather than race means this jurisprudence will not always be useful in cases involving discrimination against Roma. The Court's recognition of ethnic discrimination in *Timishev* is a promising sign for any future cases concerning limitations on Roma freedom of movement. In addition, while EU instruments may serve Roma well in instances of discrimination by travel providers and airlines, they have limitations of scope that mean while EU General principles and fundamental rights values theoretically protect Roma freedom of movement, violations by state agents may go unchallenged by the EU legal order in practice.

Chapter 3: Non-Refoulement and Individual Protections Against Expulsion

Previously, we discussed the regional level protections and the effectiveness of the tools available for upholding non-discrimination for Roma in migratory contexts. However, the aspect of forced migration involved in many of the previously mentioned case studies alludes to Roma moving to escape discrimination, particularly to seek asylum. In the Macedonian case study, the Macedonian government's attitude towards Roma travellers reiterates the presumption that Roma move to exploit, not because they themselves are exploited. As such, barriers to Roma's freedom of movement, along with limited recognition of and commitment to tackle the human rights abuses they may face, are intrinsically linked. Therefore, negative perceptions of Roma's migratory behaviour and reasons for travel (often presumed to be illegitimate), are an important topic to discuss when examining Roma's ability to exercise their right to freedom of movement, in both a general European and EU sense.

In Europe, claiming asylum as a Roma person has become nigh on impossible, owing to both restrictive law and policy in addition to restrictions on freedom of movement. The decision to impose visa regimes on countries of flight by numerous European states effectively hindered Roma in need of international protection from having access to procedures whereby their claims may be heard[82], in addition to the presumption of a 'safe country of origin' often disregarding discrimination faced there by minorities, including Roma. While 'floodgates 'arguments often raised by states and the complications of the technical aspects of international refugee law pose issues legally and politically for accepting Roma refugees in Europe, this chapter will consider recognition of Roma discrimination as a tool for regularising status in certain situations.

While the issue of Roma's access to international protection statuses overall is a broad topic requiring legal analysis beyond the scope of this paper, this chapter will focus on the aspects that link migration with international refugee law and human rights, particularly the concept of non-refoulement, and two key mechanisms available to challenge individual forced returns - Articles 3 and 8 of the ECHR. This chapter will explore these elements through the case study of returns of Kosovar Roma from Germany.

i) Case Study: Returns of Kosovar Roma from Germany

In recent situations of persecution and forced displacement in Europe, from the Holocaust to the Yugoslav and Kosovo wars, Roma are regularly disproportionately affected. However, as with other migration records, a conclusive quantifiable impact on Roma is hard to ascertain, owing to the widespread practice of not recording the ethnicity or race of asylum applicants, rather only their nationality or country of origin.

In the mid-2000s, approximately 120,000 Roma refugees lived throughout Europe[83]. From approximately 2009, Germany, a major destination country for those displaced by the Yugoslav and Kosovo wars in the 1990s, decided to initiate returns to Kosovo through a bilateral returns agreement. 35,000 Roma were estimated to live in Germany as refused asylum seekers at this time, many with a temporary 'tolerated 'humanitarian status known as Duldung, and in 2009, around 10,000 Roma, Askali and Egyptian (RAE) Kosovar asylum seekers were in line for deportation[84].

[82] ERRC 'Protecting Romani Refugees Around Europe' (1999)
[83] Refugees Information Bulletin 'Kosovo: Roma Returns Stalled by Security Concerns, Politics, and Discrimination' (2005)
[84] Ibid.

Amnesty International strongly warned against this, particularly in the case of RAE persons, who often lacked documentation, and risked inter-ethnic violence and desperate living standards on return[85]. From 2006, the UNHCR recommended that Roma not be returned to Kosovo, and in 2010, the Council of Europe Commissioner for Human Rights argued that, of the Roma that had already been forcibly returned to Kosovo, 70-75% were unable to reintegrate, with many undertaking secondary movement or returning to the deporting state[86]. In addition, Amnesty International expressed concern that while the majority of those affected were not formally recognised as refugees, the policy constituted a blanket withdrawal of temporary protection statuses. Germany did not heed their warning, with the policy only intensifying over time. In 2015, Germany carried out 20,888 deportations. 314 were to Western Balkan states, over three times the number in 2014[87].

Two options were presented by the CoE report: regularisation and integration of Kosovar Roma into the society of the host country as a preference, followed by returns only if they were accompanied with genuine assistance. According to Amnesty International, the funds and support offered to returnees were at that time 'unsustainable.[88]'

ii) Legal Provisions

a) Non-Refoulement

The first issue to discuss regarding removing Roma seeking humanitarian protection is that of non-refoulement. Under Article 33 of the 1951 UN Refugee Convention,'no person may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment', without the opportunity to challenge their return. This principle is also protected regionally, under Article 19.2 of the Charter of Fundamental Rights (CFREU), as well as being encompassed by Article 3 protections under the ECHR. In the British case of *Ex Parte ERRC*, the primary issue to be examined by the Court was whether refusing Roma passengers to board the flight constituted refoulement under Article 33 of the 1951 Refugee Convention[89]. While there is an internationally recognised right to claim asylum, there is not a right to be granted asylum, nor is there a 'right of access' to a state in order to claim asylum - hence, in this case, the appeal failed. However, for those who are already present in Germany, non-refoulement remains a relevant issue.

For those claiming asylum, whether treatment amounts to persecution is a key question. The UNHCR wrote in 2000, with particular reference to Central and Eastern Europe, that while it was 'beyond dispute 'that Roma faced discrimination 'and on occasion violence', not all of these situations would meet the threshold for persecution[90]. However, the definition of persecution remains vague and ill-defined. Bagaric and Dimopoulous proposed a 2-stage analysis to determine if a law or policy may constitute persecution: firstly, does the law on its face impose an additional burden for Convention reasons, and secondly, if it does not, does the practical effect of the law impose an additional burden on people for a convention reasons, either because the law selectively targets people for a convention ground or disproportionately applies against people for a convention

[85] Amnesty International, 'Not Welcome Anywhere: Stop The Forced Return of Roma to Kosovo' (2010)
[86] CoE (2010) loc.cit.
[87] IRIN 'Roma Fear Paying The Price of Germany's Safe Countries Policy' (2016)
[88] Amnesty Internation (2010) loc.cit.
[89] Goodwin-Gill (2005) loc.cit.
[90] UNHCR Report (2000) loc.cit.

ground[91]? Under this logic, almost all of the case studies discussed in this thesis could constitute persecution.

The situation in this case study is complicated by the assumption of a safe country of origin, both within the EU and a number of non-EU European states, for example Serbia, that feature on safe country lists. Many of these states continue to have hugely disparate outcomes for Roma nationals and migrants, yet continue to be deemed safe for returns. German authorities insisted that the decision to place Serbia and Kosovo on their safe country list was justified, as 'in general, neither political persecution nor inhuman or degrading treatment exists the and ationalIntern Amnesty .[92]' UNHCR disagreed with the German authorities assessment that Kosovo was safe for RAE[93], stating that 'the social, economic and cultural disadvantages experienced by Roma people in some Western Balkan societies can be considered a form of persecution 'under the 1951 Convention. The Council of Europe iterates that persecution is not limited to acts that cause physical harm, and that discriminatory measures that do not meet the threshold of persecution alone may amount to persecution on a cumulative basis - persecution being typically considered 'sufficiently serious by its nature and repetition as to constitute a severe violation of a basic human right; or an accumulation of various measures rea claims Roma assuming of issue the with along This, .[94]' 'manifestly unfounded 'and mass revocation of temporary humanitarian statuses, gives rise to the real risk that returns of Roma asylum seekers may constitute refoulement. However, despite key actors raising alarms, the decision to return Kosovar asylum seekers was, for the most part, uncriticised by surrounding states of the region, many of whom were conducting their own returns.

The issue of potentially unsafe return along with the 'mass revocation of status', if not outright refoulement, has similarities with the case of *Becker v. Denmark [1965]*. Based on the conditions in Kosovo, along with the risk for persecution of Roma returnees upon arrival, the deportation order could be contrary to Article 3 of the ECHR, and well as potentially constituting a violation of Article 4 Protocol 4 if Duldung statuses were revoked en masse without consideration for individual circumstances. Reports indicate that asylum seekers and those with Duldung status from Western Balkan countries had limited notice before deportation, and often lacked the means to challenge the decision[95], also raising issues of procedural rights under Article 41 CFREU.

In the EU legal order, there theoretically is potential for protection and enforcement against member states, with both Article 19.2 and standards set under the Common European Asylum System (CEAS). A area of shared competence, the EU would have a mandate to set standards concerning European asylum seekers, including those of Roma origin, to ensure protection from refoulement. However, for various reasons, this is likely to never achieve recognition. Changes to the CEAS would be unlikely to be accepted by asylum-weary member states, in addition to the deficiencies that lead to an arguable failure of the Dublin II system[96]. Added to the fact that the EU has actively tried to stem Roma movement through tying it to visa liberalisation across the Balkans - as we saw in the North Macedonian case study - as well as accession criteria (arguably to improve 'push' factors before allowing freedom of movement for aspiring member states), it is evident that the EU's 'Fortress Europe' attitude extends to European asylum seekers, who would be unlikely to benefit from any formal protections against refoulement in the EU legal order.

[91] Bagaric and Dimopolous, 'Discrimination as the Touchstone of Persecution in Refugee Law', International Journal of the Sociology of Law Vol 32 Issue 4 (2004)
[92] Brenner (2016) loc.cit.
[93] Ibid.
[94] CoE (2010) loc.cit.
[95] Amnesty International (2010) loc.cit.
[96] Bank, R., 'Forced Migration In Europe' (2011)

b) Articles 2, 3 and 8 ECHR

If Germany were able to show that generally, returns to Kosovo were possible, there are still some grounds applicants could raise to prevent forced removal. Articles 2 and 3 can prove on an individual basis that return would be unsafe - both owing to the risk of violence by state and non-state actors or the risk of destitution and inadequate living conditions. While protection in Article 2 cases tend to be more successful, humanitarian leave to remain owing to potential for Article 3 violations if destitute is a fine line. In the case of *VM v Belgium [2015]*, a family of Serbian Rom asylum seekers were ordered to leave Belgium under Dublin Regulations and left destitute in Bruxelles Nord station for three weeks before return to Serbia, two months after which the family's disabled daughter died from a lung infection. The court found a violation of Article 13 in conjunction with Article 3, in light of the discrimination faced by Roma in Serbia. The case referred to *MSS v. Belgium and Greece* in noting the particular vulnerability of these asylum seekers, especially their disabled daughter, and noted that in order to uphold the general principles of effective remedy, the application process and appeal must be accessible (particularly from a financial and linguistic standpoint). Furthermore, any appeal must have a suspensive effect. However, it is not clear how long the sending state would be responsible for helping returnees avoid destitution, and to what extent destitution and poor living conditions are grounds for suspending returns overall in regional law, a highly controversial concept.

However, under current ECtHR case law, the outcome of an Article 3 case regarding returns to Kosovo doesn't appear to be promising. In *Krasniqi v. Austria [2017]*, the federal asylum office withdrew the applicant's subsidiary protection status when 'it was found that there was no longer a risk of violation of the applicant's rights under Article 2 or 3 if he were returned to Kosovo', with no violations found by the Court.

Returns from Germany to Kosovo also have implications under Article 8, owing to the personal and family ties of the returnees. Many of those with Duldung status in Germany had lived there for decades, and many were either born in Germany or had moved there as children and could not remember life in Kosovo[97]. Contracting States tend to argue that immigration control is a legitimate and proportionate reason to interfere with this right, and the Court would have to examine several factors including how long the returnees had lived in Germany and whether there were 'insurmountable barriers 'to reintegration. While in *Üner v The Netherlands [2007]*, the Court found that expulsion of a settled migrant would constitute an interference with his private life, the ECtHR implements what may called the 'elsewhere' standard, which questions if the family of the migrant, including those who are citizens of the deporting state, could settle with the migrant in the state of return, including factors such as language, cultural context and ethnic or religious background[98]. This approach of the Court can be criticised in that this essentially exiles the citizen family of the migrant, or forces them to separate[99]. The language or cultural context assessment is also a flawed one, if it does not take into account the marginalisation Roma experience in Kosovar society.

Relevant to the facts in this case is the judgement in *Aristimuno Mendizabal v. France [2006]*. The applicant had initially been granted refugee status in France as a Spanish national in 1976, which was revoked after three years following political changes in Spain. She was subject to temporary residence permits of one year each, which later had to be renewed at increasingly short intervals, of a few weeks on some occasions. The Court ruled that examination of Article 8 is no longer limited

[97] Amnesty International (2010) loc.cit.
[98] K.M. v. Switzerland (ECtHR) [2015]
[99] Salomon, 'We Need To Talk About Citizenship and Race' (2020) EJIL Blog

to ‘the balancing of family unity and the maintenance of public order, but extends to the factual implications of a foreigner’s legal status’ - including, in this case, the impact the uncertainty and precariousness of the applicant’s situation had on her personal, social and economic relations and thus her private life. In situations of Duldung returnees, the fragility of the status could itself give rise to an Article 8 violation in particular circumstances, if the Court considered its impact analogous with that in *Aristimuno.*

While on the one hand, Article 8 is a qualified right, it may be one of the stronger grounds to prevent returns of individuals to Kosovo when the racial discrimination of Roma returnees fails to be taken sufficiently seriously.

iii) Analysis

A complication of the German situation is that many of the deportees held a form of ‘tolerated status ’known as Duldung, rather than refugee status. Particularly precarious, this form of remain came with almost none of the rights and safeguards associated with refugee status, and has been described as being aimed at ‘artificially maintaining the temporary character of an immigrant’s settlement Balkan of Roma young affected it that was policy the of smcritici particular A .[100]’ descent who, for all intents and purposes, were culturally German. These returns, particularly for those under 18, were criticised in UNICEF’s 2010 report[101]. This contributes to El-Tayeb’s theory of diaspora and that racialized minorities retain their ‘foreignness ’regardless of what generation of migrant they are[102]. In this case, the peculiarities of Duldung status meant that Balkan Roma were legally as well as racially marginalised in society, their status able to be revoked at any time. In only offering limited rights, the status perpetually kept its holders in the state of migrant or guest, unable to truly participate in German society.

A further complication of this case study is the ongoing perpetuation of statelessness among Roma in the Balkans. The OSCE, while not amounting treatment in Kosovo to persecution, had stated that Kosovo’s local authorities were ‘falling short of their obligations ’to returnees ’on vital issues including registration and legal status[103], raising red flags for ongoing de facto statelessness and revolving door detention and deportation for returnees to the Balkans. In 2006, the UNHCR estimated that 10,000 of the 35-40,000 RAE in Kosovo lacked documents confirming their civil status[104], and during a visit to Serbia in 2015, former Commissioner Nils Muižnieks noted with concern that approximately 3800 Roma were still stateless or at risk of statelessness[105]. In Kosovo, while initiatives were founded to help access nationality for returnees, they were not always accessible. This is greatly concerning, as a potential stateless-producing situation that would serve to exacerbate and perpetuate Roma marginalisation in the region for generations to come.

Amnesty International’s report raised concerns of mass refusals that implied a lack of individualised attention given to Roma asylum claims in the late 1990’s[106]. The issues of deeming Roma asylum claims manifestly unfounded are concerning in light of the securitisation of Roma travel, and the racialisation of Roma being associated as ‘chronic liars’. These factors contribute to the perception that that Roma travel is in part curtailed to manage internal domestic and regional

[100] Amnesty International (2010) loc.cit.
[101] United States Department of State, 2015 Country Reports on Human Rights Practices - Kosovo, (2016)
[102] El-Tayeb (2011) loc.cit.
[103] Amnesty International (2010) loc.cit.
[104] Ibid.
[105] Council of Europe: Commissioner for Human Rights Report Following Trip to Serbia from 16 - 20 March 2015
[106] Amnesty International (2010) loc.cit.

political relations. An interesting additional aspect of the readmission agreements situation is that it may be seen as a path to visa liberalisation, as was also relevant in the North Macedonian case study. Kosovo signed numerous similar readmission deals in the 2000s, including Switzerland, Belgium, and Albania, and approached Sweden to offer negotiations. In 2010, negotiations with Austria, Denmark, and France were ongoing[107]. If this is the case, it proves to be another interesting example, like that in North Macedonia, of controlling 'undesirable' travel to maintain or achieve privileges for richer and whiter populations.

Germany argued that their safe country policy had had a deterrent effect, leading to fewer asylum claims from Balkan migrants in recent years[108]. Previously, the EU has not dissuaded Member States from the idea that Roma are primarily economic migrants seeking to escape poverty, as suggested by former EU Commissioner Vivian Reading in 2014[109]. However, it would not be in the EU's interest to suggest Roma travel to escape discrimination, let alone persecution or to claim asylum. The alarm bells would be sounded among migrant-weary member states, fearing a 'floodgates 'response should European Roma be accepted as legitimate asylum seekers. Furthermore, in the case of the EU, the call is coming from inside the house - such a policy would question the EU's safe country of origin assumption for member states who continue to abuse the rights of domestic and migrant Roma alike. The ERRC has argued that restrictive laws have not been shown to reduce numbers of immigrants, but 'have demonstrably had a negative and humiliating effect on the lives of thousands of individuals 'over the past decades[110]. Nevertheless, balancing this with attempts to tackle discrimination against Roma in Europe and geopolitical relations (both in the EU and in aspiring member states) is a delicate balancing act.

Lack of recognition of Roma asylum seekers tends to be owing to a restrictive notion of what a refugee is, and political considerations rather than the existence of persecution towards Roma populations. The ECtHR typically portrays the issue of racism against Roma as one of individual isolated acts of bigotry, as opposed to an institutionalised or systemic issue, avoiding examination of Article 14 in cases that clearly carry racist implications[111]. Therefore, failings in recognition of racially motivated hate crime by the ECHR under article 14, and low success rates of Roma asylum claims in Europe, may be a chicken-and-egg situation. It is interesting to consider whether better regional recognition of forms of systemic discrimination, including inadequate protection from racist violence[112], would force states to better protect Roma freedom of movement tied to these acts. However, with well-documented discrimination against Roma by state and non-state actors for decades, as well as extreme hesitance to recognise 'economic migrants 'as refugees, suggests that the gaps in protection would likely remain regardless.

Moreover, the racial discrimination aspect of the returns must be examined. Some may say that non-Roma Kosovars were similarly affected by the returns policy, thus making the question one of nationality rather than race or ethnicity, which whilst covered by the regional law on collective expulsion makes the policy more difficult to challenge on racial grounds. However, reports by Amnesty International and others highlight the disparate treatment likely to face RAE asylum seekers and returnees, both in the EU and in the Balkans. In 2015, Roma applicants accounted for 30% of all Western Balkan claims in Germany, but less than 1% were granted protection[113].

[107] CoE (2010) loc.cit.
[108] Brenner (2016) loc.cit.
[109] Amnesty International, 'Roma in Europe: Demanding justice and protection in the face of violence' (2014)
[110] ERRC (1999) loc.cit.
[111] Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?' (2012)
[112] Ibid.
[113] Brenner (2016) loc.cit.

Indications show that since the peak of these returns, Roma migrants from both within the EU and outside the EU continue to face racially disparate treatment in Germany: with returns to Romania and Bulgaria in 2010[114] and returns of 400 Moldavians, mostly Roma and among them persons with illnesses and disabilities, since July 2020[115].

The German case study also carries issues with voluntary returns: between 1999 and 2009, there were reported to be 92,240 voluntary returns from Germany to Kosovo. Germany's motivations may not be as explicit as France's in our next case study, but concurrent developments suggest racial undertones, if indirect. In addition to grants given to Kosovar returnees, in June 2009, Germany, like France, ran a 'voluntary repatriations' programme whereby they paid more than 100 Roma to return to Romania[116]. Any cash involved in 'helping 'returnees leave territories once again raises questions on the voluntary nature of the returns, especially if the amount is mainly symbolic.

While statistics need to be examined further, and efforts to prove the connection may be frustrated owing to the European hesitance to collect race statistics, the implication is that an Article 14 connection based on race or ethnicity could be drawn, but unfortunately, in light of ECtHR case law on race and immigration, without wider recognition of Roma-specific discrimination in migratory contexts it perhaps is not likely to be successful.

Finally, there is question as to whether efforts to tackle Roma rights in their countries of origin are preferable to wider access to asylum. On the one hand, aims to reduce 'refugee-creating situations ' and reduce economic migration may be more sustainable, in addition to being more in line with EU priorities of neo-liberalism, free markets and equality of opportunity. However, as established throughout this thesis, while discrimination may play a role in why Roma travel, negative perceptions towards all Roma travel is by far a greater issue, leading to disproportionate restrictions on Roma across the region. As such, the wider situation of Roma freedom of movement and accessibility to stable protection statuses in continental Europe needs serious examination.

[114] Banai and Kreide (2017) loc.cit.
[115] FRA, 'Key Fundamental Rights Concerns' (1.7.2020 - 30.9.2020)
[116] CoE (2010) loc.cit.

Chapter 4: Collective Expulsion

The final aspect to be examined relating to Roma migrants' rights is the issue of collective expulsion, forbidden under Article 4 of Protocol 4 ECHR and Article 19.1 CFREU. Collective expulsions from various European countries have become a regular occurrence, typically expelling Eastern European Roma from Western European states.

i) Legal Standards: ECtHR

Collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as 'any measure compelling aliens, as a group, to leave a country collective profiling, racial with As .[117]' expulsion for the individuals concerned can give rise to other issues, including arbitrary deprivation of liberty (Article 5), and depending on conditions in immigration detention, inhuman or degrading treatment (Article 3). Owing to the collective nature and shared characteristics of the group, it may give rise to claims under Article 14.

The cornerstone case on collective expulsion in the ECtHR is *Andric v. Sweden*. While the case itself was deemed inadmissible, it established that 'there was no collective expulsion when an aliens immigration status was individually and objectively examined in a way that allowed him to put forward his case against expulsion'. As such, removing aliens as a group alone does not constitute collective expulsion, but rather only when the individual circumstances of each person have not been considered.

One of the key cases concerning collective expulsion in ECtHR case law directly discusses Roma. In *Čonka v. Belgium* [2002] a Slovak Rom family were refused asylum and, along with around 60 other Romany Slovaks, were unlawfully detained, refused the opportunity to challenge their deportation order, and were removed from Belgium. In light of the number of Slovaks detained for removal and the lack of individual consideration given to cases, the court found that there had been a violation of Article 4 Protocol 4, in addition to Articles 5(1), (4), and 13. The collective expulsion element was decided 4 votes to 3, with reference to the speed at which the deportation orders were issued making a true examination of individual circumstances impossible. The case, however, did not include reference to Article 14. While recognising that the expulsion was collective owing to the lack of individual case consideration, the racial aspect of this case was unaddressed, despite being a key underlying element in the case context. Therefore, specific recognition and protection of the right to movement of Roma was lacking.

The case law has developed in recent years with regards to expulsions of ethnic Georgians from Russia, namely the cases of *Shioshvili and others v. Russia [2010]* and *Georgia v. Russia (I)* [2014]. In the first case, the applicant and her family had moved between Georgia and Russia to 'improve their financial situation 'and overstayed their visa. They were targeted for deportation as part of a policy of collective expulsion towards Georgians, and as a result of their treatment in detention alleged violations of Articles 3, 13, and 14, as well as Articles 2 and 4 of Protocol 4. Furthermore, in *Georgia v. Russia*, the Court ruled that the expulsions of thousands of Georgians from Russia without the 'reasonable and objective examination of the particular case of each individual 'amounted to an administrative practice in breach of Article 4 Protocol 4.

The key shift in jurisprudence was that these cases addressed violations of Article 4 Protocol 4 with Article 14, finding a violation of Article 14 in *Shioshvili*. However, this was on the grounds of

[117] *Čonka v. Belgium (ECtHR) [2002]*

nationality, rather than ethnicity. The difference between whether this violation should have been found on the ground of ethnicity or nationality was stressed in the dissenting opinion of Justice Tsotsoria, who argued that the campaign against Georgians in Russia was one based specifically on ethnicity rather than nationality. The recognition of this, in this case, may have had a different impact on how the Court views expulsions of an ethnic or racial nature, such as those targeted at expelling Roma.

Most interestingly of all, after the Court found the violation of Article 4 Protocol 4 in *Georgia v. Russia*, it was deemed unnecessary to examine Article 14. On the one hand, this could give an insight into how the Court decides and views the collective element of collective expulsion - if they believe it is, then it is self-evident that such a practice is discriminatory in its own right. On the other hand, however, it makes it difficult to explicitly show that the underlying cause of such an expulsion was a policy of ethnic or racial discrimination.

Therefore, as the Court still tends to be deciding that collective expulsion cases are implicitly or explicitly based on discrimination on grounds of nationality rather than ethnicity or race, is it unclear how the Court would decide a collective expulsion case concerning Roma on racially discriminatory grounds today.

ii) Case Study: 2010 French Expulsions and EU Protections

Within the EU, the barriers of Roma travel and patterns of expulsions can be exemplified through the case study of the 2010 expulsions of Eastern European Roma from France, as an example of the uses and limitations of EU law in protecting EU-Citizen Roma in migratory contexts. This section will examine the potential mechanisms for protection, as well as the deficiencies in the EU's response, and will argue that current protections are somewhat weak unless EU bodies become more willing to intervene.

In 2010, the Sarkozy government issued expulsion orders in an attempt to clear 'illegal 'settlements, under a 'law and order 'rhetoric following two domestic incidents in 2009. While the law itself was facially neutral, the target of the policy was evident - *gens du voyage*, specifically Romanian and Bulgarian Roma who lived in the camps. The connection was confirmed by the Circulaire of August 2010, which instructed police to specifically target Roma for deportation[118]. The initiative resulted in 'the swift dismantlement of 128 irregular settlements and the expulsion of around 979 individuals 'by the end of August[119]. Of these, 151 were forced returns, with 828 said to be 'voluntary'; however, the true extent of how 'voluntary 'these returns were is in doubt, with reports detailing French authorities withholding travel documents and the use of administrative detention[120].

The case first sparked outrage among key actors, including the European Parliament and the Commission Vice President, Vivian Reding[121]. However, after threatening to launch infringement proceedings, and despite NGO pressure, France accepted minor amendments, and EU pressure waned[122].The incident raised questions about the EU's role in fundamental rights protections, with

[118] European Commission Press Release: 'Commission to Begin Infringement Proceedings Against France' (2010)
[119] Carrera and Atger, 'L'affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice' (CEPS) (2010)
[120] Van Eijken and Phoa 'Exploring obstacles in exercising core EU citizenship rights' (2016)
[121] Severance, 'France's Expulsion of Roma Migrants: A Test Case for Europe' (European policy institute) (2010)
[122] Ibid.

Sergio Carrera noting that the Roma affair constituted 'a severe test of the legitimacy' of the Area of Freedom, Security and Justice, and the effectiveness of the EU law overall[123].

Issues concerning freedom of movement for Roma EU citizens have persisted. In 2013, French Interior Minister Valls refused to apologise for calling for Roma expulsions[124], and the first half of 2013 saw record numbers of forced evictions in France[125]. In 2014, 35% of the French population overestimated the number of Roma migrants in France; 77% saw Roma as a group separate from French society[126]. Owing to the facts surrounding this case, including the shared racial characteristics of those removed and the lack of administrative guarantees, this case study will be considered an example of collective expulsion, although various EU mechanisms could have been used to challenge the policy.

Overall, in the EU, despite initiatives such as the NRIS, the issue continues to be significant with the 2018 report indicating little improvement and in some situations worsening outcomes for Roma in Europe[127], with no mention of freedom of movement issues in the 2020-2030 Strategic Framework[128]. Therefore, it is apparent that 'l'affaire des Roms 'was the tip of the iceberg regarding non-market racial discrimination in the EU, in particular against Roma populations.

iii) Analysis of EU Protections

As discussed previously, the RED may be an obvious tool to tackle racial discrimination in the EU context, but it is general unsuitable for expulsion and border policing cases, covering free-market issues only. One situation the RED could have been applied to the French case study could have been concerning the access to goods and services, including housing. A challenge on this ground could have prevented or redressed the camp evictions, a key aspect in the wider expulsions. However, this challenge alone would not adequately represent the situation, with the primary concern being the racially-selective expulsions of EU citizens.

A benefit of the RED, were it applicable, would be its recognition of both direct and indirect discrimination. A particularly controversial aspect of the 'l'affaire des Roma 'incident is the fact that the French ministry amended the Circulaire to remove reference to Roma to comply with the Commission's demands by September. However, this does not 'negate the fact that the expulsions that have been already carried out individually target this ethnic group', as well as the 'continuation of dismantling of settlements and expulsions to Romania and Bulgaria, which will in any case 'indirectly 'affect Roma and other vulnerable groups falling under the general label of 'travellers''[129]. While RED may recognise indirect discrimination, it is both unsuitable in a case of border control, as well as being inappropriate in such a case where not only can disparate impact plainly be seen, but where the motivation was explicitly stated previously. In cases such as this, the Courts of Justice (CJEU) and other community actors should not only challenge member states on the blatant disregard for fundamental rights, but should treat such flagrant abuses as direct discrimination.

[123] Carrera et al (2010) loc.cit.
[124] 'French minister Valls defends call for Roma expulsions', BBC News (2013)
[125] 'France: Record number of forced evictions', Amnesty International (2013)
[126] Amnesty International (2014) loc.cit. p15
[127] European Commission, 'Report on the evaluation of the EU Framework for National Roma Integration Strategies up to 2020' (2018)
[128] European Commission (2020) loc.cit.
[129]Carrera et al (2010) loc.cit.

The second possibility, and the Commission's preferred approach against France, was the Free Movement Directive 2004/38. Freedom of Movement (FM) was likely the preferable, 'safer 'legal basis for the Commission to challenge France's actions, owing to its stronger legal basis and framing as a Community competence. Whilst not directly linked to racial equality provisions, freedom of movement of EU citizens is guaranteed as a fundamental right under EU law, with the CJEU generally interpreting the provision broadly and its exceptions and limitations narrowly. EU member states can only apply restrictions on evidenced grounds of public policy, public security, and/or public health, with the case law of *Bambast* and *Grzelczyk* requiring a very strict proportionality test to any limitation of freedom of movement based on economic resources[130]. In addition, the Directive details procedural guarantees for those subject to expulsion orders, the importance of which is highlighted in *Rutili*, suggesting stronger measures against France should have been taken, even if only on racially neutral FM grounds. Principally, the Commission found France to be in violation of the procedural protections, in that EU citizens typically received 'no written notification of the expulsion decision, (were) not informed of the grounds on which the decision was taken, and had no right of appeal before the decision (was) enforced'[131], violating procedural guarantees such as the right to good administration (Article 41). For this reason, Carrera argues the issue raises rule of law concerns[132].

However, the racial discrimination aspect of this case has been overlooked. While 'public security' arguments were made to justify the expulsions, many of the reasonings carried racist undertones. NGOs identified such removal orders being issued based on a 'mere assertion of an alleged threat to public orders 'without any details being provided; on the basis of 'facts that are not punishable under criminal law', for example homelessness; or minor offences, such as begging[133]. Generally, such general measures under the 'personal conduct' limitation of the FM Directive have already been greatly restricted by *Bonsignore [1975]*, with later cases of *Tsakouridis* and *Pietro Infusino* pointing towards an interpretation of 'severe criminal activity'[134]. While France may argue that these grounds fall under Article 35 ('abuse of rights') and are contrary to their residence requirements, it is evident that the 'justifications', even after removing explicit reference to Roma from the Circulaires, play into racist conceptualisations of the Roma that contributes to their continued securitisation in Europe. In this respect, a 'neutral' ground does not convey the reality of the situation. One option was to refer to Article 31 of the Directive, which clearly specifies that 'member states should implement (this) directive discrimination' on grounds including 'race, colour (and) ethnic or social origin' - clearly suggesting a formal protection for Roma exercising their free movement right. Furthermore, an ongoing situation of an EU member state repeatedly violating the Citizens Directive along with racially disparate application, as in France, clearly should have been a trigger not only to address infringements of the directive, but also to raise questions around France's commitment to core values of equality and rule of law under Article 2 TEU.

A final protective element that could have challenged the French policy was Article 19.1 of the CFREU, on collective expulsion. The lack of individual consideration given to expulsion decisions, in addition to the shared racial characteristics of those targeted in this case, clearly offered an opportunity to invoke 19.1 alongside the Freedom of Movement Directive, providing a landmark opportunity for the CJEU to test the provision, as well as being an accurate legal reflection of rights concerns at play. It is not clear why the Commission did not raise this aspect, seeming to deliberately avoid racial considerations of the case altogether. Overall, the failure to invoke 19.1

[130] Ferreira and Kostakopoulou (2015) loc.cit.
[131] Van Eijken and Phoa (2016) loc.cit.
[132] Carrera et al (2010) loc.cit.
[133] van Eijken and Phoa (2016) loc.cit.
[134] Ferreira and Kostakopoulou (2015) loc.cit.

with Article 31 of the Directive was a missed opportunity to strive for substantive equality for Roma EU Citizens when exercising their freedom of movement.

To tackle the alleged violations of France in this case, the Commission had two options: infringement proceedings under Article 258 TFEU, in addition to Article 7 TEU for persistent or severe violations[135]. While action under Article 258 is in practice a pre-litigation procedure for the Commission to resolve a 'conflict' at the political level before involving the CJEU and is ultimately discretionary, commentators have expressed confusion as to why the Commission decided not to pursue proceedings, when the amendments in September 2010 clearly did not suffice. One potential argument is that the mutual trust principle, at the heart of the effectiveness of EU law, may have shaped the decision. Already seeing tensions over commitment to the Schengen in 2010, the Commission may have been hesitant to push an issue that was already threatening to exacerbate member state and Council-Commission conflict, especially if it was to lead to accusations of inconsistency and unfairness. In addition, support received for France in the European Parliament may be indicative of the EU exercising deference on state sovereignty[136].

However, such a decision raises difficult issues in the EU. Firstly, expulsions of nationals from less wealthy EU countries (in the case of Roma minorities, where they often face discrimination), implies a two-tier union where freedom of movement is restricted to those from wealthier or more established member states, and consequently those of more desirable nationalities or ethnicities. While discrimination on the basis of nationality is outlawed between member states, efforts to protect against racial discrimination must be robust to prevent a sub-group of 'undesirable 'EU citizens being prevented from exercising their treaty rights. Additionally, regardless of the legality of the provision, the 'effectiveness 'of the French policy is highly questionable in light of the realities of the Schengen zone, with qualitative interview evidence indicating that those forced to leave France would not realistically be prevented from returning[137]. Rather than being promising for FM rights, this policy rather indicates a cycle of forced migration throughout the EU, which only serves to further marginalise Roma populations who face stigmatisation through a perceptions of nomadic lifestyles[138].

Moreover, leniency with France at this time equated to leniency with antiziganist policies, with indirect support from Italy and Hungary deriving from the treatment giving perceived 'legitimacy to their own ongoing anti-Romani policies and encouraging new ones exemplifies approach This .[139]' the 'soft touch' of the EU, for example compared to the ESCR's non-binding but scathing judgement in *COHRE*, which raised an explicitly human-rights and race-conscious dynamic, particularly on aspects such as the 'voluntary 'returns. Where the EU preferred to avoid the issue of race, the ESCR judgement explicitly highlighted the discriminatory nature of the policy, stating that a person cannot waive their right to non-discrimination[140].

Furthermore, where aspiring member states in Central and Eastern Europe had accession criteria in part dependent on improving protections of Roma minority groups, the EU's lack of decisive action on racial discrimination in this case, as well as continuing policies of outsourcing migration control, may render the EU hypocritical. For example, 'when Germany announced its plan to deport non-EU

[135] Carrera et al (2010) loc.cit.
[136] Severance (2010) loc.cit.
[137] Severance (2010) loc.cit.; see also: 'Roma, on Move, Test Europe's 'Open Borders'' (New York Times 2010) and Cherkezova and Tomova (2013) loc.cit. p97 - 89% interviewed claimed that if they were expelled, they would attempt to reenter the country
[138] Lauritzen (2018) loc.cit.
[139] Severance (2010) loc.cit.
[140] *COHRE v. France (ESCR)* [2011]

citizen Roma, it encountered virtually none of the international backlash France weathered, suggesting that the disapproval of France's actions depended upon the EU citizen status of the minorities in question'[141]. Restricting the question to community law competencies made intervention by the Commission less controversial, but it is evident that without fully addressing the matter at hand, fundamental rights to racial equality are not adequately protected. This attititude also sends the message to aspiring member states that accession criteria are 'jumping through hoops' rather than ongoing requirements of EU membership[142]. Imre writes that 'while the EU has set future Eastern European member states strict standards for improving the political and economic situation of ethnic minorities, the borders of 'Europe' are increasingly protected from 'alien invasion'', increasingly on implicitly racialized grounds[143]. The disturbing side effect is that without sufficiently protecting the rights of Roma in migratory contexts, allowing travel on equal footing with their non-Roma national counterparts for both EU-citizen and third-country Roma, the EU appears complicit in the fallout of reactionary restrictions on Roma movement to allow continued travel for others.

A final interesting element to consider is to what extent the EU's approach matches standards under the ECHR. Ruling on the compatibility of the French policy with Article 31 Directive 2004/38 and Article 19.1 CFREU could have reflected the case law standards on collective expulsion and racial discrimination developed by the ECtHR in cases concerning Article 4 Protocol 4 and Article 14. Moreover, core values of rule of law and equality, including the right to good administration, could have reflected established ECHR case law on collective expulsion and the need for cases to be examined on individual merit - something that arguably was not upheld in the template expulsion notices issued by the French government owing to the sheer number and generic reasoning of the expulsions[144]. On the one hand, lack of respect for procedural safeguards can be seen in both the Commission's accusation of France and in the ECtHR case law, yet there was no mention of the collective nature of the French expulsions. Additionally, while raising the issue of FM implied a recognition of nationality discrimination, it failed to address any ethnic or racial discrimination that may be associated with it. The ECtHR's body of case law on collective expulsion raises questions on how the presumptions underlying the Bosphorus Principle would fair if the EU's case law on such an issue should diverge, were a similar decision to take place today. While an issue beyond the scope of this paper, rulings in cases such as *MSS v. Belgium and Greece* and more recently *Avontins v. Latvia* suggest that the ECtHR would rebut the presumption of 'equivalent protection 'should the circumstances call for it[145], questioning the impact of such a 'repeat incident 'on the Strasbourg-Luxembourg relationship. However, ultimately, both the CJEU and ECtHR case law are compatible in being too hesitant the recognise the element of racial discrimination in this, and other, collective expulsion cases.

In conclusion, there are gaps in mechanisms to practically and effectively protect against racial discrimination in areas of shared competence. While with rule of law concerns and the ongoing refugee crisis in the union appears to be turning the tide on deference towards member states border practices, the EU and the Commission, in particular, must give effect to their aims for Roma integration and fighting racial inequality in the Union, and evoke the law and procedures available to send the message that state sovereignty and border control is no excuse for racial discrimination. However, while the ECHR appears to be the stronger mechanism in this case, the lack of focus on

[141] Smith, 'A Home for the Roma: Why Strict Enforcement of Migration Laws is Necessary for a United EU' (2012)
[142] Romsics, 'The Roma Holocaust and Memory Games' (2018)
[143] Imre (2005) loc.cit.
[144] Van Eijken and Phoa (2016) loc.cit.
[145] Glas and Krommendijk, 'From *Opinion 2/13* to *Avotiņš*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts' (2017)

race or ethnicity in collective expulsion cases means that while these cases may still be challenged by the Court, they may not concretely define the issues facing Roma applicants compared to non-Roma of their nationality.

Conclusion

As we move through 2021, barriers to Roma migration can be seen everywhere. Cases on restrictions of North Macedonia's Roma continue to bob around the peripheries of the ECtHR, unilateral statements preventing a bolder statement 'until next time'. Removals to third countries outside the EU continue under cover of darkness, and in the EU, the last cases of collective expulsion are uncomfortably recent. Uncondemned and unremedied by courts, protective mechanisms remain under-utilised or untested.

Owing to the greater potential in scope, in addition to a greater number of state parties and a more robust body of case law on the relevant matters, I argue that the ECtHR would be the preferred forum to bring a case on antiziganist discrimination in migratory contexts, over the CJEU. While EU member states must be held to account by key EU actors, and in areas of shared or community competence must have inconsistent law and policy challenged, hesitance thus far suggests there is more hope to challenge cases of Roma discrimination in the ECtHR. This is particularly true considering developments in the law of racial profiling and collective expulsion. However, failure of both bodies to recognise racial discrimination prevalent in cases of Roma discrimination in migratory contexts means it is uncertain to what extent a Roma applicant would benefit from existing protections and whether their discrimination would be recognised accurately.

In cases concerning international protection, it could be said that failure to sufficiently recognise racial discrimination of Roma overall serves as a barrier to wider acceptance of Roma asylum claims. However, more realistic is a lack of political will, with fear of 'unmanageable flows' of Roma asylum seekers. While it is my belief that argument that Roma do not experience persecution in Europe is a legal fiction, particularly under the assumption of safe country among EU member states, it is reasonable to assume both the EU and European member states overall would not be forthcoming to recognise Roma migrants as refugees for political reasons. Nevertheless, Roma displaced by war and ill-treatment should be able to exercise other rights under the ECHR, including protection from inhuman or degrading treatment and right to private and family life, to challenge removals on in individual basis, even if it must be recognised that this fails to address the systemic nature of these returns.

Ultimately, lack of recognition of the racialisation of Roma lies at the heart of many regional cases, and this concerning freedom of movement and rights at borders are no exception. It is my opinion that Article 14 must be more readily evoked on the ground of race, to recognise the true nature of the cases in question and offer meaningful protection for Roma in migratory contexts.

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