

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**



26 November 2004

**Collective Complaint No. 27/2004
European Roma Rights Center
v. Italy**

Case Document No. 3

**OBSERVATIONS FROM THE
EUROPEAN ROMA RIGHTS CENTER
ON THE ADMISSIBILITY**

registered at the Secretariat on 12 November 2004



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Response by the European Roma Rights Center (ERRC) to the Italian Government's "Written Observations on Admissibility"¹ submitted concerning Procedure No. 27/2004, European Roma Rights Center v. Italy

The ERRC has received and reviewed the Italian government's comments to the ERRC Collective Complaint concerning Italy's compliance with the Revised Charter's Article 31 provisions, read together with or independently of the Revised Charter's Article E non-discrimination guarantees.

We cannot see grounds in the Italian government's response to the ERRC complaint which would be of sufficient gravity to cause the Committee to declare the complaint inadmissible. On the contrary, the response by the Italian government does not set to rest the concerns brought before the Committee, and indeed at a number of places the response itself arouses additional concerns.

We would observe the following:

1. To the issues raised in Paragraphs 4-9 of the Italian government's response, we have noted in the complaint against Italy that there are a number of categories of persons at issue. We would restate here that a large number of the persons at issue in the complaint (i) are Italian citizens or (ii) are nationals of other Parties lawfully resident or working regularly in Italy.² Other persons at issue in the complaint would include:
 - Refugees, including de facto refugees: Several thousands of Roma from Kosovo³ and an additional number of Roma from various countries of Central and Eastern Europe whose total

¹ Document undated in the copy we have received, submitted by Mr. Ivo M. Braguglia assisted by Ms. Maria Chiara Malaguti, resident at the Permanent Representation of Italy at the Council of Europe.

² See Collective Complaint by the European Roma Rights Center against Italy, 18 June 2004, paras. 5.01 and 5.03.

³ Roma and other persons regarded as "Gypsies" were ethnically cleansed from Kosovo following the end of NATO action against the former Yugoslavia in June 1999 (On Roma in the Kosovo crisis, see <http://errc.org/publications/indices/kosovo.shtml>). Italian practice concerning the recognition of Roma from Kosovo in particular has been extremely restrictive. Numerous reports by international agencies such as the UNHCR and the OSCE, both of which maintain field offices in Kosovo, as well as by non-governmental organisations and the Kosovo Ombudsman indicate that Roma and other persons regarded as "Gypsies" should not be forcibly returned to Kosovo in the current circumstances (see for example most recently, United Nations High Commissioner for Refugees (UNHCR), "UNHCR Position on the Continued International Protection Needs of Individuals from Kosovo", August 2004; Organization for Security and Co-operation in Europe (OSCE), Mission in Kosovo, Department of Human Rights and Rule of Law, "Human Rights Challenges following the March riots", June 2004; Human Rights Watch, Failure to Protect: Anti-Minority Violence in Kosovo, March 2004, July 2004 Vol. 16 No. 6 (D); Ombudsman Institution in Kosovo, "Fourth Annual Report 2003 – 2004", addressed to The Special Representative of the Secretary-General of the United Nations, 12 July 2004; Ombudsman Institution in Kosovo, "Letter on behalf of certain refugees from Kosovo of Roma, Ashkali

number may be in the several tens of thousands may be refugees as defined in the 1951 Convention Relating to the Status of Refugees. Such persons would fall within the scope of the Revised Charter as provided in the Appendix to the Revised Charter.

- Stateless persons: Several thousands of Roma may be stateless⁴ as defined in the Convention on the Status of Stateless Persons. Such persons would fall within the scope of the Revised Charter as provided in the Appendix to the Revised Charter.

In addition, ERRC field research indicates that many Roma from other Parties working regularly in Italy have been arbitrarily refused residence permits and/or other permits required in order to effectively exercise the right to engage in a gainful occupation on the territory of another Party,⁵ under practices extremely questionable in light of Italy's Article 18 obligations. In light of the foregoing, there should be no grounds to dismiss the complaint because of status issues.

2. Further, the Italian government is not correct when it states, in point 20, with reference to the racially discriminatory provision of residence permits and other administrative statuses required for real integration in Italy that "the possible reasons why the subjects do not satisfy the conditions required for the application of the Charter is not of any relevance". If Italian policy and practice in a field adjacent to the issue of the provision of adequate housing (the provision of durable residence status and/or citizenship) create conditions such that the right to adequate housing is frustrated systemically on arbitrary grounds such as race -- a condition we hold, on the basis of extensive documentation, to prevail at present in Italy -- then an assessment of Italy's compliance with its Charter obligations, including its obligations to guarantee the right to adequate housing for all cannot proceed blind to such conditions, arising as they do from Italian policy and/or the practices of public officials. Italy cannot avoid its Article 31 obligations with reference to very questionable practices under Article 18.
3. As to the issues raised in paragraph 7 of the Italian government's response to the ERRC complaint, the government is not correct when it contends that "the ERRC is not contesting the acts or measures specifically addressed at Italian nationals or nationals from other countries which are signatories to the Charter resident in Italy or working there regularly. The organisation is, on the contrary, attacking acts and measures of public order, such as non-authorized camps or camps whose aim is to identify individuals who do not possess a residence permit". For the purposes of clarity, we affirm here that, contrary to the claims made by the Italian government in its response to the complaint, we are challenging policies and practices aimed at or resulting in the frustration of the right to adequate housing for very significant segments of the Romani population, including those involving persons who are Italian citizens, as well as persons who are nationals of other Parties to the Revised Charter who are lawfully resident or working regularly in Italy. These practices include, for example, the establishment and maintenance by Italian authorities of so-

and Egyptian ethnicity" addressed to competent authorities in Western Europe, May 18, 2004, on file at the ERRC). These reports notwithstanding, Italian authorities have for the most part declined to recognise Roma from Kosovo as refugees. In addition, Roma from a number of countries of Central and Eastern Europe have been recognised as refugees by the asylum adjudicators of a number of countries outside Italy in recent years. The ERRC is aware of positive decisions by the authorities of a number of countries in applications for asylum by Romani individuals from Bosnia and Herzegovina, Bulgaria, the Czech Republic, Hungary, Poland, Romania, Serbia and Montenegro and Slovakia, but few if any Roma have been recognised as Convention refugees in Italy. Italian practice concerning the recognition of Roma as refugees is markedly more restrictive than in other countries.

⁴ To name only one type of such persons, a number of Romani men in Italy originally from Serbia and Montenegro refused to return to Serbia and Montenegro to perform military service during the Milosevic government, a regime implicated in genocide. Following the expiry of their passports, such persons were frequently unable to avail themselves of new passports. Without valid documents from their country of origin, they would in most cases have been unable to secure residence permits in Italy and consequently have become increasingly forced into extremes of social exclusion in Italy. Such persons are effectively stateless, in the sense of the International Convention on the Status of Stateless Persons.

⁵ See Collective Complaint by the European Roma Rights Center against Italy, 18 June 2004, paras. 5.06 and 5.07.

called "camps for nomads" and other racially segregating measures, as well as a range of practices described in the ERRC collective complaint against Italy.⁶

4. As to the comments of the government in paragraph 9, if we understand the substance of the argument correctly, it appears that the government claims that because it undertakes abusive practices against a group of persons which may include both (i) persons to whom the Charter's protections flow and (ii) persons who may not be able to avail the protections of the Charter, it is not possible to determine whether abuses of Charter rights have taken place, and therefore that the complaint should be dismissed as inadmissible. Accepting such a line of reasoning as appropriate and justified would be anathema, as it would be tantamount to accepting that the Revised Charter is not in fact part of the corpus of international human rights law, since it would follow from such an argument that the rights in the Charter do not flow to individuals. This would be an unsettling conclusion. Above and beyond this issue, however, the ERRC would note that in introducing such an argument in the first place, the Italian government appears to be conceding that it does not in fact take a differentiated approach between Roma whose rights should be protected by the Charter, and those who might not be able to avail themselves of these protections, but rather that Italian authorities treat all Roma the same, regardless of their status. This would appear to be a vindication of the ERRC's observation that Italian housing policy on Roma is in its current form infected thoroughly with racist presuppositions.
5. It is unclear what is meant under point 12 of the Italian government's response. In its decision in Complaint No. 6/1999 by the *Syndicat national des Professions du tourisme* against France, the Committee elaborated its view on what would constitute "the right to non-discrimination", in this case with respect to employment. In its decision, the Committee held:

24. The Committee points out that Article 1 para. 2 of the revised Charter requires those states which have accepted it to protect effectively the right of workers to earn their living in an occupation freely entered upon. This obligation requires *inter alia* the elimination of all forms of discrimination in employment whatever is the legal nature of the professional relationship.

25. A difference in treatment between people in comparable situations constitutes discrimination in breach of the revised Charter if it does not pursue a legitimate aim and is not based on objective and reasonable grounds.

26. The Committee points out that "the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact" (Complaint No. 1/1998, International Commission of Jurists v. Portugal, para. 32). [...]

This standard should also apply in the present complaint. Further, under European Union standards binding on Italy, "indirect discrimination" (the term used by the Italian government in its response at point 12) is a clearly defined term, acts of which are unequivocally illegal. For the purposes of EU law, indirect discrimination "shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."⁷ The Italian government has not presented any material in its response to the ERRC collective complaint indicating what legitimate aims are pursued by segregating Roma in Italy in substandard "camps for nomads" and thereby systemically frustrating the right to adequate housing where Roma are concerned, nor has it defended the means of achieving that end as appropriate and necessary. This observation holds for all of the areas of policy and practice described in the ERRC Collective Complaint against Italy.

⁶ See Collective Complaint by the European Roma Rights Center against Italy, 18 June 2004, Section 7.

⁷ European Council of the European Union Directive 43/2000 "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin", Article 2(2)(b).

6. We cannot find any provisions in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which would lead to the conclusions drawn by the Italian government in paragraph 17 of its response to the ERRC's collective complaint. The argument that the Charter or Revised Charter were designed to limit Italy's international human rights law obligations should be regarded with deep skepticism by the Committee.
7. Concerning the challenge by the Italian government in paragraph 18 of its response to the possibility of interpreting the Charter in light of other provisions of international human rights law, the ERRC notes that it would be fully appropriate to interpret the provisions of the Revised Social Charter in light of other jurisprudence and commentary, to the extent that such jurisprudence is appropriate and applicable. Indeed, such an approach is standard practice,⁸ and the Revised Charter itself makes reference to a number of other international human rights laws. The ERRC would further suggest that, contrary to the contentions of the Italian government, the evolving contour of rights as interpreted by various human rights bodies charged with the interpretation of the international human rights law regime is of relevance for arriving at consistent jurisprudence under the Revised Charter. This is particularly true in light of the fact that Italy has indeed ratified the three international laws at issue.⁹
8. Generally to the issues raised by the Italian government in paragraphs 10-18 of its comments on the ERRC complaint, we would note that since the complaint was originally lodged, the UN Committee on the Elimination of Racial Discrimination (CERD) has made public its General Recommendation 30 on "Discrimination Against Non-Citizens". This document addresses a number of the issues raised by the Italian government. For the purposes of issues related to the right to adequate housing for non-citizens, the CERD specifically recommended the following:

"29. Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health; [...] (emphasis added)

"32. Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices;"

The complete text of CERD General Recommendation 30 is appended herewith.

9. On the basis of the above, the ERRC holds that no materials presented in the Italian government's response to the ERRC collective complaint against Italy concerning the right to adequate housing are suitably compelling to warrant dismissal of the complaint as inadmissible. The ERRC would request that the Committee declare the complaint admissible, and review its merits.

⁸ See for example *McCann and Others v. United Kingdom*, Case No. 17/1994/464/545, Judgment (Merits and satisfaction), 27.09.1995, paras 138-140. A search in the European Court of Human Rights HUDOCs database for cases in which the words "United Nations Convention Against Torture" appears in the text of a judgment turns up "100+" results. A search in HUDOCs for texts including the words "United Nations Human Rights Committee" similarly produces "100+" results.

⁹ Italy ratified the International Covenant on Civil and Political Rights (ICCPR) on January 18, 1967; Italy ratified the International Covenant on Economic, Social and Cultural Rights (CESCR) on January 18, 1967; Italy ratified the International Convention on the Elimination of All Forms of Racial Discrimination on March 13, 1968.

APPENDIX

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

64th session

23 February-12 March 2004

CERD/C/64/Misc.11/rev.3

General Recommendation 30

Discrimination against non-citizens

The Committee on the Elimination of Racial Discrimination,

Recalling the Charter of the United Nations and the Universal Declaration of Human Rights, according to which all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms enshrined therein without distinction of any kind, and the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination,

Recalling the Durban Declaration in which the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance recognized that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices,

Noting that, based on the International Convention on the Elimination of All Forms of Racial Discrimination and general recommendations XI and XX, it has become evident from the examination of the reports of States parties to the Convention that groups other than migrants, refugees and asylum-seekers are also of concern, including undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live, even where such persons have lived all their lives on the same territory,

Having organized a thematic discussion on the issue of discrimination against non-citizens and received the contributions of members of the Committee and States parties, as well as contributions from experts of other United Nations organs and specialized agencies and from non-governmental organizations,

Recognizing the need to clarify the responsibilities of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination with regard to non-citizens,

Basing its action on the provisions of the Convention, in particular article 5, which requires States parties to prohibit and eliminate discrimination based on race, colour,

descent, and national or ethnic origin in the enjoyment by all persons of civil, political, economic, social and cultural rights and freedoms,

Affirms that:

1. RESPONSIBILITIES OF STATES PARTIES TO THE CONVENTION

1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2, provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;
2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;
3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;
4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;
5. States parties are under an obligation to report fully upon legislation on non-citizens and its implementation. Furthermore, States parties should include in their periodic reports, in an appropriate form, socio-economic data on the non-citizen population within their jurisdiction, including data disaggregated by gender and national or ethnic origin;

Recommends,

Based on these general principles, that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures:

2. MEASURES OF A GENERAL NATURE

6. Review and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination;
7. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;
8. Pay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them;
9. Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin;
10. Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping;

3. PROTECTION AGAINST HATE SPEECH AND RACIAL VIOLENCE

11. Take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens;
12. Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large;

4. ACCESS TO CITIZENSHIP

13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;
14. Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality;

15. Take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles;
16. Reduce statelessness, in particular statelessness among children, by, for example, encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children;
17. Regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State Party;

5. ADMINISTRATION OF JUSTICE

18. Ensure that non-citizens enjoy equal protection and recognition before the law and in this context, to take action against racially motivated violence and to ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such violence;
19. Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards;
20. Ensure that non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law;
21. Combat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying relevant legislation and regulations providing for sanctions and by ensuring that all officials dealing with non-citizens receive special training, including training in human rights;
22. Introduce in criminal law the provision that committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for a more severe punishment;
23. Ensure that claims of racial discrimination brought by non-citizens are investigated thoroughly and that claims made against officials, notably those concerning discriminatory or racist behaviour, are subject to independent and effective scrutiny;
24. Regulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a non-citizen has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment;

6. EXPULSION AND DEPORTATION OF NON-CITIZENS

25. Ensure that laws concerning deportation or other form of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies;
26. Ensure that non-citizens are not subject to collective expulsion in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account;
27. Ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment;
28. Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life;

7. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

29. Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;
30. Ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party;
31. Avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education;
32. Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices;
33. Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects;
34. Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;

35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated;
36. Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services;
37. Take the necessary measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture;
38. Ensure the right of non-citizens, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.
39. The present general recommendation replaces General Recommendation 11 (1993).