

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



6 October 2008

**Case document No. 3**

**European Roma Rights Centre v. Bulgaria**  
Complaint No. 48/2008

**RESPONSE OF THE ERRC TO THE SUBMISSION BY  
THE GOVERNMENT ON THE MERITS**

*(English only)*

Registered at the Secretariat on 18 September 2008





18 September 2008

## RESPONSE

### of the European Roma Rights Centre on the submissions of the Government of Bulgaria in reply to Collective Complaint No. 48/2008 (ERRC v. Bulgaria)

#### 1. Recent legislative and policy developments

Due to a combination of the recent economic growth in Bulgaria and the cuts in social assistance as a result of the 2006 amendments of the Social Assistance Act (SAA) the number of persons receiving monthly social assistance decreased significantly. At a press conference on 1 September 2008 the Ministry of Labour and Social Policy declared that the average number of beneficiaries of social assistance during the first six months of 2008 was 49 056, down from 124 635 for 2005. This is more than 60% decrease.<sup>1</sup> According to the estimates of that ministry from June 2007, some 40 906 unemployed persons in working age were supposed to lose their right to social assistance after 1 January 2008.<sup>2</sup> In its reply the Government submits that a total of 11 038 persons were excluded from social assistance as of 1 January 2008. In addition, some 12 564 persons lost their social assistance in the period 1 January – 31 May 2008.<sup>3</sup> The Government explains this difference between the initial estimate and the actual number with its active policy of promoting employment and vocational training for those who were to be excluded. As a matter of fact, these developments very much undermine Government's arguments that the cut of social assistance is the most adequate way to stimulate "personal initiative and...realization on the labour market" of the very poor. They show that it is possible to promote employment among them without relying to this draconic measure.

The Government's thinking in 2008 however went to the opposite direction. In June 2008 it proposed and the Parliament voted another amendment to the SAA, which provided that the period for continuous social assistance for unemployed persons in working age, shall be decreased from 18 to 12 months. The law became effective on 1 July 2008. It will certainly speed up the process of social exclusion of poor people. Soon after it entered into force the Minister of Labour and Social Policy, Ms Maslarova, declared that she plans to propose further reduction of this period to six months as of 1 January 2009.<sup>4</sup>

<sup>1</sup> See „МТСП, Постигнатото в областта на труда и социалната политика за трите години от управлението 2005 г. – 2008 г.” (MLSP, *Achievements in the sphere of labor and social policy for the three years in government 2005 – 2008*), София, Септември 2008 г. at: [http://www.mlsp.government.bg/bg/news/Social\\_Policy.doc](http://www.mlsp.government.bg/bg/news/Social_Policy.doc) (in Bulgarian).

<sup>2</sup> See pp.12-13 of the original complaint.

<sup>3</sup> See p.6 of the Government submission.

<sup>4</sup> See the following media reports on Ms Maslarova's statement: "В България няма безработица, отсече Масларова", at: <http://www.dnes.bg/article.php?id=54430>; „Масларова отпуска помощ „Инфлация”", at: <http://www.novinar.net/?act=news&act1=det&sql=MjczNzszNA==&mater=MjczNzsz3Ng==>; „Социалното ведомство се отчете", at: <http://www.focus-news.net/?id=n1030068>, all web sites accessed on 12 September

## 2. Comments on Government's reply with regard to the allegations of violation of Art. 13.1 of the European Social Charter

Without underestimating the legitimacy of the aims of the Government, namely to overcome the long-term dependency of the unemployed persons and to encourage their personal initiative and reintegration in the labour market, the ERRC nonetheless maintains that the Government contention about the compatibility of the impugned measures with the European Social Charter is flawed and is in contradiction with the Committee's case-law and conclusions.

The Government centred their analysis of the compatibility of the legislative change on the person's capability/fitness to work and put therefore undue emphasis only on the "working capacity" of the persons. They presumed that "in no way is to believe that these persons are not able to secure resources by their own efforts". They ignored the core of the entitlement to social assistance – that the sole condition for such entitlement is **the individual need**. The Committee has emphasized on many occasions that the "individual need should be the only condition for entitlement to social assistance"<sup>5</sup> and that the "only ground for refusing, suspending or reducing such assistance is that adequate resources are available".<sup>6</sup> When reviewing the compatibility of the Member States' system of social assistance benefits the Committee is always conscious as to whether the national rules comply with these principles. Moreover, when it reviews the system of suspension of social assistance benefits on the grounds of refusal by the unemployed persons to accept a position offered by the employment office, the Committee emphasizes that any reduction or suspension of the social assistance benefits is compatible only if it does not deprive the individual of means of subsistence.<sup>7</sup> The Committee requires from the Member States to provide information in such cases on what means of subsistence the persons with refused assistance are entitled to.

When assessing the termination of social assistance in Bulgaria through the prism of the above principles, it becomes evident that the persons affected by the impugned measures are deprived of means of subsistence in breach of these principles. The deprivation of means of subsistence is fully arbitrary as it is neither based on assessment of the individual circumstances, nor related to any particular conduct of the persons affected, such as refusal to take up the offered job or the like. In their submission, the Government states that the measure under the SAA "aims to encourage and motivate unemployed persons to...search and accept job offers". Further on the Government submits that "in no way it is to believe that these persons are not able to secure resources by their own efforts". This argument is flawed. The Rules and Regulations for the Implementation of the Social Assistance Act (RRISAA) provide for a long list of conditions for eligibility of monthly social assistance (see p.8 of the original ERRC complaint). One of the conditions for granting social assistance, according to Art.10, para.7 of RRISAA, is:

*"The unemployed persons had been registered in the "Bureau of Labour" directorates at least 9 months before applying for social assistance and had not denied any job that was offered, or their inclusion in the vocational trainings organized by the "Bureau of Labour" directorates."*

Thus, contrary to the Government's assertion, the amendments of the SAA affect persons who have actively searched jobs; otherwise their social assistance was to be cancelled on the basis that they have not accepted any job offer from the "Bureau of Labour" directorates. These are persons who were not able to secure resources by their own efforts despite their active position on the labour market. Thus, while in cases of suspension of the social assistance due to refusal to take up a job the persons are

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<sup>5</sup> General Introduction to *Conclusions XIII-4*, p. 55; *Conclusions XVII-1*, Spain, Article 13§1.

<sup>6</sup> *Ibid.*

<sup>7</sup> General observation on Article 13, general introduction to *Conclusions XIV-1*, p. 52; *Conclusions XIV-1*, France, pp. 271-273, *Conclusions 2006*, Estonia).

penalized because of their behaviour, in the case of termination of the social assistance because the time limit elapsed the persons are “sanctioned” not on the basis of their conduct but simply on the basis of the Government’s unwillingness to continue providing social assistance to them. It must be taken into account that this arbitrary deprivation affects not an insignificantly small group but a considerable number of persons (23 602 as of 31 May 2008, according to the official statistical data), who, moreover, represent the most vulnerable stratum of society – poor, often destitute, uneducated and marginalized. The Government claims that “the persons who are no longer eligible for social assistance can find jobs on the labour market in either subsidized employment programs and measures, or directly at the real labour market” (p.4) The Government however does not offer reasonable explanation of why, despite its active policy to promote employment in the second half of 2007, these persons, registered with the “Bureaus of Labour” and therefore actively seeking employment as they ought to, still could not find any.

The Government claims that during 2007 employers have submitted 101 242 job vacancies for low qualified jobs and in the period January – May 2008 they have submitted 47 361 job vacancies (p.6). In fact, these job vacancies were sought not only by long-term unemployed, but also by those that have just lost their jobs and receive temporary unemployment benefits. According to the official statistics of the National Employment Agency, the total number of unemployed as on 30 June 2008 was 221 089 persons. Of them 112 744 were registered as unemployed for more than one year.<sup>8</sup> In June on average 8 unemployed competed for one job vacancy.<sup>9</sup> It is therefore clear that these job vacancies were quite insufficient to absorb all willing to work. They were also distributed quite unevenly on the country’s territories. The level of unemployment in June 2008, according to the official statistics, was 5.97% on average.<sup>10</sup> But it varied from 1.33% in Sofia to 13.24% in Turgovishte. All the regions with high per cent of minority populations had unemployment rates above the average. The low salaries that these prospective jobs pay do not allow for labour mobility, especially among the poorest.

The Government cites a number of measures and programs that are supposed to encourage employment for long-term unemployed. One such program is “From Social Welfare to Employment”. According to the government submission “with this program unemployed persons in active age living on social assistance were provided with opportunities to get a job, have an income and get reintegrated into the labour market” (p.4). The ERRC recognizes that this program gave positive results, which was confirmed also by independent evaluations.<sup>11</sup> However, this program started back in 2002 and up to 2008 it functioned along with a system of social assistance that ensured uninterrupted monthly payments for long-term unemployed.

In support of its contention about the compatibility of the measures with Art.13.1 the Government incorrectly referred to the European practices (cited on page 3 of the submission) in the field of social assistance by claiming that the temporal limitation on the entitlement to social assistance is not an isolated practice and thus inferring that it is a rather common and acceptable model. The Committee has already observed the compatibility of such temporal limitations with the Charter, including the limitations in some of the countries referred by the Government. Thus, as regards the temporal limitation for payment of a minimum income under the Spanish social assistance system, the maximum payment of which varies from 6 to 12 months in the different regions, the Committee has observed that this situation is not in compliance with the individual need criterion.<sup>12</sup> It held that “social assistance

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<sup>8</sup> Source: National Employment Agency statistics at: <http://www.az.government.bg/internal.asp?CatID=25/01&WA=Summaries.asp>, accessed on 9 September 2008. The respective figures for any one of the previous months in 2008 are even higher than the above.

<sup>9</sup> Ibid., at: <http://www.az.government.bg/internal.asp?CatID=25/04&WA=AnaProBul.asp&YM=2008/06/2.htm>, accessed on 9 September 2008.

<sup>10</sup> Source: National Employment Agency, at: <http://www.az.government.bg/internal.asp?CatID=25/04&WA=AnaProBul.asp&YM=2008/06>, accessed on 9 September 2008.

<sup>11</sup> See e.g. *Strategies for Inclusion – coordinated approaches for quality employment*, Work Research Institute, Oslo, 2005, p.39.

<sup>12</sup> *Conclusions XVIII-1 – Spain*, Article 13, pp. 744 – 745.

must therefore be granted for as long as the need persists”.<sup>13</sup> The Committee thus held that the situation in Spain is not in conformity with Article 13. It also found that when benefits are paid for as long as they are needed and not restricted in time, this solution is in accordance with Article 13.1.<sup>14</sup> The Government’s reliance on the practice in Portugal is also flawed. In its 2006 Conclusions the Committee observed that “social integration income” in that country is, indeed awarded for twelve months. But “entitlement is renewable on production of documents confirming recipients’ financial situation”.<sup>15</sup>

Despite the various initiatives referred to by the Government with a view to manifest the existence of individual approach in the social policy and the impugned measures, the ERRC maintains that the Government still fails to demonstrate that such approach exists as regards the decisions to cut the social assistance. While the Government seeks to convince us that an individual assessment in granting social assistance and in assisting the unemployed persons in finding suitable jobs exist, no such approach is in any way demonstrated when the social assistance of a particular person is discontinued. The lack of such approach is clearly reflected in the significantly high number of the persons who have dropped out of the social assistance scheme so far without reasonable justification. And those persons had dropped out not on the ground of refusal to take up the offered job or similar conduct but simply due to expiration of the time limit for receiving such assistance. Thus, regardless of the personal reasons, individual circumstances and available resources, persons are deprived of their right to social assistance.

The impugned measures are also disproportionate to the aims pursued by the Government. The ERRC contends that the balance between the interests of the individual to social protection and personal security, on the one hand, and the public interest in promoting active participation of the work force and combating illegal employment, on the other, is disturbed. The affected individuals bear disproportionately heavy burden, as their means of subsistence are arbitrarily cut in their entirety and the very essence of their right to social assistance is thus affected.

At the same time, less restrictive and harmful measures are equally available to the Government to achieve the aims pursued. The ERRC once again emphasizes the lack of reasonable explanation by the Government as to why all those proactive initiatives carried out by the employment bureau intermediaries, which are claimed to have been highly efficient and successful over the years, cannot continue to be implemented without cutting the social assistance. The temporal limitation is thus applied in an absolute manner; the legislation does not provide even a sole alternative (a compensation or similar) to alleviate the negative effect of these cuts. Neither is there a possibility for the persons whose well-intentioned efforts for finding a suitable job nevertheless failed, to continue receiving some sort of support until assessment of their situation is considered anew.

The Government tries to demonstrate that the termination of monthly social assistance “shall not affect the other family members” and that “the kids have guaranteed monthly income” (p.3-4) due to the 2006 changes of the Family Assistance for Children Act, which provide for the possibility of in-kind assistance for children attending kindergartens and schools for some specific purposes: canteen meals, purchase of clothes and shoes, school aids etc. These however are one-off benefits, as is the one-off targeted assistance in cash for children enrolled in the first grade. They therefore cannot compensate for the loss of the family’s monthly social assistance throughout the year. Some of these benefits affect specific categories of children (first graders, those enrolled in schools that have canteens etc). Those children that do not fall into these categories are to be affected by the impugned measures, just as the other members of their families.

The Government disputes the allegation in the original complaint that termination of social assistance will result in loss of some other rights. The ERRC considers that the Government’s submission in this

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<sup>13</sup> General Introduction to *Conclusions XIII-4*, p. 55; *Conclusions XVII-1*, Spain, Article 13§1

<sup>14</sup> *Conclusions XVIII-1* – Czech Republic, Article 13, p. 237.

<sup>15</sup> *Conclusions XVIII-1* – Portugal, Article 13, p. 709.

regard is entirely flawed.

- **Access to legal aid**

The ERRC contests the Government statement that the right to legal aid under the Legal Aid Act will not be affected by the discontinuance of the social assistance. That law provides for four forms of free legal assistance - *legal consultations; preparation of documents for bringing a case before court; representation in court; legal assistance in case of police arrest*. As regards the legal aid in the form of *legal consultations* and *preparation of documents for bringing a case before court*, the law explicitly requires that the persons seeking such aid must comply with the requirements for receiving monthly social assistance. Pursuant to section 22, paragraph 3 of the Legal Aid Act, the persons applying for these two types of legal aid must present before the National Legal Aid Bureau the decision of the respective social assistance directorate for granting social assistance; if the persons had not applied for social assistance, they need to present a certificate by the respective social assistance directorate that they comply with the statutory requirements thereof. Thus, if persons whose social assistance had been discontinued (due to the expiration of the statutory time limit of 18/12 months) apply for these two types of legal aid, their request would be rejected on the ground of “non-compliance with the requirements for receiving social assistance”.

It would be unrealistic to expect from the administrative authorities to adopt a proactive approach and give a wider interpretation of the above provision than the wording of the law, and thus issue certificates even to persons whose entitlement to social assistance had already been discontinued. Even assuming that such a proactive approach is expected to be adopted by the authorities, the unclear legal provision in that respect may still be anticipated to lead to a contradictory application among different social assistance directorates to the detriment of the persons’ interests. The Government did not however demonstrate, in view of its contention that the right to legal aid will not be affected, that such proactive approach is realistic or that it has assured by any means available (an instruction, internal order or similar) that a contradictory application of the law will not be established to the detriment of the citizens’ rights. For these reasons, the ERRC considers that the deprivation of the affected persons of entitlement to social assistance will inevitably result in disproportionate interference with the persons’ right to legal aid, which, in turn, will lead to affecting one of the fundamental civil rights of the individuals – the right to a fair hearing and equality of arms.

- **The loss of the right to health insurance.**

As the ERRC submitted in the original complaint, Art.40, para 3, pt. 5 of the Medical Insurance Act provides that persons who receive monthly social assistance are paid medical insurance through the state budget. According to Art.37, para 3 of the same act they are exempted from the initial check tax. The Government tries to counter this assertion with two arguments: 1. That, persons who receive targeted assistance for heating have also their health insurance paid by the state budget; 2. That, whatever the case with the health insurance coverage, everybody who has no income can benefit from medical assistance on the basis of Decree No.17/31.01.2007 of the Council of Ministers.

The first argument is flawed because not everybody who receives monthly social assistance is automatically entitled to targeted social assistance for heating under the law. As a matter of fact, the Government recognizes this by stating that “*many of the persons* (i.e. not ALL) who are no longer eligible for social assistance have received targeted assistance for solid fuel and have health insurance up until the beginning of the next heating season” (emphasis added). How many is that “*many*”? In the period 12-21 April 2008 the S.E.G.A Foundation, a non-governmental organization based in Sofia, Bulgaria, conducted a survey among 757 persons of Roma origin in 12 segregated Roma neighbourhoods, whose social assistance was stopped in accordance with the SAA after 1 January 2008. One of the questions in the survey was whether and to what extent the respondents benefited from targeted social assistance in the past. According to the final results, some 30% of the respondents

declared that they have received targeted social assistance in 2003 and 60% declared that they have received targeted social assistance in 2007.<sup>16</sup> As for the possibilities of the persons whose social assistance was cut as of 1 January 2008, to benefit from free medical assistance under Decree 17, it is partial at best. Because the decree specifies the conditions for the treatment of persons without income only in *hospitals*, it does not provide for free medical services outside of that context. By contrast, persons who are medically ensured in Bulgaria have a possibility to benefit from services at all levels and avenues of medical care.

- **Access to agricultural land with priority**

It is true that for receiving agricultural land with priority under section 21 (2) of the Ownership and Use of Agricultural Land Act, the law does not require that both registrations in the local social assistance office and in the employment bureau are needed. It is however envisaged under section 17 of the Regulations for Providing Land to Landless Persons<sup>17</sup> that when several candidates with the same priority apply and all the other conditions among them are equal, the choice is made by lot. Thus the authorities must assess first whether the other conditions between two candidates with priority are equal. When making this assessment the authorities may incline to prioritize those who are still entitled to social assistance over those who are no longer eligible due to the expiration of the statutory time limit. Since the law itself (the Social Assistance Act), by cutting the social assistance after 18 months, creates a presumption that those who are no longer entitled to such aid are no longer *in need* of it, or are less in need than those who are still receiving it, it is legitimate to fear that the authorities will take this legal presumption into account when assessing the individual circumstances of otherwise equally entitled-to-land persons.

- **Payment of kindergarten fees**

The Government submits that the power to exempt categories of citizens from paying different types of taxes and fees lies with the municipal councils. They can exempt persons on whatever basis they decide, not necessarily on the basis of whether they receive monthly social assistance or not. That a family benefits from monthly social assistance however has been one of the widespread grounds for its exemption from paying full kindergarten fee by the Bulgarian municipalities. To the ERRC knowledge, no changes in the respective municipal government ordinances were made after 1 January 2008 in response to the new situation. At present, many municipalities continue to exempt parents who receive monthly social assistance from full kindergarten fees:

- In Sliven, according to Art.23 of the municipal Ordinance for Determination and Administration of Local Taxes and Prices of Services families who benefit from social assistance pay 50% of the kindergarten fee.<sup>18</sup>
- In Pleven, according to Art.22, para 4 of the municipal Ordinance No.17 for Determination and Administration of Local Taxes and Prices of Services, parents who receive monthly social assistance pay only 10 leva kindergarten fee, whereas the full fee is 40 leva.<sup>19</sup>

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<sup>16</sup> Фондация С.Е.Г.А., *Безпомощност на помощите: Резултати от социологическо проучване на ромси със спрени месечни социални помощи в 12 обособени ромски махали* (S.E.G.A. Foundation, *Helplessness of the assisted: Results of a sociological survey of Roma with cancelled monthly social assistance in 12 segregated Roma neighbourhoods*), София, 2008, p.11. Results were announced at a press conference on 15.06.2008 (See: [http://www.events.bg/bg/articles/view/Rezultati-ot-sotsiologichsko-proutchvane-sred-polutchavalite-mesetchni-sotsialni-pomoshiti-v-obosobeni-romski-kvartali\\_3498/](http://www.events.bg/bg/articles/view/Rezultati-ot-sotsiologichsko-proutchvane-sred-polutchavalite-mesetchni-sotsialni-pomoshiti-v-obosobeni-romski-kvartali_3498/)), accessed on 12 September 2008 (hereafter S.E.G.A survey). The survey report in Bulgarian is on file with the ERRC.

<sup>17</sup> Official Gazette No. 87 of 24 October 2000.

<sup>18</sup> The Ordinance is available at: <http://www.sliven.bg/index.csp?f=NOAMTCUTOS>, accessed on 12 September 2008.

<sup>19</sup> The Ordinance is available at: [http://obs.pleven.bg/index.php?option=com\\_docman&task=cat\\_view&gid=101&dir=ASC&order=date&Itemid=153&limit=10&limitstart=10](http://obs.pleven.bg/index.php?option=com_docman&task=cat_view&gid=101&dir=ASC&order=date&Itemid=153&limit=10&limitstart=10), accessed on 12 September 2008.



- In Montana, according to Art.24, para 3 of the municipal Ordinance for Determination and Administration of Local Taxes and Prices of Services, parents who receive monthly social assistance pay 50% of the kindergarten fee.<sup>20</sup>
- In Shumen, according to Art.28, para 2 of the municipal Ordinance for Determination and Administration of Local Taxes and Prices of Services, parents who receive monthly social assistance pay 50% of the kindergarten fee.<sup>21</sup>

The ERRC wishes to emphasize that according to the jurisprudence of the ECSR and other international bodies the ultimate responsibility for implementation of official policy lies with the state, regardless of the fact that, due to the decentralized structure of government, local authorities are responsible for carrying out particular functions.<sup>22</sup>

### **3. Comments on Government's reply with regard to the allegations for discrimination against Roma**

In the original complaint the ERRC submits that the impugned measures discriminate against Roma in Bulgaria. The Government tries to counter the allegation of discrimination by relying on the general anti-discrimination clauses in the Constitution and in the relevant legislation, including the SAA. These arguments may have relevance in a case of individual direct discrimination. The ERRC however makes a case for indirect discrimination as the seemingly neutral impugned measures have a disparate impact on Roma *as a group*. This assertion is based on a considerable amount of data, related to:

- The level of poverty among Roma, which is much higher than among the rest of the population, a fact recognized by the Government in the 2005 Joint Memorandum on Social Inclusion and in other documents.
- The greater reliance of Roma on social assistance as indicated by a number of surveys, including one commissioned by the UNDP.
- The estimates of some Regional Directorates of Social Assistance on the effects of the impugned measures by ethnic group. From these estimates it becomes clear that in Vratsa and Veliko Turnovo regions Roma were expected to be heavily overrepresented among the persons affected.
- The recognition by Ms Maslarova in May 2006 that Roma constitute 55-60% of the persons receiving social assistance and on her attempts to intimidate Roma leaders "not to stir up people to revolt".

The ERRC highlights here that this statistical information is indicative of a likely widespread impact of the impugned measures on Roma in Bulgaria. In the seminal case, *D.H. and Others v. The Czech Republic*, the European Court of Human Rights accepted that "the statistics submitted by the applicants may not be entirely reliable. It nevertheless considers that these figures reveal a dominant trend that has been confirmed by both the respondent State [...]"<sup>23</sup> In the present case, some Regional Directorates of Social Assistance and even the Minister of Labour and Social Policy have confirmed in their published information and statements that Roma do stand a high chance of being disproportionately affected by the legal amendments to the SAA.

At this point, the ERRC recalls the principle formulated by the European Committee of Social Rights in the Collective Complaint *ERRC v Bulgaria* (No. 31/2005) that, by failing to take into account that Roma run a higher risk of rights violation due to the precariousness of their situation arising from their vulnerable position (in that case, insecure tenure leading to forced eviction), the respondent

<sup>20</sup> The Ordinance is available at: [http://www.montana.bg/docs/os/n/NZMDT\\_Montana.pdf](http://www.montana.bg/docs/os/n/NZMDT_Montana.pdf), accessed on 12 September 2008.

<sup>21</sup> The Ordinance is available at: <http://www.shumen.bg/index.html>, accessed on 12 September 2008.

<sup>22</sup> Cf. *ERRC v. Greece*, Complaint No.15/2003, Decision from 8 December 2004, §29.

<sup>23</sup> *D.H. and Others v. The Czech Republic*, 13 November 2007, ECHR Application no. 57325/00, para 182. See also para 191.

Government had discriminated against Roma.<sup>24</sup> The ERRC notes that this principle has also been endorsed by the European Court of Human Rights in the seminal case, *D.H. and Others v. The Czech Republic*, wherein the Court recalled “as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority [...]. As the Court has noted in previous cases, they therefore require specific protection.”<sup>25</sup>

The ERRC believes that thereby it established a *prima facie* case of a disparate impact of the impugned measures on Roma. In order to reject the allegations of indirect discrimination, the Government should bear the burden to prove that these measures are objectively justified by a legitimate aim and that there is no other, less restrictive means to achieve the aim pursued.<sup>26</sup> The Government failed to do this in its response. Nor has the Bulgarian government provided adequate information in its submissions to the Committee to prove that it has taken due measures to avoid a disproportionate impact of the legal amendments at issue on members of the Romani community. It tries, in the first place, to counter the observation that the 2006/2008 amendments of the SAA have a disparate impact on Roma. The Government submits that “pursuant to the Bulgarian legislation no collection of personal data separated by ethnic groups shall be allowed”. This is not true. The Government fails to cite any piece of Bulgarian legislation that bars it to collect ethnic data. As a matter of fact, such data has been and is being collected by government agencies for several purposes. These include:

- The census of population, including the most recent one from 2001, which collected data by ethnic group.<sup>27</sup> The National Statistical Institute subsequently produced numerous analyses using this data.
- The criminal justice system. It collects ethnic data from the initial stage of the proceedings through the Statistical Form 1-CC.<sup>28</sup>
- The juvenile justice system. It collects ethnic data through Section VI of its general statistical form for all juveniles registered with the children pedagogical offices and for all juveniles who have had a correctional measure indicated by the local commissions for juvenile delinquency.<sup>29</sup>

But even if the assertion of the Government that the Bulgarian legislation does not allow for the collection of ethnic data was true, this could not serve as a basis for the denial of the disparate impact of the 2006/2008 amendments of the SAA on Roma and for proving that the principle of equal treatment was respected. In this regard the ERRC wishes to recall the consistent jurisprudence of the ECSR on government obligations in cases where a particular group is or could be discriminated against by legislative or other measures:

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<sup>24</sup> *European Roma Rights Centre v. Bulgaria*, Complaint No 31/2005. Decision on the Merits, 18 October 2006, paras 55 - 57.

<sup>25</sup> *D.H. and Others v. The Czech Republic*, 13 November 2007, ECHR Application no. 57325/00, para 182. See also para 184.

<sup>26</sup> The shifting of the burden of proof in discrimination cases is well-established practice before the Court of Justice of the European Communities (ECJ), the Council of Europe’s European Court of Human Rights, United Nations treaty bodies and many national courts (See for example the Burden of Proof Directive - EC Directive 97/80/EC of 15 December 1997, and the Race and Framework Directives - Directive 2000/43/2000 of 29 June 2000 implementing the principles of equal treatment of persons irrespective of race or ethnic origin (Race Directive) and Directive 2000/78/2000 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive). See also *D.H. and Others v. The Czech Republic*, 13 November 2007, ECHR Application no. 57325/00. See also the Netherlands (*RK Woningbouwvereniging Binderen vs. S. Kaya*, 10 December 1982, NJ 1983/687); Canadian Human Rights Act, section 15; South African Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, section 13; section 54A; New Zealand Human Rights Act 1993, section 92F; United States [in context of indirect discrimination, section 105(a) Civil Rights Act 1991; and *McDonnell Douglas Corp. v. Green*, 411 U.S. 492 (1973)]. For the approach in English cases see Neill LJ in *King v. Great British-China Centre* (1992) ICR 516 at 528, cited with approval by Lord Brown-Wilkinson in *Glasgow City Council v. Zafar* (1998) ICR 120.

<sup>27</sup> See the publication of the National Statistical Institute on population in Bulgaria by ethnic group at: <http://www.nsi.bg/Census/Census.htm>

<sup>28</sup> See more information: Krassimir Kanev, Alexander Kashumov, “The Case of Bulgaria”, in: Andrea Krizsan (ed.), *Ethnic Monitoring and Data Protection: The European Context*, Budapest, CEU Press, 2001.

<sup>29</sup> The general statistical form is on file with the ERRC.

“The Committee recalls that when it is generally acknowledged that a particular group is or could be discriminated against, the state authorities have a responsibility for collecting data on the extent of the problem (ERRC v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §27). The gathering and analysis of such data (with due safeguards for privacy and against other abuses) is indispensable to the formulation of rational policy.”<sup>30</sup>

In the absence of data on the effects of the impugned measures by ethnic group the Government is not able to counter the allegation of a disparate impact, to show that the principle of equal treatment was respected and to formulate rational policies.

The ERRC wishes to submit further evidence on disparate impact of the 2006/2008 amendments of the SAA on Roma:

- In the survey of the S.E.G.A. Foundation cited above the research team interviewed some 757 persons, all Roma, from seven municipalities (Varna, Razgrad, Haskovo, Karlovo, Dupnitsa, Kyustendil and Pavlikeni). According to the survey report, these are “Roma, living in segregated neighbourhoods with monthly social assistance cancelled as of 1 January 2008”.<sup>31</sup> From the data in the annex of the government submission it transpires that the total number of persons affected from the impugned measures from 1 January – 1 May 2008 is 544. On the other hand, on p.6 of the government submission we read that the total number of persons who lost their right to social assistance in the period 1 January 2008 – 31 May 2008 is 12 654 and the total number of persons who lost their right to social assistance as of 1 January 2008 is 11 038, i.e. even less. There is no reason to believe that there have been serious changes in the territorial distribution of the cuts in social assistance before and after 1 January 2008. This indirectly suggests heavy overrepresentation of Roma from those municipalities among the affected from the impugned measures both before and after 1 January 2008.
- The annex, which the Government attaches to its submission, cites data for the City of Sofia with its nine District Social Assistance Directorates. Of the total of 393 persons affected by the cuts in social assistance in Sofia, 355, i.e. 90%, are from the Vuzrazhdane District Social Assistance Directorate. This directorate serves the largest Roma neighbourhood in Sofia, Fakulteta. We thus have another indirect evidence for the disparate impact of the impugned measures on Roma.

In response to the allegation of indirect discrimination against Roma the Government cites several programs aiming at promoting employment opportunities. Some of these programs target Roma specifically while others are general, from which Roma can benefit, along with everybody else. Some of the Roma-specific programs targeted municipalities with relatively high numbers of Roma excluded from social assistance (Pazardzhik, Elhovo), whereas others were offered in municipalities where the level of exclusion from social assistance, according to the figures provided by the Government in the enclosed annex, is very low (Burgas, Peshtera). One can therefore ask questions as to the relevance of these programs to the effects of the impugned measures. But, most importantly, the elaboration of the Government on the above programs fails to address the questions that are relevant to the allegations of discrimination:

- How do these programs compensate for the disparate impact of the impugned measures on Roma?
- As all these programs have been operational long before 1 January 2008, what was wrong with their operation alongside a welfare system that did not allow for arbitrary interruption of monthly social assistance regardless of individual need? In other words – what made the Government chose the harsher alternative, which is disproportionate to the aim pursued?

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<sup>30</sup> *ERRC v Italy*, Complaint No. 27/2004, Decision from 21 December 2005, §23.

<sup>31</sup> S.E.G.A survey, p.4.

#### **4. Comments on Government's reply with regard to allegations for discrimination against women**

The ERRC maintains that by establishing that only women (and not men) who care about children younger than three years will not have their social assistance cut after 18/12 months, the legislator places them, especially the unemployed women and women from poor families, in a more unfavourable situation as they will be forced to take care of their children in order not to lose the social assistance. This, in turn, will make them refrain from taking up career opportunities outside of their home and will thus have a deterrent effect on their reintegration, in contradiction with the general goals pursued by the Government with the impugned legislative changes. Therefore, the legislator had constructed discrimination provisions in the law to the detriment of the women taking care of their children and had created direct discrimination against them on the ground of their sex. That this unfavourable treatment results from that provision is clear from evidence of common knowledge and facts from general life which need not be proven.

The ERRC further maintains that once it managed to demonstrate that the government actions by adopting legislation which treats differently and less favourably women than men in a comparable situation, the burden should move to the Government to prove that there was no discrimination. This rule releases the party claiming discrimination from sole responsibility for establishing this fact.

As in the original complaint, the ERRC urges the Committee to apply the principle of the shifting the burden of proof in the case at hand and accept that the ERRC has established facts from which it could clearly be concluded that there is a direct discrimination, and to shift the burden of proof to the Government. If the Government is unable to adequately explain the unfavourable treatment in issue, and the ERRC considers that thus far they failed to give a plausible explanation thereof, the discrimination should be found.

#### **5. Conclusion**

The Government failed to submit arguments to rebut the allegations in the original complaint. The ERRC reiterates its conclusions: By making social assistance limited in time with the amendments of the Social Assistance Act in February 2006 and in June 2008, in disregard of the principle of individual need, Bulgaria violated Article 13, Paragraph 1 of the Revised European Social Charter. As the Government could not show that the impugned measures, which have disparate impact on Roma, are a proportionate means to a legitimate aim and that there is no less restrictive means to achieve its aim, the ERRC concludes that the impugned measures constitute indirect discrimination in violation of Article E, in conjunction of the above article of the Charter. The amendments also discriminate directly on the basis of sex, as the female members of the families caring for children younger than three years are likely to be adversely affected when implemented.