

Does Europe Still Create Refugees? Examining the Situation of the Roma

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Throughout the twentieth century, Europe experienced many catastrophic events that created massive numbers of refugees. As the century came to a close, the creation of European citizenship marked a step toward full cooperation between European countries and free movement for citizens between participating states. However, the 1999 Aznar Protocol presumes safety within the borders of each Member State and therefore denies asylum to European Union citizens within the EU itself. This has created new flows of European refugees, composed of marginalized groups such as Roma. The authors argue that cumulative discrimination against Roma has particularly restricted their EU treaty rights to free movement, creating Roma refugees and a need for international protection.

This article begins with a history of refugee and free movement policies in Europe and an overview of the rights given to EU citizens is provided. The authors then describe who and where are the Roma and the meaning of being a Roma EU citizen. They conclude that Roma are victims of cumulative discriminatory acts which have amounted to persecution and should be grounds for refugee protection under the Refugee Convention and EU's Qualification Directive. Consequently, when contemplating whether Europe still creates refugees, the answer is yes.

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Introduction

The history of international refugee law is marked by developments in Europe, including the Nansen Passport System and the 1951 *Convention relating to the Status of Refugees* (*Refugee Convention*).² Until the adoption of the 1967 *Protocol Relating to the Status of Refugees*, the *Refugee Convention* recognized Europe as the exclusive source of refugees in the world.³ The pattern of refugee flows in Europe changed during the period of the Cold War when Eastern and Southern Europe became the primary regions of origin of refugees. Western Europe was considered the place of refuge for those fleeing persecution in the Communist East or the fascist states of Southern Europe, including Greece under the colonels, Spain under Francisco Franco and Portugal under António de Oliveira Salazar.⁴ This

1. *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [*Refugee Convention*]; *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

2. Claudena M Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (New York: Oxford University Press, 1995).

3. Terje Einarsen, "Drafting History of the 1951 Convention and the 1967 Protocol" in Andreas Zimmermann, ed, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011) 37; Elspeth Guild, "The European Geography of Refugee Protection: Exclusions, Limitations and Exceptions from the 1967 Protocol to the Present" (2012) 17:4 Eur HRL Rev 413.

4. Danièle Joly, *Haven or Hell?: Asylum Policies and Refugees in Europe*, Migration, Minorities and Citizenship Series, (London, UK: Macmillan Press, 1996) at 34–38; Anne Paludan, "Refugees in Europe" (1981) 15:1–2 Intl Migration Rev 69 at 69–71.

pattern continued well into the 1980s but began to change as totalitarian regimes fell and these nations joined the European Union.⁵

The enlargement of the EU has led to refugees and asylum claim challenges. As Spain entered the EU, so too did the political troubles of the Basque region. The treatment of suspected Basque independence supporters by Spanish authorities after the re-establishment of democracy continued to create refugees in Europe.⁶ The Spanish government championed the development of an EU citizenship in the early 1990s in an attempt to exclude EU citizens from seeking refugee status within the EU. The resulting *Aznar Protocol*⁷ was thus founded in struggles over political identity and the flight of Spanish Basque activists seeking asylum elsewhere in the EU.⁸

Similarly, the collapse of communist regimes in Eastern Europe had major consequences for asylum in Europe as large numbers of people entered EU Member States from former communist countries, and others fled from the wars in the former Yugoslavia.⁹ At the same time, the rising emphasis on national identity in many Central and Eastern European states highlighted another group of people with dubious belonging in the newly democratic states, the Roma.¹⁰ The EU's "big bang" enlargement on May 1, 2004 brought ten new Member States, mostly in Central and Eastern Europe,¹¹ and made the Roma identity issue broader than

5. András Inotai, "The 'Eastern Enlargements' of the EU" in Marise Cremona, ed, *The Enlargement of the European Union* (New York: Oxford University Press, 2003) 79 at 89–97.

6. Emmanuel-Pierre Guittet, "Is Consensus a Genuine Democratic Value?: The Case of Spain's Political Pacts Against Terrorism" (2008) 33:3 *Alt J* 267.

7. EC, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2012] OJ, C 326/1, Protocol (No 24) [*Treaty on the Functioning of the EU*] (commonly known as the *Aznar Protocol*).

8. Elspeth Guild, "International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001" in Fergus Carr & Andrew Massey, eds, *Public Policy and the New European Agendas* (Cheltenham, UK: Edward Elgar Publishing, 2006) 233 at 240–41.

9. Robin Cohen & Danièle Joly, eds, *Reluctant Hosts: Europe and Its Refugees* (Aldershot, UK: Avebury, 1989) at 5–18; Eleonore Kofman, "Contemporary European Migrations, Civic Stratification and Citizenship" (2002) 21:8 *Political Geography* 1035.

10. Peter Vermeersch, "Ethnic Minority Identity and Movement Politics: The Case of the Roma in the Czech Republic and Slovakia" (2003) 26:5 *Ethnic & Racial Studies* 879.

11. The ten new countries were Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

exclusively national. Under EU law, anyone with the citizenship of a Member State has the right of free movement anywhere else in the EU. The number of EU citizens with Roma ethnicity further increased with the next two EU enlargements; Bulgaria and Romania joined in 2007, and Croatia joined in 2013.¹²

In this article, we examine the situation of Roma EU citizens. We purport that cumulative discrimination against Roma has limited their EU treaty rights to free movement, creating Roma refugees and a need for international protection. We will discuss who and where are the Roma and what is happening to them. We will then analyze cumulative discrimination as a ground for refugee protection under the *Refugee Convention* and the EU's *Qualification Directive*.¹³ We will argue that for EU citizens of Roma ethnicity, it is often the cumulative nature of acts of discrimination, the failure of state authorities to intervene, or indeed their complicity in that discrimination that raises the question of the need for international protection policies.

I. The European Union and the Rights of Its Citizens

The European Union is a supranational organization that grants rights to individuals in the territories of its Member States and provides mechanisms to ensure the implementation of those rights. EU law defines its citizens as all nationals of any Member State.¹⁴ The acquisition and loss of nationality of a Member State remains a matter to be determined exclusively by each Member State subject only to very light EU control. National constitutions determine how citizenship is passed, and EU law

12. EC, Commission, *Enlargement Policy: From 6 to 28 Members*, online: <www.ec.europa.eu/enlargement/policy/from-6-to-28-members/index_en.htm>.

13. EC, *European Parliament and the Council Directive (EC) 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, [2011] OJ, L 337/9, arts 39–40 [Council Directive (EC) 2011/95/EU].

14. EC, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2012] OJ, C 326/1, arts 20–23.

does not normally interfere with that aspect of national sovereignty.¹⁵ The State's decision will then determine whether an individual also holds EU citizenship. Once a Member State establishes that an individual does not have or no longer has its nationality, that individual can no longer claim EU citizenship, which derives from that national status.¹⁶ As soon as a state joins the EU, its nationals automatically acquire citizenship of the Union.

EU treaties set out various rights for EU citizens including the right to move and reside freely within the territory of the Member States.¹⁷ However, this right is subject to the residual power of Member States to expel or refuse admission to citizens of other EU Members on grounds of public policy, public security or public health. The status of EU citizenship therefore does not resemble classic citizenship in international law as there is ultimately no security of residence for an EU citizen in another Member State. Expulsion from one Member State to another is legally described as, and has the effect of, deportation. A Member State's residual power is not boundless. It must exercise its power consistently with the conditions in the EU's *Qualification Directive*. The Court of Justice of the European Union (CJEU) has interpreted the grounds of public policy, public security or public health narrowly.¹⁸

Subject to Member States' residual power to refuse admission or expel an EU citizen on one of these grounds, EU citizens are generally entitled to move and reside in the territory of any other Member State for up to three months.¹⁹ This right faces an additional limitation in that it does not apply where citizens become an unreasonable burden on the Member

15. EU law may be engaged if a state abuses the EU constitutional right regarding the conferral and withdrawal of citizenship in a manner inconsistent with fundamental rights.

16. *Janko Rottmann v Freistaat Bayern*, C-135/08, [2010] ECR I-1467 at I-1492; Jo Shaw, ed, "Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?" (2011) European University Institute Working Paper No 2011/62.

17. EC, *Commission Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, [2004] OJ, L 158/77 [*Commission Directive 2004/38/EC*]; Nicola Rogers & Rick Scannell, *Free Movement of Persons in the Enlarged European Union* (London, UK: Sweet & Maxwell, 2005) at 67–244.

18. Public health can only be used as a ground to prevent first admission.

19. *Commission Directive 2004/38/EC*, *supra* note 17, art 6.

State's social assistance system.²⁰ The host Member State is also not required to provide social assistance in that time frame.²¹ Those wishing to stay longer than three months must fall into one of the following categories:

1. Be engaged in economic activity through full- or part-time employment or self-employment²² (i.e., provide services for remuneration). Individuals in this category are entitled to all social benefits available to Member State nationals in similar employment;²³
2. Attend an educational or vocational institution, and have and maintain comprehensive sickness insurance. Individuals in this category must also declare they have sufficient resources not to be a burden on the social assistance scheme of the host Member State; or
3. Remain economically inactive (including a retirement pensioner), and have and maintain comprehensive sickness insurance and evidence of sufficient resources not to be a burden on the social assistance scheme of the host Member State. Exceptions are made for those who retire in a host Member State after having worked there for a period of time.

After five years in one of the above-mentioned roles, the EU citizen acquires permanent residence and becomes entitled to claim all social assistance benefits without risking his right to reside in the territory. Permanent residency also affords additional protection against expulsion, as people with permanent residency can only be removed if the state can show that there are serious grounds of public policy or public security. If an individual has been a resident for ten years or is a minor, expulsion is only justified where there are imperative grounds of public security.²⁴

20. *Ibid*, art 14(1).

21. *Ibid*, art 24(2).

22. The CJEU has found that someone working between three and fourteen hours per week could be considered a worker. See *Wendy Geven v Land Nordrhein-Westfalen*, C-213/05, [2007] ECR I-6362 at I-06372.

23. Catherine Barnard, *EU Employment Law*, 4th ed (Oxford: Oxford University Press, 2012).

24. *Commission Directive 2004/38/EC*, *supra* note 17, art 28(3).

For people seeking international protection, these rights may be useful as they provide the opportunity to escape from a territory where they fear persecution, inhuman or degrading treatment, or punishment. At the same time, EU citizenship gives rise to a presumption *against* the need for international protection in other EU Member States. The *Aznar Protocol* states that given the level of protection of fundamental rights in the EU, all Member States will be regarded as safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.²⁵ The result is that while EU citizens have wide rights to move and reside anywhere in the EU, they may find themselves legally ineligible for any state support, even though they fear persecution and need international protection. Further, the Member State may exercise its residual right of expulsion on public policy or security grounds.

II. Who and Where Are the Roma?

In the popular imagination, the Roma or gypsies are travelling people. The romantic vision of them is of a little family grouping living in caravans and moving from town to town across Europe exercising self-employed activities, such as sharpening knives and scissors, mending pots and pans, selling horses and collecting scrap metal for the men, and fortune telling, dancing and prostitution for the women.²⁶ If this image corresponded to the reality then the rights, which the Roma have as EU citizens, might be sufficient for their purposes. Unfortunately, this image in no fashion corresponds to the reality. So who are the Roma?

Other than in reference to discrimination and social exclusion, Roma are afforded little official designation. However, three European international organizations, the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe and the European Commission attempt to locate and define the group. They roughly estimate that there are about ten to twelve million Roma across Europe. Romania likely has the largest concentration of Roma at just

25. *Treaty on the Functioning of the EU*, *supra* note 7, Protocol No (24).

26. Jodie Matthews, "Romanies/Gypsies, Roma & Irish and Scottish Travellers: Histories, Perceptions and Representations, A Research Review Discussion Paper" (2012) [unpublished, archived at University of Huddersfield Repository] at 7, online: <www.eprints.hud.ac.uk/16390>.

fewer than two million people. Turkey may have one million Roma, however the number is uncertain. Bulgaria and Spain each likely have greater than seven hundred thousand Roma, followed by Hungary with five hundred thousand, and then Slovakia and the Czech Republic. No other European state seems to have a Roma population exceeding two hundred thousand.²⁷

The OSCE describes the group by the generic term “Roma” and has actively supported strategies to mitigate discrimination against them. It states that Roma, Sinti and other groups that share common culture, language and ethnicity constitute the largest ethnic minorities in Europe: “Because of the centuries-old societal prejudice, intolerance, and pervasive discrimination that they continue to face, they experience problems in accessing rights and services in most areas of life and are poorly represented in the public and political life of their societies.”²⁸ The Council of Europe suggests that the designation of Roma has varied since the early 1970s and includes Gypsies and other travelers, nomads, populations of nomadic origin, Gypsies, Rroma (Gypsies), Roma, Roma/Gypsies, Roma/Gypsies and Travellers, and Roms et Gens du voyage.²⁹ The Council’s European Roma and Travellers Forum is open to Roma, Sinti, Kale, Travellers and other related groups. Finally, the European Commission of the European Union states that EU policy documents and discussions often use the term Roma to refer to “diverse groups that include names like Roma, Gypsies, Travellers, Manouches, Ashkali, Sinti” and other titles.³⁰ It also

27. Interactive maps based on information from the Council of Europe illustrate where Roma may be found across Europe. See Berlin Institute for Population and Development, “Roma in Europe”, cited in Andreas Griess, Maria Marquart & Dominik Peters, “Sarkozy’s Battle: Roma Camps Are the Exception in Germany”, *Spiegel Online* (17 September 2010), online: < www.spiegel.de > .

28. “ODIHR and Roma and Sinti Issues” (2013), online: Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, online: < www.osce.org/odihr/102598 > .

29. Council of Europe, “Roma and Travellers Glossary” *Roma and Travellers* (11 December 2006) at 2, online: < www.coe.int/t/dg3/romatravellers/Source/documents/GlossaryRoma.doc > .

30. “EU and Roma”, European Commission, online: < www.ec.europa.eu/justice/discrimination/roma/index_en.htm > .

notes that the term Roma is not intended to obscure the diversity among various Romani groups and communities, nor encourage stereotypes.³¹

The definitions for Roma vary largely because those groups that might be categorized as Roma worry about the collection of ethnic data, which has historically been used for discriminatory purposes. For instance, data collection during the Holocaust allowed for lists identifying the Roma/Gypsy population. Furthermore, police services use crime statistics compiled on ethnic bases, which reinforce prejudices and stereotypes.³²

A. Roma as Citizens of the European Union

Until 2004, most Roma were not EU citizens as their states of nationality were not Member States of the EU. The main exception was the Spanish Roma. But when Spain became a Member State in 1986, there was no discussion of the treatment of its relatively large population of Roma, not even after Spanish workers gained the right of free movement in 1991.

On May 1, 2004, ten states joined the EU; all of these states, other than Malta, had some Roma citizens.³³ While citizens of all of these states had an immediate right of free movement for three months—and for longer periods if they were self-employed, students or self-sufficient—only nationals of Cyprus and Malta had an immediate right to move anywhere in the EU for employment purposes. However, most Member States, except for Austria, Germany and the UK,³⁴ lifted the transitional restriction before May 1, 2011, after which it was completely removed for all Member States. On January 1, 2007, Bulgaria and Romania joined the EU. As in the case of the so-called EU-8,³⁵ a transitional restriction on

31. EC, Commission, *The Situation of Roma in an Enlarged European Union* (Luxembourg: EC, 2004).

32. Council of Europe, Committee of Experts on Roma and Travellers, *Roma and Statistics*, MG-S-ROM (2000) 13 at para 4.

33. Sergio Carrera, "What Does Free Movement Mean in Theory and Practice in an Enlarged EU?" (2005) 11:6 Eur LJ 699 at 706.

34. The UK allowed EU-8 citizens to move to work in the country from the date of accession subject to a registration requirement, but it refused to lift the registration requirement until the last day of the transitional period.

35. Those Member States that joined the EU on May 1, 2004 with the exception of Cyprus and Malta.

employment applied and was eventually lifted on January 1, 2014. Croatia joined the EU on July 1, 2013 with the same transitional arrangements as the EU-8 and the EU-2. The developments from 2004 to 2013 are important as now most people categorized as having Roma ethnicity are EU citizens, suggesting that most of them have the right to move and reside for three months in any Member State, as well as the right to move for employment or to look for work.³⁶ The right to move and reside in a host Member State does not, however, constitute an effective alternative to international protection. European institutions have found justifications to force the Roma to move on, out of their homes, off of the land where they are camped and out of the state.³⁷ The French and Italian authorities' expulsion programs against Romanian and Bulgarian nationals, which intensified from 2007 onwards and continued at the time of writing in France, are examples.³⁸

B. The People Who Do Not Want to Travel

Since the fall of the Berlin Wall in 1989, there has been a rise of nationalism in many Central and Eastern European countries, which has led to struggles over property ownership in former communist states that began to embrace free market economics.³⁹ With the marginalization of Roma from the new national identities of many post-1990 Central and Eastern European states, residential property previously owned by the state was transferred to citizens, and Roma families disproportionately

36. Sergio Carrera, Elspeth Guild & Massimo Merlino, "The Canada-Czech Republic Dispute Two Years On: Implications for the EU's Migration and Asylum Policies" (October 2011) Centre for European Policy Studies, Liberty and Security in Europe Publication Series.

37. Romain Cames, "Government by Expulsion: The Roma Camp, Citizenship, and the State" (Paper delivered at the RC21 Conference, Berlin, 29–31 August 2013), online: <www.rc21.org/conferences/berlin2013/RC21-Berlin-Papers/24-2-Cames.pdf>; Audrey Patten, "'Empty Human Rights Lip Service': France's Roma Expulsions and the Failure of the European Union to Exercise Its Racial Equality Directive" (2011) 31 Polish YB of Intl L 315.

38. Sergio Carrera & Anaïs Faure Atger, "L'Affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice" (September 2010) Centre for European Policy Studies, Liberty and Security in Europe Publication Series.

39. Katherine Verdery, "Transnationalism, Nationalism, Citizenship, and Property: Eastern Europe Since 1989" (1998) 25:2 American Ethnologist 291.

lost out.⁴⁰ There were also an alarming number of pogroms against Roma families aiming to chase them from their homes, villages and regions, which have been documented by the European Roma Rights Centre.⁴¹ Judgments from the European Court of Human Rights (ECtHR) condemn EU Member States for failing to prevent the killing of Roma in mob actions, and burning of their homes and belongings.⁴² The Council of Europe prepared a detailed summary of all Roma-related cases decided by the ECtHR by December 2013, including disputes about:

- Publication of anti-Roma sentiment in government-funded publications (Turkey);
- Forced or coerced sterilization of Roma women (Slovakia);
- Forced eviction from caravan sites (UK, Bulgaria);
- Racially biased police investigations including failure to investigate racist homicide (Greece, Croatia, Romania, Bulgaria);
- Attacks on Roma villages and destruction of property (Romania, Slovakia);
- Segregation in schools (Czech Republic, Greece, Croatia, Hungary);
- Validity of marriages (refusal of survivor's pensions) (Spain); and
- Prohibition of standing for election (Bosnia).⁴³

Not all judgments found a violation by the state, but the summary is nonetheless solemn. They all clearly show that Roma people struggle with the right not to be *forced* to move rather than the right to move. Because Roma belongings, homes and bodies are objects of racist attack and are often not effectively protected by the state, a mobile home that can escape harm seems to be a sensible, yet not always effective choice. In

40. See Marie-Bénédicte Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (New York: Cambridge University Press, 2006) at 127–30 (Dembour undertakes a detailed analysis of a Romanian property dispute before the European Court of Human Rights where the Roma residents are gradually completely silenced in the dispute).

41. See e.g. Elspeth Guild, Kieran O'Reilly & Marek Szilvasi, eds, *Going Nowhere?: Western Balkan Roma and EU Visa Liberalisation* (Budapest: European Roma Rights Center, 2014).

42. See generally *ibid.*

43. "Fact Sheet: Roma and Travellers", European Court of Human Rights (October 2013), online: <www.echr.coe.int/Documents/FS_Roma_ENG.pdf>.

France, Roma were expelled from their neighbourhoods by police, which included systematic destruction of their caravans.⁴⁴

III. Issues for Roma EU Citizens Using Their Free Movement Rights

The EU's specialized Fundamental Rights Agency (FRA) is a formal part of the EU structure. Its responsibilities include providing expert advice to the institutions of the EU and Member States and ensuring that the fundamental rights of people living in the EU are protected. The FRA has undertaken substantial research on individuals categorized as Roma in the EU and publishes its research regularly. In November 2009, it released a detailed report on the situation of Roma EU citizens settling in other Member States. Its quantitative field research illustrates that poverty and racism are the main "pushing" factors that cause Roma to leave their countries of origin. The two main "pulling" factors, or reasons why they moved to the chosen host country, were to find work and to improve living standards.⁴⁵ On crossing EU internal borders, the FRA found that Roma EU citizens were more likely than others to encounter problems "including demands for bribes by corrupt officials when leaving or returning to their own countries" and racism.⁴⁶ For example, the German border police were performing spot checks on train passengers based on racial profiling until October 2012 when a court derided and prohibited the practice.⁴⁷

The FRA found that Roma EU citizens also had different experiences when searching for work or accessing social services in a destination

44. Angellique Chrisafis, "Roma Raids Intensify in France as Socialists Seek Ways to End 'PR Disaster'", *The Guardian* (21 August 2012), online: < www.theguardian.com >; Peter Allen, "France Declares War on Illegal Migrants: Riot Police Smash Camps and Hundreds Rounded Up for Deportation as Socialists Take on Gypsies", *Daily Mail Online* (9 August 2012), online: < www.dailymail.co.uk >; Steven Erlanger, "Treatment Still Harsh for Roma in France", *The New York Times* (3 June 2013), online: < www.nytimes.com >.

45. EC, FRA, *The Situation of Roma EU Citizens Moving to and Settling in Other EU Member States* (Luxembourg: EC, 2009) at 6 [*Situation of Roma EU Citizens*].

46. *Ibid.*

47. Note that the specified case did not involve Roma, but it demonstrates racial profiling by German law enforcement authorities more broadly. For background information on the case, see Daryl Lindsey, "The World from Berlin: Profiling Ruling 'Sows Seeds of

country, depending on the attitudes of the local authorities. Many respondents were unable to register their residency because of complex procedures and incorrect national and local application of EU law on free movement of persons.⁴⁸ If an EU citizen is unable to register her residence in the host Member State, then she may not be able to prove lawful residence and thus be at risk of expulsion. The person may also not be able to provide evidence that she has contributed to the five-year residency period necessary to acquire permanent residence and access all social benefits without risk of expulsion. Work in the informal sector was also common among the FRA respondents. The FRA report found that Spain provided the best model of good practices regarding assistance to Roma EU citizens.⁴⁹

Where Roma are excluded from the labour market, they are likely to find themselves in marginalized situations. The economic downturn that began in 2008 led to rising unemployment in some EU Member States and growing xenophobia and racism toward foreign individuals taking jobs and resources from national citizens.⁵⁰ Racial discrimination also appears in bureaucracies, which delay applications for social benefits to Roma, including housing or family assistance.

A 2012 joint FRA/United Nations Development Programme (UNDP) report on the situation of Roma in eleven EU Member States found regarding Roma that

- 20% on average were not covered for health care;
- 45% live in housing lacking at least one basic amenity (including indoor kitchen, indoor toilet, indoor shower/bath or electricity);
- 90% live in households with income below national poverty standards; and
- 40% live in households where somebody had to go to bed hungry at least once in the last month because they could not afford to buy food.⁵¹

Distrust and Racism”, *Spiegel Online* (29 March 2012), online: <www.spiegel.de>. For a discussion of the appeal decision, see “German Court Raps Police Over Racial Profiling” *Deutsche Welle* (30 October 2012), online: <www.dw.de/german-court-raps-police-over-racial-profiling/a-16343389>.

48. *Situation of Roma EU Citizens*, *supra* note 45 at 7.

49. *Ibid* at 8.

50. See Helen O’Nions, “Some Europeans Are More Equal than Others” (2014) 8:1 People, Place & Policy 4.

51. FRA & UNDP, *The Situation of Roma in 11 EU Member States: Survey Results at a*

Where there is generalized discrimination, racism and social exclusion, the possibility for persecution rises substantially. For example, in countries where women are subject to forced sterilization, Roma women encountering problems during pregnancy may be unwilling to seek assistance as they doubt the medical system entirely. The possibility of moving within the EU away from the place where the person is most at risk may work for some people but may not for others.⁵² The FRA/UNDP study shows that Roma suffer extreme social exclusion in Central and Eastern European countries but also in Western Europe where they may be systematically excluded from rights to residence, housing, access to employment, health insurance and social benefits.⁵³ Human rights abuses associated with the expulsion of Roma from France to Romania and Bulgaria have attracted concern globally and from non-governmental organizations. The UN Special Rapporteurs on human rights of migrants, François Crépeau, and on racism, Mutuma Ruteer, issued a joint press release condemning the expulsions on August 29, 2012.⁵⁴

IV. Assessing Asylum Claims: Cumulative Discrimination Amounting to Persecution

A. The Perspective of the United Nations High Commissioner for Refugees (UNHCR)

According to Article 1 of the *Refugee Convention*, a person is a refugee if he is outside his country of nationality or habitual residence and fears persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion. The idea that cumulative

Glance (Luxembourg: EC, 2012) at 12, 23 [*Roma EU Citizens in 11 EU Member States*] (the eleven Member States included in the survey were: Bulgaria, the Czech Republic, Greece, Spain, France, Hungary, Italy, Poland, Portugal, Romania and Slovakia).

52. *Ibid.*

53. Commissioner for Human Rights, *Human Rights of Roma and Travellers in Europe* (Strasbourg: Council of Europe Publications, 2012).

54. OHCHR, Press Release, "Roma Evictions/Expulsions: 'France Must Comply with International Non-Discrimination Standards'" (29 August 2012), online: UN <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12466&LangID=E>.

discrimination may constitute persecution⁵⁵ is explained in a UNHCR handbook.⁵⁶ Paragraph 53 notes that:

[A]n applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.⁵⁷

Paragraph 55 also states that where discrimination is not serious in nature, an individual may still reasonably fear persecution.⁵⁸ A person’s claim will be stronger where she has been the victim of repeated discriminatory actions. Paragraph 201 mentions that “[v]ery frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained” yet even small incidents taken together could render her fear of persecution well-founded.⁵⁹

In the asylum process, an individual’s story may be disaggregated so that the cumulative discrimination concept cannot be easily applied. The interpretation of persecution therefore needs to be flexible, adaptable and sufficiently open to accommodate developing forms of persecution, human rights abuses and severe discrimination making life in an individual’s country of origin unbearable.⁶⁰ The UNHCR has created Eligibility Guidelines designed to assist states in assessing asylum claims where

55. *Refugee Convention*, *supra* note 1, art 1. This Part of this article is based on different research methods. Firstly, desk research has been done, such as existing desktop research on the topic by J. Young from UNHCR Brussels. Secondly, the research in this Part of the article is in large part based on questionnaires sent to a wide range of actors in the field.

56. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/Rev.3, December 2011.

57. *Ibid* at para 53.

58. *Ibid* at para 55.

59. *Ibid* at para 201.

60. See Erika Feller, “Statement by Ms. Erika Feller” (Statement delivered at the Strategic Committee on Immigration, Frontiers and Asylum, Brussels, 6 November 2002), online: UNHCR <www.unhcr.org/42bab1b52.html>.

cumulative discrimination may lead to persecution. They have been applied to Slovak Roma,⁶¹ Czech Roma,⁶² Afghan,⁶³ Nepalese,⁶⁴ Iraqi,⁶⁵ Eritrean⁶⁶ and Kosovoan⁶⁷ asylum claims. The UNHCR states that “discrimination can amount to persecution in some circumstances, particularly if it is linked to a protected right . . . or if there has been a persistent pattern of discrimination”.⁶⁸ For example, persecution may result where a state restricts one’s ability to earn an adequate living, regularly exposes an individual to measures such as security checks, raids, interrogation, personal and property searches, and limits freedom of movement.⁶⁹ The UNHCR’s Manual on Mandate Refugee Status Determination elaborates:

Severe discrimination, or the cumulative effect of various forms of discrimination not in themselves amounting to persecution, may make life in the country of origin so intolerable for the individual concerned that the only way out of his or her predicament is to seek international protection as a refugee. This may be considered as persecution on “cumulative grounds”.⁷⁰

61. UNHCR, *Guidelines Relating to the Eligibility of Slovak Roma Asylum Seekers*, February 1998, online: <www.refworld.org/docid/3ae6b31c54.html>.

62. UNHCR, *Guidelines Relating to the Eligibility of Czech Roma Asylum Seekers*, February 1998, online: <www.refworld.org/docid/3ae6b31d6b.html>; UNHCR, *Guidelines Relating to the Eligibility of Czech Roma Asylum Seekers, Update*, December 1999, online: <www.refworld.org/docid/3ae6b33610.html>.

63. UNHCR, *UNHCR’s Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers*, December 2007 [*Afghan Eligibility Guidelines 2007*]; UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, July 2009 [*Afghan Eligibility Guidelines 2009*].

64. UNHCR, *Nepal 2004 Annual Protection Report*, 2004 [on file with author].

65. UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August 2007; UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April 2009.

66. UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, July 2009.

67. UNHCR, *UNHCR’s Eligibility Guidelines for Assessing the International Protection Needs of Individuals for Kosovo*, UN Doc HCR/EG/09/01, November 2009.

68. UNHCR, *UNHCR Resettlement Handbook: Division of International Protection*, July 2011 at 84.

69. Guy S Goodwin-Gill, *The Refugee in International Law*, 2nd ed (New York: Oxford University Press, 1996).

70. UNHCR, *Manual on Mandate Refugee Status Determination (RSD): A Reference Tool for UNHCR Adjudicators*, 2005 [on file with author].

Cumulative grounds should be considered when assessing whether an individual has truly experienced persecution.⁷¹ Furthermore, persecution will depend on the circumstances of the case, including one's age, gender, opinions, feelings and psychological makeup and personal restrictions to housing, education and health care. Assessments must reference reliable, relevant and up-to-date country of origin information.⁷²

In 2001, the UNHCR developed further guidance on the interpretation of Article 1 of the *Refugee Convention* stating that "a pattern of discrimination, or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection".⁷³ Language such as "in the normal course" and "usually" reinforces that it is difficult to articulate clear principles of discrimination.⁷⁴

B. An Academic Perspective

Academic literature has given little attention to the concept of cumulative discrimination generally,⁷⁵ in assessing asylum claims,⁷⁶ and specifically in assessing Roma asylum claims. While discrimination has

71. See *Afghan Eligibility Guidelines* 2009, *supra* note 63.

72. UNHCR, *Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/12/09, October 2012 at paras 6, 16–17, 24.

73. UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/02/01, May 2002 at para 14. See also UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (2001) at para 17.

74. Rebecca Dowd, "Dissecting Discrimination in Refugee Law: An Analysis of Its Meaning and Its Cumulative Effect" (2011) 23:1 *Intl J of Refugee L* 28 at 42. Principles of discrimination were reaffirmed in the *Refugee Convention*, *supra* note 1.

75. See Rebecca M Blank, "Tracing the Economic Impact of Cumulative Discrimination" (2005) 95:2 *Am Econ Rev* 99; Rebecca M Blank, Marilyn Dabady & Constance F Citro, *Measuring Racial Discrimination* (Washington, DC: National Academies Press, 2004) at 223–39. The authors distinguish between cumulative discrimination across generations, processes within a domain and domains.

76. Dowd, *supra* note 74.

several meanings and usages in refugee law, neither discrimination⁷⁷ nor cumulative discrimination are clearly defined.⁷⁸ Academic commentators have suggested that the effects of various discriminatory measures should be investigated to determine whether together they amount to persecution, even where each incident is insufficient.⁷⁹ The principle that the cumulative effect of discrimination can constitute persecution has, however, generally been accepted.⁸⁰

C. The Practice of Assessing Claims

A number of institutions have recognized or acknowledged cumulative discrimination regarding Roma and the effect that it might have on asylum claims. The number of important actors involved, including the UNHCR,⁸¹ the UN Committee on the Elimination on Racial Discrimination,⁸² the UN Committee on Economic, Social and Cultural Rights,⁸³ the UN Ad

77. Helen O’Nions, “Roma Expulsions and Discrimination: The Elephant in Brussels” (2011) 13:4 Eur J Migr & L 361 (“[d]iscrimination becomes difficult to prove as the Roma applicant has no hypothetical comparator due to such profound structural inequities” at 378) [O’Nions, “Roma Expulsions and Discrimination”]. See also UNCESCR, Economic and Social Council, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20, July 2009; UNCERD, *General Recommendation 30: Discrimination Against Non-Citizens*, 64th Sess, UN Doc CERD/C/64/Misc.11/Rev.3 (2004) [*General Recommendation 30*].

78. Blank, Dabady & Citro, *supra* note 75 (“In earlier chapters, [the authors] discussed the major difficulties involved in measuring credibly and accurately the impact of discrimination within a domain at any point in time. It is even more difficult to measure cumulative effects” at 238).

79. Cumulative discrimination needs to be distinguished from so-called multiple discrimination. See Janneke Gerards, “Discrimination Grounds” in Dagmar Schiek, Lisa Waddington & Mark Bell, eds, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Portland: Hart Publishing, 2007) 33 at 170–80.

80. See also EC, *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, [2004] OJ, L 304/12, art 9 [*Council Directive 2004/83/EC*]. See especially *ibid*, art 9(1).

81. UNHCR, *Zagreb Declaration*, 27 October 2011.

82. *General Recommendation 30*, *supra* note 77.

83. ECOSOC, Committee on Economic, Social and Cultural Rights, *General Comment No 20, Non-Discrimination in Economic, Social and Cultural Rights*, (art 2, para 2, of the *International Covenant on Economic, Social and Cultural Rights*), 42nd Sess, UN Doc E/C.12/GC/20, July 2009.

Hoc Committee on Refugees and Stateless Persons,⁸⁴ United Nations International Children's Emergency Fund (UNICEF),⁸⁵ UNDP,⁸⁶ the World Bank,⁸⁷ the OSCE High Commissioner on National Minorities,⁸⁸ the Council of Europe,⁸⁹ the European Parliament,⁹⁰ the European Commission,⁹¹ the Fundamental Rights Agency,⁹² the Commissioner

84. "UN Human Rights Office Speaks out Against Targeting of Roma in Bulgaria", *UN News Centre* (4 October 2011), online: <www.un.org/apps/news>.

85. UNICEF, "UNICEF and Roma Children", online: <www.romachildren.com>; Camilla Ida Ravnø, *Women, Motherhood, Early Childhood Development: Exploring the Question of How Poor Roma Women's Status and Situation Influences Children's Survival, Growth and Development* (Hungary: UNICEF Regional Office Central and Eastern Europe & Commonwealth of Independent States, 2011).

86. Sevima Sali-Terzić, *Study on the Capacities of the Judicial Institutions (Courts) to Address the Needs and Demands of Specific Groups: Persons with Disabilities, Roma, and Women in Bosnia and Herzegovina—Strengthening Judicial Integrity Through Enhanced Access to Justice* (Bratislava: UNDP, 2011).

87. Joost de Laat, *Reducing Vulnerability and Promoting the Self-Employment of Roma in Eastern Europe Through Financial Inclusion* (Washington, DC: World Bank, 2012).

88. Claude Cahn & Elspeth Guild, *Recent Migration of Roma in Europe*, 2nd ed (Strasbourg: OSCE High Commissioner on National Minorities & Council of Europe Commissioner for Human Rights, 2008).

89. Commissioner for Human Rights, *supra* note 53; Council of Europe, PA, *Recommendation 1941 (2010) Roma Asylum Seekers in Europe* (2010); Council of Europe, *The Strasbourg Declaration on Roma*, CM(2010)133 final (2010); Council of Europe, PA, *Recommendation 2003 (2012) Final version Roma migrants in Europe* (2012).

90. Council of Europe, *European Parliament resolution on the situation of the Roma in the European Union*, Texts Adopted, P6_TA(2005)0151 (2005); EC, Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The Social and Economic Integration of the Roma*, COM(2010)133 final (Brussels: EC, 2010).

91. *Ibid.* See generally EC, *Council Directive 2000/43/EC of 29 June 2000 Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, [2014] OJ, L 180/22.

92. EC, FRA, *The Situation of Roma EU Citizens Moving to and Settling in Other EU Member States* (Belgium: EC, 2009) at 76; EC, FRA, *European Union Minorities and Discrimination Survey: Data in Focus—The Roma* (Budapest: EC, 2009).

on Human Rights,⁹³ academics⁹⁴ and NGOs⁹⁵ suggest that Roma are faced with many different forms of discrimination.⁹⁶ The European Commission specifically condemned the treatment of Roma in a strategy

93. Commissioner for Human Rights, *supra* note 53 (presenting the first overview of the human rights situation of Roma and Travellers that covered all forty-seven Member States of the Council of Europe).

94. In 2011 and 2012, the following articles appeared: O'Nions, "Roma Expulsions and Discrimination", *supra* note 77; Owen Parker, "Roma and the Politics of EU Citizenship in France: Everyday Security and Resistance" (2012) 50:3 J Common Market Stud 475 at 475–91; Michael Guet, "Challenges Related to Roma Migration and Freedom of Movement in Europe" in Nando Sigona, ed, *Romani Motilities in Europe: Multidisciplinary Perspectives* (Oxford: University of Oxford, 2010) 77; Judith Tóth, "Czech and Hungarian Roma Exodus to Canada: How to Distinguish Between Unbearable Destitution and Unbearable Persecution" in Didier Bigo, Elspeth Guild & Sergio Carrera, eds, *Foreigners, Refugees or Minorities?: Rethinking People in the Context of Border Controls and Visas* (Farnham, UK: Ashgate Publishing, 2013) 39; Diana Mahoney, "Expulsion of the Roma: Is France Violating EU Freedom of Movement and Playing by French Rules or Can It Proceed with Collective Roma Expulsions Free of Charge?" (2012) 37:2 Brook J Int L 649–82.

95. The European Roma Rights Centre has given attention to this issue. See European Roma Rights Centre, "Research and Advocacy", online: <www.errc.org/research-and-advocacy>. The European Roma Policy Coalition (ERPC) has also given attention to cumulative discrimination. It is an informal gathering of non-governmental organizations operating at the EU-level on issues of human rights, anti-discrimination, anti-racism, social exclusion, and Roma and Travellers' rights. The member organizations are: Amnesty International (co-chair); European Network Against Racism; European Roma Grassroots Organisation (chair); European Roma Information Office; European Roma Rights Centre (co-chair); Minority Rights Group International; Open Society Foundations; Policy Center for Roma and Minorities; Roma Education Fund; and Fundación Secretariado Gitano. In a reaction to the EU Framework for National Roma Integration Strategies, the European Roma Rights Centre stated: "The [European Roma Policy Commission] is deeply disappointed that while the Framework recognizes the need to fight discrimination against Roma and ensure their equal access to all fundamental rights, it fails to specify measures to combat discrimination, intimidation, anti-Gypsyism, hate speech or violence against Roma." European Roma Rights Centre, "EU Framework Weak on Discrimination Against Roma", online: <www.errc.org/article/eu-framework-weak-on-discrimination-against-roma/3824>. The Centre for European Policy Studies (CEPS) has also published a number of papers on the topic. See e.g. Carrera, Guild & Merlino, *supra* note 36; Judith Tóth, "The Incomprehensible Flow of Roma Asylum-Seekers from Czech Republic and Hungary to Canada", *Centre for European Policy Studies* (November 2010). This list of actors and publications is not meant to be exhaustive but gives an overview of the broad field at hand.

96. See also United Nations Development Group, Roma Regional Working Group, *The Role of the United Nations in Advancing Roma Inclusion*, UNDG, February 2013.

paper⁹⁷ stating that it is unacceptable that in the twenty-first century European Union, “10–12 million Roma . . . face prejudice, intolerance, discrimination and social exclusion in their daily lives”.⁹⁸ It encourages EU institutions to endorse its Framework for National Roma Integration Strategies, to complement and reinforce the EU’s equality legislation and policies at national, regional and local levels, and also to ascertain the specific needs of Roma on equal access to employment, education, housing and healthcare through dialogue. The Framework is complementary to existing EU legislation and policies on non-discrimination, fundamental rights, free movement of persons and children’s rights.⁹⁹ The Director of the European Commission’s Fundamental Rights Agency explicitly stated that “Roma are the most discriminated ethnic minority in Europe”.¹⁰⁰ EU-level actors have therefore recognized the problem, yet national and local actors have refused to respond by changing their discriminatory practices.

D. The EU Practice of Assessing Claims

The Common European Asylum System (CEAS) requires EU Member States to fully implement the adopted EU directives and regulations. While the CEAS is consistent with the *Refugee Convention*, its scope excludes all EU citizens. The CEAS *Qualification Directive* recognizes cumulative discrimination.¹⁰¹ Thus legislation in all EU countries is required by the EU to provide a rule that implements a cumulative discrimination ground of

97. EC, Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The Social and Economic Integration of the Roma*, COM(2010)133 final (Brussels: EC, 2010).

98. *Ibid* at 2.

99. See also European Commission, Press Release, IP/04/709, “Commission Canvasses Opinion on Future Direction of Anti-Discrimination Policy” (3 June 2004), online: <europa.eu>; EC, Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 2005/689/EC of 1 June 2005: Non-Discrimination and Equal Opportunities for All—A Framework Strategy*, COM(2005) 224 final (Brussels: EC, 2005).

100. *Roma EU Citizens in 11 EU Member States*, *supra* note 51 at 12.

101. *Council Directive 2004/83/EC*, *supra* note 80. December 21, 2013 is the date that the majority of provisions of the earlier Directive were repealed and replaced by the new Directive. See *Council Directive (EC) 2011/95/EU*, *supra* note 13.

protection in national laws.¹⁰² However, many Member States, including Bulgaria, the Czech Republic, Denmark, Estonia, France, Germany, Hungary, the Netherlands, Slovenia, Sweden and the United Kingdom, do not. In most of these countries,¹⁰³ decision makers have acknowledged the need for protection yet have failed to legislate accordingly.

Another question is the required burden of proof for those seeking to argue cumulative discrimination amounting to persecution. Ordinarily, refugee claimants are required to show that, on a balance of probabilities, there is a reasonable or serious possibility that the claimant will face persecution in his country of nationality. In terms of the credibility assessment of asylum claims, it should be assessed whether the statements are consistent, coherent, without contradictory aspects, and by and large do not change from one instance to another during the asylum process. The applicant should be given the benefit of the doubt if an honest effort has been made to support the statement with documentary evidence and the general credibility of the applicant's claim is not in question. Evidence may come from the claimant's statement or documents from human rights organizations (e.g., Amnesty International, Human Rights Watch and Open Society Institute), international governmental organizations (e.g., UNHCR and Council of Europe) and state organizations.

Where a claimant's fear is genuine and the state is unable or unwilling to protect her, the fear of persecution will be considered well-founded. Absent complete breakdown however, a state will be presumed able to protect its citizens and a claimant must furnish clear and convincing evidence in order to rebut this presumption. Notwithstanding the *Aznar Protocol*, EU citizens of Roma ethnicity still present asylum applications in other Member States. Despite documentary evidence indicating that the Hungarian, Czech, Slovakian, Romanian and other Central European states do not provide effective protection to Roma from harassment, discrimination and anti-Roma violence, Roma claimants fail to rebut the

102. Only Denmark is not bound by this provision. As Article 9 remained unchanged from the 2004 Directive to the 2011 version. Compare *Council Directive 2004/83/EC*, *supra* note 80 at 9, with *Council Directive (EC) 2011/95/EU*, *supra* note 13 at 9. Ireland and the UK participate in the 2004 Directive, but not the latter one, and remain bound by the provision of the former notwithstanding its repeal to the other Member States as of December 21, 2013.

103. Countries include the Czech Republic, Denmark, France, Germany, Hungary, the Netherlands, Sweden and the United Kingdom.

presumption of state protection. This is the major reason Roma asylum claims are rejected. Only Belgium, France, Hungary, Italy and Spain indicate that their national authorities grant international protection on the basis of cumulative discrimination that amounts to persecution.

In sum, the problem in applying the concept of cumulative discrimination is twofold. Firstly, despite evidence indicating that states do not provide effective protection for Roma from harassment, discrimination and anti-Roma violence, claimants fail to rebut the presumption of state protection and they are therefore rejected. Secondly, states continually conclude that the acts of harassment or discrimination do not amount to persecution. The applicant therefore needs to first prove that he faces cumulative discrimination leading to persecution and also that the state does not provide adequate protection. These barriers create an insurmountable hurdle.

Conclusion

Most European Roma are now citizens of the European Union and are therefore entitled to free movement rights as set out by the EU treaties. However, as we have seen, the Roma continue to suffer from severe social exclusion. Problems associated with the right of free movement as an EU citizen are coupled with the presumption that the person is not in need of international protection which presents a double-edged sword. On one hand, people subjected to severe cumulative discrimination may be able to move to another country in the EU to avoid suffering. They will not however be entitled to social assistance which is generally granted to asylum seekers. If they are not able to find work and support themselves and their families, they will be expelled over again to their home state where their situation may worsen as their resources and socio-economic positions are exhausted by the migration process. Those who have been the victims of cumulative discrimination in their home state are often unwilling to use the formal criminal justice system to seek redress. When Roma flee the EU in search of international protection, they are likely to fulfill the criteria of the *Refugee Convention*. Consequently, Europe still creates refugees.

