SLOVAKIA

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENER TO THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN:

M.H. AND OTHERS (APPLICANTS) AND SLOVAKIA (RESPONDENT) AND AMNESTY INTERNATIONAL (INTERVENER)

APPLICATION NO 14099/18

AMNESTY INTERNATIONAL

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I. INTRODUCTION

1. These submissions are made by Amnesty International in relation to *M.H. and Others v Slovakia* (Application no. 14099/18) pursuant to leave granted by the President of the Section by letter dated 14 January 2019, in accordance with Rule 44 § 3 of the Rules of Court.

2. This case concerns, *inter alia*, an obligation to carry out an effective investigation into allegations of discriminatory ill-treatment as required by the procedural aspect of Article 3 in conjunction with Article 14 of the European Convention on Human Rights ('ECHR'). The issue is of great significance for the development and application of legal norms concerning racial discrimination and racially-motivated violence against Roma as well as other minority groups in Europe.

3. Drawing on the Court's own jurisprudence, EU law and jurisprudence, and other relevant case law of human rights treaty bodies, domestic European courts and the Inter-American Court of Human Rights, Amnesty International respectfully invites the Court to consider adopting a two-stage approach in addressing the alleged violations in cases concerning the procedural aspect of Article 3 in conjunction with Article 14 of the ECHR.

4. Under this approach, it is submitted that once the applicant(s) have established a *prima facie* case demonstrating a racist motive for an alleged violation of Article 3 by state actors, the burden of proof should shift onto the respondent state to rebut it. In the absence of such a rebuttal, the racist motive should be established and a violation of Article 3 in conjunction with Article 14 found.

II. OVERVIEW

5. Since 2006, Amnesty International has documented discrimination of Roma in Europe in a wide number of areas, including the failure to protect them from discriminatory violence. In 2018, the European Union Agency for Fundamental Rights ('FRA'), while assessing the situation of fundamental rights across all EU states, found that "[t]he situation of Roma in employment, housing and health shows little improvement, while persisting anti-Gypsyism, which manifests itself in discrimination, harassment and hate crime, remains an important barrier to Roma inclusion."[1]

6. In Slovakia, there are thought to be approximately 320,000 to 480,000 Roma living mostly in the east and south of the country and amounting to some 6% to 8% of the total population.[2] Roma have historically faced systemic and widespread discrimination and prejudice in all areas of life, including housing, employment and education. This discrimination persists today.[3] In January 2017, the Government of Slovakia adopted a new crime prevention strategy aimed at strengthening policing in Roma settlements. This triggered concern by NGOs over ethnic profiling and discrimination.[4]

7. The Respondent Government's persistent failure to ensure equal rights of Roma has been recognised by UN human rights treaty bodies, Council of Europe bodies and the European Commission, which in 2015 initiated infringement proceedings against Slovakia for breach of the Race Equality Directive.[5]

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[1] Fundamental Rights Report 2018, European Union Agency for Fundamental Rights, page 99.
[2] Government of the Slovak Republic, National Roma Integration Strategy up to 2020 (2012). See also: UNDP, Report on the Living Conditions of Roma Households in Slovakia in 2010 (2012).
[3] Amnesty International, A Lesson in Discrimination: Segregation of Romani Children in Primary Education in Slovakia (2017) p13.
[4] Amnesty International, Annual Report2017/2018: Slovakia (2018) <https://www.amnesty.org/en/countries/europe-and-central-asia/slovakia/report-slovakia/>.
[5] Amnesty International et al., 'European Commission takes tougher stance on member states discriminating Roma' (28 April 2015) <https://www.amnesty.eu/news/european-commission-takes-tougher-stance-on-member-states-discriminating-roma-0892/>.

III. DUTY TO INVESTIGATE (PROCEDURAL LIMB OF ARTICLE 2 AND 3 OF THE ECHR)

8. Over the years, this Court has developed the most comprehensive jurisprudence on the duty to investigate, which is covered by the procedural limb of Articles 2 and 3 of the ECHR. According to the Court, investigations into the alleged violations of Article 2 and 3 ECHR need to meet the requirements of **independence**, **impartiality**, **effectiveness** and **promptness**.

9. The requirement of **independence** is met when those responsible for conducting investigations are independent from the alleged perpetrators in a hierarchical, institutional and practical way.[6] Practical independence can manifest itself in the way an investigation is conducted.[7]

10. The requirement of **impartiality** aims at ensuring that the investigation is conducted in a neutral and objective manner. It therefore requires the absence of an interest in the results of the investigation and an objective opinion towards the parties involved.[8]

11. The requirement of **effectiveness** is met when the investigation is capable of leading to a determination of whether force used was or was not justified; of ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system; and of identifying the State officials or authorities involved in whatever capacity in the chain of events in issue.[9] The Court has recognised that under the procedural facets of Article 2 and Article 3, public prosecutors have an obligation to carry out an effective investigation that must be "capable of leading to the identification and punishment of those responsible."[10]

12. **Prompt investigation** requires, among other things, that immediate steps are taken to gather evidence and that it is completed within a reasonable time and, in any case, conducted with all the necessary diligence.[11]

13. The Court has also ruled that the procedural duties under Article 2 and Article 3 of the ECHR are independent of an alleged substantive violation under those articles. In other words, the procedural and the substantive limbs of the obligations under those articles are independent from each other and even in the eventual absence of the violation of the substantive part of the obligation, the Court may still find a violation of the procedural part.[12]

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[6] Kelly and Others v. United Kingdom, App. No. 30054/96, Judgment of 4 May 2001; Güleç v. Turkey, App. No. 21593/93, Judgment of 27 July 1998; Oğur v. Turkey, App. No. 21594/93, Judgment of 20 May 1999; Taş v. Turkey, App. No. 24396/94, Judgment of 14 November 2000.

[7] For example, in the case of Ergi v. Turkey the Court ruled that the authorities failed to demonstrate a sufficient level of practical independence because the prosecutor who was responsible for the investigation relied only on the evidence of the gendarmerie incident report and that statements from relatives of the victim or others present during the operation were not taken. See: Ergi v. Turkey, App. No. 23818/94, Judgment of 28 July 1998.

[8] In Kolevi v. Bulgaria the Court held that "the involvement in the investigation of persons against whom the victim had made serious complaints is incompatible with the principle of impartiality and independence required under the procedural limb of Article 2 of the Convention." See: Kolevi v. Bulgaria, App. No, 1108/02, Judgment of 5 November 2009, para 211. In Girgvliani v. Georgia the Court found that the investigation manifestly lacked impartiality because the authorities turned a blind eye to the applicants' credible allegation of complicity between some of the persons allegedly involved and those responsible for investigating the allegations. See: Enukidze and Girgvliani v. Georgia, App. No. 25091/07, Judgment of 26 April 2011, para 266.

[9] Oneryildiz v Turkey, App. No. 48939/99, Judgment of 30 November 2004, para. 94; Jordan v. United Kingdom, App. No. 24746/94, Judgment of 4 August 2001, para. 107.

[10] It involves ensuring that "all reasonable steps" have been taken to secure the evidence concerning the incident, including eyewitness testimony and forensic evidence. See: Assenov and Others v. Bulgaria, App No. 90/1997/874/1086, Judgment of 28 October 1998, para. 101-106; Velikova v. Bulgaria, App. No. 41488/98, Judgment of 18 May 2000, paras 70 and 78-84; Balogh v. Hungary, App. No 47940/99, Judgment of 20 October 2004, paras 47-52; Nachova and Others v. Bulgaria, App. Nos. 43577/98 and 43579/98, Judgment of 6 July 2005.para. 110-113; Yasa v. Turkey, App. No. 22495/93, Judgment of 2 September 1998; Kaya v. Turkey, App. No. 22535/93, Judgment of 28 March 2000; McCann v. UK, App. No 18984/91, Judgment of 27 September 1995. See also: Ramsahai and Others v. the Netherlands, App no. 52391/99, Judgment of 15 May 2007, para 324, where the Court concluded that Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of the procedural standard.

[11] Kukayev v. Russia, App No. 29361/02, Judgment of 15 November 2007, para. 95; Taş v. Turkey, App. No. 24396/94, judgment of 14 November 2000, para. 70; Mahmut Kaya v. Turkey, App. No. 22535/93, Judgment of 28 March 2000, para 107.

[12] Slimani v. France, App No. 57671/00, Judgment of 27 July 2004; Šilih v. Slovenia, App No 71463/01, Judgment of 9 April 2009

IV. SPECIFIC DUTY TO UNMASK ANY RACIST MOTIVES

14. The procedural duty to investigate allegations of breach of Article 3 has a specific effect when combined with allegations of discrimination under Article 14. The Court has received and considered a great number of cases in which the applicants alleged the existence of racist or discriminatory motive in either the substantive or procedural violation of their rights under the Convention. In the seminal case of *Nachova and others v. Bulgaria,* the Court concluded that when investigating violent incidents, the authorities have a duty to take all reasonable steps to *unmask any racist motive* and to establish whether or not ethnic hatred or prejudice may have played a role in the event.[13]

15. The obligation to investigate possible racial motivation of attacks applies to attacks believed to have been carried out by state and non-state actors alike. In the case of *Šečić v. Croatia,* concerning police investigations into a racist attack against a person of Roma origin by individuals suspected of belonging to a skinhead group, the Court underlined that "[t]reating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights".[14]

16. If members of an ethnic group are specifically targeted because they belong to a given group, violent attacks against them are a form of discrimination and thus need to be investigated as such. In the *Stoica v. Romania* judgment the Court underlined that when investigating possible racist crimes, the authorities must actively consider whether a racist motive existed:

17. "[W]hen investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events… A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention."[15]

18. The Court also considered cases in which it assessed whether, while conducting investigations, the domestic authorities have violated the rights of the victims by not investigating the potential racist motive, which in itself, led to the violation of Article 14 in conjunction with the procedural limb of Article 3. In *Pertropoulou-Tsakiris v. Greece,* the Court found a violation of both articles because there was no attempt to verify whether the behaviour of the policemen involved in the incident displayed anti-Roma sentiment, while the Deputy Director of Police made remarks in relation to the applicant's origin. During the informal administrative investigation, officials remarked that complaints raised by Roma were exaggerated and formed part of their "common tactic to resort to the extreme slandering of police officers with the obvious purpose of weakening any form of police control." [16]

19. Criteria for effective investigation of racially motived offences have also been developed by the European Commission against Racism and Intolerance ('ECRI'). Under the General Policy Recommendation No 11 on combating racism and racial discrimination in policing, countries, should "provide for a body, independent of the police and prosecution authorities, entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police."[17] The ability of the police to unmask hate motives of an offence rely on its commitment to do so in all stages of the investigation. ECRI further recommended that during the investigation, the police shall consider "any incident which is ***perceived*** to be racist by the victim or any other person [as] a racist incident".[18]

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[13] *Nachova and Others v. Bulgaria*, App. Nos. 43577/98 and 43579/98, Judgment of 6 July 2005.
[14] *Šečić v. Croatia*, App No. 40116/02, Judgment of 31 May 2007, para. 67-69.
[15] *Stoica v. Romania*, App No. 42722/02, Judgment of 4 March 2008, para 119.
[16] *Pertropoulou-Tsakiris v. Greece*, App. No. 44803/04, Judgment of 6 December 2007, para 64-66.
[17] European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No 11 on combating racism and racial discrimination in policing, adopted by ECRI on 29 June 2007* (2007), para. 10.
[18] European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No 11 on combating racism and racial discrimination in policing, adopted by ECRI on 29 June 2007 (2007), para. 14.

20. The recognition of race, ethnicity or cultural status of the victim as factors that play a role in the investigation of crimes with a possible hate motive was also emphasised in the MacPherson report into the death of Stephen Lawrence.[19] The report introduced the concept of *institutional racism.*

Apparent bias cases in English law

21. As a matter of principle, a potential racist motive in the decision to discontinue investigations contrary to the duty under Articles 2 and 3 of the ECHR, has the same effect as judicial bias where factors other than the merits of the case play or may play a role in adjudication. The question of bias which may have affected judicial decisions have been addressed in-depth by the English courts.

22. In *In re Medicaments and Related Classes of Goods (No 2)* the Court of Appeal of England and Wales, Lord Phillips upon taking into consideration the jurisprudence of the European Court of Human Rights, ruled that:

"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased." [20]

23. As observed by Lord Steyn in *Lawal v Northern Spirit Ltd*, "the public perception of unconscious bias is the key."[21]

24. It is clear that, similar to the discrimination cases discussed above, the circumstances of the case, the context and the public perceptions of the potential bias should be taken into consideration in adjudicating whether bias has taken place.

V. EVIDENTIARY STANDARDS WHERE RACIAL MOTIVATION IS ALLEGED

(a) The law of the European Union ('EU')

25. Over the years the EU has developed a comprehensive legal framework for challenging discrimination. The current anti-discrimination framework includes the following Directives:

    a. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive);

    b. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Directive);

    c. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (the Recast Directive).

26. The three Directives include one uniform wording relating to evidentiary standard and burden of proof in discrimination cases. According to the language of the Directives:

27. "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them ***establish***, before a court or other competent authority, ***facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment***."[22]

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[19] The Stephen Lawrence Inquiry, *Report of an Inquiry by Sir William Macpherson of Cluny* (February 1999) Cm 4262-I <https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry> ('MacPherson Report'), para 6.21.
[20] In *re Medicaments and Related Classes of Goods* (No 2) [2001] WLR 700, para 85. This test for apparent bias was subsequently approved by the House of Lords in *Porter v. Magill, Weeks v. Magill* [2002] 2 AC 357.
[21] *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 at 193.
[22] Art 8(1) of Council Directive 2000/43; Art 10(1) of Council Directive 2000/78 & 2006/54 19(1).

28. In other words, the onus is on the claimants to establish a *prima facie* case which then shifts the burden of proof onto the respondent.[23]

29. In *Belov v CHEZ Elektro Balgaria AG,* Advocate General ('AG') of the Court of Justice of the European Union ('CJEU') argued that in order to establish a *prima facie* case the claimant needed to demonstrate the facts which "substantiate" a case. [24]

30. In *CHEZ v Nikolova,* the CJEU endorsed the conclusion of *AG Kokott* that in order to establish a *prima facie* case, capable of shifting the burden of proof, the claimant needed to establish "facts from which it may be presumed that there has been direct or indirect discrimination".[25] Those facts, according to the Court's ruling, could include the previous discriminatory statements by the respondent[26] as well as the "compulsory, widespread and lasting nature of the practice at issue."[27] The Court also commented on the broader context and perceptions affecting the Roma community as an important factor to be considered.

31. The CJEU went on to say that "the inhabitants of that district, which is known to be lived in mainly by Bulgarian nationals of Roma origin, are, as a whole, considered to be potential perpetrators of such unlawful conduct. Such a perception may also be relevant for the overall assessment of the practice at issue."[28]

32. Courts in EU member states have applied similar consideration as to what factors may be taken into account in deciding whether a *prima facie* case has been established. For example, in *Nazir v Asim,* the UK Employment Appeal Tribunal emphasised the need to take the context of the conduct into account. It ruled that "when a Tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of sex or race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race." [29] This approach has been followed and endorsed in the UK by more recent case law. [30]

(b) Evidentiary standard developed by the Inter-American Court of Human Rights

33. While adjudicating on cases relating to the duty to investigate violations of the right to life and the prohibition of torture and other ill-treatment, the Inter-American Court of Human Rights ('IACtHR') has recognised its broader obligation to consider the circumstances in which those acts were committed. In particular, it emphasises the overarching state responsibility to challenge prevailing impunity.[31] It has defined impunity as "the overall lack of investigation, arrest, prosecution and conviction of those responsible for violations of the rights protected by the American Convention."[32]

34. Similarly, the IACtHR has ruled that "the State is obliged to combat such a situation by all available legal means, as impunity fosters the chronic repetition of human rights violations and renders victims and their next of kin completely defenceless."[33]

35. In *Velásquez-Rodríguez v Honduras,* the IACtHR observed that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching such a decision. It recognised the importance of the context in which human rights

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[23] See: Case C-415/10, *Meister v Speech Design Carrier Systems GmbH* EU:C:2012:8, , Opinion of the Advocate General at para 14: 'the Court has already held in its judgment in *Kelly v National University of Ireland (University College, Dublin)* (Case C-104/10) [2012] ICR 322, the mechanism consists of two stages. First of all, the victim must sufficiently establish the facts from which it may be presumed that there has been discrimination. In other words, the victim must establish a prima facie case of discrimination. Next, if that presumption is established, the burden of proof thereafter lies on the defendant.' This approach was endorsed by the CJEU in their judgment in the case (paras 34-36).

[24] Case C-394/11 *Belov v CHEZ Elektro Balgaria AG* [2013] 2 CMLR 29, para 94.

[25] Case C-83/14, *CHEZ v Nikolova* EU:C:2015:480, para 78.

[26] Case C-83/14, *CHEZ v Nikolova* EU:C:2015:480, para 80-83, Case C-81/12, *Asociația Accept v Consiliul Național pentru Combaterea Discriminări* EU:C:2013:275, para 51.

[27] Case C-83/14, *CHEZ v Nikolova* EU:C:2015:480, para 84.

[28] Case C-83/14, *CHEZ v Nikolova* EU:C:2015:480, para 84.

[29] *Nazir v Asim* [2010] ICR 1225, para 70.

[30] *Igen v Wong* [2005] ICR 931; *Madarassay v Nomura International plc* [2007] ICR 867; *Hewage v Grampian Health Board* [2012] ICR 1054.

[31] *Case of the Mapiripán Massacre v. Colombia*, Inter-American Court of Human Rights Series C No 134, Judgment of September 15 2005, para. 237; *Case of the Moiwana Community v. Suriname*, Inter-American Court of Human Rights Series C No 124, Judgment of June 15 2005, para 203; Case of Huilca Tesce v Peru, Inter-American Court of Human Rights Series C No 121, Judgment of March 3 2005, para. 82.

[32] *Case of the Moiwana Community v. Suriname*, Inter-American Court of Human Rights Series C No 124, Judgment of June 15 2005, para 203.

[33] *Case of the Mapiripán Massacre v. Colombia*, Inter-American Court of Human rights Series C No 134, Judgment of September 15 2005, para. 237.

violations are often committed and the role of international human rights courts in adjudication on them.

36. Accordingly, the IACtHR ruled that "[c]ircumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts."[34] It specifically rejected the assertion that human rights adjudication required the highest evidentiary standards (i.e. 'beyond reasonable doubt') known to criminal justice adjudication. The IACtHR went on to say "The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."[35]

VI. BARRIERS TO EFFECTIVE INVESTIGATION OF RACIALLY-MOTIVATED OFFENCES IN EUROPE

37. In 2018, the FRA reported that there is consistent evidence "that victims encounter difficulties in reporting and, in many cases, the police, public prosecutors and criminal judges are reluctant to record and acknowledge hate crime."[36] With regard to Slovakia, the FRA noted that in 2018 there was no available guiding instruction containing information on bias indicators or on how the police should record hate crimes.[37] Both the ECRI[38] and the Office for Democratic Institutions and Human Rights ('ODIHR') of the Organization for Security and Cooperation in Europe ('OSCE') have repeatedly highlighted that guidelines on the investigation of a hate crime are vital for an effective investigation.[39] Such guidelines should involve a list of criteria to help police officers to identify whether a crime was motivated by racial, religious or other identity-based prejudice; rules on notification of police officers' supervisor; and consultation with a specialised unit.

38. The European Monitoring Centre on Racism and Xenophobia reported in 2005 that low levels of racially motivated crimes registered (in Hungary) were attributed to the *reluctance* of the law enforcement agents, as well as prosecutors and courts, to recognise racial motivation in violent and non-violent crimes committed against Roma. Disturbingly, instead of guiding the police towards promoting equality and prevention of racial discrimination, the focus of police leadership was aimed at the *higher criminality rate* and *cultural specificity of the Roma* rather than on racist crime and violence which was seen as marginal.[40]

39. Similar barriers were reported regarding recording racially-motivated incidents in Slovakia, "(a) victims were afraid to report such crimes to the police, e.g. because of fear of reprisals; (b) victims do not believe the police will deal with the incidents swiftly or effectively, or simply don't trust the police in general; (c) police do not address the dimension of racial motive, or simply classify the offences as civil disturbances."[41]

40. The cumulative effect of discriminatory attitudes, beliefs and behaviours within the criminal justice system, and the lack of guidance for addressing hate crimes, amounts to a risk of structural barriers in access to justice.

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[34] *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights Series C No 4, Judgment of July 29 1988, para 131.
[35] *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights Series C No 4, Judgment of July 29 1988, para 134.
[36] Fundamental Rights Agency, *Hate crime recording and data collection practice across the EU* (June 2018) p10.
[37] Fundamental Rights Agency (2018) p80.
[38] European Commission against Racism and Intolerance (ECRI), *Explanatory Report to ECRI General Policy Recommendation No 11 on combating racism and racial discrimination in policing, adopted by ECRI on 29 June 2007* (2007).
[39] OSCE, *Combating Hate Crimes in the OSCE Region* (2005) p37.
[40] European Monitoring Centre on Racism and Xenophobia, P*olicing Racist Crime and Violence* (2005) p16, emphasis added.
[41] European Monitoring Centre on Racism and Xenophobia (2005) p16.

41. In the UK, the MacPherson Report recognised the impact of prejudicial and racist attitudes within all stages of the criminal justice process.[42] It concluded that the investigation into the death of Stephen Lawrence failed "to recognise and accept racism and race relations as a central feature of their investigation of the murder […] played a part in the deficiencies in policing."[43] The inquiry found several factors undermining the adequate investigation, including "lack of understanding, ignorance or mistaken beliefs. It can arise from well-intentioned but patronising words or actions […] from unfamiliarity with the behaviour or cultural traditions of people or families from minority ethnic communities […] from racist stereotyping of black people as potential criminals or troublemakers."[44]

42. Apart from responses to reported offences, an inference to institutional racism within the law enforcement agencies can be drawn from other police actions, including specific targeting of non-white communities by the "stop and search" programmes.[45]

43. In terms of conducting investigations and prosecutions into racially motivated crimes, the MacPherson report recommended that once the prosecution's evidential test is satisfied there should be a rebuttable presumption that the public interest test should be in favour of prosecution.[46]

VII. CONCLUSION

44. In *Nachova,* the Grand Chamber of this Court considered the evidentiary standard that it should apply in cases of alleged violations of the procedural limb of Article 3 in conjunction with Article 14. While it endorsed the standard of proof "beyond reasonable doubt" it also stated that "proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact." [47]

45. Amnesty International would like to invite the Court to further clarify its reasoning in *Nachova* in order to unpack the practical meaning of this legal test and the scope for allowing circumstantial evidence in cases of alleged discriminatory violence.

46. Based on an analysis of EU law, the jurisprudence of the CJEU, IACtHR and domestic jurisdictions in Europe, Amnesty International believes that the appropriate evidentiary standard in cases of alleged violations of the procedural limb of Article 3 in conjunction with Article 14 should allow the *context of discrimination* substantiated by *reliable documentation* of structural characteristics of discrimination to be taken into account.

47. Therefore, Amnesty International invites the Court to consider a two-stage approach in which, once the applicant(s) have established "substantive reliable documentation"[48] and the "context of discrimination"[49] of a *prima facie* case demonstrating a racist motive for an alleged violation of Article 3, the burden of proof should shift onto the respondent state to rebut it. In the absence of such a rebuttal, the racist motive should be established and a violation of Article 3 in conjunction with Article 14 found.

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[42] MacPherson Report (1999) para. 46.27.
[43] MacPherson Report (1999) para. 6.21.
[44] MacPherson Report (1999) para. 6.17.
[45] MacPherson Report (1999) para. 6.45.
[46] MacPherson Report (1999) Recommendation 33.
[47] *Nachova and Others v. Bulgaria*, App. Nos. 43577/98 and 43579/98, Judgment of 6 July 2005, para. 147.
[48] UN Committee against Torture, *Chedi Ben Ahmed Karoui v. Sweden*, Case No. 185/2001 of 25 May 2002, UN doc CAT/C/28/D/185/2001, para. 10; UN Committee of Economic, Social and Cultural Rights, 'Conclusions of the Committee on Economic, Social and Cultural Rights on Luxembourg', UN doc E/C.12/1/Add.86 (2003) para 10.
[49] *D.H and Others v. Czech Republic*, App. No. 57325/00, Judgment of 7 February 2006, para 45.

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CONTACT US


info@amnesty.org


+44 (0)20 7413 5500

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This case concerns, inter alia, an obligation to carry out an effective investigation into allegations of discriminatory ill-treatment as required by the procedural aspect of Article 3 in conjunction with Article 14 of the European Convention on Human Rights ('ECHR'). Amnesty International provides legal arguments that persistent failure to ensure equal rights of Roma amounts to a barrier in adequate investigation of hate crimes. Based on an analysis of EU law, the jurisprudence of the Court of Justice of the EU, Inter American Court of Human Rights and domestic jurisdictions in Europe, Amnesty International argues that structural characteristics of discrimination are evidence of breach of ECHR.

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