

COMMENTS

Peril of Movement: Migrating Roma Risk Expulsion as EU Member States Test the Limits of the Free Movement Directive

C.J. Chido*

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I. INTRODUCTION

C.V. may be forgiven for lacking immediate clarity over the cataclysm that befell his family early one morning in the summer of 2010.¹ While sleeping in his plywood shack in a makeshift camp in Lyons, France, police agents raided his settlement and forcibly removed him and his family. C.V., a Romanian citizen of Roma ethnicity,² had no reason to anticipate the invasion. His family had been accused of no crime, and he had received no prior written warning. Yet C.V. and his family were given less than one month to leave the country that they migrated to just weeks earlier without any opportunity to challenge their

* © 2011 C.J. Chido. J.D. candidate 2012, Tulane University Law School; B.B.A. 2005, The George Washington University. The author wishes to thank Professor Jörg Fedtke for his guidance, the senior staff of this Journal for their helpful critique, and his parents, John and Lynne, and Sophie, for their constant love and support throughout this process.

1. Memorandum from Robert Kushen, Exec. Dir., European Roma Rights Ctr., to Viviane Reding, Vice-President, European Comm'n, app. 11a (Sept. 27, 2010), <http://www.errc.org/cms/upload/file/appendix-11a.pdf>.

2. Roma are also referred to as "Gypsies."

removal. The eviction and expulsion orders were issued to residents of the entire camp and were part of a larger French initiative announced earlier that summer to dismantle settlements due to their inherent “situation of lawlessness” and to expel from France those from Eastern Europe living in an “irregular situation.”³ The French Interior Ministry specifically targeted Roma-occupied settlements as a priority for French security forces.⁴

The actions of the French government sparked a renewed debate over the challenge of Roma integration in society and the extent of the right to freely move within the European Union (EU).⁵ While France received wide condemnation from a variety of nongovernmental organizations,⁶ notable praise was offered by senior administration officials of several EU Member States.⁷ Ultimately, the European Commission (EC), charged with enforcing EU laws, questioned the legality of France’s actions in progressively bolder statements.⁸ The EC cited Directive 2004/38/EC (Free Movement Directive or Directive), a far-reaching piece of legislation adopted in 2004 that (1) guarantees any EU citizen the right to cross Member State borders upon mere showing of a passport or ID card and (2) limits the opportunity for their removal.⁹ Following a particularly strong resolution by the European Parliament, France removed language specifically targeting Roma.¹⁰ However, general expulsions of people residing in illegal settlements continued. On September 29, 2010, the EC announced its determination that France had insufficiently incorporated the Free Movement Directive into its

3. VIVIANE REDING, LÁSZLÓ ANDOR & CECILIA MALMSTRÖM, THE SITUATION OF ROMA IN FRANCE AND IN EUROPE 3 (2010), available at <http://www.statewatch.org/news/2010/sep/EC-Roma-France-report.pdf>. French President Nicolas Sarkozy characterized the settlements as sources of “illegal trafficking, appalling living standards, exploitation of children through forced begging, prostitution, and crime.” Kristi Severance, *France’s Expulsion of Roma Migrants: A Test Case for Europe*, CTR. FOR RESEARCH ON GLOBALIZATION (Oct. 22, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=21558>.

4. Severance, *supra* note 3; Memorandum from Robert Kushen to Viviane Reding, *supra* note 1.

5. See REDING, *supra* note 3, at 3-4.

6. *Id.* at 4.

7. *Id.* at 3.

8. Severance, *supra* note 3. EC Vice-President Reding initially publicly accepted the word of two French ministers confirming that their government’s actions were in conformity with EU law. Later, Commissioner Reding decried France’s actions as comparable to those of the Nazis, inciting a controversy in its own right. *Id.*

9. European Parliament and Council 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 art. 4, 2004 O.J. (L 158) 77 [hereinafter Free Movement Directive].

10. Severance, *supra* note 3.

national legislation.¹¹ It was not until the EC threatened punitive action that France promised to rewrite its laws to conform properly with the Directive.

Regardless of the outcome of the revised French legislation, these events are only indicative of a wider European concern. Many other Member States engage in collective expulsion based on ethnic origin.¹² A few others, notably Italy, preceded France in making the forced removal of Roma a central piece of their crime fighting policies.¹³ Roma arguably bear the highest risk of expulsion as a group in violation of EU law. They are the largest ethnic minority in Europe, and their social isolation makes them particularly conspicuous.¹⁴ Further, Roma are often used as scapegoats by politicians for the ills of society.¹⁵ With the full accession of Romania and Bulgaria to the EU in 2012, accompanied by their large Roma populations, the issue of collective expulsion of Roma in contravention of EU law will only rise in prominence in the coming years.

The purpose of this Comment is not to rehash the debate over whether all free movement across EU borders should be tethered to economic activity. Ostensibly, the European people, as expressed through international treaties and the deliberative bodies of the EU, have already determined that the best course is to expand the right to move freely between Member States. Rather, the aim of this Comment is to identify the shortcomings in the Free Movement Directive, to highlight the impact these deficiencies have on Roma as the leading at-risk minority group within the EU, and to argue for a new understanding of the justifications currently being invoked to expel Roma. Part II will discuss the arduous history of Roma and examine how their current situation exposes them to an acute risk of expulsion. Part III will explore the evolution of the fundamental right to move freely within the EU and the adoption of the Directive. Part IV will analyze the derogation of

11. Press Release, European Comm'n, European Commission Assesses Recent Developments in France, Discusses Overall Situation of the Roma and EU Law on Free Movement of EU Citizens (Sept. 29 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1207>.

12. Memorandum from Robert Kushen, Exec. Dir., European Roma Rights Ctr., to Viviane Reding, Vice-President, European Comm'n, app. 11a (Aug. 27, 2010), <http://www.errc.org/cms/upload/file/france-ec-legalbrief-27-august-2010.pdf>.

13. Lorenzo Trucco, *Legal and Policy Developments in the Condition of Migrants and Roma in Italy*, 2 ROMA RIGHTS J. 31, 31-33 (2008), available at <http://www.errc.org/cms/upload/media/03/B7/m000003B7.pdf>.

14. REDING, *supra* note 3, at 2.

15. *Bottom of the Heap*, ECONOMIST, June 19, 2008, <http://www.economist.com/node/11579339/print>; Annabel Tremlett, *Trying To Solve a European Problem: A Comprehensive Strategy for Roma Minorities*, OPENDEMOCRACY (Jan. 11, 2011), <http://www.opendemocracy.net/print/57527>.

rights permitted under article 27 of the Directive with particular focus on the use of the public policy exception. Finally, Part V will assess the legality of recent mass expulsions of Roma in the EU and conclude that the expulsions likely violate the Free Movement Directive largely due to their scale. However, the underlying justification for many of those expulsion orders, when assessed individually, may be valid given the current conception of the public policy exception. Part V also calls for an interpretation of public policy to be made consistent throughout the EU and further argues that individual Member States must not be permitted to define scope with regard to Roma conduct in light of their particular social vulnerabilities and prior case law.

II. PLIGHT OF THE ROMA

While it is important to note from the outset that individual Roma circumstances “vary hugely” across Europe, the sad truth is that staggering numbers of Roma face dire circumstances.¹⁶ Horrendous living conditions at home and aspirations for a better life motivate the Roma to journey beyond their native countries. The substantive and procedural protections guaranteed by EU free movement law are critically important in accomplishing these endeavors. Yet, the same afflictions the Roma seek to escape at home create massive barriers to the exercise of their right to free movement. As the European Agency for Fundamental Rights (FRA) recently stated, “[t]he case of the Roma serves as a *litmus test*: the consequences for some of the most vulnerable citizens in the EU are an important indicator of the practical daily challenges faced by citizens exercising their right to free movement.”¹⁷

The necessary point of departure for any conversation about the Roma is a discussion of the term itself. Far from the homogenous group the label suggests, the Roma encompass a variety of ethnic subgroups with a multitude of languages, cultural norms, religions, and social classes.¹⁸ This umbrella term describes descendants of persons who fled

16. DIRECTORATE-GENERAL FOR EMP'T, SOC. AFFAIRS & EQUAL OPPORTUNITIES, EUROPEAN COMM'N, IMPROVING THE TOOLS FOR THE SOCIAL INCLUSION AND NON-DISCRIMINATION OF ROMA IN THE EU 9 (2010) [hereinafter IMPROVING THE TOOLS]; Tremlett, *supra* note 15.

17. EUROPEAN ROMA RIGHTS CTR., THE SITUATION OF ROMA EU CITIZENS MOVING TO AND SETTLING IN OTHER EU STATES 9, 12 (European Union Agency for Fundamental Rights ed., 2009) [hereinafter SITUATION OF ROMA EU CITIZENS]

18. *Id.* at 14; Severance, *supra* note 3; Tremlett, *supra* note 15. “The term Roma generally refers to persons who [describe] themselves as Roma, Gypsies, Travellers, Manouches, and Sinti, as well as other terms.” Iskra Uzunova, *Roma Integration in Europe: Why Minority Rights Are Failing*, 27 ARIZ. J. INT'L & COMP. L. 283, 287 (2010) (internal quotation marks omitted) (alterations in original).

from India under mysterious circumstances nearly 1000 years ago and who share similar characteristics along with a history of exclusion in European societies.¹⁹ The term “Gypsy,” typically considered pejorative and often used interchangeably with Roma, reinforces the impression that Roma are largely nomadic.²⁰ After fleeing persecution in India, enduring enslavement in Eastern Europe, and surviving the Holocaust, Roma continue to be plagued by social exclusion, poverty, and discrimination.²¹ As the European Court of Human Rights explained, “their turbulent history and constant uprooting” have led the Roma to “become a specific type of disadvantaged and vulnerable minority.”²²

Precise demographic data for the Roma is notoriously difficult to ascertain.²³ The prejudice against the Roma and fear of the population to self-identify are contributing factors. Nevertheless, varying estimates place the group at ten to twelve million within the EU and surrounding countries, making the Roma the largest ethnic minority in Europe.²⁴ Hungary, Bulgaria, Romania, and Slovakia are home to the largest population centers though the fall of communism and expansion of the EU have permitted migration on a larger scale to Western Europe.²⁵

A. *Motivations for Migration*

Extreme poverty is an inescapable fact of life within most Roma communities. A 2005 UNICEF report indicated that virtually all Roma in Bulgaria, Romania, and Hungary lived below the poverty line.²⁶ Their deplorable living conditions readily evoke images of the third world rather than the lives of EU citizens. Access to healthcare is scarce, resulting in a higher infant mortality rate and a life expectancy ten to fifteen years lower than the average European.²⁷ Many Roma live in

19. Karel Janicek & Vanessa Gera, *Through Schooling, a Few Gypsies Join Middle Class*, ABC NEWS (Jan. 18, 2011), <http://abcnews.go.com/International/wireStory?id=12635581&page=4>; Severance, *supra* note 3.

20. Severance, *supra* note 3. While some groups continue to practice a nomadic lifestyle, approximately eighty percent of the Roma are now estimated to lead a settled lifestyle. REDING, *supra* note 3, at 2.

21. Severance, *supra* note 3; *Bottom of the Heap*, *supra* note 15.

22. D.H. v. Czech Republic, App. No. 57325/00, para. 182 (Eur. Ct. H.R. Nov. 13, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; then search Application Number “57325/00”).

23. *Bottom of the Heap*, *supra* note 15; Uzunova, *supra* note 18, at 288.

24. REDING, *supra* note 3, at 2; Severance, *supra* note 3.

25. REDING, *supra* note 3, at 2; SITUATION OF ROMA EU CITIZENS, *supra* note 17, at 5.

26. *Bottom of the Heap*, *supra* note 15.

27. Uzunova, *supra* note 18, at 288.

overcrowded shacks with no running water or electricity.²⁸ These settlements are typically found on the periphery of urban areas, amplifying the tremendous social exclusion separating Roma from the majority population.²⁹

Roma existence outside mainstream society incubates the centuries-old prejudices that continue to permeate throughout all aspects of Roma life.³⁰ One recent report indicated that within Europe “negative attitudes to Roma are far more prevalent than for any other ethnic group or minority.”³¹ Polls in ex-communist countries demonstrate that up to eighty percent of respondents would not want Roma neighbors.³² Stereotypes of poor hygiene and criminal activity are widespread.³³ Indeed, the poor economic conditions generally suffered by the Roma tend to motivate a disproportionate level of involvement in the black market, petty crime, and begging.³⁴ While activists argue that this is only the result of the actions of a visible minority, it nevertheless fuels the negative opinions of the Roma already held by the public.

Intolerance is readily converted to discrimination, which reinforces the barriers to overcoming other massive challenges that affect Roma.³⁵ For example, the same segregation and substandard conditions found in Roma housing is often mirrored in their access to education. States routinely direct Roma children to institutions for the mentally handicapped.³⁶ One consequence of this finds an estimated twenty-five percent of Roma illiterate.³⁷ Another is a stigma upon entering the workforce that is perhaps equally as debilitating.³⁸ Many employers

28. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HOUSING CONDITIONS OF ROMA AND TRAVELLERS IN THE EUROPEAN UNION 72-73 (2009).

29. IMPROVING THE TOOLS, *supra* note 16, at 9.

30. See REDING, *supra* note 3, at 2; Jonathan Fox, *Patterns of Discrimination, Grievances and Political Activity Among Europe's Roma: A Cross-Sectional Analysis*, 2001 J. ETHNOPOLITICS & MINORITY ISSUES IN EUR. 2, 3; Leigh Phillips, Kate Connolly & Lizzy Davies, *EU Turning Blind Eye to Discrimination Against Roma, Say Human Rights Groups*, GUARDIAN (July 30, 2010), <http://www.guardian.co.uk/world/2010/jul/30/european-union-roma-human-rights/print>.

31. REDING, *supra* note 3, at 2; see also *Bottom of the Heap*, *supra* note 15.

32. *Bottom of the Heap*, *supra* note 15.

33. *A Long Road*, ECONOMIST, Sept. 16, 2010, <http://www.economist.com/node/17043366/print>; SITUATION OF ROMA EU CITIZENS, *supra* note 17, at 49.

34. Fox, *supra* note 30, at 3.

35. REDING, *supra* note 3, at 15.

36. *Hard Travelling*, ECONOMIST, Sept. 2, 2010, <http://www.economist.com/node/16943841/print>. One survey indicates that in Slovakia, Roma constitute sixty percent of students in “special schools,” while they only comprise ten percent of the general school-age population. *Id.*

37. Janicek & Gera, *supra* note 19.

38. *Bottom of the Heap*, *supra* note 15.

openly discriminate in job interviews, enforcing a “total exclusion policy regarding the employment of Roma.”³⁹

The confluence of these circumstances motivate Roma in Eastern Europe to seek a better life elsewhere. The FRA categorized these motivations as “push” and “pull” factors. Poverty, specifically the lack of work in Eastern European countries, is a primary force pushing the Roma from their countries of origin.⁴⁰ This push is augmented by Roma racism, which one study identified as predominantly economic in nature and occurring consistently more in Eastern Europe than in Western Europe.⁴¹ At the same time, the Roma are “pulled” to Western European countries by the prospect of better living standards and employment opportunities.⁴² Yet, while conditions may be better in Western Europe, many of the same afflictions faced at home are waiting for them in their destination countries.

B. Risk of Expulsion

Access to employment, housing, health care, and education may be more readily available in Western Europe, but Roma arrival is rarely welcome.⁴³ Western European attitudes toward the Roma differ little from attitudes in Eastern Europe,⁴⁴ and prejudice is abundant.⁴⁵ The added concern for migrant Roma is a reliance on Member States to correctly uphold their right to free movement. Many politicians use predictable public reaction against the Roma in order to further their own agenda.⁴⁶ The result is the legitimization of anti-Roma racism, heightened xenophobia, and irresistible calls for expulsion regardless of EU law.⁴⁷

Scapegoating is nothing new to the Roma, and the stark contrast in lifestyles makes the Roma particularly easy for politicians to exploit.⁴⁸ For instance, the sight of Roma begging with their young children and their encampments in public spaces “scandalises the citizenry.”⁴⁹ Many

39. Ann Hyde, *Systemic Exclusion of Roma from Employment*, 1 ROMA RIGHTS J. 3 (2006), available at http://www.errc.org/popup-article-view.php?article_id=2535.

40. SITUATION OF ROMA EU CITIZENS, *supra* note 17, at 6.

41. Fox, *supra* note 30, at 13.

42. SITUATION OF ROMA EU CITIZENS, *supra* note 17, at 6.

43. *Hard Travelling*, *supra* note 36.

44. *Bottom of the Heap*, *supra* note 15.

45. *Id.*

46. Tremlett, *supra* note 15; see also *Tough-Guy Sarko*, ECONOMIST, Aug. 26, 2010, <http://www.economist.com/node/16889547/print>.

47. *Bottom of the Heap*, *supra* note 15.

48. *Id.*

49. *Id.*

in Western Europe blame the Roma for an outbreak of various petty crimes. In some countries, however, the blame goes further. For example, an unsubstantiated string of gruesome muggings and rapes, allegedly committed by the Roma in Italy in 2008, led to riots in several cities.⁵⁰ Right-wing politicians fueled anti-Roma sentiment with incendiary statements, and the rioters proceeded to burn Roma huts and caravans.⁵¹ Many Roma were later arrested and deported.⁵² That same year, Italy declared a “state of emergency” in three regions of the country, claiming that settlements of “communities of nomads” had caused “great social alarm” threatening “public order and security for local populations.”⁵³

This cycle feeds on itself and is widespread. Similar Roma deportation policies in breach of EU law are reported to have occurred in Denmark, Sweden, Belgium, and Germany.⁵⁴ In many cases, no distinction is made between Roma who are committing criminal acts and the overwhelming majority of the Roma population.⁵⁵ Consequently, the belief spreads that the very presence of Roma in these countries constitutes a threat to public safety and necessitates their removal.⁵⁶ The question then becomes whether legally sufficient grounds exist for Roma expulsion in light of EU free movement law.

III. EVOLUTION OF THE FUNDAMENTAL RIGHT TO FREEDOM OF MOVEMENT

The concept of “Citizenship of the Union” arrived in 1992 along with amendments to the Treaty Establishing the European Community (EC Treaty).⁵⁷ Citizenship is based upon a set of provisions that delineates various rights.⁵⁸ Among these is the right to move and reside

50. *Id.*

51. *Id.*

52. *Id.*

53. Trucco, *supra* note 13, at 31.

54. Phillips, *supra* note 30.

55. COMM’R FOR HUMAN RIGHTS, COUNCIL OF EUR., POSITIONS ON THE HUMAN RIGHTS OF ROMA (May 30, 2010), <https://wcd.coe.int/ViewDoc.jsp?id=1631909>.

56. *Id.*

57. Treaty on European Union art. 8, Aug. 31, 1992, 1992 O.J. (C 224) 1 [hereinafter TEU]. The TEU inserted provisions addressing citizenship into the Consolidated Version of the Treaty Establishing the European Community. Consolidated Version of the Treaty Establishing the European Community art. 17, Dec. 29, 2006, 2006 O.J. (C 321) 37 [hereinafter Consolidated EC Treaty]. Now, following the entry into force of the Treaty of Lisbon, the same provisions are found in the Consolidated Version of the Treaty on the Functioning of the European Union. Consolidated Version of the Treaty on the Functioning of the European Union art. 20, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

58. TFEU art. 20.

within the EU.⁵⁹ The European Court of Justice (ECJ) had previously recognized a similar right among economically active persons, and at the start of the new millennium, ruled in *Baumbust v. Secretary of State for the Home Department* that the treaty-based ideas of citizenship conferred the right directly to every person holding the nationality of a Member State.⁶⁰ This marked a significant turning point for freedom of movement in the EU, altering the general understanding that noneconomically active citizens had no such right under the EC Treaty. The ECJ in *Baumbust* held that then-article 18 granted a generally applicable right to residency, limited by secondary national legislation.⁶¹ Such legislation, however, must comply with the principle of proportionality (discussed below).⁶²

The next milestone in this arena was the adoption of Directive 2004/38/EC on the right of citizens of the EU, and their family members, to move and reside freely within the territory of the Member States.⁶³ The Directive, which came into force on April 30, 2004, gives material effect to the treaty-based freedom of movement.⁶⁴ Beyond consolidating two regulations and nine directives on the topic, the Directive also incorporated and clarified ECJ case law.⁶⁵ The effect was to simplify and harmonize the disparate rules governing rights to residency and procedural guarantees prior to expulsions.⁶⁶ In some areas the Directive went further, expanding previous rights and establishing new ones for the first time. The preamble makes clear that the freedom of movement is to be understood as one of the fundamental freedoms of the Union.⁶⁷

The general rule set forth by the Directive is that any EU citizen has the right to exit and enter into the territory of a Member State upon mere showing of valid identification.⁶⁸ For the first time, nearly all other conditions on residency were eliminated for citizens exercising their freedom of movement for up to three months.⁶⁹ Specific categories such as worker, student, and self-employed were removed and replaced with

59. *Id.* art. 21.

60. Case C-413/99, *Baumbust v. Sec. of State for the Home Dep't*, 2002 E.C.R. I-7136, paras. 81-86, 94.

61. *Id.* para. 85.

62. *Id.* paras. 91, 94.

63. Free Movement Directive, *supra* note 9, at 78.

64. SERGIO CARRERA & ANAÏS FAURE ATGER, CTR. FOR EUROPEAN POLICY STUDIES, *L'AFFAIRE DES ROMS: A CHALLENGE TO THE EU'S AREA OF FREEDOM, SECURITY AND JUSTICE* 6 (2010).

65. Free Movement Directive, *supra* note 9, art. 38; Miriam Aziz, *Implementation as the Test Case of European Union Citizenship*, 15 COLUM. J. EUR. L. 281, 293 (2008-2009).

66. CARRERA & ATGER, *supra* note 64, at 6.

67. Free Movement Directive, *supra* note 9, at 78, para. 2.

68. *Id.* art. 4.

69. *Id.* art. 6.

“citizen.”⁷⁰ Thus, a representative arm of the EU conferred a right which the ECJ had previously recognized for all citizens several years earlier.⁷¹ The potential impact was particularly strong for migrant workers and others crossing borders in search of work, including many Roma, as they were no longer required to navigate cumbersome formalities or secure employment from a distance. The Directive expands on this concept with the introduction of what may yet be the closest approach to EU residency: permanent residency after five years of continuous, legal residency in a host Member State.⁷²

The recent expansion of free movement rights may lead many Europeans to believe that their right to intra-EU movement is unconditional.⁷³ In fact, the Directive establishes substantial restrictions. Economic activity once again becomes a defining criterion for the right of residency beyond three months.⁷⁴ Article 7 of the Directive requires residents at that point to be either workers, self-employed, or otherwise have “sufficient resources” so that the beneficiaries of free movement do not become a burden on the social assistance system of the host Member State.⁷⁵ In addition, Member States are not required to provide any economic assistance to citizens in their first three months of residency.⁷⁶ The assessment of what constitutes “sufficient resources” may vary across Member States, but in any event, is typically greater than what can be expected from the poorest of society.⁷⁷ Thus, in the case of the Roma, the three-month window provided by the Directive becomes a crucial period to find employment. However, those fortunate enough to maintain legal status for a period of five years are entitled to permanent residency within the host Member State, and the article 7 conditions of economic activity no longer apply.⁷⁸

Transitional arrangements drafted with regard to the 2007 accession to the EU of Bulgaria and Romania alter some of these rights for

70. *Id.* art. 4.

71. *Id.* art. 6.

72. *Id.* art. 16.

73. *See* Free Movement Directive, *supra* note 9.

74. *Id.* art. 7.

75. *Id.*

76. *Id.* art. 24.

77. Communication from the Commission and the European Parliament to the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members To Move and Reside Freely Within the Territory of the Member States, at 8, COM (2009) 313 final (July 2, 2009) [hereinafter Guidance for Better Transposition].

78. Free Movement Directive, *supra* note 9, art. 16.

accession nationals.⁷⁹ The accession treaty permits Member States to derogate from elements of the Directive until January 2012 (or for two years more, subject to certain conditions).⁸⁰ In particular, access to the labor markets of other Member States may depend on individual national law. Often this means workers from the acceding states are required to have work permits.⁸¹ Several Western European Member States, including France, Italy, and the United Kingdom, continue to impose labor restrictions on accession nationals.⁸² For example, the United Kingdom limits unskilled Bulgarian and Romanian nationals from employment in certain industries by use of a quota system.⁸³ Nevertheless, many Member States provide for simplified procedures in numerous occupations, and the virtually unconditional right of EU citizens to enter and reside in a host Member State for up to three months provides an opportunity for the Roma to move in search of employment despite the transitional arrangements.⁸⁴

Freedom of movement, while broadly guaranteed under the Directive, is not necessarily enshrined in national legislation. The responsibility lies with each Member State to implement EU law in a process known as transposition.⁸⁵ This means that Member States must “bring into force the laws, regulations and administrative provisions necessary to comply with the Directive.”⁸⁶ Conformity is often lacking.

79. Treaty Between the Member States of the European Union and the Republic of Bulgaria and Romania concerning the accession of the Republic of Bulgaria and Romania to the European Union, annexes VI, VII, June 21, 2005, 2005 O.J. (L 157) 11.

80. *Id.* As the European Commission explains:

For the first two years after a country joined the EU, national law and policy of the countries that were already part of the EU determines access to the labour market of workers from that country so that they may need a work permit. If a country wants to continue to apply these restrictions for three more years, it must inform the Commission before the end of the first two years. After that, countries can continue to apply restrictions for another two years if they inform the Commission of serious disturbances in their labour market; all restrictions must end after 7 years.

Enlargement—Transitional Provisions, EUR. COMM’N, <http://ec.europa.eu/social/main.jsp?catId=466&langId=en> (last visited Oct. 30, 2011). Thus, the transitional arrangements do not permit derogation beyond 2014.

81. *Members Since 2007*, EUR. COMM’N, <http://ec.europa.eu/social/main.jsp?langId=en&catId=508> (last visited Oct. 30, 2011).

82. *Id.*

83. *Id.*

84. *Id.*

85. Free Movement Directive, *supra* note 9, art. 40.

86. Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members To Move and Reside Freely Within the Territory of the Member States, at 3, COM (2008) 840 final (Dec. 10, 2008).

A report prepared for the EC on the transposition of the Directive, recently concluded:

The overall transposition of Directive 2004/38/EC is far from satisfactory. Not one of the Member States has transposed the entire Directive in an effective and correct manner. In a few Member States . . . the problems of conformity relate only to a small number of Articles, but in most Member States, considerable parts and crucial provisions were wrongly or not transposed.⁸⁷

France, as noted in the introduction, narrowly averted the start of EU enforcement proceedings at the close of 2010 for failure to correctly transpose the Directive. A separate conformity report found that France had severe deficiencies with respect to the grounds for loss of right of entry and residence as well as procedural safeguards.⁸⁸ Many other Member States were similarly cited for insufficient or nonexistent transposition in these areas.⁸⁹ Italy earned special mention as having “[t]he most serious transposition problems in relation to the grounds of expulsion.”⁹⁰ Transposition is thus the first occasion for Member States to skirt the obligations imposed by the Directive, thereby creating incongruent free movement law in contravention of its intention.

IV. ARTICLE 27 EXCEPTIONS

Aside from concerns over transposition, the Directive does provide Member States justification to limit the freedom of movement of citizens under article 27.⁹¹ This includes the authority to expel any EU citizen irrespective of the rights of entry and residence conferred elsewhere in the Directive on the grounds of preserving public policy or public security.⁹² Because the protection against expulsion is considered to lie at the heart of the idea of citizenship, article 27 is subject to rigorous material and procedural safeguards.⁹³ Justifications must be based on individual personal conduct (a case-by-case assessment), and “must

87. MILIEU LTD. IN CONSORTIUM WITH THE EUROPA INSTITUTE, UNIV. OF EDINBURGH, CONFORMITY STUDIES OF MEMBER STATES' NATIONAL IMPLEMENTATION MEASURES TRANSPOSING COMMUNITY INSTRUMENTS IN THE AREA OF CITIZENSHIP OF THE UNION, at i (2008) [hereinafter CONFORMITY STUDIES].

88. MILIEU LTD. IN CONSORTIUM WITH THE EUROPA INSTITUTE, UNIV. OF EDINBURGH, CONFORMITY STUDY FOR FRANCE 8-9 (2008).

89. CONFORMITY STUDIES, *supra* note 87, at 60-63.

90. *Id.* at 61.

91. Free Movement Directive, *supra* note 9, art. 27.

92. *Id.* Article 27 also permits the same limitation on the grounds of public health, a category that is well defined in the Directive and has generated sufficiently less controversy than the other enumerated grounds. *Id.*

93. *Id.* arts. 27-28, 30-31; CARRERA & ATGER, *supra* note 64, at 6.

represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.”⁹⁴ Measures enforcing expulsion must also be based on the personal conduct of the individual concerned and must comply with the principle of proportionality.⁹⁵ Specific factors to be taken into account regarding the individual are enumerated in article 28.⁹⁶ Finally, host Member States are required to formally notify the individual concerned in writing, provide access to judicial and administrative redress, and typically must permit at least one month to leave the country.⁹⁷

Despite these safeguards, failure of the Directive to define many of these terms leaves EU citizens at risk once more. For example, the distinction between public policy and public security, which the Directive does not address, gains significance the longer a citizen resides in a host Member State.⁹⁸ A citizen who acquires permanent resident status after five years may be expelled only on “serious grounds of public policy and public security.”⁹⁹ “Imperative grounds of public security” is the only basis to expel a citizen residing in a Member State for at least ten years.¹⁰⁰ Indeed, vague allusions to crime prevention is an oft-invoked justification to support programs of mass expulsion.¹⁰¹ Clarity is therefore critical to prevent illegal expulsion orders.

A. *Scope of the Public Policy Exception*

The first obligation of EU citizens exercising their right to free movement is to respect the laws of the host Member State.¹⁰² Those who break the law may be sent back to their country of origin if their conduct sufficiently threatens public policy or public security.¹⁰³ While the significance of these terms weighs heavy, the Directive leaves much to be desired in their definition. ECJ interpretation of these concepts found in

94. Free Movement Directive, *supra* note 9, art. 27.

95. *Id.*

96. *Id.* art. 28.

97. *Id.* arts. 30-31.

98. *Id.* art. 28.

99. *Id.*

100. *Id.*

101. *See, e.g.*, Letter from Robert Kushen, Managing Dir., European Roma Rights Ctr. & Eric Støttrup Thomsen, Dir., Romano, to Lars Løkke Rasmussen, Prime Minister, Denmark (July 12, 2010), <http://www.errc.org/cms/upload/file/denmark-mass-arrests-and-deportations-july-2010.pdf> (citing a media report of the arrest of twenty-three EU Roma in Copenhagen, followed by a call from the city mayor to expel the arrestees due to alleged thefts and their “criminal” nature).

102. Guidance for Better Transposition, *supra* note 77, at 11.

103. Free Movement Directive, *supra* note 9, art. 27.

the Directive, as well as in the foundational treaties and precursor legislation to the Directive, is therefore instructive.

Public security is generally interpreted as the preservation of the internal and external security of a Member State, and often arises in the context of armed conflict.¹⁰⁴ In contrast, the ECJ's case law makes clear that invocation on public policy grounds requires an infringement of the law which disturbs the social order.¹⁰⁵ Consequently, many of the justifications used to expel Roma (e.g., illegal residence, prostitution, theft) constitute crimes that arguably threaten society and therefore fall under the justification of preserving public policy.

The absence of clear guidance on how Member States may define either "public security" or "public policy" may lead to inconsistent application within the Union and undermine the idea behind freedom of movement. The ECJ recognized the potential for this variance in its judgment in *Van Duyn v. Home Office*. In that case, Van Duyn, a Dutch national and a member of the Church of Scientology, attempted to gain entry to the United Kingdom in order to begin secretarial work at a Scientology "college."¹⁰⁶ Government agents refused entry on the grounds that it would violate U.K. public policy.¹⁰⁷ At that time, the United Kingdom considered Scientology to be socially harmful.¹⁰⁸ The Minister of Health described it as a "pseudo-philosophical cult" that "alienates members of families from each other" and "can be a serious danger to the health of those who submit" to its principles and practice.¹⁰⁹ U.K. law did not permit the government to ban the practice of Scientology within its borders, but in order to curb its growth, the government took steps to prevent foreign nationals from entering with the intention of working at a Scientology establishment.¹¹⁰

The EC argued in the case that uniform interpretation of the limits to public policy was necessary if the principle of freedom of movement was to be maintained.¹¹¹ If nationals from one Member State could freely move and work in another, while the reverse could not be said for nationals of the second Member State, the essence of free movement

104. Case C-285/98, *Kreil v. Bundesrepublik Deutschland*, 2000 E.C.R. I-95, para. 15.

105. Case C-33/07, *Ministerul Administrației și Internelor v. Jipa*, 2008 E.C.R. I-5157, para. 23.

106. Case C-41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, 1340.

107. *Id.*

108. *Id.* at 1339.

109. *Id.*

110. *Id.* at 1339-40.

111. *Id.* at 1344.

without respect to nationality would be defunct.¹¹² The ECJ observed that it was legal under U.K. law for nationals of the host state to perform the same work for which the United Kingdom considered to violate its public policy when performed by Van Duyn.¹¹³

Nevertheless, the ECJ upheld the limitation of Van Duyn's right to free movement on public policy grounds.¹¹⁴ The ECJ held that "the particular circumstances justifying recourse to the concept of public policy may vary from one country to another" and "an area of discretion" for competent national authorities is necessary.¹¹⁵ The ECJ emphasized, however, that such discretion was limited.¹¹⁶ "[D]erogating from the fundamental principle of freedom of movement," the ECJ declared, must be done only by strictly interpreting the concept of public policy "so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community."¹¹⁷

Not all conduct that threatens a Member State's public policy justifies expulsion under article 27. In *Procureur du Roi v. Royer*, the ECJ assessed for itself whether certain conduct, considered by a Member State to threaten its public policy, nevertheless merited that determination within the meaning of the Treaty Establishing the European Economic Community (the precursor to the EC Treaty and TFEU).¹¹⁸ The case arose when Royer, a French national, entered Belgium without having completed the administrative formalities of entry required of the population at the time.¹¹⁹ Apparently aware that Royer was previously prosecuted for several armed robberies in France, Belgium police ordered Royer to leave the country and not return on the basis that he was an illegal resident.¹²⁰ Following a second arrest where police agents again discovered Royer in Belgium, he was subsequently committed to a Belgian prison.¹²¹ When Royer later earned his freedom on appeal, he was served with an expulsion order on the same day as his release.¹²² The order was based on the grounds that Royer's failure to comply with the

112. *Id.*

113. *Id.* at 1340.

114. *Id.* at 1350-51.

115. *Id.* at 1350.

116. *Id.*

117. *Id.*

118. Case C-48/75, *Procureur du Roi v. Royer*, 1976 E.C.R. 498, 515.

119. *Id.* at 499.

120. *Id.*

121. *Id.*

122. *Id.* at 500.

legal formalities concerning entry, movement, and residence of aliens constituted a threat to Belgium public policy.¹²³

The ECJ recognized that it is the privilege of the Member State to assess the requirements of its public policy and that it retains the right to expel an individual in light of those requirements.¹²⁴ However, the ECJ held that the mere failure to comply with immigration formalities is “not of such a nature as to constitute in itself conduct threatening public policy,” and cannot be used to justify expulsion.¹²⁵ The ECJ observed that the conduct constituting the threat was the exercise of a treaty right itself, and for that reason was unwilling to sanction measures controlling immigration as sufficient public policy.¹²⁶ Thus, the ECJ will not hesitate to inject itself in the “area of discretion” granted to Member States to determine which circumstances justify article 27 expulsions when such a determination would contradict treaty-based rights.

Subsequent cases have further elaborated on the concepts underpinning the article 27 requirement that the threat to public policy and public security derive from an individual’s personal conduct and be “genuine, present, and sufficiently serious.”¹²⁷ Restrictive measures must be based on an actual threat and cannot be justified merely by a general risk.¹²⁸ A presumed threat is not genuine, and past conduct which does not indicate a propensity to reoffend is not a present threat.¹²⁹ Previous criminal convictions in themselves are insufficient to invoke the exception, but the conditions which gave rise to the conviction may be taken into account to assess the future conduct of an individual.¹³⁰

Perhaps the most relevant case bearing on the present situation facing the Roma is *Polat v. Stadt Rüsselsheim*.¹³¹ That case addressed whether numerous minor offenses, that when taken individually, were not serious enough to be considered a threat affecting a “fundamental interest of society,” may yet justify expulsion because of their number.¹³² The case centered on Polat, a Turkish national who lived in Germany for most of his childhood and adult life.¹³³ Polat was well acquainted with the

123. *Id.*

124. *Id.* at 514.

125. *Id.* at 515.

126. *Id.* at 513-14.

127. Free Movement Directive, *supra* note 9, art. 27.

128. Case C-67/74, *Bonsignore v. Oberstadtdirektor der Stadt Köln*, 1975 E.C.R. 297, 307.

129. Case C-30/77, *Regina v. Bouchereau*, 1977 E.C.R. 2000, 2012-13.

130. Case C-50/06, *Comm’n v. Netherlands*, 2007 E.C.R. I-4383, 4400-01.

131. Case C-349/06, *Polat v. Stadt Rüsselsheim*, 2007 E.C.R. I-8170.

132. *Id.* at I-8183-84

133. *Id.* at I-8176.

German criminal justice system.¹³⁴ As a minor, he committed theft and drug offenses and was convicted an additional eighteen times for similar crimes after turning twenty-one.¹³⁵ German national authorities initially offered Polat the opportunity to undertake drug rehabilitation in lieu of being expelled, but he was ultimately sentenced to prison and later expelled from Germany following “frequent interruptions of his drug withdrawal treatment and his persistent wrongful conduct.”¹³⁶

The German government justified the expulsion on the basis that Polat demonstrated himself to be a repeat offender constituting a specific risk to society.¹³⁷ The government highlighted the fact that fines, government warnings, and threats of imprisonment had not curtailed Polat’s criminal acts in the past.¹³⁸ Essentially, the government argued that the increased likelihood of future offenses based on past convictions of numerous, though insufficiently serious crimes, qualified as a genuine and sufficiently serious threat to a fundamental interest of society.¹³⁹ The ECJ reiterated the rule that previous criminal convictions alone cannot be the basis for expulsion, though the circumstances that gave rise to the conviction are valid evidence in the analysis.¹⁴⁰ Therefore, the ECJ held that a national court may find a sufficient threat based on conduct that, taken individually, is insufficient, as long as the behavior develops the required threat.¹⁴¹

The EC further developed this point. In its communication on guidance for better transposition and application of the Directive, the EC took the explicit position that “[i]n certain circumstances, persistent petty criminality may represent a threat to public policy, despite the fact that any single crime/offence, taken individually, would be insufficient to represent a sufficiently serious threat.”¹⁴² The EC developed a set of factors for Member States to consider when assessing the existence of a

134. *Id.*

135. *Id.*

136. *Id.* at I-8177.

137. *Id.* at I-8177-78.

138. *Id.*

139. *Id.* at I-8183-84. Although not stated explicitly, the parties appeared to have agreed that theft and drug offenses, taken individually, were insufficient to support the public policy exception. The German court, in its reference of the matter to the ECJ, assumed that “a number of minor offences . . . taken individually, are not sufficient to form the basis of an actual and sufficiently serious danger to a fundamental interest to society.” *Id.* at I-8181.

140. *Id.* at I-8184-85.

141. *Id.* at I-8186.

142. Guidance for Better Transposition, *supra* note 77, at 12.

threat to public policy in these cases.¹⁴³ These factors include “the nature of the offences; their frequency; [and] damage or harm caused.”¹⁴⁴

B. Principle of Proportionality and Other Safeguards

Deriving from the Treaty of Lisbon, the principle of proportionality is incorporated in the Directive, and its adherence is explicitly called for in article 27.¹⁴⁵ Once a Member State has determined that a citizen’s conduct creates the necessary threat to warrant derogation of a person’s rights, national authorities must then carry out a proportionality assessment before any expulsion may take place.¹⁴⁶ The objective is to ensure that any measure taken in response to the threat against the Member State is appropriate and does not go beyond what is strictly necessary.¹⁴⁷ National authorities are directed to balance the personal and family situation of the individual concerned against the protected state interests.¹⁴⁸

The factors that a Member State must take into account when assessing the personal and family situation of the individual are enumerated in article 28.¹⁴⁹ Factors most relevant in the case of the Roma include the individual’s length of residency in the host state, the extent of social and cultural integration in the host state, and the extent of ties with the individual’s country of origin.¹⁵⁰ Roma children born in the host state, for example, would have a stronger claim to integration than a recent immigrant.¹⁵¹ Moreover, many Roma could make a plausible claim of facing serious difficulties if they were forced to return to their country of origin.¹⁵² As noted previously, the period of residency in a host state automatically implicates heightened protection from expulsion.¹⁵³ Individuals who have validly resided in a host state for at least ten years cannot be expelled on public policy grounds, thereby eliminating the main justification currently used to expel the Roma.¹⁵⁴

Beyond the required proportionality assessment, Member States are also obliged to conform to certain procedural safeguards when effecting

143. *Id.*

144. *Id.*

145. Free Movement Directive, *supra* note 9, art. 27.

146. Guidance for Better Transposition, *supra* note 77, at 13.

147. *Id.*

148. *Id.*

149. Free Movement Directive, *supra* note 9, art. 28.

150. *Id.*

151. Guidance for Better Transposition, *supra* note 77, at 14.

152. *See id.* at 13.

153. Free Movement Directive, *supra* note 9, art. 28.

154. *Id.*

an expulsion.¹⁵⁵ For instance, article 30 mandates that the person concerned receive written notification of any article 27 decision.¹⁵⁶ The notification must fully and precisely inform the person of the grounds for the decision in such a way that the person can understand its content and implications.¹⁵⁷ Notification lays the foundation for the right to appeal the decision in the host state's courts, which is also guaranteed under article 30.¹⁵⁸ Lastly, individuals ordered to leave a host state are normally permitted at least thirty days to comply.¹⁵⁹ This is meant to ensure at least a minimal period for the individual to adjust to the forced change in circumstances (e.g., arrange for personal belongings to be shipped to new destination, notify employers, etc.).¹⁶⁰ Member States may only derogate from this guaranteed adjustment period in "duly substantiated cases of urgency."¹⁶¹ In those cases, a separate proportionately assessment must be made to justify such an urgent expulsion.¹⁶²

V. ANALYSIS

On the question of whether the mass expulsions of the Roma (at the levels recently reported in France, Italy, and to a lesser extent other Member States) is legal, the answer readily appears that such actions are not. It is highly improbable that expulsions enforced on such a wide scale are conducted pursuant to the case-by-case assessment explicitly required by article 27 and necessary to adhere to the principle of proportionality. To be sure, the European Roma Rights Center (ERRC), an advocacy group, conducted an in-depth investigation of the French expulsions publicized last summer and confirmed that "expulsions without individual considerations are indeed commonplace."¹⁶³ To illustrate this claim, consider evidence offered by the ERRC.¹⁶⁴ On August 12, 2010, identical expulsion orders were issued to thirty Roma in the context of a camp eviction.¹⁶⁵ Nearly all the forms were issued by the same notifying agent, at an average rate of six minutes per person, indicating that the agent did not take the time to consider individual

155. *Id.* art. 30.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Guidance for Better Transposition, *supra* note 77, at 14.

161. Free Movement Directive, *supra* note 9, art. 30.

162. Guidance for Better Transposition, *supra* note 77, at 14.

163. Memorandum from Robert Kushen to Viviane Reding, *supra* note 1.

164. *Id.*

165. *Id.*

circumstances.¹⁶⁶ In fact, the forms were indistinguishable save for handwritten names and dates of birth, and all forms lacked any reference to the specific circumstances of each person.¹⁶⁷

It is reasonable to conclude that the decision to issue expulsion orders was based on collective factors, such as residence in the camp or identity as Roma, not on individual conduct as required by the Directive. Furthermore, without conducting a case-by-case assessment, French authorities could not have determined critical details in order to perform the proportionality assessment, such as integration in France or connection to the country of origin. Even more significant is the lack of knowledge regarding how long each person resided in France, which may have barred expulsion on public policy grounds all together if the individual qualified.

This is not to say, however, that the public policy exception cannot justify expulsions of Roma if otherwise conducted on a case-by-case basis. *Van Duyn* advises that Member States generally retain the right to determine what constitutes a threat to its own public policy.¹⁶⁸ Just as in *Polat*, where the foreign national's criminal conduct could constitute a sufficient threat in the aggregate, though not individually, many Roma are accused of similar, multiple petty crimes which may rise to a sufficient threat justifying expulsion.¹⁶⁹ Accusations that are later confirmed on the basis of individual conduct permit valid expulsions. The concern for the many Roma who are not repeat offenders nor criminal in any respect is that this conception of public policy allows politicians in the host state to tailor the definition of threatening conduct with the intent to expel Roma just for being Roma. A common EU definition of public policy would go far to alleviate this concern.

Unfortunately for the Roma, settling on a common definition of public policy has proved to be difficult. Member States structure their societies in different ways and naturally place greater value on different activities.¹⁷⁰ The nature of treaty-making calls for a variety of interpretations on agreed rules where values diverge.¹⁷¹ Yet Member States may not be entitled to their "area of discretion" on this issue as it relates to the Roma. Under *Royer*, the exercise of a treaty-based right

166. *Id.*

167. *Id.*

168. Case C-41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1338, 1350.

169. Case C-349/06, *Polat v. Stadt Rüsselsheim*, 2007 E.C.R. I-8170, I-8186.

170. Catherine Kessedjian, *Public Order in European Law*, 1 ERASMUS L. REV. 25, 28 (2007).

171. *Id.*

cannot in itself be a threat to public policy.¹⁷² Royer was ordered to leave the country for failure to follow Belgian immigration procedures, which the ECJ struck down because Royer's violation of immigration procedures was itself an exercise of his right to free movement guaranteed under the EC Treaty.¹⁷³ As observed recently in France, Roma are typically ordered to leave their host states for living in an "irregular situation" or some similar conduct unique to their lifestyle and economic options. Given the long history of the Roma as scapegoats (reaching to the present day), utter lack of political support, and widespread discrimination and stereotyping across the EU, the more likely explanation is that they are being expelled because they are Roma who exercised their right to free movement. The power to curtail freedom of movement of the Roma cannot be held by the same political leaders who have such great motivation to abuse it. Due to this inherent risk, derogations justified as preserving public policy must be viewed with suspicion and be considered a presumptively invalid action, just as in *Royer*, to limit their freedom of movement solely because that right was exercised in the first place.

A new method of defining public policy as it relates to the Roma is therefore necessary. Perhaps a community-wide definition of public policy can be achieved. Or perhaps a special provision to article 27 that addresses minorities at risk has greater political feasibility. I will leave it to the next commentator on this topic to develop the shape this protection might take. For now, it is sufficient to say that the link between national political leaders and the power to curtail the fundamental right to freedom of movement that the Roma possess must be severed. The fox can no longer guard the hen house.

VI. CONCLUSION

The recent wave of mass Roma expulsions occurring within the EU is illegal, assuming that as recent reports suggest, such expulsions are violating the Free Movement Directive's requirement of case-by-case determinations and proportionality assessments. The EC should thus initiate punitive actions to bring rogue Member States in line. However, the Roma will continue to remain at risk of abuse as long as the leaders who are politically motivated to expel them are permitted to define the scope of the public policy exception as it applies to this particularly vulnerable minority group. At the same time, the current conception of

172. Case C-48/75, *Procureur du Roi v. Royer*, 1976 E.C.R. 498, 513-14.

173. *Id.* at 513-15.

public policy violates treaty-based rights of the Roma and should be nullified because a substantial temptation exists to expel the Roma simply for exercising their right to free movement. A new method of defining legally sufficient public policy grounds to expel Roma, therefore, must be devised in order to prevent illegal expulsions and secure the notion of free movement that is considered a fundamental right for all citizens of the EU.