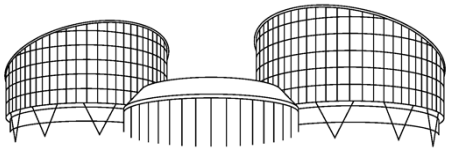

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MEMEDOVA AND OTHERS v. NORTH MACEDONIA

(Applications nos. 42429/16 and 2 others)

JUDGMENT

Art 34 • Victim • Finding of a violation of the right to liberty of movement without monetary compensation for non-pecuniary damage, in case circumstances, insufficient redress
Art 2 P4 • Freedom to leave country • Refusal of permission to persons of Roma ethnicity to leave Respondent State's territory • Jurisprudential inconsistency as to whether Schengen Borders Code part of the domestic legal order and ambiguity as to its applicability in the applicants' case • No regard to applicants' individual circumstances • Interference not in accordance with domestic law and not justified
Art 14 (+ Art 2 P4) • Discrimination of applicants based on their Roma origin • Way in which relevant domestic border control instructions applied in practice by border officers resulting in disproportionate number of Roma being prevented from travelling abroad • Convincing prima facie case of indirect discrimination • Lack of objective and reasonable justification

STRASBOURG

24 October 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Memedova and Others v. North Macedonia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Arnfinn Bårdsen*, President*,
Jovan Ilievski,
Pauliine Koskelo,
Saadet Yüksel,
Lorraine Schembri Orland,
Frédéric Krenc,
Davor Derenčinović*, judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the applications (nos. 42429/16, 8934/18 and 9886/18) against the Republic of North Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by five applicants, all Macedonians/citizens of the Republic of North Macedonia, listed in the appended table ("the applicants"), on the various dates indicated therein;

the decision to give notice to the Government of the Republic of North Macedonia ("the Government") of the complaints under Article 2 of Protocol No. 4 taken alone and in conjunction with Article 14, and Article 1 of Protocol No. 12 to the Convention, and to declare the remainder of the applications inadmissible;

the parties' observations;

Having deliberated in private on 3 October 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The present case concerns border incidents in which the applicants, all of Roma ethnicity, were not allowed to leave the territory of the respondent State. They complained under Article 2 of Protocol No. 4, taken alone and in conjunction with Article 14, and under Article 1 of Protocol No. 12 to the Convention, that they had been singled out by the border police officers owing to their Roma ethnicity.

THE FACTS

2. The applicants' details are set out in the appendix.

3. The Government were represented by their acting Agent, Ms D. Djonova.

I. BACKGROUND TO THE CASES

4. From 19 December 2009 entry by the respondent State's citizens into the Schengen Area was simplified for those holding a biometric passport issued by the respondent State.

5. On 28 April 2011 the Ministry of the Interior ("the MOI") sent an alert to the regional centres for border affairs, the Sector for Border Affairs and Migration and other relevant bodies within the Ministry, indicating that an increasing number of nationals were applying for asylum in the European Union and the Schengen member States and were thus abusing the existing visa-free regime. One of the measures proposed by the MOI was strengthening border controls for organised groups of citizens leaving the country who were potential asylum-seekers, under section 15 of the Border Control Act (*Закон за гранична контрола*, Official Gazette nos. 171/2010 and 41/2014), which provides for minimum border checks to verify the identity and the validity of documents of those crossing the State border. In particular, police officers are entitled to check the appropriate records and electronic databases in order to establish whether such persons pose a threat to national security, public policy, international relations or public health.

II. CIRCUMSTANCES OF THE CASE AND CIVIL PROCEEDINGS INSTITUTED BY THE APPLICANTS

A. The first applicant (Ms Memedova)

6. On 29 November 2014 the first applicant was prevented from leaving the country via Skopje Airport. After her passport had been checked, it was returned to her with a stamp that had been crossed with two parallel lines, which meant that the entry or exit stamp had been cancelled (as specified in the Rules on the form and content of the entry and exit stamp of the Republic of North Macedonia and the procedure for stamping travel documents (*Правилник за формата и содржината на штембилот за влез и излез во Република Македонија и начинот и постапката на неговото втиснување*, Official Gazette, no.46/2012)).

7. On the same day an official note of the MOI stated that, in line with section 15(4) of the Border Control Act (see paragraph 5 above), the first applicant had not been allowed to leave the country because she had posed a threat to public policy and to the State's relations with the member States of the European Union (EU), and because she had not provided evidence of sufficient financial means for her planned length of stay, nor had she presented a return ticket or a formal letter of invitation or sponsorship.

8. On 30 March 2015 the first applicant brought a civil action against the MOI under the Discrimination Act arguing that her rights to equal treatment and to leave the country had been violated. She claimed that the border officer

had insulted her by saying that she, like other Roma persons, would seek asylum. She added that she had tried to explain to the officer that she was retired and was travelling in order to visit her children and that she had tried to present documents showing that her son was resident in Germany. In the course of the proceedings, the first applicant's other son gave oral evidence confirming that his brother was resident in Germany. The first applicant also relied on the practice of the domestic courts (judgment no. *GZh-183/15* – see paragraph 30 below), a decision of the Constitutional Court (see paragraph 28 below) and the 2013 annual report of the Ombudsman (see paragraph 32 below). She further claimed that she had previously travelled to Germany without being asked to present a letter of sponsorship. Her passport had been stamped by the German authorities during her previous stay, which attested to that fact and could not be interpreted, as the border officers had apparently done, as evidence of a previous attempt to seek asylum in Germany. Lastly, she noted that on the relevant date some other Roma persons had been allowed to cross the border.

9. On 23 June 2015 the Vinica Court of First Instance dismissed the first applicant's claims and held that she had not been discriminated against. She had not been allowed to travel because of her failure to justify her purpose and reason for travel with credible documents, as required by law. The court further referred to her statement that other passengers of Roma origin had been allowed to leave the country on the same day and found that the checking of her previous German entry stamp (see paragraph 8 above) had been conducted as part of the border checks in order to establish whether she fulfilled the conditions for crossing the border. The court concluded that the available evidence did not prove that other persons in comparable circumstances had been allowed to leave the country.

10. In her appeal against the first-instance decision the first applicant argued that, among other things, there had been a violation of Article 2 of Protocol No. 4. She also argued that she had never received an official decision stating the reasons for her being prevented from crossing the border.

11. On 18 January 2016 the Shtip Court of Appeal upheld the lower court's judgment and found that her rights to equal treatment and to leave the State had not been violated. It also found that in order to leave the territory of the respondent State and enter a member State of the Schengen Borders Code, it was not enough to have a valid biometric passport and that other conditions also had to be met, such as providing a letter of sponsorship and demonstrating sufficient financial means, so that the person could prove his or her purpose and reasons for travel to and stay in the EU member States. In that connection the court referred to Article 5 of Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 (Schengen Borders Code; see paragraph 27 below). The border check had been performed in order to prevent and detect illegal immigration and

other threats to public and legal order, national security and international relations.

B. The second applicant (Ms Kurtishova)

12. On 19 June 2014 the second applicant was prevented from leaving the respondent State via Skopje Airport, on the grounds that she had not presented a credible letter of sponsorship and did not have sufficient funds.

13. On 18 July 2014 she brought a civil action under the Discrimination Act arguing, among other things, that her right to liberty of movement had been violated. In support of her claims, she referred to reports of the Council of Europe Commissioner for Human Rights (see paragraphs 38-39 below) and the European Roma Rights Centre, which reported that between 2011 and April 2014 it had documented 91 cases of Roma individuals who were prevented from leaving the country and had become aware of another 33 such cases. She also submitted the letter of sponsorship she claimed she had presented to the border officer, which indicated the German municipality where she had intended to stay and in which her host (her brother-in-law) confirmed that he would cover the costs of her stay. She further submitted a certified copy of her permanent employment contract with a company in the respondent State, which she also claimed to have presented to the border officer. The second applicant also referred to a Constitutional Court decision (see paragraph 28 below) and a statement by the Minister of the Interior given on 8 February 2013 during an official visit to Sweden that in order to prevent abuse of the recent visa liberalisation, almost 8,000 citizens had been stopped from crossing the border. During the main hearing the second applicant stated that she had travelled abroad before but had not been asked to present letters of sponsorship.

14. At a hearing in the Skopje Court of First Instance, an MOI employee who had witnessed the events of 19 June 2014 at the border crossing stated that he had refused to allow the second applicant to cross the border in accordance with the Schengen Borders Code and section 15(4) of the Border Control Act (see paragraph 5 above) because she had not had sufficient financial means, the letter of sponsorship had been illegible, and she had not presented a hotel reservation or invitation. He also stated, without presenting any supporting documents, that on that day he had not allowed anyone to cross the border unless they fulfilled the conditions required of the second applicant.

15. Following a remittal, on 29 March 2017 the Skopje Court of First Instance dismissed the second applicant's claims, finding that she had not met the requirements set out in the Schengen Borders Code for entering an EU member State (see paragraph 27 below) and that she had not been allowed to leave the country because she had not provided the original of the purported letter of sponsorship and it did not confirm that she had sufficient financial

means. The court held that the applicability of the Schengen Borders Code in the respondent State derived from the Stabilisation and Association Agreement (Law on Ratification of the Stabilisation and Association Agreement between the European Communities and their Member States and the former Yugoslav Republic of Macedonia (*Закон за ратификација на Спогодбата за стабилизација и асоцијација*), Official Gazette no. 28/2001) under which the parties had agreed to cooperate in fields visas, border control, asylum and migration and the respondent State had undertaken to readmit any of its nationals illegally present on the territory of a member State at the request of the State in question and without further formalities once such persons had been positively identified (ibid., section 76). In addition, the court held that the second applicant had not been discriminated against as she had not identified a person who had been allowed to leave the country at around the same time and under the same conditions as in her case, nor had she noticed what documents had been required of other passengers. Lastly, the court held that the decision of the Constitutional Court (see paragraph 28 below) declaring certain provisions of the Passport Act invalid was inapplicable to the second applicant's case.

16. On 17 July 2017 the Skopje Court of Appeal upheld the findings of the first-instance court.

C. The third, fourth and fifth applicants (Mr Abazov, Ms Abazova and Mr Memedovski)

17. On 14 March 2014 the third and fourth applicants, who are spouses, arrived together with the fifth applicant at the Tabanovce border crossing into Serbia in two vans decorated according to Roma culture, headed for a traditional wedding ceremony in Kosovo.[1] There were two drivers, one of whom was the fifth applicant, making six people in each van, among them the third and fourth applicants. The third and fourth applicants were not allowed to cross the border after being questioned by the border officers; their passports were stamped and the stamp was crossed with two parallel lines (see paragraph 6 above). As to the fifth applicant, there were contradictory statements as to whether he was actually prevented from crossing the border or whether he chose not to do so voluntarily after the passengers in his van were denied exit from the country (see paragraph 22 below).

18. On the same date, in an official note of the MOI entitled "Denial of exit of MKD nationals", it was stated that in accordance with section 15(4) of the Border Control Act (see paragraph 5 above), all the people travelling in the two vans had been refused permission to leave the country because they had posed a threat to public policy and the relations of the State with an EU

[1] All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

member State, and because they had not had sufficient financial means and letters of sponsorship to cover their planned stay abroad. The fifth applicant was also listed in the note, with a remark that there had been an alert for him in the Border Control Sector system. The relevant parts of the note read as follows:

> " ... [I]t was established that the vehicles, their drivers, and some of the passengers ... were named in alert 229 of 4 March 2014 issued by the Border Control Sector in conjunction with alert 68 of 7 March 2014, which is why they were questioned [by the border police inspector] ...; they argued that the reason for their journey was to attend a wedding ...; however, because they did not have sufficient financial means or a written letter of sponsorship covering their stay abroad, they were not allowed to leave [the country]."

19. On 1 July 2015 the three applicants brought a civil action under the Discrimination Act against the MOI, complaining of a violation of their rights to equal treatment and liberty of movement. They argued among other things that after being prevented from leaving the country, they had started to protest together with the other passengers. They claimed that the police officers had acted rudely towards them and made offensive comments related to their ethnicity. They enclosed an expert report supporting their claim for compensation for the non-pecuniary damage caused by the violation of their rights to both equality and freedom of movement which they claimed to have suffered as a result of the events of 14 March 2014 (see paragraph 17 above).

20. In support of their claim, the applicants referred to the report of the Ombudsman for 2014 (see paragraph 33 below) and a notification of 25 February 2016 addressed to the applicants' representative in the domestic proceedings, in which the Ombudsman stated that in 2013 the number of complaints by Roma persons who claimed to have been victims of ethnic discrimination at the borders had rapidly increased. The Ombudsman further stated that he had found violations in several of these cases, about which he had informed the MOI and had made recommendations, but he had not received a proper reply and, in his view, the situation at the border remained unchanged. The Ombudsman further noted in that letter that because of the Government's inactivity in resolving the situation at the border, the negative discriminatory practice had been noted in his Annual Report for 2014 and in a separate report submitted to the United Nations Committee for Protection of Human Rights in respect of the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (see paragraph 33 below).

21. The applicants also relied on reports of the Council of Europe Commissioner for Human Rights (see paragraphs 38-39 below) and Frontex, statistics published by the European Roma Rights Centre and the US State Department, and a statement by the MOI regarding the number of citizens who had been stopped from crossing the border (see paragraph 13 above). Moreover, the applicants referred to a presentation given by the Assistant

Minister of the MOI in May 2014 to a meeting of the *Ad hoc* Committee of Experts on Roma Issues in Strasbourg, in which the Assistant Minister had stated that the profile of people who had been prevented from leaving the country corresponded to the profile of those citizens who had been forcibly returned from the EU member States, indicating that Roma persons made up the greatest proportion by ethnicity and that the people who had been forcibly returned mostly came from municipalities with majority Roma populations. The applicants further referred to a decision of the Constitutional Court (see paragraph 28 below) and several other domestic court judgments (see paragraphs 30 and 31 below).

22. The fifth applicant argued that he had been refused permission to cross the border together with the passengers, and that, as was the case with the others, his passport had been stamped by the domestic authorities and then crossed with two lines, but that stamp had later been covered up by another one that had been put in his passport by officials at the Bulgarian border.

23. In its response to the civil action, the MOI contested the fifth applicant's statement (see preceding paragraph) and argued that he had been allowed to cross the border but had chosen not to, as he had been driving one of the vans carrying passengers who had not been allowed to cross the border. An inspector responsible for border policing who was questioned during the main hearing submitted that, after questioning the third, fourth and fifth applicants on 14 March 2014, he had informed the border officers that there was no suspicion that the applicants might abuse the visa-free regime.

24. On 9 March 2017 the Skopje First-Instance Court partly allowed the third and fourth applicants' claim and found a violation of their right to liberty of movement but dismissed their discrimination claim and their claim in respect of non-pecuniary damage. The court relied on the border police inspector's statement (see preceding paragraph) and further held that the respondent State was not legally bound by the Schengen Borders Code, and that therefore it had not been necessary to ask the third and fourth applicants to provide documents concerning their stay and the purpose of their travel. However, on the basis of the witness statements of the MOI employees, the court was satisfied that the police had treated people of different ethnicity equally and, accordingly, had not discriminated against the applicants. There had been no internal alert or guidelines requiring the police officers to pay specific attention to Roma people. The court emphasised that although most of the witnesses were not entirely familiar with the applicable constitutional provisions, they had acted in accordance with the Border Control Act and their supervisors' directions. It also held that the applicants themselves had not provided any evidence to show that the refusal of permission for them to leave the country had been based on their Roma origin and, therefore, it found their statements contradictory. It further found that the third, fourth and fifth applicants had not been insulted on the grounds of their ethnicity by the border officers. Any insulting words which might have been uttered by the

border officers after the applicants' protests were not relevant because by then the applicants had already been stopped from crossing the border, and in any case, there was no evidence supporting those claims. In respect of their claim for compensation for non-pecuniary damage, on the basis of the expert report submitted by the applicants (see paragraph 19 above), the court found that it related only to their discrimination claim, which it had dismissed.

25. The court dismissed the fifth applicant's claims in their entirety and held that he had not been prevented from crossing the border but had voluntarily turned back together with the other passengers as he had been the one who had been driving. That finding was supported by the arguments made by the MOI in its response to the civil action (see paragraph 23 above). The finding had been further supported by an inspection of the applicant's passport, in which there was no stamp with two crossed lines from the date in question. The stamp with two crossed lines that the fifth applicant had in his passport was dated 20 March 2014 and related to a border crossing from Bulgaria. The courts assessed the fifth applicant's oral statements but found them illogical, unconvincing and divergent from the written evidence.

26. On 5 July 2017 the Skopje Court of Appeal upheld the findings of the first-instance court.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. EUROPEAN UNION LAW

Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

27. Article 5 § 1 of Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), as in force at the material time, provided that for stays of up to three months in a six-month period, third-country nationals should, among other things, justify the purpose and conditions of the intended stay and show that they had sufficient means of subsistence both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they were certain to be admitted, or were in a position to acquire such means lawfully. Moreover, they should not be considered to be a threat to public policy, internal security, public health or the international relations of any of the member States, in particular where no alert had been issued in the member States' national databases for the purposes of refusing entry on the same grounds. Paragraph 3 of the same Article provided that the means of subsistence should be assessed in

accordance with the duration and the purpose of the stay and by reference to average prices in the member State concerned for board and lodging in budget accommodation, multiplied by the number of days of the stay. Declarations of sponsorship, where such declarations were provided for by national law, and letters of guarantee from hosts, as defined by national law, where the third-country national was staying with a host, might also constitute evidence of sufficient means of subsistence.

II. RELEVANT DOMESTIC PRACTICE

A. Constitutional Court

28. In its decision *U.br.189/2012* dated 25 June 2014, the Constitutional Court decided to declare invalid certain provisions of the Passports Act by which a request for the issuing of a passport or a visa would be rejected if the person had been forcibly returned or expelled from another country because he or she had infringed that country's rules for entry and stay. The Constitutional Court held that for a country to restrict a person that had a valid passport from leaving his or her own country, there had to be serious and exceptional circumstances such as those specified by Article 27 of the Constitution, namely the national security, the prevention of crime and the protection of health. The protection of the State's reputation and the enforcement of another country's entry and stay regime could not be considered grounds for limiting a person's right to leave his or her own country. Citing *Stamose v. Bulgaria* (no. 29713/05, ECHR 2012), the court held that the automatic imposition of a measure restricting a person's right to leave his or her own country because of a previous infringement of another country's entry and stay regime would be disproportionate and not in accordance with the principle of the rule of law.

29. In its decisions *U.br. 99/2013* dated 5 February 2014 and *U.br. 108/2013* dated 18 February 2015, the Constitutional Court dismissed requests for protection of the rights and freedoms of several persons who claimed that they had not been allowed to cross the State border owing to their Roma origin. The court held that the claimants had not provided sufficient evidence in support of their discrimination claims, meaning that there was no evidence that the border police officers' actions had related to the applicants' ethnic origin rather than merely enforcement of the law, and therefore it was not able to examine the merits of the cases.

B. Courts of general jurisdiction

30. In two final judgments nos. *GZh-183/15* and *GZh-518/15*, dated 9 March and 15 May 2015 respectively, the Shtip Court of Appeal upheld first-instance decisions finding a violation of the right to equal treatment of

Roma persons who had not been allowed to cross the border owing to their ethnic origin. The court held in both cases that the burden of proving that there had been no discrimination had shifted onto the defendant (meaning the MOI), but the latter had not provided any evidence to show that the plaintiffs had not had sufficient financial means or that there had been any other legitimate reason for not allowing them to cross the border.

31. The Skopje Court of Appeal, in judgments no. *GZh-5169/14* of 23 September 2015 and *GZh-3162/18* of 5 July 2018, upheld first-instance judgments finding a violation of the right to equal treatment of Roma persons who had not been allowed to cross the border owing to their ethnic origin. In the first case, the court held that the plaintiff could not have caused the border officers to have any reasonable doubts that might have justified their not allowing him to cross the border. He had sufficient financial means, a letter of sponsorship and a wedding invitation. Most importantly, an MOI employee questioned as a witness during those proceedings had stated that he had been directed to pay particular attention to the Roma population. The victims in the second case had been travelling together with the third, fourth and fifth applicants in the present case. The court found that the plaintiffs who had valid passports (no consideration seems to have been given to whether they had a letter of invitation and sufficient funds) met the criteria for leaving the country, and if they had been potential asylum-seekers, it would have been for the country they were entering to assess any such claims. Furthermore, the court stated that the Schengen Borders Code was not part of domestic law and was not legally binding on the respondent State. The court also held that the MOI had not indicated any legal provisions which regulated the kind of documents a person was required to present at the border when leaving the country.

III. RELEVANT DOMESTIC DOCUMENTS

The respondent State's Ombudsman

32. The relevant parts of the 2013 Annual Report read as follows:

> "... These ethnicity-based discrimination claims include specific complaints submitted by Roma citizens who were not allowed to cross the State border, in relation to which the MOI did not accept the Ombudsman's recommendations. While investigating these cases, the Ombudsman requested information from relevant bodies within the border police, pointing out that discrimination was prohibited ... and that restrictions on liberty of movement were also prohibited ... the Ombudsman delivered a Note to the Minister of Internal Affairs and the Government ... pointing out the obligation to implement domestic and international standards in respect of guaranteeing the liberty of movement and the prohibition of discrimination."

33. The relevant parts of the Ombudsman's 2014 Annual Report read as follows:

"... In respect of ethnicity-based discrimination, it should be emphasised that this year there were more complaints from citizens from the Roma and Albanian communities who sought protection from the Ombudsman after being turned back at the State border. Those citizens consider that the prohibition on their crossing the border or their being turned back for trying to travel on an ID card (*лична карта*) was not justified and that they were being turned back only because of their ethnic origin.

... The MOI did not confirm that in these cases there had been an unjustified turning back of citizens, but it also did not convince the Ombudsman that this behaviour had not been discriminatory. On the contrary, the Deputy Ombudsman [who is of Roma ethnic origin, as indicated in a Periodic (Alternative) Information note submitted in 2015 by the Ombudsman to the United Nations Committee on the Elimination of Racial Discrimination] faced the same problem while on a business trip, when she was questioned about the purpose of her trip by passport control officers at ... Skopje Airport, ..., which was not the case with her associate, who was allowed to leave the [country] freely.

This not only confirmed the Ombudsman's position that the behaviour shown towards citizens from the Roma and Albanian communities and the restriction of their right to liberty of movement has discriminatory elements, but it also confirmed that the MOI restricts citizens' right to liberty of movement because of their Roma and Albanian ethnic origin, that is, discriminates against them."

34. The relevant parts of the Ombudsman's 2015 Annual Report state:

"... [I]n the cases in which citizens complained of being discriminated against on the basis of their ethnic origin, having their right to liberty of movement restricted and being turned back at the State border, the MOI did not accept any of the Ombudsman's recommendations, although it was established beyond dispute that there had been a violation of the right to liberty of movement of Roma citizens."

IV. RELEVANT INTERNATIONAL DOCUMENTS

A. Council of Europe documents

1. European Commission against Racism and Intolerance (ECRI)

(a) General Policy Recommendation No. 11 on combating racism and racial discrimination in policing on 29 June 2007 (CRI(2007)39)

35. This Recommendation defines racial profiling as follows:

"1. ... For the purposes of this Recommendation, racial profiling shall mean:

The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities;"

36. The Explanatory Memorandum to the Recommendation, regarding paragraph 1 of the Recommendation, reads, in so far as relevant:

"34. iii) ... Research has shown that racial profiling has considerably negative effects. Racial profiling generates a feeling of humiliation and injustice among certain groups of persons and results in their stigmatisation and alienation as well as in the deterioration of relations between these groups and the police, due to loss of trust in the latter ..."

(b) Report on "The Former Yugoslav Republic of Macedonia" (fifth monitoring cycle) adopted on 18 March 2016

37. The relevant parts of the report state:

"83. ... During a meeting with the ECRI delegation, it became evident that, in spite of training received, the border police did not seem to be aware of the discriminatory impact of racial profiling and did not have any intention of stopping its use.

84. ECRI recommends that the authorities ensure that the country's border police force receives adequate training to be able to carry out its duties under the visa-liberalisation regime with the European Union without applying racial profiling."

2. Council of Europe Commissioner for Human Rights

(a) Report by Nils Muiznieks, Council of Europe Commissioner for Human Rights, following his visit to the former Yugoslav Republic of Macedonia from 26 to 29 November 2012, published on 9 April 2013

38. The relevant parts of the report state:

"99. There are indications that passports are regularly confiscated from those persons who are forcibly returned to 'the former Yugoslav Republic of Macedonia', and that Roma make up the majority of persons who have been prevented from leaving the country and had their travel documents confiscated. Several NGOs have collected information to this effect. It has also been reported that the practice of the border authorities is to stamp the passport of those persons who are prevented from leaving the country. ...

101. The Commissioner is fully cognizant of the necessity for the authorities to implement binding rules and policies in the context of the country's EU accession process. Moreover, states have a legitimate authority to control their borders and regulate migratory movements. However, it is of serious concern to him that these measures are being applied through profiling at borders. Even though the authorities have argued that these controls are not aimed at any particular ethnic group, there are clear indications that Roma are disproportionately affected by the exit control measures in question. At the same time, it is clear that the Macedonian authorities have developed a profile of a potential 'unfounded' or 'false' asylum seeker on the basis of information they receive from EU countries ..."

39. The Commissioner concluded as follows:

"106. The Commissioner considers that the measures adopted by the authorities of 'the former Yugoslav Republic of Macedonia' in response to EU demands for management of migratory outflows interfere with the freedom to leave a country, including one's own, guaranteed under Article 2 of Protocol No. 4 to the ECHR ... Roma are clearly disproportionately affected by the exit control measures and the confiscation of travel documents, which effectively amount to travel bans."

(b) The right to leave a country, Issue Paper by the Council of Europe Commissioner for Human Rights, October 2013

40. The relevant parts of the paper (pp. 6-7, 48) state:

"... One of the most worrying aspects of recent interferences in Europe with the right to leave is evidence that such measures are taken against specific ethnic groups, in particular the Roma.

... The recent years' rise in asylum applicants from the Western Balkans in certain EU states has led to the intensification of legal and other measures by Western Balkan governments aimed at managing and stemming migration flows to, including seeking asylum in, western Europe. Although the migrants' numbers are not alarming, seen through the overall EU migration figures, the measures taken by certain Western Balkan states raise serious issues of compatibility with human rights standards, including the right to seek and enjoy asylum. They are also inconsistent with the principle of non-discrimination given that the social group primarily targeted and affected by these measures is, in practice, the Roma, who continue to suffer in the Western Balkans from institutionalised discrimination and social exclusion.

... What appears to be happening in the Western Balkans is that as EU member states increase pressure on these states to the effect that if the numbers of their nationals applying for asylum in the EU does not decrease, then all nationals of the state will be subjected to a mandatory visa requirement (again), the authorities of these states are seeking to restrict the departure of individuals who they consider at risk of applying for asylum, that is, the Roma.

The Council of Europe Commissioner for Human Rights in his report following his visit to 'the former Yugoslav Republic of Macedonia' in November 2012 was advised by the Minister of Interior that between December 2009 until the end of November 2012 about 7 000 citizens of this state had not been allowed to leave the country."

3. Advisory Committee on the Framework Convention for the Protection of National Minorities

41. The relevant parts of the Fourth Opinion on "the former Yugoslav Republic of Macedonia", issued on 24 February 2016, read as follows:

"...

27. Moreover, there are documented incidents of ethnic profiling at external borders directed primarily at persons belonging to the Roma minority. Repeated independent surveys point to an established practice of not allowing Roma to exit the country, despite having valid travel documents. The Ministry of the Interior confirmed the practice to the Advisory Committee as a procedure that, in an apparent effort to comply with the EU visa-liberalisation agreement, is based on 'risk-analysis' and the established profile of so-called 'fake asylum-seekers'. This practice reportedly continues despite an increasing number of court decisions that have condemned it and despite the Ministry of the Interior having been ordered to pay compensation to affected individuals. According to officials, the court decisions were prompted by the failure of individual police officers, who have since been reprimanded, rather than the result of a systematic practice.

...

30. Practices of ethnic profiling and other means of ethnically based discrimination must further be discontinued immediately and relevant court decisions implemented without delay."

B. United Nations documents

1. Human Rights Committee (HRC)

42. The relevant parts of the concluding observations of the HRC on the third periodic report of the former Yugoslav Republic of Macedonia on the implementation of the International Covenant on Civil and Political Rights, issued on 17 August 2015, read as follows:

> "16. The Committee is concerned about the fact that between 2011 and the end of 2014, thousands of State party nationals were denied exit from the territory of the State party and about allegations of ethnic profiling, particularly of Roma, limiting freedom of movement across the State party's borders (art. 12).
>
> The State party should take measures to ensure that the right to liberty of movement in the State party is fully respected, in compliance with article 12 of the Covenant."

2. Committee on the Elimination of Racial Discrimination (CERD)

43. The relevant parts of the concluding observations by the CERD on the combined eighth to tenth periodic reports of the former Yugoslav Republic of Macedonia on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, issued on 21 September 2015, read as follows:

> "14. The Committee is concerned about reports that citizens belonging to Roma and Albanian communities have been prevented from leaving the country on the grounds that they would apply for asylum in European Union countries, and have had their travel documents confiscated. The Committee notes the 2014 ruling of the Constitutional Court that abolished restrictive provisions of the Law on Travel Documents, but remains concerned by the ethnic profiling of these communities by border police officers (arts. 2 and 5).
>
> 15. While taking note of the delegation's declaration that the State party will implement the above-mentioned ruling, the Committee recommends that the State party closely assess and take steps to respond to the causes that lead persons belonging to these communities to leave or seek refuge in other countries. The Committee recommends that the State party fully respect the right to liberty of movement of its citizens and their right to leave and return to the country. In the light of its general recommendation 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recalls that States parties should take the necessary steps to prevent questioning, arrests and searches solely on the basis of the ethnicity of individuals. The mere perception or the fact of belonging to an ethnic group is not a sufficient reason, *de jure* or *de facto*, to restrict the right to movement."

THE LAW

I. JOINDER OF THE APPLICATIONS

44. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION CONCERNING THE FIFTH APPLICANT

1. The parties' submissions

45. In respect of the fifth applicant, the Government argued that he could not claim to be a victim of a violation of his rights under the Convention as he had not been denied exit at all but had decided not to leave the country voluntarily as he was the driver for the passengers who had been denied exit. Contrary to his arguments, his passport had been stamped not on 14 March 2014 but on 20 March 2014, following his exit from the Republic of Bulgaria (see paragraph 25 above).

46. The fifth applicant argued that he had not only been driving the van but had been invited to the wedding as well and that he had been prevented from crossing the border. He pointed out that he was listed in the official note as one of the passengers who had not been allowed to leave the State (see paragraph 18 above). He also reiterated his explanation concerning the stamp in his passport (see paragraph 22 above).

2. The Court's assessment

47. The Court reiterates that it may not itself assess the facts which have led a national court to adopt one decision rather than another, or question the admissibility and assessment of evidence at the trial. If it were otherwise, it would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action. The only circumstance in which the Court may, as an exception to this rule, question the findings and conclusions in question is where the latter are flagrantly and manifestly arbitrary, in a manner which flies in the face of justice and common sense and gives rise in itself to a violation of the Convention (see *Garrido Herrero v. Spain*, no. 61019/19, § 85, 11 October 2022, with further references).

48. In the present case, the Court finds no reason to question the domestic courts' finding of fact that the fifth applicant had not been prevented from crossing the border. On the available evidence (see paragraphs 18 and 23 above) the courts concluded that the fifth applicant had been allowed to cross the border (see paragraph 25 above). The Court takes note of the MOI's official note of 14 March 2014, which listed the fifth applicant with the passengers who were not allowed to cross the border, indicating that there had been an alert for him in the Border Control Sector system (see paragraph 18 above). However, it is nonetheless able to accept the findings of the domestic courts, which cannot be regarded as arbitrary or manifestly unreasonable (see *De Tommaso v. Italy* [GC], no. 43395/09, § 170, 23 February 2017).

49. The foregoing considerations are sufficient to enable the Court to conclude that, in the circumstances of the present case, there is no indication

that the domestic authorities prevented the fifth applicant from leaving the country. His complaints are therefore manifestly ill-founded and should be rejected under Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

50. The first to fourth applicants ("the remaining applicants") complained that their right to leave the respondent State had been violated, contrary to Article 2 of Protocol No. 4 to the Convention, the relevant parts of which read as follows:

> "2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of [this right] other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others ..."

A. Admissibility

1. The first and second applicants

(a) The parties' submissions

51. The Government argued that the first and second applicants had not specifically requested that the domestic courts find a violation of their right to liberty of movement, but had only complained of having been discriminated against.

52. Both applicants contested the Government's objection. The second applicant argued that she had referred to the freedom of movement in her civil action. She further argued that the two rights were closely linked.

(b) The Court's assessment

53. The general principles regarding the exhaustion of domestic remedies under Article 35 § 1 of the Convention are set out in, for example, *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70-77, 25 March 2014, with further references).

54. The Court notes that in the civil actions both applicants argued that their right to liberty of movement as guaranteed under the Constitution and the Convention had been violated by the authorities (see paragraphs 8 and 13 above). Furthermore, the domestic courts decided these arguments on the merits and held that the applicants' right to liberty of movement had not been violated (see paragraphs 11 and 15 above).

55. In the light of the foregoing, the Court considers that the first and second applicants raised, at least in substance, their argument as to a violation

of their right to liberty of movement in their actions, relying on relevant legal provisions protecting that right. It follows that the Government's objection of non-exhaustion of domestic remedies must be dismissed.

2. The third and fourth applicants

(a) The parties' submissions

56. The Government argued that the third and fourth applicants had lost their victim status in respect of the allegations under this head. The domestic courts had found a violation of the right in question, which, according to the Government, constituted sufficient just satisfaction.

57. The third and fourth applicants claimed that they were still victims of the violation complained of since the domestic courts had not awarded them any compensation.

(b) The Court's assessment

58. The general principles regarding the applicants' victim status under Article 34 of the Convention are set out in, for example, *Scordino v. Italy (no. 1)* ([GC], no. 36813/97, §§ 179-80, ECHR 2006-V) and *Shipovikj v. North Macedonia* ((dec.), nos. 77805/14 and 77807/14, § 48, 21 March 2021, with further references).

59. It follows from those principles that the Court is required to verify whether, in respect of the third and fourth applicants, there has been an acknowledgment, at least in substance, by the authorities of a violation of a right protected by the Convention and whether the redress can be considered appropriate and sufficient (see, among other authorities, *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001; *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003; and *Nardone v. Italy* (dec.), no. 34368/02, 25 November 2004).

60. The first condition, which is the finding of a violation by the national authorities, is not in issue in the present case, as the domestic courts found a violation of the third and fourth applicants' right to liberty of movement (see paragraph 24 above). With regard to the second condition, namely appropriate and sufficient redress, the Court notes that the third and fourth applicants' claim for compensation for non-pecuniary damage was dismissed by the domestic courts, which held that the non-pecuniary damage related only to the discrimination claim (see paragraph 24 above). They were therefore awarded no monetary compensation.

61. In this connection, the Court has previously accepted that the authorities' acknowledgment of a violation of the applicants' freedom of movement without awarding damages could entail the loss of victim status in a case characterised by the short duration of the disputed restriction and where no claim for damages had been made in the domestic proceedings (see *D.J. and A.-K.R. v. Romania* (dec.), no. 34175/05, 20 October 2009). It has

reached the same conclusion in a case where no actual travel plans had been thwarted, nor had any circumstances required the applicant's presence outside the country. The restriction therefore amounted to a formal and theoretical hindrance rather than a practical impediment to the exercise of the right of freedom of movement (see *Timishev v. Russia* (dec.), nos. 55762/00 and 55974/00, 30 March 2004).

62. The Court notes that no such circumstances were present in the case of the third and fourth applicants, who could not attend a wedding ceremony as planned (see paragraph 17 above) and sought compensation in the disputed civil proceedings for the non-pecuniary damage sustained as a result of the violation of their liberty of movement (see paragraph 19 above). The Court therefore cannot accept the Government's argument that the finding of a violation of the right to liberty of movement constituted sufficient compensation for the third and fourth applicants' grievances (see *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 71, ECHR 2005-XII, and *Mursaliyev and Others v. Azerbaijan*, nos. 66650/13 and 10 others, § 59, 13 December 2018).

63. The Court therefore dismisses the Government's objection in respect of the third and fourth applicants and concludes that they can still claim to be "victims", within the meaning of Article 34 of the Convention, of the alleged violations of Article 2 of Protocol No. 4 to the Convention.

3. Conclusion on admissibility

64. The Court further notes that the remaining applicants' complaint under Article 2 of Protocol No. 4 to the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

65. The remaining applicants reiterated that their right to liberty of movement had been violated, contrary to Article 2 § 2 of Protocol No. 4 to the Convention.

66. The Government conceded that in the light of the circumstances of the cases, domestic law and practice, and the Court's case-law, there had been a violation of Article 2 § 2 of Protocol No. 4 to the Convention in respect of the remaining applicants.

2. The Court's assessment

67. The Court notes that the present case concerns the applicants' right of liberty of movement, in particular the freedom to leave any country, including

their own, as guaranteed by paragraph 2 of Article 2 of Protocol No. 4 to the Convention, which implies a right to leave for such country of the person's choice to which he may be admitted (see *Baumann v. France*, no. 33592/96, § 61, ECHR 2001-V; *De Tommaso v. Italy* [GC], no. 43395/09, § 104, 23 February 2017, and *Stamose v. Bulgaria*, no. 29713/05, § 30, ECHR 2012).

68. It is undisputed between the parties, and the Court does not consider otherwise, that the refusal of permission for the remaining applicants to leave their own country amounted to an interference with their right to liberty of movement.

69. In this connection the Court observes that the first and second applicants held valid passports but were not allowed to leave the respondent State because they allegedly lacked financial means, a letter of sponsorship and/or a return ticket (see paragraphs 7 and 12 above). The Court notes that in these two applicants' cases the domestic courts applied the Schengen Borders Code, which specified the entry requirements for third-country nationals travelling to EU member States (see paragraphs 11, 15 and 27 above). As regards Ms Memedova, the courts merely referred to the Code without providing any explanation as to how it was regarded part of the domestic law. In the second applicant's case, they held that the applicability of the Borders Code derived from the Stabilisation and Association Agreement between the European Communities and their Member States and the respondent State (see paragraph 15 above). The Court does not consider that such construction was sufficiently clear, in itself and in view of the interpretation of Article 27 of the Constitution provided by the Constitutional Court (see paragraph 28 above). Furthermore, it was in contradiction to the approach followed by the same courts in other cases, where it was clearly established that the Code was not part of the domestic law and, accordingly, was not legally binding on the respondent State (see paragraphs 24 and 31 above).

70. The Court reiterates its settled case-law, according to which the expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects. As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably

couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *De Tommaso*, cited above, §§ 106-08).

71. The Court considers that the jurisprudential inconsistency mentioned above militates against foreseeability whether the Code was part of the domestic legal order. Furthermore, it has not been informed whether any tool available under the domestic law (for example, an exceptional leave, under section 372 of the Civil Proceedings Act, to appeal on points of law before the Supreme Court with a view of harmonising the judicial practice or "conclusions (*заклучоци*) of the Courts of Appeal - see, *Spaseski and others v. the former Yugoslav Republic of Macedonia* (dec.), no. 15905/07 and others, 27 September 2011) was used to allow the courts to dissipate the interpretational doubts in this respect. In this connection the Court reiterates that the persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 116, 1 December 2020).

72. Given the above ambiguity pertaining to the applicability of the Schengen Borders Code in the applicants' case, the Court considers that the interference with the first and second applicants' right under this head was not in accordance with domestic law.

73. However, having regard to the specific circumstances of the case, the Court considers it important to continue its examination whether the interference was necessary in a democratic society. In this connection the Court notes that in the domestic proceedings there was nothing to indicate that either of these applicants appeared in any alerts or had participated in any activities suggesting that they posed a threat to national security or public safety or the maintenance of public order, or, indeed, met any other criteria listed in paragraph 3 of Article 2 of Protocol No. 4 to the Convention. In this connection the Court notes the first applicant's previous lawful stay(s) abroad (see paragraph 8 above). Whereas the Court might be prepared to accept that a prohibition on leaving one's own country imposed in relation to breaches of the immigration laws may in certain compelling situations be regarded as justified, it does not consider that the imposition of such a measure without any regard to the individual circumstances of these applicants may be characterised as necessary in a democratic society (see *Stamose*, cited above, § 36).

74. As regards the third and fourth applicants, the Court has no reason to question the conclusion of the domestic courts that the refusal of permission for them to leave the country if not unlawful, was not justified (see paragraph 24 above).

75. Having examined all the material submitted to it and taking into account the Government's acknowledgment of a violation (see paragraph 66

above), the Court concludes that there has been a violation of Article 2 § 2 of Protocol No. 4 to the Convention in respect of the first four applicants.

IV. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

76. The applicants complained that they had suffered discrimination in the enjoyment of their right to leave their country on the grounds of their Roma origin, contrary to Article 1 of Protocol No. 12 to the Convention and Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 4. The Court, being the master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], no. 37685/10, §§ 114 and 126, 20 March 2018), and noting that the meaning of discrimination in Article 1 of Protocol No. 12 is identical to that in Article 14 of the Convention (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 55, ECHR 2009, and *Baralija v. Bosnia and Herzegovina*, no. 30100/18, § 45, 29 October 2019), considers that the complaint should be examined only under Article 14 taken in conjunction with Article 2 of Protocol No. 4 (see, *mutatis mutandis*, *X and Y v. North Macedonia*, no. 173/17, § 64, 5 November 2020).

77. Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

1. Non-exhaustion of domestic remedies

(a) The parties' submissions

78. The Government argued that the applicants had not exhausted the available domestic remedies in respect of their allegations of discrimination. They specified that none of the applicants had availed themselves of the opportunity to bring a constitutional appeal in the Constitutional Court, a remedy they should have pursued before seeking protection of their rights before the Court.

79. The applicants argued that the remedy of a constitutional appeal to the Constitutional Court was not effective in the circumstances, given its decisions in similar cases (see paragraph 29 above).

(b) The Court's assessment

80. The Court reiterates that in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose, for the purpose of fulfilling the requirement of exhaustion of domestic remedies, a remedy which addresses his or her essential grievance. In other words, when one remedy has been pursued, the use of another remedy which has essentially the same objective is not required (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 177, 25 June 2019).

81. Having regard to the discrimination claim made by the applicants in the civil proceedings brought against the State under the Discrimination Act as the *lex specialis*, the Court is satisfied that the applicants took reasonable steps to bring their complaints to the attention of the domestic authorities and to seek redress. For the reasons stated in *Elmazova and Others v. North Macedonia* (nos. 11811/20 and 13550/20, §§ 58-60, 13 December 2022), which likewise apply to this case, the Court finds that the applicants were not required to also make use of the remedy referred to by the Government. Accordingly, the Government's objection must be dismissed.

82. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

83. The applicants, relying on the available material (see paragraphs 13, 20, 21, 28-34, 37-39 above and 85 below), submitted that the MOI engaged in racial profiling at the border when deciding who was allowed to leave the country. They argued that they had provided prima facie evidence of discrimination against them and that the burden was on the Government to refute the allegations of discrimination. They submitted that the Government had failed to show that Roma were not disproportionately affected by the practice of stopping people from leaving the country because of their "profile" as potential asylum-seekers, notwithstanding the fact that only the national authorities had access to the relevant information. In that connection, the first applicant argued, when referring to her previous statement that other Roma had been allowed to cross the border (see paragraph 8 above), that she had no information as to whether those other persons were citizens of the respondent State. The applicants also maintained that border officers had used racial slurs and force against them at the border.

(b) The Government

84. The Government argued that the applicants had failed to provide sufficient evidence in support of their claims. Some of the applicants had themselves stated that they had previously travelled abroad without any problems (see paragraphs 8 and 13 above). There was no indication that on the previous occasions they had left the country under different conditions and circumstances, or that other persons had been allowed to leave the country on the same dates under different conditions from those imposed on the applicants. Furthermore, the applicants had not argued that Roma were specifically targeted and no such conclusion could be drawn from the available evidence. No MOI documentation suggested that there were any guidelines that would lead to such treatment of Roma. The Assistant Minister had simply presented the statistics for persons returned from Germany and those statistics could not have been interpreted as evidence of any racial profiling (see paragraph 21 above). On the contrary, they merely confirmed the need to increase border checks and to ensure compliance with the legal requirements for leaving the country, as well as the conditions provided in the Schengen Borders Code for persons travelling to EU member States. This was necessary in order to prevent abuse of the established visa-free regime and endangerment of the State's relations with other countries. The Government denied that any abusive language or racist comments had been used in respect of the applicants, or that force had been used by the police against the third and fourth applicants.

85. The Government also submitted a statement by the Minister of the Interior of 2 November 2016 to the effect that the increase in proceedings (over forty cases) against the MOI by Roma persons who had not been allowed to leave the country had made it necessary to issue instructions aimed at preventing any discrimination at the border. Following the Minister's statement, on 8 February 2017 an NGO representative had stated that pressure at the borders had substantially decreased and that the NGO had not received any new discrimination complaints.

86. Lastly, the Government contested the third and fourth applicants' allegations that the people who had been prevented from crossing the border were predominately Roma persons, submitting that the MOI did not keep a record of the ethnicity of the citizens who had not been allowed to cross the border.

2. The Court's assessment

(a) Compliance with Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 4

(i) General principles

87. The relevant principles in respect of the prohibition of discrimination have been summarised in *Beeler v. Switzerland* ([GC], no. 78630/12, § 93,

20 October 2020) and *Molla Sali v. Greece* ([GC], no. 20452/14, § 123, 19 December 2018, with further references).

88. As to where the burden of proof lies in discrimination cases, the Court reiterates that once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that that difference in treatment can be justified (see *Timishev* (judgment), cited above, § 57). As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court reiterates that in proceedings before it there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. Where a difference in the effect of a general measure or a *de facto* situation is alleged, the Court has relied extensively on statistics produced by the parties to establish a difference in treatment between two groups in similar situations (see, *mutatis mutandis*, *Volodina v. Russia*, no. 41261/17, § 112, 9 July 2019). The Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 188, ECHR 2007-IV). Reliable national or international reports can also be used to that effect (see, *mutatis mutandis*, *D.H. and Others v. the Czech Republic*, cited above, § 113, and *Y and Others v. Bulgaria*, no. 9077/18, § 122, 22 March 2022).

89. The Court further reiterates that, as noted in previous cases, applicants may have difficulty in proving discriminatory treatment and in order to guarantee the effective protection of the rights of those concerned, less strict evidential rules should apply in cases of alleged indirect discrimination (see *D.H. and Others v. the Czech Republic*, cited above, §§ 185-86). In this connection, the Court reiterates that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent. This is only the case, however, if the policy or measure has no "objective and reasonable" justification (see *Biao v. Denmark* [GC], no. 38590/10, § 91, 24 May 2016, with further references).

(ii) Application of the above-mentioned principles to the present case

(α) Whether a presumption of indirect discrimination arises in the instant case

90. Turning to the present case, the Court notes that it was not disputed by the parties that in 2011 the MOI had sent an internal alert to the regional centres for border affairs, the Sector for Border Affairs and Migration, and other relevant bodies under the Ministry indicating that an increasing number of nationals were applying for asylum in the European Union and the

Schengen member States and thus abusing the visa-free regime (see paragraph 5 above). Although the alert did not contain specific guidelines for any action directed towards Roma persons, the Court cannot but note that in the period after it had been disseminated, international bodies observed a trend of Roma persons being prevented from crossing the State border (see paragraphs 42-43 above).

91. In this connection, the Court notes that United Nations bodies such as the CERD and the HRC had expressed concerns about allegations of ethnic profiling at the borders, particularly of Roma persons, before the applicants brought their cases, and had recommended that the respondent State ensure that its citizens' right to freedom of movement was fully respected and that all necessary steps were taken to prevent questioning and searches solely on the basis of ethnicity (*ibid*.). Furthermore, Council of Europe bodies including ECRI and the Commissioner for Human Rights, whose report preceded the applicants' cases (see paragraphs 35-39 above), noted the discriminatory impact of racial profiling by the border police, who seemed neither to have been aware of it nor to have shown any intention to end it (see paragraph 37 above). The Commissioner emphasised that Roma people were clearly disproportionately affected by the exit control measures imposed by the State (see paragraph 39 above). Similarly, an opinion prepared for the respondent State by the Advisory Committee on the Framework Convention for the Protection of National Minorities specifically referred to documented incidents of ethnic profiling at the respondent State's border directed primarily at Roma persons, despite the fact that all the persons in question had possessed valid travel documents (see paragraph 41 above).

92. The Court further notes that the respondent State's Ombudsman pointed out the high number of complaints made by Roma persons who had been prevented from crossing the border and characterised that practice at the border as discriminatory (see paragraph 32 above). In his annual reports the Ombudsman emphasised that the MOI had not accepted any of his recommendations, despite its being indisputably established, in the Ombudsman's view, that there had been a violation of the right to liberty of movement of Roma persons based on their ethnic origin (see paragraphs 32-34 above).

93. Moreover, the Court cannot disregard the many proceedings initiated before the domestic courts by Roma persons – including the present applicants – claiming that, because of their ethnic origin, their rights to liberty of movement and equal treatment had been violated by border officers who had prevented them from crossing the border, or the fact that in some of those proceedings the courts found violations of the right to equal treatment (see paragraphs 30-31 above). Indeed, in a statement made in 2016, the Minister of the Interior acknowledged the increased number of cases against the MOI (over forty at that point) in which allegations of discrimination at the border had been raised. The Minister considered that the situation made it necessary

to issue instructions aimed at preventing discrimination at the border (see paragraph 85 above).

94. Having regard to the above-mentioned reports by national and international bodies, the Court concludes that despite the absence of any discriminatory wording in the internal instructions of 28 April 2011 or in the statutory provisions in force at the material time, the way in which those instructions were applied in practice by the border officers resulted in a disproportionate number of Roma being prevented from travelling abroad, as was also established by international bodies in their reports post-dating those instructions (see paragraphs 42-43 above). The absence of specific statistics on the ethnic origin of people who had been prevented from crossing the border (see paragraph 86 above) is of no particular relevance (see*, mutatis mutandis, Oršuš and Others v. Croatia* [GC], no. 15766/03, § 153, ECHR 2010).

95. Accordingly, the Court is satisfied that the applicants have put forward sufficiently strong, clear and concordant inferences as to make a convincing prima facie case of indirect discrimination, both in the proceedings before the domestic courts and in the proceedings before the Court (see, for example, *D.H. and Others v. the Czech Republic*, cited above, § 178, and *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, § 218, 26 May 2020).

96. The burden of proof must therefore shift to the Government, who must show that the practice in question was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate, necessary and proportionate (see *Oršuš and Others v. Croatia*, cited above, § 155).

(β) Objective and reasonable justification

97. The Court notes that the Government did not present any evidence capable of refuting the applicants' allegations and of showing that they had not been treated differently because of their ethnicity, or any arguments alleging that the difference in treatment might have been justified (see, conversely, *D.H. and Others v. the Czech Republic*, cited above, § 197). The fact that the applicants had previously been able to travel does not suffice to refute the prima facie case established by them.

98. Moreover, the Court notes that the domestic courts dismissed the applicants' discrimination claims (see paragraphs 9, 15 and 24 above) without addressing any of the various reports and court decisions on which the applicants had relied and without giving any explanation as to why those reports and decisions might not have been reliable or relevant (with the sole exception of the second applicant's case regarding the Constitutional Court's decision; see paragraph 15 above). Furthermore, the domestic courts did not treat the burden of proof as having shifted to the authorities to refute the applicants' allegations despite the fact that the authorities were in exclusive possession of the information regarding passengers who had been allowed to

cross or prevented from crossing the border under conditions that were the same as or different from those applicable to the applicants. In this connection, even though the first applicant stated in the domestic proceedings that other Roma people had been allowed to cross the border (see paragraph 9 above), the Court must accept that she could not have known whether those other persons were citizens of the respondent State (see paragraph 83 above). Instead, it appears that the domestic courts strictly applied the principle *affirmanti incumbit probatio* and held that the applicants had not proved that non-Roma persons had crossed the border under the same conditions as the applicants, an approach which, in the circumstances, appears to have been unreasonable and to have placed an excessive burden on the applicants.

99. Accordingly, the Court finds that neither the Government nor the domestic courts provided an objective and reasonable justification for the different treatment to which the applicants had been subjected at the border. The foregoing considerations are sufficient to enable the Court to conclude that the first, second, third and fourth applicants were discriminated against because of their Roma origin when they were prevented from crossing the State border.

100. There has accordingly been a violation of Article 14 in conjunction with Article 2 of Protocol No. 4 to the Convention in respect of those applicants.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. The parties' submissions

102. In respect of pecuniary damage, the first and second applicants claimed 150 euros (EUR) and EUR 180, respectively, for the plane tickets they had been unable to use. In respect of non-pecuniary damage, the first, third and fourth applicants claimed EUR 3,000 each and the second applicant claimed EUR 4,100 for being discriminated against. The third and fourth applicants further claimed EUR 5,000 each in respect of non-pecuniary damage resulting from the violation of their right to freedom of movement.

103. The Government contested the first and second applicants' claim in respect of pecuniary damage because they had not submitted any receipts in support of their claims. They also contested the applicants' claims in respect of non-pecuniary damage as unsubstantiated and excessive.

2. The Court's assessment

104. The relevant principles with regard to pecuniary damage have been summarised in *Vasilevski v. the former Yugoslav Republic of Macedonia* (no. 22653/08, § 66, 28 April 2016). Taking account of those principles and the documents in its possession, the Court awards EUR 150 to the first applicant and EUR 180 to the second applicant in respect of pecuniary damage.

105. The Court also considers that the four applicants have suffered non-pecuniary damage – such as distress and frustration resulting from the actions and decisions of the domestic authorities that have been found to be incompatible with the Convention and the Protocols thereto – which is not sufficiently compensated by the findings of violations. The Court thus grants the first and second applicants' claims in full and awards EUR 3,000 to the first and EUR 4,100 to the second applicant. As for the third and fourth applicants' claims, the Court finds them excessive. Making its assessment on an equitable basis, it awards the third and fourth applicants, who are part of the same household (see paragraph 17 above), EUR 5,900 jointly under this head.

B. Costs and expenses

1. The parties' submissions

106. The first applicant claimed EUR 1,000 for legal fees for submitting the application to the Court.

The second applicant claimed EUR 510 for an expert opinion and court fees incurred in the domestic proceedings and EUR 3,020 for legal representation in the domestic proceedings and before the Court.

The third and fourth applicants claimed EUR 4,700 jointly in respect of costs and expenses for legal representation in the domestic proceedings.

107. The Government contested the applicants' claims for costs and expenses as excessive and not properly substantiated with relevant documents.

2. The Court's assessment

108. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). In the present case, regard being had to the above criteria and the absence of any supporting documents, the Court rejects the first applicant's claim as unsubstantiated. As for the remaining applicants, regard being had to the documents in its possession, the Court grants their claims in respect of costs and expenses in part and awards EUR 2,350 to the second applicant and

EUR 1,435 jointly to the third and fourth applicants, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the complaints of the first, second, third and fourth applicants under Article 2 of Protocol No. 4 to the Convention and Article 14 in conjunction with Article 2 of Protocol No. 4 to the Convention admissible and the complaints of the fifth applicant inadmissible;

3. *Holds* that there has been a violation of Article 2 of Protocol No. 4 to the Convention in respect of the first, second, third and fourth applicants;

4. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 4 to the Convention, in respect of the first, second, third and fourth applicants;

5. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention the following amounts, to be converted into the national currency of the respondent State, at the rate applicable at the date of settlement:
      (i) EUR 150 (one hundred and fifty euros) to the first applicant and EUR 180 (one hundred and eighty euros) to the second applicant, plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 3,000 (three thousand euros) to the first applicant, EUR 4,100 (four thousand one hundred euros) to the second applicant and EUR 5,900 (five thousand nine hundred euros) jointly to the third and fourth applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 2,350 (two thousand three hundred and fifty euros) to the second applicant and EUR 1,435 (one thousand four hundred and thirty-five euros) jointly to the third and fourth applicants, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 24 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Arnfinn Bårdsen President

APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Year of birth Place of residence	Represented by
1.	42429/16	Memedova v. North Macedonia	16/07/2016	**Demirana MEMEDOVA** **1957** **Vinica** (first applicant)	Zharko HADJI-ZAFIROV
2.	8934/18	Kurtishova v. North Macedonia	06/02/2018	**Emran KURTISHOVA** **1985** **Skopje** (second applicant)	Bojan GJUROVSKI
3.	9886/18	Abazov and Others v. North Macedonia	21/02/2018	**Nazmi ABAZOV** **1972** **Kriva Palanka** (third applicant) **Afrodita ABAZOVA** **1976** **Kriva Palanka** (fourth applicant) **Omer MEMEDOVSKI** **1979** **Kriva Palanka** (fifth applicant)	EUROPEAN ROMA RIGHTS CENTRE