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Chapman Redux
The European Court of Human Rights and Roma Traditional Lifestyle

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Introduction

On 18 January 2001, in *Chapman v. the United Kingdom*,[2] the European Court of Human Rights (ECtHR), sitting in a Grand Chamber, ruled that the refusal to grant a Gypsy/Roma[3] woman planning permission to settle with her family on a caravan on her own land and her subsequent eviction from her property did not constitute a breach of the European Convention on Human Rights (ECHR).[4] This judgment was seen by many as a missed opportunity for the Court to develop an effective protection of minorities' right to preserve their cultural traditions based on the European Convention.[5] Paradoxically, the Court did acknowledge in this ruling that the Convention must be interpreted in the light of emerging international norms on minority protection, in particular the Framework Convention for the Protection of National Minorities (FCNM).[6] Yet, at the same time, it limited the practical impact of this principle and when reviewing the concrete facts at stake, it paid only lip service to the

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[2] EctHR (GC), *Chapman v. The United Kingdom*, 18 January, 2001.

[3] Different terms are in use to refer to this community. Since the late 1990s it has become the practice in European institutions to describe them as 'Roma'. But other terms are still used at national level by state authorities or by the members of these communities themselves, such as 'Gypsies', 'Travellers', 'Sinti' or 'Gitanos'. See J.-P. Liégeois, *Roma in Europe*, Council of Europe ed., Strasbourg, 2007. In *Chapman v. the United Kingdom*, the Court, following the terminology which appears in British legislation, employs the term 'Gypsies'. But in cases concerning Central and Eastern Europe countries, it uses the word 'Roma'. See, e.g., Eur. Ct. H.R., *Velikova v. Bulgaria*, 18 May 2000 (Appl. No. 41488/98) and Eur. Ct. H.R., *D.H. and Others*, 13 November 2007 (Appl. No. 57325/00). In this paper, both the terms 'Gypsies' and 'Roma' will be used.

[4] App. No. 27238/95. The Court arrived at the same conclusion in four other cases on similar facts decided the same day: *Beard v. the United Kingdom* (App. No. 24882/94), *Coster v. the United Kingdom* (24876/94), *Lee v. the United Kingdom* (25289/94), *Smith v. the United Kingdom* (25154/94), 18 January 2001.

[5] In this sense, see F. Sudre, "A propos de l'autorité d'un "précédent" en matière de protection des droits des minorités", *Revue trimestrielle des droits de l'homme*, 2001, No. 47, pp. 905-915, esp. 913-915; M. Levinet, "Juges de Strasbourg, encore un effort si vous voulez devenir des défenseurs de l'identité minoritaire! Observation sur les arrêts *Chapman, Beard, Coster, Jane Smith* et *Lee*", *l'Europe des Libertés*, 2001, n°5, pp. 2-5 2001; Benoît-Rohmer, "La Cour de Strasbourg et la protection de l'intérêt minoritaire: une avancée décisive sur le plan des principes ? (En marge de l'arrêt *Chapman*)", *Rev. trim. dr. h.*, 2001, n°48, pp. 999-1015, esp. pp. 1001-1002; D. Rosenberg, "L'indifférence du juge européen aux discriminations subies par les Roms (En marge de l'arrêt *Chapman*)", *Rev. trim. dr. h.*, 2001, n°48, pp. 1017-1033; J. Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme*, Bruxelles, Bruylant, 2006, pp. 242-247.

[6] ETS No. 157.

notion and goals of minority protection. The special importance of this judgment lies with the fact that it strikingly illustrates the ambivalence of the European Court of Human Rights, and indeed of human rights themselves, towards the minority question. It highlights both the potential of classic individual rights in providing the foundations for the development of minority protection and the obstacles that often hamper the emergence of a minority-sensitive interpretation of these rights. Significantly, this ruling was highly contested within the Court itself: 7 judges among 17 dissented and argued that the facts did reveal a violation of the Convention. But *Chapman* is also very interesting to look at in a historical perspective: when examining the judgment today, ten years after it was issued, one realises how much has changed in the Court's case-law as well as in the broader legal environment in which the ECtHR operates. For all these reasons, this case seemed to me especially relevant for the redrafting exercise proposed by the editors of this volume.

In what follows, I will proceed in three steps. First, I will provide some background information on the case. (I). Second, I will underline what I see as the three major flaws in the majority's reasoning, namely the downplaying of the importance of minority rights, the individualistic reading of the facts and the formalistic approach to equality. (II). Third, I will present the alternative drafting of the judgment that I propose. In doing so, I will take a deliberately anachronistic approach: I will not try to ascertain how the judges could have dealt with the case at the time. Rather, I will discuss how the Court could handle a similar case today, taking into account the evolutions that have taken place in the ECtHR's jurisprudence and in the European legal space more generally. (III).

I. The Background to the Case

In Britain as in other Western Europe countries, lives a small Gypsy/Roma community whose presence dates back to the 16th century.[7] Their traditional lifestyle, characterised by caravan dwelling and travelling, has been profoundly affected by the development of planning legislation and policies since the 1960s.[8] The *Caravan Sites and Control of Development Act 1960* granted local authorities the power to close commons on which Gypsies were until then allowed to stop. This resulted in a drastic reduction of the number of lawful stopping sites available to them. Many families found themselves in breach of the law when stationing their caravans on lands on which they were used to halt for years. Acknowledging the problem, the authorities adopted a new law in 1968, the *Caravan Sites Act*, which created a duty for local authorities to provide adequate accommodation for gypsies

[7] J.-P. Liégeois, *supra* note 3, p. 20.
[8] On the evolution of legislation and policies relating to caravan lifestyle in England and Wales between the 1960s and the 1990s, see S. Poulter, *Ethnicity, Law and Human Rights. The English Experience*, Oxford, Clarendon Press, 1998, pp. 147-194; OSCE High Commissioner on National Minorities, *Report on the situation of Roma and Sinti in the OSCE area*, March 2000, pp. 111-116; S. Campbell, "Gypsies: the Criminalisation of a Way of Life?", *Crim. L. R.*, 1995, pp. 28-37.

residing in or resorting to their area.[9] Where the Secretary of State was satisfied either that a local authority had fulfilled this obligation or that it was not necessary or expedient to make such provision, it could 'designate' that district or county, which had the effect of making it an offence for any Gypsy to station a caravan within this area on any other land without the consent of the occupier.[10] This legislation did not have the expected results: only a minority of local authorities created the required stopping sites. A 1976 report by Sir John Cripps observed that among the estimated 40,000 Gypsies living in England and Wales, three quarters were still without the possibility of finding a legal stopping place.[11] In 1992, a study indicated that among the 13.500 Gypsy families living in caravans, around 4.500 were still unable to find a legal stopping place.[12] Nonetheless, in 1994, the government decided to repeal the obligation for local authorities to provide accommodation for Gypsies while generalizing the powers previously limited to designated areas.[13] Under the *Criminal Justice and Public Order Act* 1994, whether or not they had created caravan sites for gypsies, local authorities were given the power to direct any person residing in a vehicle on a land without the owner's consent to move.[14] Failure to comply with such direction became a criminal offence. Local authorities could apply to a magistrates' court for an order authorising them to remove caravans parked in contravention of such a direction.[15] The government argued that 'public provision of sites has now reached an acceptable level' and that it was not in the public interest 'to continue to maintain what has become an open-ended commitment to provide sites for all gypsies seeking accommodation at the public's expenses.'[16] The right approach in its view 'now [was] to encourage more gypsies to establish their own sites through the planning system.'[17] However, the government did not take any initiative to counter the obstacles resulting from planning regulation to the placement of caravans on private properties by their owner. According to S. Poulter, in practice, '[t]he opposition encountered from local residents when coupled with environmental and traffic safety factors is usually sufficient to prevent the necessary permission being granted.'[18]

It is against this background that the predicament of Ms Chapman must be viewed. She was Gypsy by birth and had lived in caravans all her life. Unable to find a place on a public caravan site, she was constantly moved from place to place by the police or local authorities' representatives, which was detrimental to the health of her family and the education of her children. Hence, she decided to buy a

[9] Section 6 of Caravan Sites Act 1968.
[10] Section 10 and 12 of Caravan Sites Act 1968.
[11] *Accommodation for Gypsies: A report on the working of the Caravan Sites Act 1968*, London, HMSO, Department of Environment, 1977, quoted in *Chapman v. United Kingdom*, para. 36.
[12] Study quoted by S. Poulter, *supra* note 8, p. 173..
[13] S. Poulter, *supra* note 8, pp. 179-180.
[14] Section 77 of Criminal Justice and Public Order Act 1994.
[15] Section 78 of Criminal Justice and Public Order Act 1994.
[16] Speech of the Parliamentary Under-Secretary of State, quoted in ECtHR, *Connors v. the United Kingdom*, 27 May 2004, para. 37.
[17] Speech of the Parliamentary Under-Secretary of State, *supra* note 16.
[18] S. Poulter, *supra* note 8, p. 175.

piece of land with the intention of settling on it with her family in a mobile home. Yet, the district Council refused her application for planning permission and served enforcement notices. Her appeal was dismissed by the inspector on the ground that the land was in the Metropolitan Green Belt in which there is a general presumption against inappropriate development. While noting that there were no sufficient sites for gypsies in the county, the inspector declared that he attached more weight to the fact that 'this site lies in an attractive setting of mainly sporadic dwellings in extensive grounds and in a designated Landscape Conservation Area. (…) [I]t was agreed that the area is popular for recreational walking and riding.'[19] After being fined twice, the family moved out of the land and returned to a nomadic life. They could not find any alternative place to live on and were constantly moved from place to place by Council officials. The eldest children had to abandon the professional training they had started and the younger children could no longer attend school.[20]

II. The Judgment

In her application before the Court, Ms Chapman claims a violation of her right to respect for her private life, family life and home under Article 8 ECHR, her right to property (Article 1 of the first Protocol) and her right not to be discriminated against (Article 14 ECHR).

Thus, the first question the case raised was whether the ability of Gypsies to live in caravans according to their cultural traditions could be said to be protected under the European Convention. In a previous judgment on similar facts, *Buckley v. United Kingdom*,[21] the Court disregarded the opinion expressed by the former Commission that the traditional lifestyle of a minority may attract the guarantee of Article 8 as concerning the private life, family life and home:[22] the judges merely stated that the contested measures had affected the applicant's right to respect for her home and that it was unnecessary to decide whether her right to respect for her private life and family life was also at stake.[23] They therefore treated the issue as a banal problem of refusal of planning permission, eluding the cultural aspect of the case.[24] The *Chapman* ruling marks an important evolution in this respect: the Court this time acknowledges that 'the applicant's occupation of her caravan is an integral part of her

[19] Quoted in *Chapman v. the United Kingdom*, para. 17.
[20] *Chapman v. the United Kingdom*, para. 15.
[21] ECtHR, *Buckley v. the United Kingdom*, 25 September 1996.
[22] Eur. Comm. H.R., *Buckley v. the United Kingdom* (App. No. 20348/92), Report, 11 January 1995, para. 64. This position was first outlined by the Commission in *G. and E. v. Norway*: Eur. Comm. H.R., *G. and E. v. Norway* (App. No. 9278/81 & 9415/81), decision, 3 October 1983, *D.R.* 35, p. 30.
[23] *Buckley v. the United Kingdom*, para. 55. The Court later concluded that the interference with the applicant's right was justified under Article 8(2).
[24] See O. De Schutter, "Le droit au mode de vie tsigane devant la Cour européenne des droits de l'homme : droits culturels, droits des minorités, discrimination positive", *Rev. trim. dr. h.*, 1997, pp. 64-93 and J. Ringelheim, *supra* note 5, pp. 225-227. On this case, see also J.-P. Marguénaud, "La protection du paysage rural contre les caravanes des gens du voyage", *Revue européenne de droit de l'environnement*, 1997, No. 1, pp. 87-95, esp. 90-91.

ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle.'[25] Accordingly, measures affecting her stationing of her caravans 'have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.'[26] Hence, her right to respect for her private and family life as well as home is in issue.[27] The Court, moreover, notes the emergence of an international consensus amongst Council of Europe member states recognising the special needs of minorities and an obligation to protect their identity and lifestyle, 'not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.'[28] Given the vulnerable position of Gypsies as a minority, special consideration should be given to their needs 'both in the relevant regulatory planning framework and in reaching decisions in particular cases.' To this extent, States parties have a positive obligation by virtue of Article 8 'to facilitate the Gypsy way of life'.[29]

This judgment represents in this respect an important move in the direction of integrating minority concerns in the interpretation of the European Convention. However, when examining whether the interference with Ms. Chapman's rights was justified under the Convention, the majority of the Court returns to a 'minority-blind' approach, which contradicts the minority-sensitive perspective it seems to adopt initially. This allows it to easily conclude that the restriction could be deemed necessary in a democratic society to achieve a legitimate aim under the Convention, namely the protection of the rights of others through the preservation of the environment. In contrast with the first part of the judgment, the reasoning held at this stage appears as a setback for minority protection. More precisely, the position of the majority presents three major problems: it trivializes the importance of minority rights, it is based on an individualistic reading of the facts and it relies on a formalistic approach to equality and non-discrimination.

The Trivialization of Minority Rights

After acknowledging the emergence of an international consensus recognising an obligation to protect minorities' identity and lifestyle, the Court however declares that this consensus is not sufficiently concrete to derive any guidance as to the conduct or standards which member states consider desirable in any particular situation. In its view, the Framework Convention, adopted in 1995 and in force since

[25] *Chapman v. the United Kingdom*, para. 73.
[26] *Chapman v. the United Kingdom*, para. 73.
[27] *Chapman v. the United Kingdom*, para. 74. About a year before, in *Noack v. Germany*, the Court had for the first time admitted that 'for the purposes of Article 8 of the Convention, a minority's way of life is, in principle, entitled to the protection guaranteed for an individual's private life, family life and home' (ECtHR, *Noack v. Germany*, Decision of 25 May 2000).
[28] *Chapman v. the United Kingdom*, para. 93.
[29] *Chapman v. the United Kingdom* , para. 96. USE OF *Ibid.*, para…; CHECK THROUGHOUT PLEASE.

1998, merely sets out general principles and goals but the signatory states were unable to agree on means of implementation. The Court thus considers international norms on minority protection as no more than vague declarations of good intentions devoid of any concrete content. This enables it to deprive of any practical impact the recognition of an emerging international consensus on minority protection and to justify the granting of a wide margin of appreciation to state authorities.[30]

Besides, when commenting on the difficulties faced in general by Gypsies leading a caravan lifestyle in Britain, the Court misrepresents the problem at stake. It states that it cannot accept the argument that 'because statistically the number of Gypsies is greater than the number of places available on authorised Gypsy sites, the decision not to allow the applicant Gypsy family to occupy land where they wished in order to install their caravan in itself, and without more, constituted a violation of Article 8.'[31] This would be tantamount to imposing on states an obligation to make available to the Gypsy community an adequate number of suitably equipped sites, a conclusion that cannot be supported as Article 8 does not recognise a right to be provided with a home.[32] This however mischaracterises what is really at issue: Gypsies in Britain do not need to be provided with a home. Rather, the problem lies with the fundamental inequality of treatment of their traditional way of life compared to that of the majority who lives in sedentary houses: planning legislation and policies only take into account the lifestyle of the majority, considered as the norm, and ignore the needs of the Roma minority. As a result, a substantial number of them are unable to find a place – either on public or on private lands – where they are simply *allowed* to live. In short, because it does not take minority rights seriously, the Court's majority distorts the issue underlying the case and downplays the responsibility of states authorities in creating this situation.

An Individualistic Reading of the Facts

In order to capture the seriousness of the measures taken against Ms Chapman, it was necessary to pay regard to the overall condition of the Roma minority living in caravans in Britain. For this general situation was a determining element to assess the alternatives open to her once she had been expulsed from her land. This situation was characterised by a persistent shortfall of sites where Gypsy families were allowed to reside. Importantly, public authorities had largely contributed to produce this state of affairs: whereas public lands on which Gypsies used to stop had been closed to them during the 1960s, the state had consistently failed to ensure that local authorities create a sufficient number of public caravan sites. Nonetheless, in 1994, the government repealed the obligation previously imposed on local authorities in this regard. And despite declaring that Gypsies would from then on be encouraged

[30] *Chapman v. the United Kingdom*, para. 94.
[31] *Chapman v. the United Kingdom*, para. 98.
[32] *Chapman v. the United Kingdom*, para. 98-99.

to establish their own site, no initiative was taken to remedy the tendency of local authorities to refuse planning permission submitted by Gypsies to place a caravan on a private land.

In the case of Ms Chapman, it had been acknowledged during the procedure that there were no official Gypsy sites in the district. While some sites existed at the level of the county, it was recognised that they were insufficient and that there was no place available in them.[33] In such circumstances, given the factual and legal background described above, refusing to allow Ms Chapman to reside in a caravan with her family on her own land amounted to force her either to live in illegality or to abandon her traditional lifestyle against her will and assimilate to the majority. The Court's majority, however, seems to go out of its way to detach the case of Ms Chapman from its wider context and from the global difficulties faced, in the whole country, by the minority she belonged to. This attitude is palpable where it states that:

> 'the issue to be determined by the Court in the present case is not the acceptability or not of a general situation, however deplorable, in the United Kingdom in the light of the United Kingdom's undertakings in international law, but the narrower one of whether the particular circumstances of the case disclose a violation of the applicant's – Mrs Chapman's – right to respect for her home under Article 8 of the Convention.'[34]

To be sure, it admits that the legal and social context in which the measure was taken is a relevant factor.[35] But despite the wealth of evidence indicating that public sites accessible to gypsies were insufficient in Britain generally, and in the county where Ms. Chapman lived in particular, the majority states that 'it cannot be doubted that vacancies on official sites arise periodically.'[36] On this basis, it concludes that it is 'not persuaded that there were no alternatives available to the applicant besides remaining in occupation on land without planning permission in a Green Belt area.' It adds that 'Article 8 does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest'.[37]

This reading of the facts appears narrowly individualistic in two ways: first, notwithstanding its acknowledgment that caravan life holds an important place in Gypsy collective identity, at the end of the day the majority discards the cultural dimension of the issue and reduces the wish of Ms. Chapman to live in a caravan to a question of mere *individual preference*. Second, it refuses to see her plight as one instance of a collective and systemic problem: the failure of public authorities to ensure the availability of a sufficient number of places, on public or private lands, where Roma pursuing a traditional lifestyle can lawfully reside.

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[33] *Chapman v. the United Kingdom*, para. 12.
[34] *Chapman v. the United Kingdom*, para. 100.
[35] *Chapman v. the United Kingdom*, para. 101.
[36] *Chapman v. the United Kingdom*, para. 111.
[37] *Chapman v. the United Kingdom*, para. 113. The Court in this last sentence reiterates a remark already made in *Buckley v. the United Kingdom* (para. 81).

A Formalistic Approach to Equality and Non-Discrimination

Chapman was decided after *Thlimmenos v. Greece*, in which the Court acknowledged that the right not to be discriminated against under Article 14 ECHR is not only violated when states treat differently persons in analogous situations, but also when they fail to treat differently persons whose situations are significantly different, without objective and reasonable justification.[38] Nonetheless, in *Chapman*, the majority returns to a formalistic approach to non-discrimination and suggests that to accord Ms Chapman a different treatment from that accorded to any individual who has established a house unlawfully in a particular place would be discriminatory.[39] This statement overlooks the fact that Ms Chapman's situation differs in some crucial respects from that of any other individual who would have been refused planning permission: as a Gypsy living in a caravan and willing to maintain her traditional lifestyle, her possibilities to find an alternative place to live were much more limited than those of people living in sedentary houses. Accordingly, the consequences of the decision to evict her form her land were much more serious than in the case of a house dweller: she did not have anywhere else to which she could reasonably be expected to move. It was predictably impossible for her to find another place to live on lawfully, unless she renounced to her traditional way of life.

The Dissenting Opinion

Judging by the number of dissenting judges, one can surmise that the case sparked lively debates within the Court. Importantly, the dissenting opinion demonstrates that there is no necessary opposition between classic individual rights and minority rights. In contrast with the majority, the alternative reasoning it proposes does fully take into account both the concrete situation in which Ms. Chapman was placed and the underlying question of respect for a minority lifestyle. But it also seems much more consistent with the principles asserted by the majority itself in the first part of the judgment, in particular that states have a positive obligation by virtue of Article 8 to facilitate the Gypsy traditional way of life. Crucially, for the dissenting judges, given the potential seriousness of an interference which prohibits a Gypsy family from pursuing his or her lifestyle at a particular location, 'where the planning authorities have not made any finding that there is available to the Gypsy any alternative, lawful site to which he or she can reasonably be expected to move, there must exist compelling reasons for the measures concerned.'[40] In their opinion, it is 'disproportionate to take steps to evict a Gypsy family from their home on their own land in circumstances where there has not been

[38] ECtHR (GC), *Thlimmenos* v *Greece*, 6 April 2000, para. 44.
[39] *Chapman v. the United Kingdom*, para. 95.
[40] Joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Straznicka, Lorenzen, Fischbach and Casadevall, para. 3.

shown to be any other lawful, alternative site reasonably open to them (…)'.[41] Hence, they conclude that the measures taken against Ms. Chapman could not be deemed necessary in a democratic society.

III. Redrafting *Chapman* in 2011

Looking back at *Chapman* in 2011 and reflecting on how such case could be dealt with nowadays allows us to take stock of the evolutions that have occurred in the case law of the Court and in the European legal space more widely. These developments, I would argue, have reinforced the approach that was defended at the time by the dissenting judges. But they have also enabled the Court to go beyond the dissenting opinion and to point out some further problems the case raises. In the Court's case-law, these ten years have seen the rise of the non-discrimination norm as well as of the notion of systemic violation of the Convention. Outside the Court, this period has been marked by the development of the work of the Advisory Committee on the Framework Convention for the Protection of National Minorities, the emergence of the issue of Roma Right to Housing in the European Committee of Social Rights's case law and the expansion of European Union non-discrimination law. All these evolutions are relevant to the interpretation of the ECHR: indeed, as the Court has asserted repeatedly, the European Convention is a living instrument which must be interpreted in the light of present day conditions

Recognising Roma Right to Traditional Housing

Since 2001 a number of evolutions concur to reinforce the view that in conditions such as those prevailing in Britain, the decision to evict a Roma family living in a caravan on their own land where there has not been proven to be any lawful alternative site reasonably available to them, should be considered a violation of the European Convention.

In *Chapman*, the majority, while accepting that the adoption of the FCNM was to be taken into account when interpreting the rights guaranteed under the Convention, declared that this instrument only set out general principles but did not provide any guidance as to the standards required in particular situations. This stance was already highly disputable in 2001.[42] Article 5 of this Convention, in particular, lays down the obligation of states to promote the conditions necessary for members of minorities to preserve the essential elements of their identity and to refrain from policies aimed at assimilation of persons belonging to national minorities against their will. At the time of the judgment, however, the Advisory Committee – the body of experts charged with supervising implementation of the FCNM and whose work contributes to clarify the obligations stemming from it – had not issued

[41] Joint dissenting opinion, para. 5.
[42] See joint dissenting opinion, para. 3.

any opinion on the United Kingdom (UK). Today, two Committee opinions relating to this country are available: the first one was published in November 2001,[43] the second in June 2007.[44]

In both opinions, the Committee clearly identifies the lack of caravan sites available for Gypsies throughout the United Kingdom as being problematic from the viewpoint of Article 5 of the Framework Convention: 'This combined with a range of legislative and administrative measures have the effect of inhibiting nomadism and effectively denying travellers the right to maintain and preserve or develop one of the important elements of their culture and identity, namely travelling.'[45] This problem was also highlighted by the Committee of Ministers in its 2002 Resolution on the implementation of the FCNM in the UK, stating that 'the implementation of the Framework Convention has not been successful as concerns Roma/Gypsies and Irish Travellers, *inter alia*, due to the lack of adequate stopping places (…)'.[46]

The question of respect for Roma traditional lifestyle has also emerged in another institution of the Council of Europe, namely the European Committee of Social Rights. Since 1998, this body is entitled to examine collective complaints alleging a violation of the European Social Charter.[47] In 2004, the issue of the Roma right to traditional housing was raised for the first time before it in *European Roma Rights Centre v. Greece*.[48] The Committee found that a state's failure to take due account of the specific needs of Roma or Travellers and to ensure that they have access to a sufficient number of

[43] Advisory Committee on the FCNM, First opinion on the United Kingdom, adopted on 30 November 2001, ACFC/INF/OP/I(2002)006.
[44] Advisory Committee on the FCNM, Second Opinion on the United Kingdom, adopted on 6 June 2007, ACFC/OP/II(2007)003.
[45] Advisory Committee on the FCNM, First opinion on the United Kingdom, adopted on 30 November 2001, ACFC/INF/OP/I(2002)006, para. 42. The second opinion, adopted in 2007, notes that new legislation has been adopted aimed at remedying the shortage of adequate stopping sites for Gypsies and Travellers and the negative effect that this has on their ability to maintain their culture. However, 'delays in the implementation of the new legislation, and in some cases resistance to taking the necessary measures on the part of local authorities, mean that numerous Gypsy and Traveller families continue to live on unauthorised land and/or unauthorised encampments.' (Second Opinion on the United Kingdom, adopted on 6 June 2007, ACFC/OP/II(2007)003, para. 17).
[46] Resolution ResCMN(2002)9 on the implementation of the Framework Convention for the Protection of National Minorities by the United Kingdom, adopted by the Committee of Ministers on 13 June 2002. The Resolution adopted in 2008, following the second opinion of the Committee on the UK, observes that "[h]ostility among some people within the local population and the resistance of certain local authorities to improving the availability of authorised sites have contributed to the fact that a number of Gypsies and Travellers continue to live on unauthorised sites and may face eviction orders." (Resolution CM/ResCMN(2008)7 on the implementation of the Framework Convention for the Protection of National Minorities by the United Kingdom, adopted by the Committee of Ministers on 9 July 2008).
[47] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (CETS No. 158), adopted in 1995 and entered into force in 1998. Adopted in 1961, the European Social Charter, which guarantees social and economic rights, was revised in 1996. The 1996 revised European Social Charter is meant to gradually replace the initial 1961 Convention. On this system, see O. De Schutter (ed.)s, *The European Social Charter. A Social Constitution for Europe*, Brussels, Bruylant, 2010.
[48] *European Roma Rights Centre v. Greece*, 8 December 2004 (merits), No. 15/2003.

appropriate camping sites constitutes a violation of the European Social Charter.[49] This conclusion was confirmed in two later cases, *European Roma Rights Centre v. Italy* and *European Roma Rights Centre v. France*, where the Court found a breach of Article 31, which guarantees the right to housing, as well as of Article E, which prohibits discrimination, combined with article 31.[50] On a similar note, in its 2009 concluding observation on the periodic report submitted by the UK, the United Nations Committee on Economic, Social and Cultural Rights expresses concern about the shortage of adequate sites for Roma/Gypsies and Irish Travellers and recommends that the 'State party ensures the provision of sufficient adequate and secure stopping sites for Roma/Gypsies and Irish Travellers.'[51]

More generally, the housing problems faced by Roma and Travellers in Europe have attracted the attention of the Committee of Ministers of the Council of Europe. In a Recommendation adopted in 2005, it calls upon member states to ensure that, 'within the general framework of housing policies, integrated and appropriate housing policies targeting Roma are developed'.[52] Significantly, it insists that Roma and Travellers must be guaranteed the freedom to choose to pursue sedentary or nomadic lifestyles: 'all conditions necessary to pursue these lifestyles should be made available to them by the national, regional and local authorities in accordance with the resources available and to the rights of others and within the legal framework relating to building, planning and access to private land.'[53]

> 'the situation in England as it had developed (…) placed considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle' and that 'the authorities had to take some responsibility' for this

These elements would have to be considered by the Court would it be asked today to decide on a case similar to *Chapman* (see paragraphs 94, 97 and 98 of redrafted judgment). In fact, in *Connors v. United Kingdom* (2004), the European Court itself seems to qualify some of the findings of *Chapman*: it incidentally recognises that [54] (see paragraph 97 of redrafted judgment). The facts at stake were different from *Chapman* though: at issue here was the regime applicable to Gypsies renting a plot on a

[49] *European Roma Rights Centre v. Greece*, 8 December 2004 (merits), No. 15/2003, para. 46-47. The Committee found a breach of Article 16 of the Charter under which states undertake to promote the economic, legal and social protection of family life *inter alia* through provision of family housing.
[50] See *European Roma Rights Centre v. Italy*, 7 December 2005 (merits), No. 27/3004, para. 37 and *European Roma Rights Centre v. France*, 19 October 2009 (merits), No. 51/2008, para. 40-41.
[51] UN Committee on Economic, Social and Cultural Rights, Concluding observations, United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories, E/C.12/GBR/CO/5, 12 June 2009, para. 30.
[52] Recommendation Rec(2005)4 on improving the housing conditions of Roma and Travellers in Europe, adopted by the Committee of Ministers of the Council of Europe on 23 February 2005.
[53] Recommendation Rec(2005)4, *supra* note 52.
[54] ECtHR, *Connors v. the United Kingdom*, 27 May 2004, para. 94.

local authority public site. The Court found that the special power of local authority to evict tenants from these sites without the requisite procedural safeguards was not compatible with Article 8 ECHR.

Acknowledging the Systemic Nature of Violations of Roma Right to Pursue their Traditional Lifestyle

It was noted above that in order to assess the seriousness of the interference with Ms. Chapman's rights, account needed to be taken of the overall situation of Gypsies living in caravan in the UK. Today, however, the Court could tackle more directly the general obstacles faced by Gypsies wishing to pursue a traditional lifestyle in this country. Indeed, in May 2004, as a response to the increasing workload of the Court which has become a growing source of concern throughout the years 2000, the Committee of Ministers has expressly invited the Court to identify, where it finds a violation of the Convention, what it considers to be an underlying systemic problem, in particular when it is likely to give rise to numerous applications.[55] Beyond the so-called 'pilot-judgment procedure', this has had a significant impact on the way the Court exercises its role: in a growing number of cases, the Court does not content itself with finding an individual violation of the Convention. Where it deems it appropriate, it also highlights the systemic defect in the state's law or practice from which the violation originates and which needs to be remedied.[56] This approach, I believe, should be applied to a case like *Chapman*: the Court should not only rule that the measures taken against the individual applicant were in breach of the Convention, it should also acknowledge that this violation results from a systemic problem in UK's legislation and policies, which affects a large number of Roma/Gypsies, who are unable to find a place where they can lawfully reside in caravans. Accordingly, it should recognise that the UK needs to adopt general measures in order to bring its legislation and administrative practice into conformity with the Convention for what regards Roma/Gypsies' right to respect for their private and family life (see paragraph 100 of redrafted judgment).

The Discrimination Question

It was observed earlier that the Court could have applied to the case of Ms Chapman the principle asserted in *Thlimmenos*, according to which discrimination may arise were a state, without objective and reasonable justification, fails to treat differently persons whose situations are significantly different.[57] On this account, the Court could have acknowledged that the situation of Ms Chapman was

[55] Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, adopted on 12 May 2004. This resolution provided the basis for the development of the so-called 'pilot-judgment' procedure. See A. Buyse, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomika Vitma (The Greek Law Journal)*, 2009, Vol. 57, pp. 1890-1902.
[56] See, among numerous examples, ECtHR, *Hasan and Eylem Zengin v. Turkey*, 9 Octobre 2007, para. 84; ECtHR, *Dybeku v. Albania*, 18 décembre 2007, para. 64 or ECtHR, *Slawomir Musial v. Poland*, 20 janvier 2009, para. 107.
[57] *Thlimmenos* v *Greece*, para. 44.

not analogous to that of any other person who would have established a caravan or a house without planning permission: as a Gypsy leading a traditional lifestyle, her possibilities to find an alternative place to live were much more limited than those of any other person. Hence, refusing to take these differences into account could have been deemed to constitute discrimination.[58] Since January 2001, however, the Court's case law on the concept of discrimination has undergone further evolution. Under the influence of EU non-discrimination law, and in particular of Council Directive 2000/43/EC which prohibits racial and ethnic origin discrimination[59], the Court has progressively integrated the notion of *indirect* discrimination: it now accepts that a general policy or measure that has disproportionately prejudicial effects on a particular ethnic group may be considered discriminatory even where it is not specifically aimed at that group.[60] Applying this notion, in *D.H. and others v. the Czech Republic* (2007), it famously found that Roma children, who were unjustifiably overrepresented in special schools for mentally disabled pupils, were the victim of indirect discrimination in access to education.[61]

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In my view, the concept of indirect discrimination is better suited than the *Thlimmenos* principle to identify the discrimination at work in a case like *Chapman*. For it allows to see that the individual measures taken against Ms Chapman and her family are part and parcel of a general policy which, taken as a whole, has a disproportionately prejudicial impact on the Gypsy minority in the UK: it is because the overall planning legislation and policy largely ignores the needs and lifestyle of this community that many Gypsies, like Ms Chapman, face considerable obstacles in finding a place where to settle lawfully. The indirect discrimination notion therefore permits to pinpoint the fundamental inequality of treatment, within UK law and practice, of the Roma traditional lifestyle compared to the majority way of life. Given that this adverse impact cannot be objectively and reasonably justified, this legal framework should be considered to constitute discrimination, in violation with Article 14 ECHR, read in conjunction with Article 8 (see paragraph 129 of redrafted judgment).

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[58] This was hinted at by the dissenting judges in *Chapman*: '[W]e cannot agree with the view expressed by the majority that to accord protection under Article 8 to a Gypsy in unlawful residence in a caravan on her land would raise problems under Article 14 where planning laws continued to prevent individuals from setting up houses on their land in the same area (…). This approach ignores the fact, earlier acknowledged by the majority, that in this case the applicant's lifestyle as a Gypsy widens the scope to Article 8, which would not necessarily be the case for a person who lives in conventional housing, the supply of which is subject to fewer constraints. The situations would not be likely to be analogous. On the contrary, discrimination may arise where States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different (…).' (§ 8) Nonetheless, the dissenters explain that they voted for non-violation of Article 14 of the Convention as, given their firm conviction that Article 8 had been violated, they considered that no separate issues remained to be examined (§ 11).

[59] Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin (OJ L 180 of 19 July 2000, at 22).

[60] ECtHR, *Hugh Jordan v. the United Kingdom*, 4 May 2001, para. 154; ECtHR, *Hoogendijk v. the Netherlands*, 6 January 2005 (admissibility decision); ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007, para. 175 and 184.

[61] *D.H. and Others v. the Czech Republic*, para. 208-210.

Conclusion

The *Chapman v. United Kingdom* ruling quite clearly indicates that, compared to other international human rights institutions, the European Court of Human Rights has not been a leader for what regards the defence of Roma right to pursue a private and family life in accordance with their traditions. It is not too late to reverse this situation. The dissenting opinion in *Chapman* demonstrates that already at the time it was possible for the Court to take a different road. There are even more reasons to do so today. Since 2001, several evolutions have reinforced the case for mainstreaming diversity in the Court's jurisprudence and affording more effective protection to the Roma right to maintain their traditional way of life. First, various circumstances indicate the rise of a 'European consensus' on the need for states to ensure that members of the Gypsy/Roma minority have real and concrete opportunities to live in caravan if they so wish. The Advisory Committee on the FCNM has made clear that the Framework Convention on the Protection of National Minorities entails an obligation to respect the Roma/Gypsy caravan lifestyle and abstain from adopting measures, which effectively deny this community the freedom to preserve or develop this aspect of its identity. The lack of camping places in the United Kingdom, in particular, has been deemed to reveal an unsatisfactory implementation of the Framework Convention. The European Social Committee has ruled that similar situations in Italy or France disclose a breach of the right to housing under the European Social Charter. The Council of Europe's Committee of Ministers has recommended all member states to create conditions necessary to guarantee 'Roma and Travellers' the freedom to choose to pursue sedentary or nomadic lifestyles. Would a case similar to *Chapman* return to the Court, the right to respect for private life, family life and home under the European Convention would have to be interpreted in the light of these new developments. Second, the Court nowadays could apply its post-2004 jurisprudence on 'systemic problems' and recognise that beyond the individual violation of the rights of the applicant, the eviction of a family from its own land in the conditions at stake in *Chapman* reveals a systemic defect in the state's law and practices, which needs to be remedied through general measures. Finally, relying on the concept of indirect discrimination, the Court could acknowledge that where planning and housing legislation or policies have a disproportionate adverse impact on Roma/Gypsies, because they result in an especially high number of them being unable to find a place where they can lawfully settle, without objective and reasonable justification, they must be deemed to constitute discrimination.

Rewriting *Chapman* v. *The United Kingdom*

Note: The sentences in italic are taken from the dissenting opinion annexed to the original judgment.

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

93. The applicant urged the Court to take into account recent international developments, in particular the Framework Convention for the Protection of National Minorities, in reducing the margin of appreciation accorded to States in light of the recognition of the problems of vulnerable groups, such as Gypsies. The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (see paragraphs 55-59 above, in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

~~94. However, the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The framework convention, for example, sets out general principles and goals but the signatory States were unable to agree on means of implementation. This reinforces the Court's view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection, and the interests of a minority with possibly conflicting requirements renders the Court's role a strictly supervisory one.~~

94. The work of the Advisory Committee on the Framework Convention on the Protection of National Minorities (FCNM) makes clear that this consensus entails an obligation for the state to take steps to ensure the availability of an adequate number of sites where Roma/Gypsies or Travellers living in a caravan are allowed to stop or to settle, in order to enable them to maintain their traditional lifestyle if they so wish (first opinion on the United Kingdom, para. 42). In the same vein, the European Committee of Social Rights has acknowledged that the right to housing under the European Social Charter implies, in the case of Roma leading a traditional lifestyle, that adequate stopping places be provided (ERRC v. Greece, para. 25). More generally, member states must take into account in their housing policies the caravan lifestyle and the special needs of travellers, including settled travellers (ERRC v. France, para. 37, 40 and 60). Similarly, in its Recommendation Rec(2005)4 on improving the housing conditions of Roma and Travellers in Europe (23 February 2005), the Committee of Ministers states that 'Member states should ensure that, within the general framework of housing policies, integrated and appropriate housing policies targeting Roma are developed'. Importantly, Roma and Travellers must be guaranteed the freedom to choose to pursue sedentary or nomadic lifestyles: 'all conditions necessary to pursue these lifestyles should be made available to them by the national, regional and local authorities in accordance with the resources available and to the rights of others and within the legal framework relating to building, planning and access to private land.'

Article 8 of the European Convention must be interpreted in the light of these developments. Seen in this light, it entails a positive obligation for Contracting States to ensure that Roma/Gypsies or Travellers *have a practical and effective opportunity to enjoy their right to respect for their home, and their private and family life, in accordance with their traditional lifestyle*.

[…]

~~97. It is important to appreciate that, in principle, Gypsies are at liberty to camp on any caravan site which has planning permission; there has been no suggestion that permissions exclude Gypsies as a group. They are not treated worse than any non-Gypsy who wants to live in a caravan and finds it disagreeable to live in a house. However,~~ It appears from the

Supprimé: The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle.

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material placed before the Court, including judgments of the English courts, that the provision of an adequate number of sites ~~which the Gypsies find acceptable and~~ on which ~~they~~ Gypsies can lawfully place their caravans ~~at a price which they can afford~~ is something which has not been achieved.

~~98. The Court does not, however, accept the argument that, because statistically the number of Gypsies is greater than the number of places available on authorised Gypsy sites, the decision not to allow the applicant Gypsy family to occupy land where they wished in order to install their caravan in itself, and without more, constituted a violation of Article 8. This would be tantamount to imposing on the United Kingdom, as on all the other Contracting States, an obligation by virtue of Article 8 to make available to the Gypsy community an adequate number of suitably equipped sites. The Court is not convinced, despite the undoubted evolution that has taken place in both international law, as evidenced by the framework convention, and domestic legislations in regard to protection of minorities, that Article 8 can be interpreted as implying for States such a far-reaching positive obligation of general social policy (see paragraphs 93-94 above).~~

98. In evaluating the seriousness of the interference with the applicant's right, the Court must have regard to the alternative opportunities available to her to find a place where she could live lawfully in a caravan. *Having regard to the potential seriousness of an interference which prohibits a Gypsy from pursuing his or her lifestyle at a particular location*, the Court *considers that, where the planning authorities have not made any finding that there is available to the Gypsy any alternative, lawful site to which he or she can reasonably be expected to move, there must exist compelling reasons for the measures concerned*.

[...]

~~113. The Court is therefore not persuaded that there were no alternatives available to the applicant besides remaining in occupation on land without planning permission in a Green Belt area. As stated in *Buckley*, Article 8 does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest (judgment cited above, p. 1294, § 81). If the applicant's problem arises through lack of money, then she is in the same unfortunate position as many others who are not able to afford to continue to reside on sites or in houses attractive to them.~~

113.There was no indication in the planning procedures that the applicant had anywhere else to which she could reasonably be expected to move her caravans. The local authority had been found in breach of their duty to make adequate provision for Gypsies (...) and had been under a direction from the Secretary of State to comply with their statutory duty, without any concrete improvement of the situation resulting since. In these circumstances, the Court *finds that the planning and enforcement measures exceeded the margin of appreciation accorded to the domestic authorities and were disproportionate to the legitimate aim of environmental protection. They cannot therefore be regarded as 'necessary in a democratic society'.*

[...]

~~100. In sum, the issue to be determined by the Court in the present case is not the acceptability or not of a general situation, however deplorable, in the United Kingdom in the light of the United Kingdom's undertakings in international law, but the narrower one of whether the particular circumstances of the case disclose a violation of the applicant's – Mrs Chapman's – right to respect for her home under Article 8 of the Convention~~.

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The Court also observes that the violation of the applicant's rights under Article 8, originates in a systemic problem related to the lack of consideration for the needs of Roma/Gypsies and travellers in housing and planning legislation and policies. In view of its findings in the present case, the Court considers that, in addition to individual measures, the UK should take general measures in order to bring its legislation and administrative practice into conformity with this provision of the Convention, by guaranteeing Roma/Gypsies practical and effective opportunities to lead their private and family life according to their cultural tradition. It is not for the Court to determine whether, as a matter of general policy, this should be achieved through the creation of more public caravan sites or rather through an increase in their possibility to settle lawfully on private sites. But plainly the present situation entails a breach of the Convention.

ALLEGED VIOLATION OF ARTICLES 14 AND 8 OF THE CONVENTION

~~95. Moreover, to accord to a Gypsy who has unlawfully stationed a caravan at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention~~.

[...]

126. The applicant complained that she had been discriminated against on the basis of her status as a Gypsy, contrary to Article 14 of the Convention which provides:

"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."

127. The applicant submitted that the legal system's failure to accommodate Gypsies' traditional way of life, by treating them in the same way as the majority population, or disadvantaging them relatively to the general population, amounted to discrimination in the enjoyment of her rights under the Convention based on her status as a member of an ethnic minority. For example, Gypsies alone were singled out for special treatment by the policy which declared that Gypsy sites were inappropriate in certain areas, and unlike house dwellers, they did not benefit from a systematic assessment of and provision for their needs. Further, the application to them of general laws and policies failed to accommodate their particular needs arising from their tradition of living and travelling in caravans. She referred, *inter alia*, to the Framework Convention on National Minorities, as supporting an obligation on the United Kingdom to adopt measures to ensure the full and effective equality of Gypsies.

128. The Government, referring to the Commission's majority opinion, found that any difference in treatment pursued legitimate aims, was proportionate to those aims and had in the circumstances reasonable and objective justification.

~~129. Having regard to its findings above under Article 8 of the Convention that any interference with the applicant's rights was proportionate to the legitimate aim of preservation of the environment, the Court concludes that there has also been no a discrimination contrary to Article 14 of the Convention. While discrimination may arise where States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV), the Court does not find, in the circumstances of this case, any lack of objective and reasonable justification for the measures taken against the applicant.~~

129.The Court has accepted that a general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups who are identifiable on the basis of an

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ethnic criterion, may be considered discriminatory notwithstanding that it is not specifically aimed at that group (see, *mutatis mutandis*, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001 and *D.H. and others v. the Czech Republic*, no. 57325/00, § 175, 13 November 2007), unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate. Furthermore, discrimination potentially contrary to the Convention may result from a *de facto* situation.

The material before the Court reveals that the legislation in force and the planning policies applied by the central and local authorities in the United Kingdom result in a substantial number of members of the Gypsy community being, like Ms Chapman, unable to find a place where they are allowed to live according to their tradition. This policy therefore has disproportionate prejudicial effects on the Gypsy community to which Ms Chapman belongs. In view of its findings above (paragraphs 100 and 113), the Court deems that the means used to achieve the legitimate objective of regulating planning practices and protecting the environment were not proportionate. Accordingly, the Court considers that the applicant, as a Gypsy pursuing a traditional lifestyle, has been discriminated against in the enjoyment of her rights under Article 8. There has therefore been discrimination contrary to Article 14 of the Convention.