

# IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 26828/06

Makuc and others

v.

Slovenia

## WRITTEN COMMENTS OF THE EQUAL RIGHTS TRUST

### I. Introduction

1. The Equal Rights Trust (ERT) respectfully submits written comments by permission of the President of the Chamber of the European Court of Human Rights (the Court)<sup>1</sup> in accordance with Article 36(2) of the European Convention on Human Rights and Fundamental Freedoms.
2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human rights and a basic principle of social justice. Established as a resource centre and a think tank, it focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.
3. The instant case presents a number of issues of significance in the area of discrimination, and offers opportunity for the development of legal interpretations regarding discrimination based on national origin, nationality and statelessness in relation to the right to respect for private and family life and the right to property. These areas are relatively unexplored in the jurisprudence of the Court, but have been addressed in international jurisdictions and have been the subject of European conventions. The instant case offers the Court an opportunity to clarify the protection against discrimination awarded to stateless persons in Europe, particularly in respect of residence status and nationality following state succession.

### II. Discussion

- A. **Discrimination based on National Origin as Concerns Enjoyment of the Right to Private and Family Life:**
  - i. **The *continuing effects of the “erasure”* of individuals from the Register of Permanent Residence constitutes discrimination in breach of Article 14 in combination with Article 8 of the ECHR.**
4. Irrespective of the date of entry into force of the European Convention of Human Rights (the Convention) for member states the concept of continuing violations of

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<sup>1</sup> Pursuant to a letter dated 5 September 2007 by the Registrar, Santiago Quesada.

Convention rights is clearly well established in the jurisprudence of the Court.<sup>2</sup> The Court and Convention organs have recognised this concept to mean “*violations which started prior to the critical date and which still continue*”.<sup>3</sup> In effect this enables the Court to consider the ongoing violations of rights which commenced at a time prior to (a) the application of the Convention for the member state; or (b) a point in which the Court had the jurisdictional competence to do so.

5. The Court has recognised that the principle of continuing violations, in which the continuing effects of a violation is an integral component, is a concept that has application for Article 8.<sup>4</sup> It is submitted that close corollary exists between the continuing violations and their effects of Article 8 and a similar occurrence under Article 14.
6. Applying the definition of continuing violation outlined in paragraph 4 and recognising its application in respect of Article 8 and others, it is plain that the concept has applicability for any potential violation of Article 14. Indeed, the very nature of discrimination conveys the distinction that it rarely exists in a temporal or spatial vacuum. Violations of the right to non-discrimination by their nature arise from a singular event, which is an important similarity with other convention rights. However, unique to the nature of discrimination is that often a greater violation of the dignity of the victim is the continuing effects of the initial violating act. In this regard certain grounds of discrimination, such as national origin and its associates of ethnic origin or race, have been the focus of particular attention to the consequences of continuing violations and their effects.<sup>5</sup>

**ii. The failure to regulate legal status and comply with the Constitutional Court Decision of 3 April 2003 constitutes discrimination within the meaning of Article 14.**

7. In respect to individuals “erased” from the Register of Permanent Residence, it is clear that the distinctions made as a consequence of “erasure” can lead to the long term and continuous discrimination of individuals. Many “erased” lost their jobs, work status and their homes. A number live without adequate housing. Numerous ex-Yugoslavs have been detained, kept in transit centres, and lost the opportunity to buy the housing they lived in due to a lack of legal status in Slovenia.
8. The prohibition against discrimination has been recognised as of fundamental importance within the Court’s jurisprudence.<sup>6</sup> This reflects in the legal protections of many Council of Europe states wherein discrimination on the grounds of race,

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<sup>2</sup> See *Papamichalopoulos and Others v. Greece*, 24 June 1993 (Application no. 14556/89), Series A no. 260-B, pp. 69-70, paras. 40 and 46; *Agrotexim and Others v. Greece*, 24 October 1995, Series A no. 330-A, p. 22, para. 58.

<sup>3</sup> See *Loizidou v Turkey* (Application No. 15318/89), dissenting opinion of Judge Lopes Rocha.

<sup>4</sup> *Ibid.*

<sup>5</sup> See e.g. “Human Rights Watch Backgrounder to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.” August 2001. This called for “reparation to address the **continuing effects** of slavery, segregation, and other extreme forms of racism.” (available at: [http://www.hrw.org/campaigns/race/backgrounder\\_english.pdf](http://www.hrw.org/campaigns/race/backgrounder_english.pdf)).

<sup>6</sup> See e.g. *Assenov v. Bulgaria*, 28 October 1998, 28 EHRR 652, para. 102

ethnicity and/or national origin is prohibited<sup>7</sup>. In the same manner Article 14 of the Slovenian Constitution states “*In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin.*”

9. The Court has set out and reiterated the definition of discrimination for the purposes of Article 14 as, “treating differently, without an objective and reasonable justification, persons in relevantly similar situations.”<sup>8</sup> Whilst not explicitly stated by the Court, it has been submitted that inherent within the Court’s jurisprudence is a recognition of the concept of direct discrimination.<sup>9</sup>
10. The parameters of this concept of discrimination have been set out in the developing jurisprudence of the Court. The Court has opined that in certain circumstances it is necessary to prove the intention or state of mind of the discriminator in discerning a discriminatory act.<sup>10</sup> It is clear from further dicta of the Court, however, that the requirement of proving intention should be limited to cases involving violence or criminal behaviour. Indeed, the Grand Chamber decision of *Nachova* recognised that the required proof of intent may be limited to instances where racially motivated violence is alleged to have occurred.<sup>11</sup> Within other situations (for example, employment or legislative and policy decisions of an executive) the requirement may be lowered to proof of the discriminatory effect.
11. This approach is consistent with English law where the proper legal test for proving direct discrimination is the ‘but for’ test which examines cause and effect rather than intention.<sup>12</sup> Some experts have indicated that this is the approach of the European Court of Justice in interpreting the concept within EU anti-discrimination law.<sup>13</sup> Therefore, it is submitted that the court may find a violation of Article 14 in combination with Article 8 through direct discrimination, by examining the effect of the discriminatory act and not the underlying intention or state of mind of any alleged discriminator which is necessary in cases where racially motivated violent acts (or, by analogy, other hate-motivated violence) is alleged.

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<sup>7</sup> See, e.g. Art 3(2)(h) of the Irish Equal Status Act (2000), s.3(1) of the United Kingdom’s Race Relation Act 1996 or Article 70/A of the Hungarian Constitution.

<sup>8</sup> *Willis v. the United Kingdom* (no. 36042/97, § 48, ECHR 2002 IV).

<sup>9</sup> See Interights, “Non-Discrimination in International Law: A Handbook for Practitioners” (available at: <http://www.interights.org/doc/Handbook.pdf>), particularly pages, 74 – 76 which set out cases where the Court held that distinctions or detrimental treatment amounted to (direct) discrimination. For example, see *Schuler-Zgraggen v. Switzerland* (No. 14518/89, 24/06/1993), *Van Raalte v. The Netherlands* (No. 20060/92, 21/02/1997) or *Karlheinz Schmidt v. Germany* (No. 13580/88, 18/07/1994)

<sup>10</sup> See *Nachova and Others v. Bulgaria*, 26 February 2004, Applications nos. 43577/98 and 43579/98), para. 165.

<sup>11</sup> *Nachova and Others v. Bulgaria*, 6 July 2005, (Applications nos. 43577/98 and 43579/98), para. 157.

<sup>12</sup> See e.g. *James v. Eastleigh Borough Council* [1990] 2 A.C. 751.

<sup>13</sup> See Hepple, Bob, “The European Legacy of *Brown v. Board of Education*”, *University of Illinois Law Review*, Volume 3 2006.

12. Moreover, the Court has made clear that the *Willis* definition of discrimination does not preclude indirect discrimination. In *C v Netherlands*<sup>14</sup> it was held that “a rule which is formally not discriminatory can nevertheless be discriminatory in its practical application.” In addition, the Court has recently opined, “(i)f a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group”.<sup>15</sup>
13. In effect a violation of Article 14 may be found if a policy or measure (such as the Slovenian policy of “erasure”) has been shown to disproportionately affect one group of people, for example people of a certain national origin. In the case of applications to remain in a country following succession, it follows that legislation which has a disproportionate effect on one or several groups not of the seceding country’s ethnicity may constitute indirect discrimination, as the effect of legislation is not derived from the desire of certain groups to immigrate, but a failure to account for the particular circumstances of certain national groups who may wish to remain in the seceding state.
14. Likewise, international law prohibits both direct and indirect discrimination. Article 26 of the International Covenant on Civil and Political Rights (1966) has been construed to encompass indirect discrimination within its definition<sup>16</sup>. Therefore, the recognition of the concept of indirect discrimination by the Court would provide continuity to the jurisprudence on international human rights law.
15. Finally, other Council of Europe organs have interpreted the right to non-discrimination as requiring positive action on the part of the member states. Hence the Court has institutional precedent to interpret the right to non-discrimination as requiring positive legislative movements on the part of member states and require the enforcement of national constitutional court decisions.<sup>17</sup>

**B. Discrimination based on statelessness as concerns enjoyment of the right to private and family life: The Failure to provide protection for the applicants who had become stateless on 26 February 1992 resulted in a violation of Article 14 in conjunction with Article 8.**

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<sup>14</sup> (1992) 15 EHHR CD 26.

<sup>15</sup> *D.H. and Others v. the Czech Republic*, Application no. 57325/00, ECHR 2006, para 46.

<sup>16</sup> See, Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994). See also decision of *International Association Autism-Europe (IAAE) v. France* (Complaint no. 13/2002), before the European Committee of Social Rights, (available at: [http://www.coe.int/t/e/human\\_rights/esc/4\\_collective\\_complaints/list\\_of\\_collective\\_complaints/RC13\\_on\\_merits.pdf](http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/RC13_on_merits.pdf)).

<sup>17</sup> *European Roma Rights Centre v. Bulgaria* (Complaint no. 31/2005), before the European Committee of Social Rights, (available at: [http://www.coe.int/t/e/human\\_rights/esc/4\\_collective\\_complaints/list\\_of\\_collective\\_complaints/MeritsRC31\\_en.pdf](http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/MeritsRC31_en.pdf)).

16. All organs of the Convention have declared it a living instrument, “to be interpreted in the light of present-day conditions”.<sup>18</sup> In respect to Article 14 this underlying commitment has been reflected in the Court’s jurisprudence through developing protection for grounds of discrimination not mentioned in the main text of the Article, for example, disability.<sup>19</sup>
17. Statelessness is regarded as one of the most prominent sources of disadvantage and discrimination globally. According to the United Nations High Commissioner for Refugees the problems and barriers facing individuals without effective citizenship are broad in both scope and form.<sup>20</sup> Treaty bodies have made reference and voiced their concerns regarding discrimination facing the stateless.<sup>21</sup>
18. The international protection against discrimination on grounds of nationality, citizenship and statelessness has solid foundations under international law.<sup>22</sup> Similarly, other regional human rights mechanisms have sought to make declarations regarding the security of nationality and citizenship. In 1984 the Inter-American Court of Human Rights issued an advisory opinion in which it stated, “It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual’s legal capacity.”<sup>23</sup>
19. Further, the 1954 Convention in Relation to Stateless Persons offers certain direction within international human rights law. However, its provisions are regarded as difficult to enforce, due in part to the narrow definition of a “stateless person” under Article 1 which many experts suggest protects against *de jure* but not *de facto* statelessness. Likewise, the adjudication within national jurisdiction in many instances has been fraught with difficulties.<sup>24</sup> By contrast the Court of Appeal in England accepted the appeal of an applicant who argued that, “arbitrary and discriminatory measures to deprive citizens of their nationality,

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<sup>18</sup> See e.g. *Case of Pla and Puncernau v. Andorra*, 13 July 2004 (Application no. 69498/01), para. 62.

<sup>19</sup> See *Botta v. Italy* (153/1996/772/973), 24 February 1998.

<sup>20</sup> See e.g. UNHCR Brief on Stateless and Detention issues, 27 November 1997, para.2; see also UNHCR Guidelines on Applicable Criteria and Standards to the Detention of Asylum-Seekers, February 1999, Para. 6.

<sup>21</sup> See e.g. Committee on the Elimination of Racial Discrimination (CERD/C/CAN/CO/18, 25 May 2007). Similarly, see CERD “General Recommendation 30: Discrimination against Non-Citizens”, which recognises that “in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits”. The denial of citizenship was recognised as undermining economic, social and cultural rights as well as civil and political guarantees, causing CERD to recommend that States party “regularize the status of former citizens of predecessor states who now reside within the jurisdiction of the State Party”.

<sup>22</sup> See e.g. Article 15 of the Universal Declaration of Human Rights or Article 9 of the International Convention on Civil and political Rights.

<sup>23</sup> Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Inter-Am.Ct.H.R. (Ser. A) No. 4 (1984). Para. 32 (available at: [http://www1.umn.edu/humanrts/iachr/b\\_11\\_4d.htm](http://www1.umn.edu/humanrts/iachr/b_11_4d.htm)).

<sup>24</sup> See e.g. Australian High Court case of *Al Kateb v. Godwin* (2004) HCA 37.

*deport them or leave them stateless and in exile amounts to persecution, where the discriminatory treatment is related to a Convention (relating to the Status of Refugees 1951) concern such as ethnicity, or perceived ethnicity.*<sup>25</sup> Herein, it was further purported that whilst the appellant may have retained her nationality in law (*de jure*) she lost her effective (*de facto*) nationality.

20. In practice the effects of “erasure” perpetuate (a) a distinction between persons of different national origin and (b) a situation of de-facto statelessness and discrimination against foreigners which departs from the central recognition of the right to non-discrimination within the application of Article 14 in combination with Article 8. It is well recognised that such discriminations manifest the most serious forms of discrimination and disadvantage.
21. The Court has previously found violations of Article 8 in respect to stateless applicants in *Al-Nashif and Others v Bulgaria*<sup>26</sup>. Here the Court opined that the mechanisms in place within Bulgaria in relation to the deportation of the applicant did not provide the “*necessary safeguard against arbitrariness*”<sup>27</sup>. Although Article 14 was not considered in this case it is clear from the dicta of the Court that in matters concerning violations of Article 8 member states will be required to ensure that their measures are not arbitrary, capricious or by implication discriminatory.
22. In addition, the Council of Europe has taken some steps to address the problem of statelessness, particularly following succession, within the European Convention on Nationality (1997). The Convention sets out as a general rule that a State party may not provide in its internal law for the loss of its nationality except in certain cases and circumstances. Moreover, the Convention on the Avoidance of Statelessness in Relation to State Succession (2006), whilst not yet in force, sets out the Council of Europe’s approach to the position of stateless persons. It provides the right to a nationality for those who had the nationality of the predecessor state or who would become stateless as a result of state succession<sup>28</sup>. It requires all states should take “appropriate measures” to prevent statelessness in the succession process<sup>29</sup> and contains a general non-discrimination provision on the application of the Convention, thereby setting the standard for non-discrimination in relation to statelessness and the granting of successor State nationality.<sup>30</sup> Further, Article 5 also deals with this matter, outlining the responsibility of the successor State to “*grant its nationality to persons who, at the time of State succession, had the nationality of the predecessor State, and who have or would become stateless as a result of State succession*” provided the individual was habitually resident in the territory of the successor state, or had an appropriate connection with that State, such as being born in that country or having previously had habitual residence there.

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<sup>25</sup> *E.B. (Ethiopia) v. Secretary of state for the Home Department* (2007), Case No: C5/2006/2355.

<sup>26</sup> Application No. 50963/99.

<sup>27</sup> Para. 128.

<sup>28</sup> Article 2.

<sup>29</sup> Article 3.

<sup>30</sup> Article 4.

23. Though Slovenia is not yet a party to this convention, it provides a clear framework for assessing the impact of statelessness and recognising the particular problems of state succession in relation to nationality. The tendency within the Council of Europe to facilitate the naturalisation of stateless persons in new or successor states is reflected in the Slovenian Constitution. However, the failure to grant residence permits, particularly with retroactive application, suggests that its practical application is not functional.
24. “Erasure” may also be discriminatory in effect in relation to members of Roma communities who are less likely to have a regularised status elsewhere in the former Yugoslavia due to their condition as a minority without a “kin-state”. Roma may have increased difficulty in accessing citizenship due to social marginalisation, impoverishment, informal settlement and racial prejudiced naturalisation requirements.
25. Slovenian legislation has a number of provisions which relate to the problem of statelessness. The Citizenship Act of the Republic of Slovenia has the prevention of statelessness as one of its guiding principles, providing for the acquisition of citizenship through naturalisation, the territorial principle and by origin. The territorial principle provides that children of parents who are stateless automatically obtain Slovenian citizenship on the principle *ius soli*. Naturalisation also provides the possibility for stateless persons to acquire citizenship.
26. The Act delineates differing types of naturalisation, including facilitated naturalisation, which exempts applicants from certain requirements necessary for regular naturalisation. Exceptional naturalisation for which the applicants must have particular circumstances which fall outside the existing provisions for naturalisation can apply to stateless persons. Despite these modes, naturalisation remains subject to individual discretion and is awarded on a case-by-case basis, therefore citizenship is not guaranteed even to those who meet all existing conditions.
27. It seems plain that in consideration of the dicta of the Court in *Al-Nashif* and the surrounding international and regional obligations the ultimately discretionary nature of the Citizenship Act may not satisfy the requirement of non-arbitrariness due to its unpredictable and opaque nature. Accordingly, the Court may find that the consequences of the arbitrary nature inherent in the decision making procedure represent an important factor in assessing whether the legislative and administrative facets of this case invoke a violation of Article 14.

**C. Intersectional or multiple discrimination as concerns those who were “erased” and in addition were forcibly deported from Slovenia: Those “erased” and deported where victims of intersectional or multiple discrimination which constitutes a violation of Article 14.**

28. The Court has found that deportation in itself constitutes an interference with the right to respect for family life, and that in such cases it is necessary to establish whether the expulsion would be directed towards one or more of the legitimate aims listed in Article 8(2).<sup>31</sup> The Court has also opined that, “*In cases where the*

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<sup>31</sup> See, *Beldjoudi v. France*, 26 March 1992, (Application no. 12083/86).

*relevant decisions would constitute an interference with the rights protected by paragraph 1 of Article 8, they must be shown to be “necessary in a democratic society”, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.*<sup>32</sup>

29. An examination of critical academic thinking and national jurisprudence, however, postures a position where multiple forms of discrimination act cumulatively to create a more abhorrent and demanding (in terms of legal proof) form of discrimination.
30. Very often discrimination occurs due to an individual possessing an economic, social, cultural (including ethnic) or political trait which results in their identification for discriminatory and disadvantaging treatment or exclusion. In many other occasions, however, the nature of discrimination is rather more complex. Wherein, an individual is the subject of complementary grounds of discrimination which combine to impose a greater violation of the individual's dignity.
31. The jurisprudence from English courts has encountered this issue on a number of occasions but has unfortunately not developed the appropriate legal techniques to provide redress for victims of this form of discrimination.<sup>33</sup> Various prominent academics and lawyers<sup>34</sup> suggest that the inability of national jurisdictions to provide redress for this mode of discrimination is not a consequence of any narrow definition of discrimination, but the procedures for proving discrimination.
32. At present the application of anti-discrimination law in the United Kingdom permits the use of a hypothetical comparator for unitary grounds of discrimination, however, it is not permissive of a similar approach for multiple forms of discrimination. Therefore, there is both practical and conceptual barrier to proving the case for this form of discrimination. By contrast, Canadian law has developed in a manner in which multiple forms of discrimination are afforded greater legal recognition and are subsequently easier to prove. The Canadian approach places less reliance on tradition comparison and a greater emphasis on a violation of dignity and a minimum standard of treatment. Essentially the human rights model employed by Canadian jurisprudence to tend to issues such as multiple discrimination permits the judiciary to apply a standard of proof which is more adequate in the case of proving discrimination.
33. The practical application of this issue has two caveats for the Court. First, individuals subject to the system of “erasure” and subsequent deportation clearly have suffered discrimination on intersectional or multiple grounds. It is patently plain that the individuals who were the subject of “erasure” from the Register of Permanent Register and also deported from the country have been subjected to more than one form of discrimination.

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<sup>32</sup> See *Moustaquim v. Belgium*, 18 February 1991, (Application no. 12313/86), para. 43.

<sup>33</sup> See .e.g. *Burton and Rhule v De Vere Hotels* [1997] ICR 1 or more recently *Bahl v the Law Society* (2004) IRLR 799, where the applicants were victims of both race and sex discrimination.

<sup>34</sup> See e.g. Moon, Gay “Multiple Discrimination – problems compounded or solutions found?” (available at: <http://www.justice.org.uk/images/pdfs/multipliediscrimination.pdf>).

34. Second, in applying any legal test in determining whether any act of discrimination suffered by those both erased and deported constituted multiple discrimination, the Court may wish to consider whether the proper legal test is that applied within the Canadian jurisdiction. The reasons for this are twofold:

- a. English anti-discrimination law essentially has its origins in the Law of Torts, and while on occasion this may provide useful direction for the Court, in respect to complex and multifaceted issues such as multiple discrimination the English tort model is not appropriately equipped.
- b. The Canadian model is born out of a constitutional human rights setting, subsequently, there are various conceptual and legal corollaries existing between the Canadian system and this Court's system on this facet of the right to non-discrimination.

**D. Discrimination as concerns denial of pension benefits constitutes a violation of Article 14: the deprivation of the applicants' pension benefits, to which they should have been entitled as a result of their contributions, constituted indirect discrimination in breach of Article 14 in combination with Article 1 of protocol 1 of the ECHR.**

35. The Court has declared that equal treatment of persons in differing situations may violate Article 14:

*"The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of rights guaranteed under the Convention is violated when states treat differently persons in analogous situations without providing an objective and reasonable justification... However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."*<sup>35</sup>

36. The Court also made it clear that the responsibility fell upon the respondent State to ensure that legislation took account of the different situations of individuals which may be tied to a category included in Article 14. This suggests that the assessment of immigration and citizenship legislation requires that the prior residential status of the applicant needs to be taken into account. An assessment may be necessary so as to discern whether such legislation results in the position of the applicant significantly differing from other groups or individuals seeking to obtain citizenship, and if the enforcement of the same legislation for all groups may result in indirect discrimination.

37. This position permits the interpretation that the treatment of individuals who had prior to succession resided, worked and contributed to pension schemes within Slovenia in the same manner as persons who had no such ties to the country – to the extent that such individuals were deprived of their pension benefits – may

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<sup>35</sup> *Thlimmenos v. Greece*, Judgement of 6 April 2000, (Application no. 34369/97), para. 44.

constitute indirect discrimination. As a failure to take into account the particular circumstances through which these individuals became non-residents and non-citizens of Slovenia, neglects to adhere to the interpretation of the right of non-discrimination handed down in *Thlimmenos*.

38. This interpretation has been reiterated again in a separate opinion of Judge Greve in *Price v the United Kingdom*<sup>36</sup>. Again the centrality of the principle of non-discrimination in European human rights jurisprudence was re-emphasised, and the notion that at times equal treatment requires differential treatment was recalled to reiterate the importance of the state's responsibility for assessing any negative outcome of legislation which would disproportionately affect a particular group of persons.

### III. Conclusion

39. It is respectfully submitted that this Court should make clear that Article 14 of the Convention in combination with Article 8 contains within its definition the concepts of direct and indirect discrimination. Further it is submitted that the appropriate legal test for establishing direct discrimination, in situations where the severity of violence or harmful criminal behaviour is not present is proving causation and effect rather than intention. This interpretation is entirely consistent with the Court's existing dicta and jurisprudence, existing international and regional legal norms and the case law of many Council of Europe member states. It is also respectfully submitted that the Court is well placed to recognise statelessness as a prohibited ground of discrimination under Article 14 of the Convention. Such recognition would mirror the recognition of the discrimination facing stateless persons by other international organisations and Council of Europe member states. Similarly, it would reiterate the notion that the Convention is a "living instrument" reflective of modern social norms. In addition it is respectfully submitted that the Court gives attention to the notion of multiple or intersectional discrimination in determining a violation of the applicants Article 14 rights. This notion deserves attention due to the recognition of the emerging jurisprudence in a number of countries with advanced equality and non-discrimination legislation. It is also fully consistent with the conceptual approach of the Convention in respect to the right to non-discrimination under Article 14. Finally, it is respectfully submitted that the Court should make it clear that economic policies which have the effect of creating distinctions and disadvantage on prohibited grounds are a violation of Article 14 in combination with Article 1 of Protocol 1. This is consistent with the jurisprudence of the Court and the interpretation of the scope of Article 14.

Respectfully submitted,



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<sup>36</sup> 10 July 2001, (Application no. 33394/96).