

V.C. v. SLOVAKIA: A REPRODUCTIVE RIGHTS VICTORY MISSES THE MARK

LINDSAY HOYLE*

Abstract: In *V.C. v. Slovakia*, the European Court of Human Rights (ECtHR) should have held that Slovakia's intentional, systematic policy of coerced sterilization of Roma women violated the discrimination provision of the Convention for the Protection of Human Rights and Fundamental Freedoms. The ECtHR, however, is reluctant to find Article 14 discrimination violations unless the government fails to effectively investigate concrete evidence suggesting racial animus, thereby amounting to a procedural violation. In *V.C.*, a discrimination violation was nonetheless appropriate in light of the importance of the Convention rights violated, disproportionate accounts of hospitals sterilizing Roma women, and other objective evidence implicating discriminatory intent. Thus, the ECtHR should have shifted the burden to Slovakia to disprove discrimination. Rather, by avoiding a fact-specific assessment of the discrimination complaint, the ECtHR framed the government's coerced sterilization of Roma women as mere hospital error.

INTRODUCTION

In a landmark ruling issued on November 8, 2011, the European Court of Human Rights (ECtHR) held that a public hospital's coerced sterilization of the female Roma petitioner violated international human rights law.¹ In *V.C. v. Slovakia*, the ECtHR specifically determined that the Slovak Republic, through the actions of its hospital employees, breached Articles 3, 8, and 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).² As its name indicates, the members created the Convention to ensure greater unity between its members through the "maintenance and further realization of human rights and fundamental freedoms."³ The court pri-

* Lindsay Hoyle is a Staff Writer for the *Boston College International & Comparative Law Review*.

¹ See *V.C. v. Slovakia*, App. No. 18968/07, Eur. Ct. H.R. (2011) ¶¶ 120, 155, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107364>.

² See *id.* at ¶¶ 120, 155, 160–161.

³ EUR. CONSULT. ASS., *European Convention on Human Rights, as amended by Protocols Nos. 11 & 14*, C.E.T.S. No. 5, pmb. (entered into force Sept. 3, 1953, as amended by Protocols Nos.

marily focused on Slovakia's disregard for Article 3's prohibition on torture and inhuman or degrading treatment and Article 8's right to private and family life.⁴

Prior to *V.C. v. Slovakia*, the ECtHR had not recognized coerced sterilization as a human rights violation, although other international courts had done so.⁵ Various human rights entities worldwide applauded the decision as a first step in addressing thousands of reports of coerced sterilization of Roma women throughout Central and Eastern Europe.⁶ This ruling further examined Romani rights to reproduction generally, challenged racist practices that barred Romani access to healthcare and threatened their right to personal dignity and autonomy.⁷ The ECtHR did not address whether Slovakia's coerced sterilization of V.C. and other Roma women breached the Convention's Article 14 protection from discrimination. Consequently, the ECtHR side-stepped the crux of the alleged problem—Slovakia's alleged intentional, systematic policy of coerced sterilization of Roma women.⁸

Part I of this Comment analyzes the factual and procedural history of the *V.C. v. Slovakia* ruling. Part II discusses the legal background concerning the Convention, the 1972 Sterilisation Regulation, other international law governing informed consent and access to reproductive health care, and case law addressing Article 14's protection against discrimination. Part III assesses the ECtHR's application of Article 14's discrimination provision to the facts of the case *V.C. v. Slovakia* and the surrounding context of coerced sterilization in Slovakia.

I. BACKGROUND

Czechoslovakia recognized forced sterilization of Roma women as a human rights problem as early as 1978 when reports surfaced concerning government initiatives to sterilize Roma women through incen-

3, 5, 8, 11, which entered into force Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998 respectively) [hereinafter *Convention*].

⁴ See generally *V.C.*, App. No. 18968/07 ¶¶ 87–155 (discussing the details of Slovakia's disregard of these provisions).

⁵ See Comm. on the Elimination of Discrimination Against Women, *A.S. v. Hungary*, 36th Sess., Aug. 7–25, 2006, U.N. Doc. CEDAW/C/36/D/4/2004, ¶ 11.4 (Aug. 14, 2006) [hereinafter *A.S. v. Hungary*]; Christina Zampas, *V.C. v. Slovakia: A Step Towards Justice for Roma Women*, OPEN SOCIETY FOUNDS., 1 (Nov. 18, 2011), <http://archive.blog.soros.org/2011/11/vc-v-slovakia-a-step-toward-justice-for-roma-women/>.

⁶ See, e.g., Zampas, *supra* note 5, at 1.

⁷ See *V.C.*, App. No. 18968/07 ¶¶ 44, 106, 138, 143.

⁸ See *id.* ¶¶ 170, 180.

tive programs and threats to withhold social welfare benefits.⁹ Following the dissolution of Czechoslovakia and the creation of the Slovak Republic as an independent nation state in 1993, Slovakian society continued to distrust and dislike the Romani.¹⁰ Though the government no longer publicly endorsed sterilization initiatives of Roma women, some human rights advocates argue that it continued to surreptitiously promote Roma population control.¹¹ For example, in 1995 the Slovakian health minister at the time, Lubomir Javorsky, stated at a public rally, “[t]he government will do everything to ensure that more white children than Romani children are born.”¹²

In 2003, the Center for Reproductive Rights published a report called *Body and Soul: Forced Sterilization and other Assaults on Roma Reproductive Freedom in Slovakia* (Body and Soul Report). This report identified over 140 accounts of nonconsensual sterilization of Roma women similar to the petitioner, V.C.’s, experience.¹³ In response, the Slovak government tasked the Ministries of Health and the Interior with investigating these claims.¹⁴ The Ministry of Health ultimately found that no crime of genocide or any violation of Slovakian law had occurred.¹⁵ Critics argue that the government’s investigation was fundamentally flawed for a variety of reasons, and thus invalid.¹⁶ For instance, critics cite the narrow time frame investigated (after 1993), and the conflict of interest inherent in the Ministry of Health investigating the government’s potential wrongdoing.¹⁷ The critics further highlight the government’s alleged obstruction of the investigation, including threats to charge possible victims or their partners and instances of courts blocking access to medical records.¹⁸ Critics also note that the government

⁹ See COMM’N ON SEC. AND COOPERATION IN EUROPE, *Accountability and Impunity: Investigations Into Sterilization Without Informed Consent in the Czech Republic and Slovakia*, 1–2 (2006), http://www.csce.gov/index.cfm?Fuseaction=Files.Download&FileStore_id=647 [hereinafter *Accountability Report*].

¹⁰ See *id.* at 3, 8.

¹¹ See *id.* at 3, 5–9.

¹² *Id.* at 17 (quoting *Slovak Roma Uneasy About Health Minister’s Statements*, OPEN MEDIA RESEARCH INST. DAILY DIGEST (Oct. 31, 1995) quoting *Minister Seeks to Regulate Romanies’ Birthrate*, Bratislava, NARADONA ORODA (OPEN SOURCE CENTER, transl. (Oct. 28, 1995)).

¹³ Ctr. for Reproductive Rights and Poradna Pre Obcianske a Ludské Práva, *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia*, 55 (2003), <http://reproductiverights.org/en/document/body-and-soul-forced-sterilization-and-other-assaults-on-roma-reproductive-freedom> [hereinafter *Body and Soul Report*].

¹⁴ See V.C., App. No. 18968/07 ¶ 49; *Accountability Report*, *supra* note 9, at 14.

¹⁵ See V.C., App. No. 18968/07 ¶ 53.

¹⁶ See *Accountability Report*, *supra* note 9, at 8–14.

¹⁷ See *id.*

¹⁸ See *id.*

failed to investigate sterilizations absent informed consent, and unnecessarily limited the scope of potential wrongdoing to genocide rather than lesser, easier-to-prove crimes.¹⁹

On August 23, 2000, medical personnel at the Hospital and Health Care Centre in Presov (Presov Hospital)²⁰ sterilized the applicant, V.C., immediately following the birth of her second child via Caesarian section.²¹ The hospital staff noted on the delivery record that the “[p]atient is of Roma origin” and the “[p]atient requests sterilisation”.²² V.C. alleged that when she was several hours into labor and experiencing severe pain, the hospital personnel pressured her to elect sterilization, threatening that any future pregnancy would be fatal to herself or the baby.²³ V.C. claimed she signed the consent form in fear for her life even though she was unaware of the meaning of sterilization.²⁴ V.C. also contends that on the basis of her Roma ethnic origin, hospital staff segregated her in the gynecology and obstetrics ward when she was placed in a room with only Roma women and was not permitted access to bathrooms used by non-Roma women.²⁵ As a result of her sterilization, the applicant claimed to suffer serious medical and psychological harm, including symptoms of false pregnancy, relationship problems culminating in divorce, and ostracism by the Roma community.²⁶

On September 9, 2004 the applicant filed a civil suit in the Presov District Court alleging violations of Slovakian law and Articles 3, 8, 12, and 14 of the Convention.²⁷ The district court dismissed her complaint because her sterilization was medically necessary and consistent with Slovakian law governing consent.²⁸ On October 25, 2006 the Presov Regional Court upheld the district court’s ruling under a similar rationale.²⁹ The applicant filed a separate complaint with the Constitutional Court on January 17, 2007, alleging violations of Articles 3, 8, 12, 13, and 14 of the Convention and Article 5 of the Convention on Hu-

¹⁹ *See id.*

²⁰ This hospital is currently known as the University Teaching Hospital and J.A. Reiman Health Care Centre, and at the time of the incident, the hospital was subject to the management of the Ministry of Health. V.C., App. No. 18968/07 ¶ 9.

²¹ *Id.* ¶ 10.

²² *Id.* ¶¶ 14, 17. Throughout the Slovakian documents, sterilization is spelled “sterilisation.” *See id.*

²³ *Id.* ¶ 15.

²⁴ *Id.* ¶ 15.

²⁵ *Id.* ¶ 18.

²⁶ V.C., App. No. 18968/07 ¶¶ 19–20.

²⁷ *Id.* ¶ 28.

²⁸ *Id.* ¶ 35.

²⁹ *Id.* ¶ 39.

man Rights and Biomedicine.³⁰ The Constitutional Court of the Slovak Republic dismissed the Complaint, citing lack of jurisdiction to review the Regional Court's findings because the substantive rights did not invoke constitutional review, and the plaintiff failed to file an Article 6 § 1 violation of the Convention necessary to review the procedural rights.³¹

On April 23, 2007, the applicant filed a complaint against the Slovak Republic with the ECtHR, alleging violations of Articles 3, 8, 12, 13, and 14 of the Convention.³² On June 16, 2009, the ECtHR admitted the application, and on March 22, 2011 heard oral arguments from both parties.³³ The ECtHR unanimously found substantive violations of Article 3's prohibition on torture and inhuman or degrading treatment and Article 8's right to private and family life.³⁴ The ECtHR reasoned that coerced sterilization constitutes a major interference in an individual's reproductive health status, thus implicating human dignity and autonomy and requiring prior informed consent.³⁵ Nevertheless, the ECtHR did not find a procedural Article 3 violation or an Article 13 violation because the rights to effective investigations and remedies only ensure avenues to assert breach of rights, not favorable results.³⁶ Nor did the ECtHR determine, based on the facts, whether Slovakia breached Article 14's discrimination provision.³⁷

II. DISCUSSION

A. Domestic and International Law on Sterilization

Slovakia ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) on March 18, 1992, thereby subscribing to the Convention's purpose to collectively

³⁰ *Id.* ¶ 41. The Convention rights are as follows: Article 3 prohibits torture, Article 8 protects private and family life, Article 12 protects the right to marry, and Article 14 prohibits discrimination. Convention, *supra* note 3, at art. 3, 8, 12, 14.

³¹ *Id.* ¶¶ 42–45; *V.C. v. Slovakia*, Decision as to the Admissibility of App. No. 18967/07 8, EUR. CT. H.R. (2009) available at <http://www.unhcr.org/refworld/publisher/ECHR/SVK,4a648cb42,0.html>.

³² *V.C.*, App. No. 18968/07 ¶¶ 1, 3.

³³ *Id.* ¶¶ 4, 7.

³⁴ *Id.* ¶¶ 87, 120, 143, 155.

³⁵ *Id.* ¶¶ 106, 138.

³⁶ *Id.* ¶¶ 124, 129, 168.

³⁷ *Id.* ¶ 180.

enforce human rights and fundamental freedoms.³⁸ The pertinent provisions of the Convention prohibit inhuman or degrading treatment under Article 3, arbitrary government interference in private and family life under Article 8, and discrimination regarding any fundamental right or freedom on the basis of race or sex under Article 14.³⁹

The controlling domestic law at the time of V.C.'s sterilization was the 1972 Sterilisation Regulation, which permitted such procedures only where the sterilization was requested, or medically necessary for diseased organs or to preserve the life or health of the woman.⁴⁰ The regulation required a medical committee (sterilisation committee) to meet and approve the sterilization prior to the surgery if the woman's reproductive organs were not affected by disease.⁴¹ Additionally, the Health Care Act of 1994 commanded hospitals to obtain informed consent from patients prior to any medical procedure.⁴² Consequently, doctors were obliged to inform patients "in an appropriate and provable way, about the nature of his or her illness and the necessary medical procedures."⁴³

International law, as evidenced through other conventions and commissions, also recognizes the principle of informed consent as integral to human rights.⁴⁴ For instance, the Convention on Human Rights and Biomedicine, which entered into force for Slovakia on January 15, 1998, mandates free and informed consent on the basis of objective information, provided without any pressure, regarding the nature and consequences of the medical intervention and its alternatives.⁴⁵ The Council of Europe Commissioner for Human Rights (the Commis-

³⁸ See Council of Europe Treaty Office, *Convention for the Protection of Human Rights and Fundamental Freedoms: Chart of Signatures and Ratifications*, <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Oct. 30, 2012) [hereinafter *Chart of Signatures*].

³⁹ See *Convention*, *supra* note 3, arts. 3, 8, 14.

⁴⁰ V.C. v. Slovakia, App. No. 18968/07, Eur. Ct. H.R. (2011) ¶¶ 60, 61, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107364> (citing MINISTRY OF HEALTH OF THE SLOVAK SOCIALIST REPUBLIC, OFFICIAL JOURNAL OF THE MINISTRY OF HEALTH No. 8–9, No. Z-4 582/1972-B/1 ("1972 Sterilisation Regulation")).

⁴¹ *Id.* ¶ 62.

⁴² *Id.* ¶¶ 65–67 (citing Health Care Act (1994), §§ 13,15, Law No. 277/1994 (Slovk.)).

⁴³ *Id.* ¶ 67.

⁴⁴ See, e.g., EUR. CONSULT. ASS., *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Art. 5 (Feb. 10, 2000), C.E.T.S. No. 164, [hereinafter *Convention on Human Rights and Biomedicine*]; V.C., App. No. 18968/07 ¶ 76.

⁴⁵ V.C., App. No. 18968/07 ¶ 76; COUNCIL OF EUROPE, *Explanatory Report: Convention on Human Rights and Biomedicine*, C.E.T.S. No. 164 (2000) ¶ 35, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/164.htm>.

sioner) and the European Commission against Racism and Intolerance (ECRI) also recommended that health care practitioners provide patients with comprehensive information prior to sterilization procedures.⁴⁶

In light of the aforementioned domestic and international laws regulating medical interventions, the ECtHR held that Slovakia violated the Convention's Article 3 prohibition on torture and inhuman or degrading treatment and Article 8 right to private and family life.⁴⁷ Nonetheless, the court declined to determine whether the facts of the case constituted an Article 14 discrimination breach because V.C. presented insufficient objective evidence to find that the Article 8 violation was motivated on the basis of race or gender.⁴⁸

B. *Discrimination on the Basis of Race*

A state discriminates when it treats similarly situated individuals differently absent an "objective and reasonable justification."⁴⁹ The ECtHR has declared racial violence a "particular affront to human dignity" that must be combated by "all available means."⁵⁰ Thus, the applicant must prove a *prima facie* difference in treatment by offering the "coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."⁵¹ At this point, the burden shifts to the government to rebut the alleged discrimination.⁵² The moment at which the court is persuaded to shift the burden depends on the specific circumstances, the nature of the charges, and the Convention right violated.⁵³

Article 14 places an investigation obligation on States to "take all reasonable steps to unmask any racist motive and to establish whether

⁴⁶ EUR. COMM. AGAINST RACISM AND INTOLERANCE (ECRI), *Third Report on Slovakia* ¶ 96 (Jan. 27, 2004); COUNCIL OF EUROPE, Comm'r for Human Rights, *Recommendation of the Commissioner for Human Rights concerning certain aspects of law and practice relating to sterilization of women in the Slovak Republic* (Oct. 17, 2003) ¶ 53(1), available at <https://wcd.coe.int/ViewDoc.jsp?id=979625>.

⁴⁷ See V.C., App. No. 18968/07 ¶¶ 120, 155.

⁴⁸ See *id.* ¶¶ 179–180.

⁴⁹ *Willis v. the United Kingdom*, App. No. 36042/97, Eur. Ct. H.R. (2002) ¶ 48, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60499>.

⁵⁰ *Nachova and Others v. Bulgaria*, App. Nos. 43577/98 & 43579/98, Eur. Ct. H.R. (2005) ¶ 145, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69630>.

⁵¹ *Mizigarova v. Slovakia*, App. No. 74832/01, Eur. Ct. H.R. (2010) ¶ 116, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102279>.

⁵² *Id.* ¶¶ 115–116.

⁵³ *Id.*

or not ethnic hatred or prejudice may have played a role in the events.”⁵⁴ For instance, in *Nachova and Others v. Bulgaria*, the ECtHR held that Bulgaria violated Article 14’s discrimination provision in conjunction with an Article 2 procedural violation by failing to meaningfully investigate whether the killings were motivated by race.⁵⁵ In *Nachova*, military officers entered a Roma neighborhood to arrest two Roma men and subsequently shot and killed both when they attempted to flee.⁵⁶ The ECtHR explained that by failing to investigate potential racial discrimination in light of evidence that suggested the killings were race-motivated, the government failed to provide an effective investigation.⁵⁷ The concrete information that implicated a racial motivation for the shooting was the officer’s racist remark, “You damn Gypsies,” to a bystander immediately following the shooting.⁵⁸ Other objective evidence that supported a racist motive included: the use of grossly excessive force; the officer’s knowledge of the victims’ race; the disregard for public safety within a Roma neighborhood; and numerous independent incidents of law enforcement discrimination against the Romani.⁵⁹

In contrast, in *Mizigarova v. Slovakia*, the ECtHR found no Article 14 discrimination violation where a Romani man was shot while in police custody in Slovakia.⁶⁰ Unlike *Nachova*, the government was not aware of any concrete information indicating racial motivation, thus, the State’s failure to carry out an Article 3 effective investigation did not transfer the burden to the Slovakian government to defend against discrimination charges.⁶¹ Nevertheless, the ECtHR noted that evidence suggesting a systemic problem of discrimination and racism against the Roma could be relevant to determining whether authorities were on notice of a potentially racist motive, which necessitates further investigation.⁶² The ECtHR further reasoned that the petitioner did not present sufficient evidence to prove that the officer’s individual actions

⁵⁴ *Id.* at ¶ 119.

⁵⁵ See *Nachova*, App. Nos. 43577/98 & 43579/98 ¶ 168.

⁵⁶ *Id.* ¶¶ 15–35.

⁵⁷ *Id.* ¶¶ 162–168.

⁵⁸ *Id.* ¶ 163.

⁵⁹ *Id.* ¶¶ 162–168. The ECtHR reasoned, however, that the evidence was not sufficient to prove that the military officers’ actions were racially motivated against the Roma in conjunction with Article 2’s substantive violation; the officers plausibly shot and killed the fleeing suspects without regard to their Roma ethnicity. *Id.* ¶¶ 157, 159.

⁶⁰ *Mizigarova*, App. No. 74832/01 ¶¶ 14, 112, 123.

⁶¹ See *id.* ¶ 122.

⁶² See *id.*

were racially motivated, and evidence regarding prevalent police abuse of the Slovakian Roma in general was not sufficient to establish a State policy of racial discrimination.⁶³ Based on the ECtHR's analysis in these cases, the court prefers to find an Article 14 discrimination violation in conjunction with a procedural violation regarding ineffective investigation rather than a substantive violation of the individual's rights.⁶⁴

Despite the ECtHR's common approach of assessing procedural violations, it has nevertheless held discriminatory effects, or indirect discrimination, to prove a state policy of discrimination.⁶⁵ For instance, in *D.H. and Others v. the Czech Republic*, the ECtHR held that racism motivated the state policy of segregating Romani children into different schools, though no evidence proved discriminatory intent.⁶⁶ Rather, the discriminatory impact of Roma children disproportionately being placed in special schools created a presumption of indirect discrimination.⁶⁷ This presumption, combined with the ECtHR's recognition that the Roma represent a "specific type of disadvantaged and vulnerable minority" that require "special protection," and the evidence of discrimination against the Roma generally, elevated the State's policy to discrimination on the basis of race.⁶⁸ Consequently, the burden to disprove discrimination shifted to the government even absent concrete evidence of discrimination.⁶⁹ In contrast, in V.C.'s case, the ECtHR refused to discuss the issue, rather than applying this case law.⁷⁰

C. The ECtHR's Article 14 Discrimination Determination

The ECtHR assessed the discrimination complaint solely in conjunction with the substantive violation of Article 8's right to private and family life because this violation "affected one of her essential bodily functions."⁷¹ Thus, the ECtHR did not consider whether Slovakia's violation of Article 3's prohibition of torture and inhuman or degrading treatment also amounted to discrimination.⁷² Although the ECtHR

⁶³ *Id.* ¶ 117.

⁶⁴ *See id.*; *Nachova*, App. Nos. 43577/98 & 43579/98 ¶¶ 162–164.

⁶⁵ *See D.H. and Others v. the Czech Republic*, App. No. 57325/00, Eur. Ct. H.R. (2007) ¶ 184, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256>.

⁶⁶ *See id.* ¶¶ 193–195, 208–210.

⁶⁷ *See id.* ¶¶ 193–195.

⁶⁸ *See id.* ¶ 182.

⁶⁹ *Id.* ¶ 195.

⁷⁰ *See V.C.*, App. No. 18968/07, ¶¶ 170, 180; *D.H.*, App. No. 57325/00, *supra* note 65 ¶ 182.

⁷¹ *V.C.*, App. No. 18968/07 ¶ 176.

⁷² *See id.*

noted that the sterilization procedures impacted “vulnerable individuals from various ethnic groups,” it held that insufficient objective evidence existed to prove an “organized policy or that the hospital staff’s conduct was intentionally racially motivated.”⁷³ Consequently, the ECtHR declined to determine whether the facts of the case violated Article 14’s discrimination provision.⁷⁴

In contrast, Judge Mijovic’s dissent called for a separate examination of the discrimination complaint on its merits because it was the “very essence of this case.”⁷⁵ Judge Mijovic determined that Slovakia violated Article 14’s discrimination provision by treating V.C. differently due to her Roma ethnicity absent any objective and reasonable justification.⁷⁶ To support his finding of racial animus, Judge Mijovic cited the ethnic designation on V.C.’s medical records (“Patient is of Roma origin”), the history of rampant discrimination against the Roma, including the state policy of Roma sterilizations, the continued discrimination against the Roma as evidenced through the ECRI report and other reports of coerced sterilizations, and finally, the presence of similar pending cases before the ECtHR.⁷⁷

III. ANALYSIS

In *V.C. v. Slovakia*, the petitioner asked the ECtHR to determine whether the unnecessary sterilization of a Roma woman absent her informed consent was motivated by race.⁷⁸ While the majority of the ECtHR swiftly proclaimed a lack of sufficient evidence to prove a discriminatory policy or motivation, Judge Mijovic, in dissent, voiced the importance of assessing the merits of the discrimination claim, as racial violence is a particularly egregious affront to human dignity.⁷⁹ In *Mizigarova v. Slovakia*, the ECtHR opined that “treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive to fundamental rights.”⁸⁰ Thus, by avoiding

⁷³ *Id.* ¶ 177.

⁷⁴ *See id.* ¶ 180.

⁷⁵ *Id.* at 45 (Mijovic, J., dissenting).

⁷⁶ *See id.* at 45–46.

⁷⁷ *See V.C.*, App. No. 18968/07 at 45–46 (Mijovic, J., dissenting).

⁷⁸ *See V.C. v. Slovakia*, App. No. 18968/07, Eur. Ct. H.R. (2011) ¶ 169, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107364>.

⁷⁹ *See id.* ¶ 177; *id.* at 45–46 (Mijovic, J., dissenting).

⁸⁰ *Mizigarova v. Slovakia*, App. No. 74832/01, Eur. Ct. H.R. (2010) ¶ 119, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102279>.

a fact-specific assessment of the discrimination complaint, the majority diminished the focus of the case to the hospital's improper sterilization procedures, rather than the government's systematic sterilization of Roma women.⁸¹

Contrary to the ECtHR's ruling, V.C. did present "sufficiently strong, clear and concordant inferences" that the government orchestrated, or was at least complicit in, a sterilization initiative targeted at Roma women.⁸² The Slovakian government arguably failed to conduct an effective investigation into concrete and objective information that suggested the sterilization was racially motivated.⁸³ Even if the government's investigation is deemed sufficient, its substantive violations of Article 3's prohibition on torture and inhuman or degrading treatment and Article 8's right to private and family life should have led to an Article 14 discrimination violation.⁸⁴ A discrimination finding was appropriate in light of the importance of the rights violated, the disproportionate accounts of hospitals sterilizing Roma women, and other objective evidence that implicates discriminatory intent.⁸⁵ Thus, the ECtHR should have shifted the burden to the state to prove that no racial discrimination occurred.⁸⁶

Sufficient objective evidence existed for Slovakian authorities to know that the hospital's sterilization procedures were possibly motivated by race.⁸⁷ As Judge Mijovic noted in his dissenting opinion, the designation in the hospital's medical records that "[p]atient is of Roma origin" is suspect, and suggests that the sterilization may have been racially motivated.⁸⁸ Similar to the officer's racial remark to a bystander following the shooting of two Roma men in *Nachova and Others v. Bulgaria*, this racial notation in the medical records is concrete evidence capable of suggesting racial motive, and therefore necessitating further investigation.⁸⁹ Even if this note was simply intended to provide Roma patients with "special protection" to combat poor health care in Roma communities, the fact that the special attention provided here was a

⁸¹ See V.C., App. No. 18968/07 ¶¶ 177–180.

⁸² *Nachova and Others v. Bulgaria*, App. Nos. 43577/98 & 43579/98, Eur. Ct. H.R. (2005) ¶ 147, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69630>; see also V.C., App. No. 18968/07 at 44–45 (Mijovic, J., dissenting).

⁸³ See V.C., App. No. 18968/07 ¶ 121.

⁸⁴ See *id.* ¶¶ 120, 155; *Mizigarova*, App. No. 74832/01 ¶ 116.

⁸⁵ See V.C., App. No. 18968/07 ¶¶ 120, 155; *Mizigarova*, App. No. 74832/01 ¶ 116.

⁸⁶ See *Mizigarova*, App. No. 74832/01 ¶¶ 115–116.

⁸⁷ See V.C., App. No. 18968/07 ¶¶ 17, 18, 44, 45, 80, 121.

⁸⁸ *Id.* at 45 (Mijovic, J., dissenting).

⁸⁹ See *id.*; *Nachova*, App. Nos. 43577/98 & 43579/98 ¶¶ 15–35; 164–616.

coerced, medically unnecessary sterilization further suggests racial motivation.⁹⁰

Additionally, the history of prevalent discrimination against the Roma during the Communist regime in Slovakia, which continues, albeit in less overt forms, to the present day, is another consideration that implies racial bias was a factor.⁹¹ The ECtHR previously emphasized the history of discrimination against the Roma when finding Article 14 discrimination violations in both *Nachova* and *D.H. and Others v. the Czech Republic*.⁹² Consequently, reports indicating continued discrimination against Roma, especially regarding reproductive rights and coerced sterilizations, further suggest racial bias.⁹³ For instance, the Body and Soul Report stated that over 140 Roma women have been sterilized without informed consent.⁹⁴ Moreover, other cases of coerced sterilization similar to V.C.'s have either been adjudicated in Slovakian courts or are still pending, which also suggests that coerced sterilizations are disproportionately performed on Roma women.⁹⁵ This is analogous to the indirect discrimination found in *D.H.* where the disproportionate number of Romani children attending special schools proved a state policy of racial discrimination.⁹⁶

Additionally, public officials including the prime minister, health minister, and others, made derogatory statements about the Romani to the public, thus illuminating the pervasive racism within the government.⁹⁷ For instance, in April 2000, the deputy mayor of Rudnany, Ladislav Sabo, said with regards to the Romani population, "What we need is a Chinese fertility program."⁹⁸ Thus, a government intent to curb the Romani population continued to exist.⁹⁹ As the Slovakian authorities were aware that racial animus may have played a role in coerced sterilizations, they had a duty to conduct an effective investigation to deter-

⁹⁰ V.C., App. No. 18968/07 ¶ 117; *id.* at 45–46 (Mijovic, J., dissenting).

⁹¹ See *id.* at 45 (Mijovic, J., dissenting).

⁹² See *D.H. and Others v. the Czech Republic*, App. No. 57325/00, Eur. Ct. H.R. (2007) ¶¶ 184, 210, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256>; *Nachova*, App. Nos. 43577/98 & 43579/98 ¶ 154.

⁹³ See V.C., App. No. 18968/07 at 45–46 (Mijovic, J., dissenting); *D.H.* ¶¶ 184, 210; *Nachova*, App. Nos. 43577/98 & 43579/98, ¶ 154.

⁹⁴ See *Body and Soul Report*, *supra* note 13, at 55.

⁹⁵ See V.C., App. No. 18968/07 at 45–46 (Mijovic, J., dissenting).

⁹⁶ See *D.H.*, App. No. 57325/00 ¶¶ 193–195; 208–210.

⁹⁷ See *Accountability Report*, *supra* note 9, at 5.

⁹⁸ *Id.* (quoting Steven Erlanger, *The Gypsies of Slovakia: Despised and Despairing*, N.Y. TIMES, Apr. 3, 2000 available at <http://www.nytimes.com/2000/04/03/world/the-gypsies-of-slovakia-despised-and-despairing.html>).

⁹⁹ See *id.*

mine whether race did in fact motivate the sterilization.¹⁰⁰ While the ECtHR did not find an Article 3 failure to conduct an effective investigation, the Accountability Report identified several defects in the Slovak investigation into coerced sterilizations, which arguably invalidate the investigation, or at least implicate a racist motive behind the sterilizations.¹⁰¹

First, Slovakia did not initiate an investigation specific to V.C., but rather conducted a general investigation into the many reports of coerced or forced sterilizations of Roma women.¹⁰² Second, in order to avoid finding government wrongdoing, the investigation only sought to determine whether the crime of genocide was perpetrated—a crime that is one of the most difficult to prove—rather than a lesser crime of bodily harm.¹⁰³ Third, the investigation only considered reports of wrongdoing from 1993 onward, thus completely ignoring the blatantly forced sterilizations performed during and after the Communist regime.¹⁰⁴

Fourth, the investigation was plagued by a conflict of interest because the Ministry of Health investigated its own public hospitals' alleged transgressions with little or no assistance from the inspector general, an independent commission, or outside watchdog organizations.¹⁰⁵ Fifth, the investigation ignored the principle of informed consent, thus dismissing numerous incidents like V.C.'s where hospitals sterilized Roma women without informed consent—an internationally recognized human rights violation.¹⁰⁶ Notwithstanding cases of coerced sterilizations, the government knew about several reports of forced sterilization, including some incidents of minors being sterilized absent parental consent, but failed to further investigate them, simply classifying them as procedural shortcomings.¹⁰⁷ Lastly, the government obstructed the investigation in a number of ways.¹⁰⁸ Hospitals, sometimes aided by courts, often denied or limited Roma women's access to their medical records.¹⁰⁹ The Ministry of Human Rights and National Minorities also

¹⁰⁰ See *Nachova*, App. Nos. 43577/98 & 43579/98 ¶¶ 164–166, 168.

¹⁰¹ See *V.C.*, App. No. 18968/07 ¶¶ 128–129; *Accountability Report*, *supra* note 9, at 8–13.

¹⁰² See *V.C.*, App. No. 18968/07 ¶ 121.

¹⁰³ See *Accountability Report*, *supra* note 9 at 8–9.

¹⁰⁴ See *id.* at 8–10.

¹⁰⁵ See *id.* at 9–10.

¹⁰⁶ See *e.g.*, *V.C.*, App. No. 18968/07 at 45 (Mijovic, J., dissenting); *Accountability Report*, *supra* note 9, at 13–14.

¹⁰⁷ See *Accountability Report*, *supra* note 9, at 13–14.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 11–12.

intimidated potential plaintiffs from bringing claims by threatening statutory rape charges against husbands married to minor Roma women and charging victims with failure to report a known crime if they later came forward.¹¹⁰

In light of the defective and arguably corrupt government investigation into coerced sterilization of Roma women, the government failed to take all reasonable steps to determine whether racism motivated the sterilizations.¹¹¹ Thus, similar to the ruling in *Nachova*, the government violated Article 14's discrimination provision in light of its failure to conduct an effective investigation.¹¹²

Even if the government's investigation escapes an Article 3 procedural violation, the weakness of the investigation combined with the aforementioned objective evidence sufficiently proves a prima facie case of discrimination, thus shifting the burden to Slovakia to rebut the discrimination charges.¹¹³ While the ECtHR has seemingly set a heightened standard for proving discrimination in conjunction with a substantive violation, rather than a procedural violation, the importance of Article 3's prohibition on torture and degrading treatment, and Article 8's right to private and family life, weigh heavily in favor of shifting the burden onto the government.¹¹⁴ Additionally, reports that coerced sterilizations are disproportionately performed on Roma women evidence indirect discrimination that should transfer the burden onto the government.¹¹⁵ Consequently, the ECtHR should have found an Article 14 discrimination violation on the basis of race.¹¹⁶

CONCLUSION

In *V.C. v. Slovakia*, the ECtHR recognized that a Slovakian hospital's coerced sterilization practices violated the Convention's Article 3 prohibition on torture and inhuman or degrading treatment, and Article 8 right to private and family life. Nonetheless, the ECtHR refrained from determining whether these practices discriminated on the basis of

¹¹⁰ See *id.* at 10.

¹¹¹ See *Nachova*, App. Nos. 43577/98 & 43579/98 ¶¶ 164–166, 168.

¹¹² See *V.C.*, App. No. 18968/07 at 45 (Mijovic, J., dissenting); *Nachova*, App. Nos. 43577/98 & 43579/98 ¶¶ 164–166, 168.

¹¹³ See *V.C.*, App. No. 18968/07 at 44–45 (Mijovic, J., dissenting); *Mizigarova*, App. No. 74832/01 ¶ 116.

¹¹⁴ See *V.C.*, App. No. 18968/07 ¶¶ 100, 176; *Mizigarova*, App. No. 74832/01 ¶¶ 116–117; *Nachova*, App. Nos. 43577/98 & 43579/98 ¶¶ 162–164.

¹¹⁵ See *D.H.*, App. No. 57325/00 ¶ 175; *Mizigarova*, App. No. 74832/01 ¶ 117.

¹¹⁶ See *V.C.*, App. No. 18968/07 at 45–46 (Mijovic, J., dissenting).

race, thus ignoring the crux of the alleged problem—that the victims were primarily Roma women.

An analysis of the ECtHR's prior rulings regarding racial discrimination indicates that where the petitioner has proven by sufficiently strong inferences that a difference in treatment occurred, the burden to disprove discrimination shifts to the government. Given the abundance of objective evidence suggesting racial motivation, the importance of the Convention rights at stake here, and the vulnerable position of the Roma in Slovakia, the ECtHR should have found a presumption of racial discrimination, thereby requiring Slovakia to prove that the difference in treatment was objectively reasonable and not discriminatory. By sidestepping the discrimination allegations, the ECtHR trivialized the government's actions, framing the systematic, coerced sterilization of Roma women as mere hospital error.