REPORT

# For effective protection of the rights of Roma

## CONTRIBUTION TO THE NATIONAL STRATEGY

**In the eyes of the law, we are all equal**

Défenseurdesdroits
RÉPUBLIQUE FRANÇAISE

REPORT

# CONTRIBUTION TO THE NATIONAL STRATEGIC FRAMEWORK FOR ROMA EQUALITY, INCLUSION AND PARTICIPATION

For effective protection of the rights of Roma

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# INTRODUCTION

The Defender of Rights, approached by the Interministerial Delegation for Housing and Access to Housing (DIHAL), wanted to contribute to the development of the French strategy on Roma equality, inclusion and participation. In the interests of consistency with regard to the context and national law, the Defender of Rights wished to present this contribution in two parts, one devoted to the rights of Travellers and the other to those of foreign Roma people, although a certain number of issues are common to both.

This contribution is devoted to Roma citizens of the European Union or of third countries. It has been drawn up on the basis of the work carried out by the Office of the Defender of Rights since its inception and is based on the expertise developed on the basis of individual claims handled by its investigation services but also on its opinions, recommendations and reports relating to more general provisions of the legislative and regulatory framework.

# BACKGROUND INFORMATION

## 1· THE RECOMMENDATION OF THE EUROPEAN COMMISSION

In October 2020, the European Commission published a proposal for a Recommendation, adopted by the Council on 12 March 2021 on Roma equality, inclusion and participation[1].

This recommendation provides for Member States to draw up, by the end of 2021, **national strategic frameworks for Roma equality, inclusion and participation**, which incorporate measures in particular in seven key areas: equality, inclusion and participation in terms of horizontal objectives, but also education, employment, healthcare and housing concerning sectoral objectives.

With regard to equality and the fight against discrimination, in its first paragraph, the recommendation encourages Member States to "*consolidate efforts to adopt and implement measures to promote equality and effectively prevent and combat discrimination (...) as well as its root causes*". In particular, by adopting the provisions related to the powers of the Defender of Rights in the fight against discrimination, the efforts made must include:

- Intensify the fight against direct and indirect discrimination and harassment, as provided for in Directive 2000/43/EC (...);
- Provide targeted assistance to Roma people who have faced discrimination;
- Combat multiple and structural discrimination against Roma and, in particular, against Roma women, Roma children, LGBTI+ Roma, Roma with disabilities, elderly Roma, stateless Roma and EU mobile Roma.

In the key areas covered by the recommendation and for which the Defender of Rights is competent, the Recommendation encourages Member States to:

- Prevent forced evictions by promoting early warning and mediation, organise support for people at risk of eviction and provide adequate alternative housing, focusing particularly on families;
- Ensure effective equal access to all stages of education without discrimination;
- Ensure effective equality and non-discrimination in access to public services, including health services, and in access to adequate social protection schemes;
- Guarantee access to desegregated housing and essential services;
- Guarantee access to essential services such as tap water, safe and clean drinking water[2];
- Improve the living conditions of Roma people and prevent and tackle the negative health impact of exposure to pollution and contamination;

With regard to the methodological aspect, paragraphs 14 and 15 of the Recommendation provide that Member States allow the involvement of the national bodies for combating discrimination in all their tasks (handling of complaints, research work, cooperation with civil society, etc.).

The recommendation also highlights the need for governments to closely involve these bodies in the development, implementation and monitoring of national strategy.

DIHAL therefore asked the Defender of Rights in May 2021 to contribute to the work being undertaken to develop the strategy.

Finally, the recommendation insists on the assistance that Member States must provide to these bodies so that they can effectively remedy the problem of "underreporting" by Roma people or people perceived as such and the non-exercise of their rights.

## 2 · THE FIELD OF COMPETENCE OF THE DEFENDER OF RIGHTS

The Defender of Rights was created by the Organic Law No. 2011-333 of 29 March 2011. It is an independent, single-member administrative authority established by Article 71-1 of the Constitution.

It is responsible for:

- Combating direct or indirect discrimination prohibited by law, or by an international commitment duly ratified or approved by France, as well as promoting equality;
- Defending rights and freedoms in the context of relations with state administrations, local authorities, public institutions, and bodies with a public service mission;
- Defending and promoting the best interests and the rights of the child enshrined in law or by an international commitment duly ratified or approved by France;
- Ensuring compliance with professional ethics by persons carrying out security activities on the territory of the French Republic.

Finally, the Organic Law No. 2016-1690 of 9 December 2016 on the competence of the Defender of Rights for the orientation and protection of whistleblowers provides that it is also in charge of "helping to guide all whistleblowers to the competent authorities under the conditions laid down by law and ensuring their rights and freedoms".

It has also been appointed by the Government to ensure, on the one hand, the mission of an independent monitoring mechanism for the implementation of the International Convention on the Rights of Persons with Disabilities under Article 33.2 and, on the other, the monitoring of the International Convention on the Rights of the Child.

The Defender of Rights is also the body responsible for France, in accordance with Article 4 of Directive 2014/54/EU, for promoting equal treatment and supporting European workers and members of their family.

As part of its various missions, since its inception, the Defender of Rights has carried out work (previously undertaken by the High Authority for the Fight against Discrimination and for Equality) in the fields of protection, promotion and proposals for reforms concerning the rights of Roma people or people perceived as such. It was thus required to issue several individual and/or general opinions and decisions.

The Defender of Rights is further represented, as an independent administrative authority, on the Commission nationale de suivi de la résorption des bidonvilles set up as part of the government's instruction of 25 January 2018 aimed at giving new impetus to the clearing of illegal camps and slums, organised by the Interministerial Delegation for Housing and Access to Housing (DIHAL) on 20 June 2018. Within this context, the institution participates, in particular, in the working group created around the theme of housing.

This representation allows the Defender of Rights to collect information from civil society and institutional players involved in the implementation of the objective of clearing illegal camps and slums, and to ensure the dissemination of such information from the field within the institution. The Defender of Rights also communicates its news within the Commission at quarterly meetings and is able to answer questions asked by members about its competences.

In this respect, the Defender of Rights has access to the *resorption-bidonvilles* platform, and attended the webinar organised by DIHAL on 31 May entitled "Instruction du 25 janvier 2018 sur la résorption des bidonvilles : où en est-on 3 ans après ?"[3]. The Defender of Rights is also represented within the *Jurislogement* network and is an active participant in the "occupants/eviction" and "accommodation" working groups. Participation in the quarterly network meetings and working groups enables the Defender of Rights to exchange information with the associations on the subjects of housing and accommodation.

## 3· GENERAL OPINIONS AND DECISIONS SINCE THE INSTITUTION'S INCEPTION

Beyond individual situations, the Defender of Rights has made several recommendations requesting the amendment of legislative and regulatory texts that do not comply with respect for the fundamental rights and freedoms of Roma people or people perceived as such.

As a preliminary point, it is important to mention that Roma of foreign nationality face specific difficulties related to their membership of the Roma community, but in some cases they are combined with the difficulties more generally encountered by foreigners and migrants present in the territory which the Defender of Rights has also sought to highlight for many years.

Questioned in spring 2012 by numerous associations about the situation of persons of Romanian and Bulgarian origin occupying land without right or title, mainly of Roma origin, both on the legal and material conditions of evacuation of land as well as on access to schooling for children or access to the healthcare system,

the Defender of Rights analysed the application of the interministerial circular of 12 August 2012 on the anticipation and support of evacuations of illegal camps[4]. This constitutes the basis of the policy of the Defender of Rights developed later on in terms of informal housing (slums, squats and camps).

More generally, the Defender of Rights makes no distinction as to the origin or nationality of persons living in informal living spaces, whether they are citizens of the European Union or third countries. Illegal occupation of land does not deprive the exercise of the most fundamental rights such as the right to accommodation, the right to be treated, the right to an education and the right not to suffer inhumane or degrading treatment.

Consequently, the recommendations made in recent years in the publications of the Defender of Rights concerning the situation of exiles in Calais or Paris for the purpose of improving the reception of exiles in France[5] are largely transferable to Roma nationals of the European Union or from third countries.

In a 2016 report on the fundamental rights of foreigners in France[6], the Defender of Rights pointed out all the obstacles that hinder access by foreigners to fundamental rights, based on the institution's decisions but also by identifying new legal problems. It noted that the limits to the exercise by foreigners in France of their fundamental rights were not only linked to practices without a legal basis, but also to certain rules of law themselves, both in terms of civil and political law and economic and social rights.

Many of these difficulties, particularly with regard to social security, may also, or sometimes particularly, affect foreign Roma people. With particular regard to vulnerable European Roma people, the conditions of the right of residence applicable to them are governed by multiple and complex sources, sometimes not known to or poorly applied by the social bodies responsible for assessing them, which leads to often too restrictive approaches to the right of residence that have a direct impact on the rights of those concerned.

In addition, within the context of the contribution of the Defender of Rights to the citizen consultation on discrimination[7], it reiterated that public authorities must take into account in all their decisions the fact that the Roma community constitutes a "'*socially disadvantaged and vulnerable group' recognised as such by the European Court of Human Rights which calls for special attention and protection*".

**The Defender of Rights also called for consideration of the stigmatisation of Roma people as part of the plan to combat racism and any strategy to combat discrimination based on origin**.

# FINDINGS AND RECOMMENDATIONS AIMED AT THE EFFECTIVE PROTECTION OF THE RIGHTS OF PERSONS OF ROMA ORIGIN

## 1· ACCESS TO EMERGENCY ACCOMMODATION AND HOUSING

According to the census carried out by DIHAL on 12 May 2021, 22,189 people lived in slums, including 12,342 European nationals, mostly from Romania and Bulgaria[8].

In this context, the European Committee of Social Rights concluded that France had failed to comply with its obligations under Articles 16 and 31 of the European Social Charter on the right to housing on several occasions, in particular with regard to Roma people in a regular situation[9]. The Committee stressed, among other things, "*the lack of adequate protection for Roma families and Travellers in terms of housing, including the conditions of eviction and access to social housing*".

In the exercise of its missions, the Defender of Rights regularly denounces the unfit living conditions of persons who, because of the failure to effectively guarantee their unconditional right to emergency accommodation, are forced to live in squats, slums or informal camps[10].

The extremely vulnerable include foreign people, with Roma people or people perceived as Roma overrepresented.

### RECOMMENDATION 1

The Defender of Rights, while stressing the unacceptable nature of the persistence of slums, recalls that a slum should never be cleared without long-term solutions that respect the fundamental rights of the people living there being provided first.
Otherwise, the slums reform, in increasingly precarious conditions.

#### A UNDERMINING OF THE UNCONDITIONAL RIGHT TO EMERGENCY ACCOMMODATION RESPONSIBLE FOR THE FORMATION OF SLUMS

While the unconditional reception in an emergency accommodation facility is provided for by Article L. 345-2-2 of the French Family and Social Action Code (CASF), which provides that "*any homeless person in a situation of medical, psychological or social distress shall have access, at any time, to an emergency accommodation system*", and it was raised to the rank of fundamental freedom by the judge ruling in summary proceedings of the Council of State in an order dated 10 February 2012[11], in practice, this principle is not applied.
The case law of the Council of State[12] indeed leads to the reservation of emergency accommodation only for persons enjoying

a right of residence or, failing this, in a particularly vulnerable situation.

The Defender of Rights regularly denounces the violations resulting from the irrelevant choice to alleviate the saturation of this system by checking the regularity of the residence of those hosted.

In its report on the fundamental rights of foreigners in France[13], published in May 2016, the Defender of Rights asked the public authorities to draw the conclusions of the principle of non-conditionality provided for by law, by making every effort to produce an adequate housing supply, with the selection of the persons concerned with regard to their nationality not, in any case, constituting the adjustment variable of a system that does not meet demand, whereas only the vulnerability of the persons concerned should be taken into account.

More and more frequently, prioritisation criteria, different from one department to another and evolving over time, are introduced in order to place conditions on access to this system.

These violations of the principle of non-conditionality are just as critical as the consideration of the administrative situation because they have the effect of considering, for example, that a family with a child under the age of three would take priority when it comes to being housed in one department while, in another, it would be families with children under one year old. Such practices are worrying as they lead to the belief that the need for shelter differs according to the age of a child.

In its 2017 annual report on the rights of the child, entitled *Au miroir de la convention internationale des droits de l'enfants*[14], the Defender of Rights recalled that the progressive restriction of the principle of non-conditionality of acceptance in emergency accommodation, due in particular to the tightening of migration policy and the shortage of housing, was likely to constitute a serious violation of the fundamental rights of children, their dignity and their health.The institution also produced recommendations[15] and observations before the Council of State[16] on the circular of 12 December 2017 on the examination of administrative situations in emergency accommodation, as well as on the instruction of 4 July 2019 on cooperation between integrated reception and orientation services and the French Office for Immigration and Integration for the management of asylum seekers and beneficiaries of international protection. It considers that these two texts, by creating confusion between the issues related to the implementation of the right to accommodation and those of the migration policy, tend to undermine the principle of the non-conditionality of the right to emergency accommodation.

Regarding the shortage of accommodation, the Ministry of Housing announced at the end of May 2021 that 43,000 spaces would be kept open for one year until at least the end of March 2022.

The health crisis has thus encouraged the increase in emergency housing stock long called for by those on the ground and by the Defender of Rights.

This deployment must be accompanied by compliance with the rules of access and maintenance within this system provided for by the French Family and Social Action Code, which does not seem to be guaranteed currently, the Defender of Rights having already received several claims denouncing the practice of many departments aimed at making access to emergency accommodation conditional on increasingly selective, random and potentially discriminatory criteria.

Consequently, the Defender of Rights will remain vigilant as to the effectiveness of this right. On this point, the fact that DIHAL is now in charge of the public service of housing should allow greater consistency in the implementation of public policies to fight homelessness and those aimed at the clearance of slums.

**RECOMMENDATION 2**

The Defender of Rights reiterates that, according to the law, the right to emergency shelter must be guaranteed unconditionally. This means encouraging the consultation of stakeholders to really identify needs and deploy resources accordingly.
The administrative situation of persons cannot under any circumstances constitute the adjustment variable of an undersized system. Only the orientation towards a stable housing or care structure, or towards suitable accommodation, can justify departure from the emergency system.

## B· EVACUATIONS AND EVICTIONS IN DISREGARD OF FUNDAMENTAL RIGHTS

As an additional penalty, the many people who, in the absence of decent housing or at least reception in the emergency shelter system, are forced to remain on the streets, in makeshift housing, squats, camps or slums, often live in fear of eviction.

In this regard, Roma people represent a disproportionate share of those threatened with forced evictions, and the Defender of Rights is regularly aware of situations in which those occupying land without right or title, of Roma origin or identified as such, have been the subject of an eviction order following a court decision.

According to figures from the Observatoire des expulsions transmitted by Romeurope for the period from November 2020 to October 2021, 7,752 people were affected by evictions, including Roma people or people perceived as Roma.

Of the 306 evictions reported outside the cities of Calaisis and Grande-Synthe, 106 concerned living spaces occupied by Roma people or people perceived as Roma, i.e. 34% of the evictions.

### a. Breaches resulting from evacuations carried out without actual support measures

Regularly contacted about the repeated evictions of the inhabitants of slums and squats in France, the Defender of Rights is called upon to intervene upstream of these evictions to reiterate the rights of those concerned by these procedures.

In this context, it ensures the implementation of appropriate alternative solutions in the event of eviction, in accordance with the recommendations of the circular of 26 August 2012 on the anticipation and support of operations to evacuate illegal camps and the instruction of 25 January 2018 aimed at giving new impetus to the clearing of illegal camps and slums.

In June 2013, the Defender of Rights thus published an initial analysis of the application of the interministerial circular of 26 August 2012 on the anticipation and support of operations to evacuate illegal camps[17].

It then noted that the lack of anticipation of evacuation operations by the authorities, as well as the inadequacy of accompanying measures to ensure the continuity of the rights of those evacuated, were counterproductive since they only moved the problem to another site and increased the vulnerability of the occupants, thereby imposing forced "nomadism" on them.

The claims regularly filed with the Defender of Rights reveal in fact that this phenomenon of camp reconstitution is the consequence of the inadequacy of the proposed accompanying measures or the absence of such measures. This is particularly the case when nights in hotels are offered only to families recognised as vulnerable and who have been settled on a site for several years.

Generally approached prior to the implementation of the eviction procedures, the Defender of Rights has, since 2013, submitted observations in court as an *amicus curiae* in the context of thirty disputes brought

against these proceedings, mainly before the courts. The legal analysis presented by the institution was most often followed up by the judicial judge who prohibited the eviction or set time limits for its implementation.

In these decisions, the Defender of Rights recalls the recommendations of the circular of 26 August 2012 in terms of the accompaniment of those evicted, as well as the protective case law of the European Court of Human Rights (ECHR)[18] and of the European Committee of Social Rights[19], which undertake to take into account the situation of persons evicted from land. On the basis of the right to private and family life guaranteed by Article 8 of the Convention, the ECHR calls for a balancing of the interests at stake: those of the owner of the site and those of the occupants who have established their domicile on the site. Eviction without accompanying measures, without an alternative accommodation solution, is thus likely to violate the right to respect for private and family life and the Defender of Rights recalls in this context the proportionality check that the judge must ensure.

In 2014, the Defender of Rights also made observations before the ECHR, as a third-party intervener, in the case of *Hirtu v. France*[20], which raised the question of the conformity of the eviction measures aimed at Roma families living in makeshift shelters on illegally occupied land, in extremely precarious conditions, with the requirements of the European Convention on Human Rights, in particular Articles 3, 8 and 13 thereof. In its observations, the Defender of Rights brought to the attention of the judges the alarming conclusions that it had drawn in its analysis of the application of the interministerial circular of 26 August 2012. It also reiterated the obligations incumbent on France in the context of eviction orders aimed at families in precarious situations who occupy land without right or title, in accordance with the rights arising from the Convention: rights to the protection of the home, the right not to be homeless, the right to schooling, the right to protection of health, etc.

In a judgment of 14 May 2020, the ECHR concluded that France had violated Articles 8 and 13 of the Convention. In that judgment, the Court recalls that the Roma community constitutes a socially disadvantaged and vulnerable group, and that, as such, its special needs must be taken into account in the examination that the authorities are obliged to carry out, "*not only when they envisage solutions to the unlawful occupation of sites, but also, if eviction is necessary, when deciding on its date, the terms and, if possible, resettlement offers*". In the case in hand, the Court notes that the circular of 26 August 2012 was not respected. It also reiterates the right of persons to benefit from an examination of the proportionality of the eviction measure by an independent tribunal.

The Defender of Rights also submitted observations to the European Committee of Social Rights, in the case *Forum européen des Roms et des Gens du voyage v. France*[21]. It submitted similar findings on the application of the 2012 interministerial circular and on access to their rights by persons belonging to the Roma community, noting in particular the lack of legal protection of Roma affected by a threat of eviction and appropriate and permanent resettlement solutions. The Committee followed the conclusions of the Defender of Rights relating to housing, considering in particular that frequent evictions of Roma families were not sufficiently guaranteed to reduce their impact on access to the fundamental rights of the persons concerned[22].

In this context, the adoption in 2018 of the instruction of 25 January aimed at giving new impetus to the clearing of illegal camps and slums[23], intended to correct the inadequacies of the interministerial circular of 26 August 2012 on dismantling operations, appeared as a shift in paradigm in the policy to combat this precarious type of housing. Conceding that "*despite repeated evacuations in recent years, the number of people occupying these slums has not significantly decreased*", the government explicitly acknowledged

that concerted actions involving several stakeholders alongside State departments were more effective than evictions at combating the phenomenon of camp formation.

In this regard, when the UN Regional Human Rights Office in Europe published its *Aucun laissé-pour-compte* report on the effectiveness of the right to housing and related rights for Roma in France, on 29 June 2018, Claude Cahn, a human rights official, declared that:

"*The cycle of housing in slums and periodic forced evictions should be replaced by insertion into conventional and integrated housing with appropriate support. The new instruction of the government of January 2018 is an opportunity to develop and implement policies to protect and promote the human rights of the poorest people and ensure that no one is left behind*".

Three years later, DIHAL, in charge of monitoring the implementation of this text, analysed its application and presented its analysis to the Defender of Rights.

As regards the positive points, it points out that the appropriations for the slum clearance policy were doubled in 2020, from four million euros to eight million. The digital platform set up by DIHAL to strengthen the cooperation of the various stakeholders and allow for better identification and monitoring of situations on the ground is also part of the progress.

Nevertheless, while the deployment of this new policy enabled, according to DIHAL, the clearance of several occupied sites[24], there is still a lot to be done in this area since it identified, as at 31 May 2021, 439 slums in mainland France[25]. For 2021, DIHAL set a target of 39 sites to be cleared.

Thus, despite the ambitions displayed in 2018, evacuations without suitable alternative solutions continue.

At the same time, the health crisis has made those forced to live in informal housing even more vulnerable.

Thus, the Defender of Rights reiterated, in June 2021[26], its concern with regard to the living conditions of children living in slums, and the recurrence of evictions not accompanied by suitable resettlement solutions.

Recently, the Defender of Rights was informed of the measures taken by the Ile-de-France Regional Health Agency (ARS) to follow up the children and of the few hotel spaces that could be offered to four families of children suffering from lead poisoning as a result of them living with their families in a slum located in the former areas of sludge and raw waste water spreading in Val d'Oise. However, the families did not stay at the hotel, in particular because they could not cook in their hotel rooms, but also due to their scrapping activities. The "resettlement" arrangements therefore do not always seem to be appropriate for the social realities of these families.

### RECOMMENDATION 3

The Defender of Rights reiterates[27] that, in accordance with the right to protection of the home and the right not to be homeless, the evacuation of a camp must be preceded by a social and global diagnosis, and that it cannot be carried out before the public authorities have previously identified real alternative accommodation solutions and taken the necessary measures to ensure continuity in access to education and care. It also recommends complying with the ECHR's *Hirtu v. France* judgment and ensuring that persons who are the subject of an eviction order have an effective remedy.

### b. Evacuations with no legal basis or revealing abuses of procedure

In addition to evictions carried out without an appropriate accompanying measure, the Defender of Rights is concerned about the development of practices consisting of using non-dedicated criminal or administrative proceedings to conduct evacuations outside any legal framework or to circumvent any protective measures ordered by the judicial judge. Indeed, according to the figures of the *Observatoire des expulsions,* 12.3% of the evictions that took place between 1 November 2019 and 31 October 2020 outside of Calais and Grande-Synthe were executed without a legal basis[28].

For example, on several occasions, the institution has heard complaints alleging orders to leave French territory (OQTFs) in slums by way of an eviction order, or fines for criminal offences being issued in order to evict occupants from a plot of land. The associations consulted by the Defender of Rights note "*more and more repeated visits from the police in certain living spaces in order to intimidate or threaten inhabitants, whether or not an eviction or evacuation order is in place. These practices, which are sometimes outside any legal framework, and without the authorisation of police help being necessary, do not allow inhabitants to access accommodation solutions (...). They often require them to leave quickly, not allowing them to prepare psychologically and physically for departure.*"

In two decisions of 2018, the Defender of Rights thus reiterated that criminal proceedings cannot under any circumstances constitute a method of eviction of occupants without right or title, stressing that it deprives those evicted of the guarantees provided by law[29]. On an unprecedented basis, it recommended disciplinary sanctions against a Prefect, considering that the Prefect had failed in its duty by authorising implementation of an eviction outside any legal framework.

For several years now, the Defender of Rights has also been concerned about the development of the practice of holding administrative and judicial procedures concurrently to ensure the eviction of occupants on the same site. It seems that, in order to circumvent favourable court decisions issued by the judicial judge, some municipalities, sometimes acting with the support of the Prefecture, decide to issue a municipal evacuation order.

The Defender of Rights has thus been able to underline, on two occasions, the development of this practice in Seine-Saint-Denis, on the one hand, during observations brought before the judge ruling in summary proceedings of the Administrative Court of Montreuil[30], and on the other hand before the Council of State, in the context of a dispute brought against a municipal decree ordering the evacuation of occupants of Roma origin[31]. In these observations, the Defender of Rights denounced, in addition to the lack of support for eviction measures, the development of the practice aimed at accumulating administrative and judicial procedures to ensure the eviction of occupants, a practice that is described as "*questionable abuse of procedure*". The development of this practice indeed appears to be a legitimate cause for concern about respect for the authority of court decisions. The legality of the practice was moreover expressly questioned by the CNCDH in its "*Avis sur le respect des droits fondamentaux des populations vivant en bidonvilles*"[32]. In this context, the Defender of Rights has recently submitted observations before the Constitutional Council[33] on the law on acceleration and simplification of public action of 28 October 2020, which extends the scope of the derogatory eviction procedure. It argued that these eviction procedures not subject to judicial review deprived the occupants of vacant accommodation and premises of effective recourse, and therefore of numerous guarantees and respect for their fundamental rights, in particular with regard to the great vulnerability of the Roma

**RECOMMENDATION 4**

The Defender of Rights recalls that the detection of an offence must give rise to the implementation of criminal proceedings, controlled by the judicial authority. as soon as the decision is made to question somebody, the Public Prosecutor must be informed, and all the reports associated with an interrogation and the application of the rights attached to the deprivation of liberty must be drawn up. Criminal law may not, unless it departs from its objective, constitute a method of eviction.

### c. Violations of the ethics of security observed in the context of evacuation procedures

In the 2013 report on the application of the interministerial circular of 26 August 2012[34], the Defender of Rights received several claims relating to damage to property, harassment and violence by police forces in the context of eviction orders. According to the figures of the *Observatoire des expulsions*, between November 2019 and October 2020, in 44.76% of cases, those evicted had their property confiscated or destroyed by the police[35].

Since then, the Defender of Rights has been contacted regarding situations in which the intervention and use of force appeared disproportionate. In two aforementioned 2018 decisions, it was thus required to recommend disciplinary sanctions against police officers[36], including a commissioner and a peacekeeper.

The Defender of Rights also reiterated, in a decision of 25 November 2015[37], that the ordinary law prohibiting any restriction on the freedom to come and go applied without distinction as to the so-called actual or alleged ethnic origin, and that the freedoms of populations of Roma origin cannot be restricted, without legal basis, even if these restrictions are temporary.

## 2· ACCESS TO RIGHTS REGARDLESS OF WHERE YOU LIVE

**The Defender of Rights would like to reiterate here that the illegal occupation of land does not deprive the exercise of the most fundamental rights such as the right to accommodation, the right to be treated, the right to an education and the right not to suffer inhumane or degrading treatment.**

In this sense, the recommendations made in recent years by the Defender of Rights concerning the situation of exiles in Calais or Paris for the purpose of improving the reception of exiles in France[38] are – as has been mentioned previously – largely transferable to Roma nationals of the European Union or from third countries.

### A THE RIGHT TO DOMICILIATION

According to Articles L. 264-1 and L. 264-4 of the French Family and Social Action Code (CASF), there is a right to domiciliation by the *Centre Communal d'Action Sociale* (CCAS) for any person without a stable home connected with the municipality, that is to say, for any person settled in the latter's territory.

Article L. 264-2 of the CASF states that the declaration of election of domicile cannot be issued to non-European foreigners without a residence permit, unless they are seeking State medical aid, legal aid or the exercise of civil rights recognised by law. In contrast, it follows that European or assimilated citizens, as well as third-country nationals in a legal situation, have unrestricted access to domiciliation under ordinary law[39].

Having received a claim relating to the refusal of domiciliation by a mayor for seven persons residing in two slums in the municipality, on the grounds that they could not prove a right of residence, only a right of movement, the Defender of Rights reiterated that such a refusal of domiciliation was based on discriminatory criteria – origin, place of residence and economic vulnerability – all prohibited by law[40].

In general, the associations have alerted the institution to many situations in which people receive unjustifiable oral refusals, contrary to the provisions of the instruction of June 2016.

#### RECOMMENDATION 5

The Defender of Rights reiterates that access to domiciliation is fundamental in that it allows people without a stable home access to certain civic, civil and social rights. Under the law, municipalities must ensure, without discrimination, effective access to domiciliation. In this context, the CCASs are required to justify any refusal of domiciliation and only the absence of any link with the municipality can justify a refusal of domiciliation.

### B THE RIGHT TO EDUCATION FOR CHILDREN OF ROMA ORIGIN: THE PERSISTENCE OF DISCRIMINATORY DENIAL OF SCHOOLING

The Defender of Rights' Child Rights Defence Division regularly intervenes in situations that highlight discriminatory denials of schooling due to origin, nationality and particular vulnerability resulting from the economic situation of families. Roma children are over-represented among these discriminated populations, compared to children from the Traveller community and children living in 'social hotels'.

The Defender of Rights already reported on these situations in its 2016 annual report on the rights of the child: "*Droit fondamental à l'éducation : une école pour tous, un droit pour chacun*".

To justify denials of schooling, mayors[41] questioned by the Defender of Rights invoke ineffective or even illegal grounds such as the incompleteness of the file, the nullity of certain proofs of domicile or residential instability and/or its provisional and/or illegal nature.

Indeed, international law and our domestic law provide that every child has the right to education regardless of the situation of his or her parents, or his or her nationality or place of residence.

The International Convention on the Rights of the Child (UNCRC) guarantees the right of every child to education without discrimination of any kind. Under Article 2, "*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*".

In addition, in June 2020, Article D. 131-3-1 of the French Education Code[42], added by the Decree of 29 June 2020, states that only documents proving the identity of the child, the persons responsible for it and their domicile may be required to support their application for enrolment. In the event that one of these documents cannot be produced, it may be justified by any means, including a sworn statement[43].

The Defender of Rights, contacted by families and associations, also has the opportunity to present observations before the courts to which the matter is referred by the families (administrative courts – in summary proceedings – or judicial proceedings)[44].

Before the criminal court, the Defender of Rights also intervened three times in the same case concerning the situation of five children living in a camp located in the territory of a city in the Ile-de-France region, who had been unable to enrol in the municipality's school system. After adversarial investigation of the case, the Defender of Rights made observations before the Correctional Court. by judgment of 2 September 2015, the Créteil Correctional Court pronounced the mayor's acquittal. The civil parties lodged an appeal. The Defender of Rights again presented its observations before the Paris Court of Appeal, which did not follow them.

Following an appeal to the Court of Cassation, in a judgment of 23 January 2018, the criminal division of the Court of Cassation[45] held, on the one hand, that the failure to produce proof of domicile did not allow it to oppose school enrolment and, on the other hand, that the fact that the mayor stood by her refusal decision, even though she was aware of the identity of the minors and their place of residence in the municipality's territory, without having proceeded with any taking of evidence of the applications for enrolment, and without indicating what documents were missing, could conceal a distinction based on the children's belonging to the Roma community and their place of residence, a distinction likely to constitute a civil fault. Following this judgment of the Court of Cassation, the case was referred to the Versailles Court of Appeal, whose responsibility it was to state whether the acts of discrimination were constituted, before deciding on compensation for the mayor's civil fault. The Defender of Rights again presented its observations[46] before the Second Court of Appeal.

In a judgment of 19 June 2019[47], the Court of Appeal noted that although dialogue between the education authority and the association was interrupted on 30 September 2014, the mayor had not reacted subsequently, even though she had a period of one and a half months, between 30 September and 17 November 2014, the date of the direct summons before the criminal court, to reply to the letters addressed to her; that she had been informed of the identity of the children by correspondence from their lawyer of 3 October 2014; that she did not take into account case law and circulars recommending the facilitation of the enrolment of children of Roma origin even if some of the required supporting documents were missing; that she could carry out checks at the camp, all the more so as the education authority did not mention a particular overload of work at the

time of the events; that she did not make it known that registration with the *Centre Communal d'Action Sociale* was sufficient and did not suggest other types of proof of domicile.

Thus, the Court of Appeal considered that the elements of the case file mainly resulting from the investigation carried out by the Defender of Rights characterised discrimination based on the children belonging to the Roma community and their place of residence, and that they constituted a civil fault that caused damage likely to give rise to compensation.

In the face of such discriminatory refusals, which are particularly detrimental to the rights and best interests of the child, the Defender of Rights alerts the public authorities and the State whenever necessary. When families – often assisted by associations – have sought in vain to enrol their child/children with the required documents – proof of domicile, identity and compulsory vaccination certificate – the services of the Defender of Rights write to the mayors concerned and, where appropriate, to the academic directors of the national education authorities who have a power of substitution, to ask them to proceed with admission of the children.

During the examination of these files, the Defender of Rights found that families lacked information on registration procedures which, where they exist, are difficult to access and/or are not translated into a language that the families understand. Moreover, the absence of delivery of a receipt following registration procedures, particularly when the town hall refuses registration due to missing evidence, and the lack of reasoning for refusal decisions are still lamentable because they do not allow families to understand what is expected, nor can they, if necessary, effectively complete the file or challenge the administrative refusal decisions.

Thus, in its decision no. 2018-005 of 25 January 2018[48], the Defender of Rights recommended that a mayor implement a procedure allowing for a receipt to be issued immediately, at the counter, confirming the date of filing of the application, the documents produced and any difficulties.

At the end of the investigation, which meets the requirements of the adversarial proceedings, if the breaches are proven and persistent, despite attempts to reach an amicable settlement initiated, the decisions of the Defender of Rights may conclude that there is:

- a violation of the child's right to education and the best interests of the child;
- And discrimination based on the criteria of place of residence and/or origin, nationality and/or particular vulnerability resulting from their economic situation, apparent or known by its author, in accordance with Article 225-1(1) of the French Penal Code, as drafted by Law No. 2016-832 of 24 June 2016.

For example, the Defender of Rights intervened with regard to a denial of school registration on the grounds of the imminent execution of an eviction order against the family, which finally took place eleven months after the application for registration. In doing so, the mayor prioritised the issue of the regularity of the family's housing over the children's right to an education. In its decision, the Defender of Rights concluded that there was discrimination in access to education based on the criteria of origin, residence and particular vulnerability resulting from the family's economic situation[49].

Decisions adopted by the Defender of Rights may be transmitted to the Public Prosecutor with territorial jurisdiction[50] under Article 40 of the French Penal Code, so that he may determine the action to be taken. Thus, in two cases transmitted, the mayor was given a reminder of the law by the Public Prosecutor.

In addition, during the COVID-19 pandemic, children living in informal housing belonging to the Roma community were exposed to additional difficulties related to the

widespread use of remote education[51]. Due to a considerable digital divide, Roma children living in informal housing often could not participate in e-learning activities in the same way as other children, making them more likely to drop out of school[52].

#### RECOMMENDATION 6

The Defender of Rights reiterates that local authorities are not entitled to use administrative disputes against families staying on illegally occupied land to hinder, prevent or even prohibit children's access to school. Such refusal to enrol these children is clearly illegal and likely to constitute discrimination based on the actual or alleged belonging of children to the Roma community, their place of residence and their particular vulnerability resulting from their economic situation[53].

#### RECOMMENDATION 7

The Defender of Rights recommends that mayors implement a procedure allowing immediate delivery, at the counter, of a receipt confirming the date of filing of the application for school registration, the documents produced and the documents whose absence would justify a refusal.

### C· ACCESS TO HEALTHCARE

In the area of health, and as reiterated by the Defender of Rights to the European Committee of Social Rights[54], the interministerial circular of 28 August 2012 requires prefects to promote "*access to rights, prevention and care, with particular vigilance regarding access to vaccination and to mother and child healthcare*".

#### a. Specific difficulties accessing care in the event of an irregular situation

Roma people or people perceived as Roma living in slums may encounter particular difficulties in access to healthcare, particularly when they are unable to prove a right of residence.

In its 2016 report on the fundamental rights of foreigners in France, the Defender of Rights pointed out the difficulties of access to specific care faced by foreigners in an irregular situation: firstly because State medical aid (AME), the exception mechanism reserved for them, offers less coverage of healthcare than the universal scheme; secondly, since the diverging and sometimes illegal practices of the funds are likely to hinder access by illegal foreigners to State medical aid; and, finally, because they are more exposed to the risk of discriminatory refusal of care. In 2019, while legislative reforms had introduced new obstacles, the Defender of Rights reiterated its findings[55].

In the context of the health crisis, the European Agency for Fundamental Rights' study on the impact of COVID-19 on Roma populations and Travellers[56] reiterates that people living in a situation of overcrowding and squalor in slums or squats are more likely to be infected. These living conditions expose Roma people in particular to the disease, in particular because they do not allow for isolation of those infected.

#### RECOMMENDATION 8

The Defender of Rights reiterates its recommendation, already formulated by the institution in its 2019 report "*Personnes malades étrangères : des droits fragilisés, des protections à renforcer*"[57], that the duality of the systems (health insurance and State medical aid) be reconsidered.

Pending such a reform, the Defender of Rights recalls that, in 2018, the institution published information tools[58] intended to prevent discriminatory refusals of care, in particular against beneficiaries of State medical aid. It would be useful to disseminate these tools as part of awareness campaigns organised for professionals. Indeed, in several of its reports, including the report "*Droits de l'enfant en 2017 : Au miroir de la Convention internationale des droits de l'enfant*"[59] of November 2017, the institution strongly

encourages the development of health mediation activities for people in vulnerable situations, giving priority to children, reiterating the extremely vulnerable and insecure conditions in which the inhabitants of slums live. The Defender of Rights encourages the authorities to advertise the existing mediation mechanisms[60] so that these people can make use of them.

The Defender of Rights also hopes that quantitative and qualitative monitoring of refusals of care for beneficiaries of State medical aid can be put in place, as provided for in CNAM Circular 33-2008 of 30 June 2008 for holders of the CMU (universal health cover). Finally, the Defender of Rights recommends that the creation of a digital map for beneficiaries of State medical aid be considered, in order to allow them to access the same digital tools as those with health insurance.

### b. Health protection: the paradox of access difficulties emphasised by the implementation of European law

In a 2019 report on the rights of sick foreigners, the Defender of Rights found that citizens of the European Union were increasingly experiencing, in addition to the problems likely to affect all foreigners, specific difficulties with accessing health protection, linked to the application of European Union law and regulations on the coordination of social security systems. Roma people or people perceived as Roma are affected by these difficulties in the same way as all other European nationals, even though their often more difficult economic and social situation predisposes them to these difficulties more frequently.

In its 2016 report on the fundamental rights of foreigners in France, the Defender of Rights already cited wrongful referrals to the European Health Insurance Card (CEAM), in terms of the specific difficulties encountered by citizens of the European Union. The purpose of this card, which is intended for persons travelling to another Member State, is to facilitate, for persons already covered by the health protection of one European country, the treatment of unplanned healthcare delivered during temporary stays in another country. However, the funds refer European nationals with a valid CEAM to this system, even though they are not temporarily in France but are established there.

On the other hand, it may be that the opening up of rights in France is subject to proof by the European national that he or she cannot get a CEAM. by referring people based in France and normally residing there to the European card, the funds are mistakenly applying the law, contrary to the objectives pursued by the card.

In particular, so-called “inactive” European nationals who establish their residence in France are particularly affected by wrongful referrals to European coordination mechanisms (illegal referrals to the European health insurance card or to the mechanisms of “portability” of rights), even though the principle provided for by the coordination rules is the responsibility of the State of residence (Article 11.3.e of the basic Regulation No 883/2004). In this context, the centralisation of the processing of applications from European nationals within a single national division – the Centre for Inactive European Nationals (CREIC) – should help to limit the errors of law, particularly in the complex assessment of the right of residence of EU nationals[61].

However, this procedure is itself a source of difficulties, not only because errors in the interpretation of the right of residence sometimes occur within this framework, but also because the procedure is lengthy and opaque for the nationals who fall under it. While the file is being examined by CREIC, these people remain without open rights. Furthermore, at the end of the procedure, the funds require the interested party to file a new application when they find that the

access to rights has not been requested on the right basis (for example, orientation towards an application for State medical aid when it turns out that the person has no right of residence). Steering them towards new applications is detrimental to the persons concerned as they lose, as a result, the benefit of the prior rights and can thus end up with significant hospital debts.

#### RECOMMENDATION 9

The Defender of Rights recommends that CNAM and the DSS ensure that specific public instructions on the terms of the internal care schemes (State medical aid, health insurance, DSUV) and mechanisms resulting from the coordination regulations are distributed to health insurance funds in order to avoid refusals related to wrongful referrals to coordination arrangements.

It also recommends that, in the context of the CREIC procedure, a comprehensive examination of the rights (health insurance or, additionally, State medical aid) be carried out, with retroactive entitlement back to the date the first application was filed.

To do this, and more generally to simplify access to rights for the interested parties but also for hospital establishments or other accompanying persons, it recommends a single health protection application form (consolidating the current forms for health insurance, State medical aid or even complementary health insurance), allowing an examination that leads to the correct rights being granted to those applying for health protection.

In the fight against discrimination against Roma people, the Defender of Rights invites the development of dedicated tools for assessing the share of EU nationals of Romanian or Bulgarian nationality and/or in situations of particular economic vulnerability who remain without health protection or who encounter difficulties in accessing their rights.

### D ACCESS TO PUBLIC SERVICES: DRINKING WATER, ELECTRICITY AND WASTE COLLECTION

The Defender of Rights has handled several complaints concerning access to water (fundamental right recognised by several international bodies), electricity and household waste collection in informal living spaces. It also intervenes occasionally on matters relating to temporary connection when it is contacted by vulnerable persons.

The right to adequate housing as defined by the UN, stemming from Article 11 of the ICESCR and the observations of the CESCR on the right to housing, implies more than housing alone. Indeed, "*housing is not adequate if its occupants do not have safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal*"[62].

The UN Special Rapporteur on the right to adequate housing has made recommendations to that effect on several occasions. In a statement dated 27 July 2020, it recommends that the authorities "*ensure that all people have safe and adequate access to water and sanitation facilities, in line with the objectives of sustainable development, so that people who are homeless or living in inadequate housing, such as informal settlements, can carry out the necessary hygiene procedures, including hand washing, to protect themselves from COVID-19. These facilities must be located in safe places and provide non-discriminatory access for all so that affected persons can effectively protect themselves from the disease*"[63].

The right to water as a basic good is also provided for in Article 16 of Directive (EU) 2020/2184 of 16 December 2020 on the quality of water intended for human consumption (recast)[64]. The text provides, in particular, in its Article 16 for new guarantees for access to water for vulnerable and marginalised groups.

In its communication on the Directive, to be transposed by the Member States by 12 January 2023, the European Commission states that: "*The new rules will require Member States to* ***improve access for all people, especially for vulnerable and marginalised*** *groups who currently have difficult access to drinking water. In practice, that means setting up equipment for access to drinking water in public spaces, launching campaigns to inform citizens about the quality of their water and encouraging administrations and public buildings to provide access to drinking water*"[65].

In this respect, the Council of State obliges the authorities to verify, when they plan to take a decision refusing temporary connection, that this decision does not disproportionately harm the right to private and family life as protected by Article 8 of the European Convention on Human Rights[66]. Moreover and with regard to water, the Council of State ordered the authorities to guarantee access to it for the most vulnerable populations[67]. However, according to the study by the European Agency for Fundamental Rights on the impact of COVID-19 on Travellers and Roma[68], 80% of slums and squats in France – in which approximately 15,000 Roma live – did not have access to water before the pandemic.

The Agency has also reiterated that obstacles to access to water, of which there were more during the COVID-19 pandemic, had health consequences[69]. The crisis has increased litigation on the subject of access to essential needs (water, hygiene, shelter, food, etc.). While favourable decisions have been obtained to ensure access to water and hygiene, they are not homogeneous, such that there is no convergence on the distance of water points accessible from the occupied sites.

The Defender of Rights has also spoken on several occasions about the difficulties for vulnerable populations to access water.

In its 2015 report "*Exilés et droits fondamentaux : la situation sur le territoire de Calais*", it recommended that, pending implementation of decent accommodation solutions and in line with the unconditional right to emergency accommodation, at least ten additional water points be created in slums, spread out as much as possible to limit the distance that has to be travelled to access them. In a new report published three months later, it extended these findings to the Grande-Synthe and Ouistreham camps[70].

More recently, in January 2021, the attention of the Defender of Rights was drawn to the situation of dozens of children who live with their families in a slum located in the former areas of sludge and raw waste water spreading in Val d'Oise.

According to the information provided by the associations that work with the people living in the slum, some thirty children living on this site, between September 2019 and September 2020, had the lead in their blood measured, first on the initiative of the parents and the Val d'Oise Roma support group, then as part of a screening campaign organised by the Regional Health Agency (ARS) for sixteen children. of the 30 children, 26 were suffering from lead poisoning (lead in the blood greater than 50 µg/l): the lead in their blood was between 53 and 164 micrograms (µg/l).

In accordance with Article L.1334-1 of the French Public Health Code, an environmental investigation has been carried out and the ARS carried out a soil analysis. This analysis confirmed that the lead rate in the soils was above average, and that the origin of the children's lead poisoning was linked to the place where they lived.

Many other children have been screened since January 2021, and are also thought to have been affected by lead poisoning. This health risk situation was all the more worrying given that the slum did not have access to drinking water or sanitary facilities, and therefore no hygiene measures could be put in place.

Despite the meetings held, bringing together several actors, including the prefecture,

the joint union for the development of the plain of Pierrelaye-Bessancourt (SMAPP) and DIHAL, certain solutions presented to guarantee access to drinking water, including the implementation of an off-ground service that could transport water to the inhabitants, had not yet been adopted until the intervention of the Defender of Rights, which challenged the prefecture and the union about the solutions that needed to be quickly considered and adopted.

In July 2021, a water fountain was installed approximately 800 m/1 km from the camp. While this facility is an improvement in the living conditions of some people in the slum, particularly those who have a vehicle to transport the containers, the associations have informed the Defender of Rights of their concern about the poorest families for which the distance to the fountain remains a major obstacle.

They also expressed their concerns about many sites in Ile-de-France, and in particular in Val d'Oise, that could be equally contaminated and that are occupied by vulnerable populations for whom no preventive or screening measures would be considered for the time being.

As a result, a letter was sent in July 2021 to the Ile-de-France Regional Health Agency, requesting an inventory of the sites listed in Ile-de-France presenting risks of lead contamination for occupants, children in particular.

The Defender of Rights also wished to understand the measures anticipated, where applicable, to screen people who are potentially contaminated and affected by lead poisoning, and the prevention and information actions carried out or planned on these sites.

#### RECOMMENDATION 10

The Defender of Rights recommends that interministerial reflection involving DIHAL be conducted in order to examine the provisions that would ensure effective access to drinking water for the most vulnerable and an ambitious transposition of the Directive on this subject. It recommends that the applicable law and the responsibilities and powers of the public institutions be clarified. It also recommends that prevention and screening measures be adopted on lead-contaminated sites occupied by vulnerable populations. In this respect, an inventory of the sites occupied by families presenting risks of contamination, particularly with lead, should be considered in partnership with the associations supporting Roma populations.

## 3 THE RIGHTS OF ROMA AS EUROPEAN CITIZENS

### A FREEDOM OF MOVEMENT IN THE EUROPEAN UNION: RESTRICTIONS LIKELY TO AFFECT ROMA PEOPLE MORE SPECIFICALLY

The Defender of Rights observes a general trend that tends to give precedence to immigration police imperatives over the principles of equality (particularly in terms of social protection)[71].

As citizens of the European Union, Roma must enjoy to an equal extent the fundamental rights and freedoms enshrined in the European Treaties, in particular the freedom of movement within the Union guaranteed by Articles 18 and 21 of the Treaty on the Functioning of the European Union and whose limitations allowed by the texts can only be heard restrictively.

In this respect, Article 27 of Directive 2004/38[72] on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation allows Member States to restrict the freedom of movement and residence of Union citizens and their family

members on grounds of public policy, public security or public health, if there is "*a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*". These grounds shall not be invoked to serve economic ends. In addition, Article 35 of the same Directive provides Member States with the opportunity to adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud.

On these grounds, the Law of 16 June 2011 ("Besson Law"), introduced into French law the possibility of taking out an expulsion order (order to leave French territory – OQTF) against a European Union national. Subsequently, the Law of 7 March 2016 opened the possibility of combining the OQTFs taken out on these grounds – threat to public order and abuse of rights – with prohibitions on movement within (and therefore on returning to) the territory for a fixed period[73].

During the legislative debates on these latter provisions, the Defender of Rights had expressed reservations as to their compliance with European law while deploring that these provisions, certainly applicable to all European nationals, seem in fact, given the circumstances in which they had been adopted, to refer more specifically to Romanian and Bulgarian citizens of real or alleged Roma origin[74].

Indeed, these provisions allowing for a ban on movement in the territory (ICTF) for a European national representing a threat to public order were adopted in a context where the Council of State had developed an extensive interpretation of this concept, considering in particular that an EU national who had no other means of existence than begging constituted "*a genuine, present and sufficiently serious threat to public security that constitutes a fundamental interest of French society*" since she had been questioned, without being convicted, for a charity scam[75].

Since the adoption of these provisions, the Defender of Rights has been approached only at the margins by European nationals who are subject to prohibitions on movement in the territory.

#### RECOMMENDATION 11

The Defender of Rights considers that it would be useful to draw up a precise statistical analysis of the implementation of the provisions introduced by the Law of 7 March 2016, in order to be able to observe in particular whether, among the populations concerned, persons of Romanian or Bulgarian nationality are more specifically covered by the restrictions on free movement that these provisions allow.

### B· SOCIAL PROTECTION: RIGHTS SUBJECT TO THE RECOGNITION OF A COMPLEX AND OFTEN LITTLE-KNOWN RIGHT OF RESIDENCE

The counterpart of the free movement of workers, the right of residence of European nationals responds to a particularly complex casuistic governed by several European standards, which are themselves interpreted by the Court of Justice. However, if European nationals, like other foreigners, are required to justify a regular residence on French soil in order to claim most social benefits, the provision of a benefit to a European national may never be subject to the production of a residence permit.

Thus, in practice, it is up to the funds to examine, on a case-by-case basis, the right of residence of European nationals, such that, in addition to the complexity of the law, there are many errors in interpretations of the texts.

Within the context of the tasks entrusted to it, the Defender of Rights regularly receives complaints showing that the conditions of the right of residence applicable to EU nationals are sometimes disregarded or poorly applied by the prefectures and the bodies responsible for assessing them, leading to unjustified denial of benefits.

The Defender of Rights has highlighted, in several recent decisions, repeated errors which European nationals may experience in the examination of their right of residence.

In the present cases, the individuals were not necessarily Roma. However, Roma people, as citizens of the European Union, are, like all citizens of the Union, subject to the difficulties described below.

### a. Misinterpretations of the concept of occupational activity conferring a right of residence

The Defender of Rights is, as reiterated at the beginning of this contribution, the body responsible for France, in accordance with Article 4 of Directive 2014/54/EU, for promoting equal treatment and supporting European workers and members of their family.

Many of the complaints that it receives about the difficulties encountered by European and assimilated nationals concern the interpretation by social protection bodies of the right of residence as a worker or former European worker. The main difficulties arise in the context of applications for social aid (AAH and RSA in particular), with contributory benefits not seeming, in the state of the claims submitted, to be as frequent a problem.

While Directive 2004/38/EC and CJEU case law call for a broad interpretation of the concept of occupational activity conferring a right of residence, it is not uncommon for the Caisses to adopt an interpretation that excludes many European workers from accessing benefits. This interpretation is sometimes encouraged by directives contrary to applicable law.

For example, during the investigation of a claim relating to the suspension of the rights to housing benefit (APL), active solidarity income (RSA) and the activity bonus of a Romanian national on the grounds that she did not fulfil the “minimum activity conditions”, since the CAF used a 2009 CNAF circular to consider that an occupational activity of less than 60 hours per month did not confer a right of residence as a worker and therefore did not allow entitlement to benefits such as the RSA or the APL.

In a decision no. 2019-080, it showed that this analysis was the result of an erroneous interpretation of Union law and therefore recommended that the National Family Allowances Fund (CNAF) amend the disputed circular so that it specifies that any period of work completed in France, including for a monthly total of less than 60 hours, confers a right of residence as a worker. The recommendation was also made that the Social Security Department remind all the funds involved in studying the right of residence of European and assimilated nationals that any occupational activity, including those exercised for less than 60 hours a month, confers a right of residence as a worker.

In a network letter no. 2021-016 of 10 March 2021, the CNAF asked its services to abandon the minimum activity requirement for assessing the right of residence of European nationals.

### b. Difficulties identifying certain scenarios of acquisition of a permanent right of residence

The files submitted to the Defender of Rights also highlight the difficulties faced by the organisations in identifying the right of permanent residence acquired after several years of inactivity, during which the status of worker was nevertheless maintained.

For example, a claim was filed with the Defender of Rights relating to a series of refusals for the RSA by the departmental council for a European national residing in France since 2008 on the grounds that he did not meet the conditions of the right of residence required of European nationals by law with regard to receiving the RSA.

However, it emerged from the investigation carried out by the Defender of Rights that

the Departmental Council had incorrectly interpreted the concept of occupational activity conferring a right of residence and had therefore not examined the situation of the person in question in view of the maintenance of the status of worker granting the right of permanent residence within the meaning of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004.

Consequently, the Defender of Rights decided to make observations before the Council of State[76], which, by a decision of 18 February 2019[77], annulled the judgment of the administrative court rejecting the claimant's claim. On this occasion, the Council of State specified, as reiterated by the Defender of Rights, that the right of residence of more than three months acquired in the course of an occupational activity of more than one year is maintained indefinitely provided that the person concerned is included on the list of jobseekers. He added that the mere fact that the last employment contract preceding the inclusion on the list of jobseekers was for less than one year could not have the effect of limiting the maintenance of the right of residence to six months if an unlimited right of residence had previously been acquired due to an occupational activity carried out for more than one year.

The Defender of Rights also found difficulties in the recognition by the funds of the right of residence of EU nationals who entered France as minors.

**RECOMMENDATION 12**

In order for the situation of EU nationals to be examined in accordance with EU law, the Defender of Rights has recommended[78] to the CNAF to remind all the funds in its network that they must ensure that they examine the right of residence of EU nationals in light of all possible grounds, in particular the right of permanent residence, including when this was acquired by an inactive assignee as a minor. The Defender of Rights also invited the CNAF to clarify to its network that the right of permanent residence acquired by an EU national is retained unless the person in question leaves the territory for more than two consecutive years and thus cannot be asked to justify the regularity of their residence each year without violating European Union law. At this time, the institution has not received a response from the CNAF.

### c. a lack of knowledge of the right of residence acquired as a parent of a child in school

The right of residence of European nationals or family members acquired as parents of schooled children is another aspect of European law that is little known to the prefectures and the funds required to pay social security benefits.

Article 10 of Regulation No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union – formerly Article 12 of Regulation No 1612/68 – recognises the right to education of the children of workers and former workers who are nationals of the Union as follows:

"*The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.*

*Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.*"

The CJEU has looked at the implications of this right to education in the field of residence by laying down the principle of the right of independent residence of the child. It thus considered that the right of access to education for the child of a migrant worker implies a right of residence in favour of that child as well as of the parents who are the "primary carer of that child", even if the migrant worker parent does not reside or work in the host Member State[79].

Since Directive 2004/38/EC did not amend Article 10 of the aforementioned regulation, the Court also stated that its entry into force did not affect the principle of the right of residence deriving from the schooling of a child[80].

Thus, this right of residence is not subject to the conditions laid down in Directive 2004/38, and in particular to the conditions of having comprehensive health insurance and sufficient resources so as not to constitute a burden on the social assistance system of the host Member State.

In reading the case law of the Court, it appears that the right of residence of school children and the parents who look after them must meet the following conditions only:

- One of the parents must be a citizen of the European Union and work or have worked in the host Member State;
- The child, whether or not a Union national, must have resided in the territory of the host Member State with his or her EU-national parent at the time this parent worked in that State;
- The child must still reside in the host Member State and have started or pursue schooling there;
- a parent who is a national or not of the Union, who claims the derived right of residence – and does not necessarily have the status of worker within the meaning of EU law – must look after the child.

If these conditions are met, the resulting right of residence enjoyed by the parent(s) of the school child ends when the child reaches majority, unless it is demonstrated that the child continues to need the presence or care of his or her parent in order to continue his or her education.

Based on the reasoning of the CJEU, the French administrative courts have also recognised the right of residence of the parent of the school child[81].

Although it had never commented on the application of this basis of the right of residence by the *Caisses de Protection Sociale*, the Defender of Rights stated this in two decisions[82] commenting on a dispute between an Italian national and the Prefecture. The positions adopted by the Grenoble Administrative Court[83] and the Lyon Administrative Court[84] in the context of this dispute are intended to apply to any authority responsible for deciding on the right of residence of European nationals and members of their families.

### RECOMMENDATION 13

The Defender of Rights recommends that the competent authorities proceed with the reiteration, clarification and publication of all the rules on the right of residence of European nationals for the attention of all the funds involved in examining this condition, which makes access to most benefits conditional. It also reiterates its recommendation to proceed with the systematic publication of network circulars and letters that specify the methods of application of these rules.

## 4· DISCRIMINATORY LANGUAGE AND INCITEMENT TO DISCRIMINATION

Exposed to multiple discriminations, Roma people are the minority that receives the most negative opinions from the French population[85].

### RECOMMENDATION 14

The Defender of Rights' studies, reports and opinions indicate a continuum between racist speech against Roma people and the discriminatory behaviour they suffer.

The Defender of Rights undertakes to contribute to the development of the communication tools and campaigns produced by DIHAL, DILCRAH and CNCDH in order to combat antigypsyist language and actions, for aspects falling within its areas of competence. Coordinated, ambitious actions on the part of the institutions, developed and implemented with the associations, are necessary to combat prejudices towards Roma people.

## CONCLUSION

This contribution will be transmitted to DIHAL to feed into the national strategic framework **for Roma equality, inclusion and participation**, which is expected to be finalised by the end of 2021.

# NOTES

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021H0319(01)&from=EN.

[2] See Article 16 in conjunction with recital 31 of Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast), which provides that Member States shall take "*the measures they consider necessary and appropriate to ensure that there is access to water intended for human consumption for vulnerable and marginalised groups*".

[3] Instruction du 25 janvier 2018 sur la résorption des bidonvilles : où en est-on 3 ans après ? | idealCO.

[4] Defender of Rights, "Bilan d'application de la circulaire interministérielle du 26 août 2012 relative à l'anticipation et à l'accompagnement des opérations d'évacuation des campements illicites", June 2013.

[5] Defender of Rights, "Exilés et droits fondamentaux : la situation sur le territoire de Calais", October 2015; "Exilés et droits fondamentaux, trois ans après le rapport Calais", December 2018.

[6] Defender of Rights, "Les droits fondamentaux des étrangers en France", May 2016.

[7] Defender of Rights, "Consultation citoyenne sur les discriminations : Recommandations et propositions du Défenseur des droits", June 2021.

[8] DIHAL, "Résorption des bidonvilles : Point d'étape", 2021.

[9] See CEDS, "Conclusions 2019 – France", March 2020; CEDS, *Forum européen des Roms et des Gens du Voyage (FERV) v. France*, No. 119/2015, 5 December 2017; CEDS, *Médecins du Monde international v. France*, No. 67/2011, 11 September 2012; CEDS, *Forum européen des Roms et des Gens du Voyage v. France*, No. 64/2011, 24 January 2012.

[10] Defender of Rights, "Exilés et droits fondamentaux : la situation sur le territoire de Calais", October 2015; "Exilés et droits fondamentaux, trois ans après le rapport Calais", December 2018.

[11] Council of State, Ref., 10 February 2012, No. 356456, *Fofana v. Minister of Solidarity and Social Cohesion*.

[12] See Council of State, 4 July 2013, No. 369750; Council of State, 21 July 2017, No. 412666.

[13] Defender of Rights, "Les droits fondamentaux des étrangers en France", May 2016.

[14] Defender of Rights, "Droits de l'enfant en 2017 : Au miroir de la Convention internationale des droits de l'enfant.

[15] Decision No. 2018-23 of 18 January 2018.

[16] Decisions No. 2018-72 of 31 January 2018 and No. 2019-259 of 14 October 2019.

[17] Defender of Rights, Bilan d'application de la circulaire interministérielle du 26 août 2012 relative à l'anticipation et à l'accompagnement des opérations d'évacuation des campements illicites, August 2012 – May 2013.

[18] ECHR, *Winterstein v. France*, No. 27013/07, 17 October 2013; *Hirtu et al. v. France*, No. 24720/13, 14 May 2020.

[19] CEDS, *Médecins du Monde-International v. France*, No. 67/2011, 11 September 2012; CEDS, *Forum européen des Roms et des Gens du Voyage (FERV) v. France*, No. 119/2015, 5 December 2017.

[20] Decision MLD-MDE-MSP-MDS-2014-111 of 1 September 2014 on the compliance of the evacuation conditions of a camp with Articles 3, 8 and 13 of the ECHR.

[21] Decision MSP-MLD-MDE-2016-184 of 13 July 2016 on a third-party intervention concerning the situation of Roma families living in slums before the CEDS.

[22] CEDS, *Forum européen des Roms et des Gens du Voyage (FERV) v. France*, No. 119/2015, 5 December 2017.

[23] For the associations consulted by the Defender of Rights, although the instruction constitutes a shift in paradigm, in particular by focusing on the implementation of a resorption project as soon as a slum is formed, it is currently applied very differently in the territories, and suffers because of its non-binding nature, allowing full expression of the will of the prefects.

[24] According to DIHAL figures, 19 in 2019 and 17 in 2020.

[25] DIHAL, "Instruction du 25 janvier 2018 sur la résorption des bidonvilles : où en est-on 3 ans après ?", 31 May 2021.

[26] Defender of Rights, "Consultation citoyenne sur les discriminations : Recommandations et propositions du Défenseur des droits", June 2021.

[27] See Defender of Rights, "Exilés et droits fondamentaux, trois ans après le rapport Calais", December 2018 (p. 55).

[28] Observatory of evictions from informal living spaces, "11er novembre 2019 – 31 octobre 2020 : Note détaillée", 2021.

[29] Decision 2018-014 of 8 March 2018 on the evacuation of a squat outside of any legal framework and use of unnecessary and disproportionate force; Decision 2018-286 of 7 December 2018 on the evacuation of a squat outside of any legal framework.

[30] Decision 2017-189 of 6 June 2017 relating to a procedure for the eviction from a site of occupants without right or title.

[31] Decision 2019-040 of 6 February 2019 relating to a procedure for the eviction from a site of occupants without right or title submitted to the judge ruling in summary proceedings of the Council of State.

[32] Official Journal of the French Republic no. 0034 of 10 February 2015.

[33] Decision 2020-222 of 9 November 2020 on the presentation of observations before the Constitutional Council on the law on acceleration and simplification of public action, voted by the National Assembly on 28 October 2020.

[34] Defender of Rights, "Bilan d'application de la circulaire interministérielle du 26 août 2012 relative à l'anticipation et à l'accompagnement des opérations d'évacuation des campements illicites", August 2012 – May 2013.

[35] Observatory of evictions from informal living spaces, "1er novembre 2019 – 31 octobre 2020 : Note détaillée", 2021.

[36] Decision 2018-014 of 8 March 2018 on the evacuation of a squat outside of any legal framework and use of unnecessary and disproportionate force; Decision 2018-286 of 7 December 2018 on the evacuation of a squat outside of any legal framework.

[37] Decision MDS-2015-288 of 25 November 2015 on restrictions on the freedom to come and go of Roma families who had just been evicted from an illegal camp.

[38] Defender of Rights, "Exilés et droits fondamentaux : la situation sur le territoire de Calais", October 2015; "Exilés et droits fondamentaux, trois ans après le rapport Calais", December 2018.

[39] Decision 2017-305 of 28 November 2017 on the refusal of many prefectures to examine the applications for admission or renewal of residence of persons without a stable home who can only provide, as proof of residence required by the texts, a certificate of election of domicile by a Centre Communal d'Action Sociale or an approved body.

[40] Decision 2017-275 of 18 October 2017 on a refusal of domiciliation in a Centre Communal d'Action Sociale against slum inhabitants.

[41] Referrals to the Defender of Rights concern almost exclusively primary school with regard to this population.

[42] Decree no. 2020-811 of 29 June 2020 specifying the documents that may be requested in support of an enrolment application from the list provided for in Article L. 131-6 of the Education Code.

[43] And yet the associations observe that some town halls do not accept sworn statements by parents and require an "official" registration of address or certificate (from the Centre Communal d'Action Sociale, 115, water or electricity bill, rent receipt, etc.).

[44] See Decision No. 2016-154 of 31 May 2016 before the Paris Court of Appeal; Decision No. 2019-111 of 25 July 2019 before the Versailles Administrative Court of Appeal.

[45] Court of Cassation, 23 January 2018 No. 17-81 369.

[46] Decision No. 2018-232 of 12 October 2018 before the Versailles Court of Appeal.

[47] Versailles Court of Appeal, 19 June 2019, No. 18/01049.

[48] Decision 2018-005 of 25 January 2018 on a denial by a town hall of schooling for Roma children.

[49] Decision 2018-221 of 12 October 2018 on the denial of schooling for a child in a nursery school opposed by the mayor on the grounds that an eviction order for the squat in which he lived with his family was in progress.

[50] For example, Decision 2021-001 of 21 January 2021 on a denial by a town hall of schooling for a family living in a slum.

[51] FRA, "Implications of COVID-19 pandemic on Roma and Travellers communities", 15 June 2020.

[52] FRA, Coronavirus Pandemic in the EU - Impact on Roma and Travellers, 1 March - 30 June 2020.

[53] Decision 2018-005 of 25 January 2018 on a denial by a town hall of schooling for Roma children.

[54] Decision MSP-MLD-MDE-2016-184 of 13 July 2016 on a third-party intervention concerning the situation of Roma families living in slums before the CEDS.

[55] Defender of Rights, "Personnes malades étrangères : des droits fragilisés, des protections à renforcer", 2019.

[56] FRA, "Implications of COVID-19 pandemic on Roma and Travellers communities", 15 June 2020.

[57] Defender of Rights, "Personnes malades étrangères : des droits fragilisés, des protections à renforcer", 2019.

[58] Defender of Rights, "Fiche pratique à destination des professionnels de santé : Les refus de soins", 2018; Defender of Rights, "Agir contre les refus de soins", December 2018.

[59] https://www.defenseurdesdroits.fr/fr/rapports-annuels/2017/11/rapport-annuel-2017-consacre-aux-droits-de-lenfant-au-miroir-de-la (p.60).

[60] See in particular the HAS presentation: https://www.has-sante.fr/upload/docs/application/pdf/2017-10/la_mediation_en_sante_pour_les_personnes_eloignees_des_systemes_de_preve....pdf; http://www.mediation-sanitaire.org/wp-content/uploads/2017/01/Livret_daccueil_colloque.pdf.

[61] See *below*.

[62] See fact sheet 21 on the High Commissioner for Human Rights website: https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf (pp 3 -4).

[63] See p. 25 of document: https://www.undocs.org/en/A/75/148.

[64] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L2184&rid=1, Article 16: "(...) Member States shall:
(a) identify people without access, or with limited access, to water intended for human consumption, including vulnerable and marginalised groups, and reasons for such lack of access;
b) assess possibilities for improving access for such people;

c) inform such people about possibilities for connecting to the distribution network or about alternative means of having access to water intended for human consumption;
d) and take measures that they consider necessary and appropriate to ensure that there is access to water intended for human consumption for vulnerable and marginalised groups. (...)"

[65] See Communication from the European Commission: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_429.

[66] Council of State, 15 December 2010, No. 323250.

[67] Council of State, 31 July 2017, No. 412125, 412171.

[68] FRA, "Coronavirus pandemic in the EU – Impact on Roma and Travellers communities", Bulletin #5, 2020.

[69] FRA, Coronavirus Pandemic in the EU - Impact on Roma and Travellers, 1 March - 30 June 2020.

[70] See Defender of Rights, "Exilés et droits fondamentaux", December 2018, page 27 et seq.

[71] In the *Dano* judgment of 11 November 2014, the CJEU considered that the exclusion of the benefit of social benefits of economically inactive European citizens arriving in the territory of another Member State without the willingness to find employment was in line with European Union law. Almost a year later, in the *Alimanovic* judgment of 15 September 2015, the Court extended this possibility of restricting social benefits to European citizens who had travelled to the territory of a Member State as jobseekers and who have already worked there for a certain period of time, since they do not enjoy equal treatment with regard to access to social benefits, in the same way as nationals and EU citizens who meet the conditions for legal residence provided for in Directive 2004/38 (on the one hand, have comprehensive health insurance in the host Member State and, on the other hand, have sufficient resources to avoid becoming a burden on the social assistance system). Thus, under these two judgments, European Union citizenship is no longer sufficient to benefit from equal treatment in the host Member State (unlike the previous case law of the Court, according to which it considered that "*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for*", CJEC, Grzelczyk, case C-184/99, 20 September 2001, point 31; see also CJEC, Martinez Sala, case C-85/96, 12 May 1998; CJEC, Trojani, case C-456/02, 7 September 2004; CJEC, Bidar, case C-209/03, 15 March 2005. In this sense, more recently, the Court held that membership of a Member State's public health insurance system could be restricted for inactive European citizens, and dependent on the requirements of Directive 2004/38, so that they would not become an unreasonable burden for the public finances of the host Member State (CJEU, case C-535/19, 15 July 2021). In such a situation, a European citizen may then be denied access to the state-funded medical care system both in their host country and in their country of origin, thus finding themselves with no access to such protection.

[72] Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[73] The associations consulted by the Defender of Rights nevertheless observe the actual or alleged notification of orders to leave the territory to persons of Roma origin, following an interpretation of the very extensive threat to public order and not in accordance with the case law in force (persons not yet convicted or convicted several years ago, without reoffending). Challenging these decisions is very difficult because of the extremely short appeal period that applies (48 hours).

[74] Opinion 16-02 of 15 January 2016.

[75] Council of State, 1 October 2014, No. 365054.

[76] Decision No. 2019-031 on the refusal of RSA for a Spanish national, based on an erroneous interpretation of the rules governing the right of residence of EU nationals.

[77] Council of State, 18 February 2019, No. 417021.

[78] Decision No. 2019-293 on the assessment and control by the CAFs of the right of permanent residence of EU nationals.

[79] CJEU, *Baumbast, case* C-413/99, 17 September 2002.

[80] CJEU, *Ibrahim*, case C-310/08 and *Teixera, case* C-480/08, 23 February 2010.

[81] See in particular Douai Administrative Court of Appeal, 13 November 2013, No. 13DA00515.

[82] Decision 2018-177 of 19 June 2018 on the right of residence of an Italian national whose children are enrolled in school in France; Decision 2019-280 of 6 November 2019 on the right of residence of an Italian national and former worker whose children are enrolled in school in France.

[83] Grenoble Administrative Court, 31 December 2019, No. 1900683-1900687.

[84] Lyon Administrative Court of Appeal, 10 July 2018, No. 17LY03759.

[85] Refer to: CNCDH, "Rapport 2020 sur la lutte contre le racisme, l'antisémitisme et la xénophobie", July 2021.

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