European Court of Human Rights
Council of Europe
Strasbourg, France

Application under Article 34 of the European Convention on Human Rights and Rules 45 and 47 of the Rules of the Court

I. THE PARTIES

A The applicants

Family name: Horváth
First name: István
Gender: Male
Nationality: Hungarian
Date and place of birth: 22 August 1994
Permanent address: H-4400 Nyíregyháza, Viola utca 2/5.

Family name: Kiss (born as Kóka)
First name: András
Gender: Male
Nationality: Hungarian
Date and place of Birth: 7 February 1992
Permanent address: H-4400 Nyíregyháza, Dália út 3/6

Appointed representatives of the applicants:

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2. **European Roma Rights Centre (ERRC)**
The European Roma Rights Centre is an international public interest law organisation which monitors the human rights situation of Roma across Europe and provides legal

defence in cases of human rights abuse. The ERRC has consultative status with both the Council of Europe and the Economic and Social Council of the United Nations.
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This application is being submitted jointly by Dr Lilla Farkas attorney-at-law and the ERRC as the appointed representatives of the applicants.

B The High Contracting Party

The Republic of Hungary

II. STATEMENT OF THE FACTS

1. This application concerns two young Romani men, who were misdiagnosed as having mental disabilities. As a result of these misdiagnoses, the applicants could not access mainstream education. Instead, they were educated in a segregated remedial school created for children with mental disabilities. Their education under a lower curriculum limited their future opportunities in secondary education and they only had the opportunity to continue their studies in special vocational secondary school, where they cannot acquire Baccalaureate necessary for higher education and certain jobs. The first applicant, who is still in school, is unable to follow a course to be a dance teacher and follow the same career path as his father. Instead, he is currently following a special vocational training course to be a baker. The second applicant is precluded from pursuing his ambition to train as a car mechanic.
2. The applicants' intellectual abilities were examined by the Expert and Rehabilitation Panel of Szabolcs-Szatmár–Bereg County[1] (Szabolcs-Szatmár-Bereg megyei Tanulási Képességet Vizsgáló 1. Sz. Szakértői Rehabilitációs Bizottság, hereafter referred as "Expert Panel"). The Expert Panel diagnosed both

[1] Later became: Szabolcs-Szatmár –Bereg County Pedagogical, Public Education and Training Institution

applicants with “mild mental disability” and found that their successful development required a special pedagogical framework and designated them to attend a segregated special school for disabled children, the Göllesz Viktor Primary School.

Applicant 1

3. The first applicant, István Horváth, a minor born on 22 August 1994, is of Romani ethnic origin.

4. The first applicant started his elementary education in remedial school based on the recommendation of the Expert Panel. The examination of the first applicant was requested by his nursery on 19 April 2001[2] which he was attending at that time. The nursery claimed that the first applicant’s mental and social abilities were lower than normal for his age, which showed in his sense of logic, drafting skills and in his communication. The first applicant spent very little time in the nursery, as he was sick most of the time.[3] However this was not taken into account when assessing his results, despite the fact that it is known as a common cause for bad performance in tests. According to sociological research, the results of school readiness assessments assign a far higher than average proportion of children of poor and uneducated parents to special education classes or so-called reduced-size compensatory classes, and inadequate nursery education greatly contributes to this outcome.[4]

5. The examination requested by the nursery was performed by a special pedagogue (*gyógypedagógus*) and psychologist on 17 May 2001. In its opinion, the Expert Panel diagnosed the applicant with “mild mental disability” and the origin of disability was declared unknown[5]. The following IQ tests were performed on the applicant: Budapest Binet Test: IQ 64; Raven test: IQ 83. Their IQ rate scales the same for the two tests. However, there was 19 point difference in the results of the two tests, yet the Expert Panel did not elaborate in its opinion on the causes of this difference. It is to be noted that experts warn that discrepancies between the test

[2] See: Annex No.3 : Request for examination by kindergarten, 19 April 2001
[3] See: Annex No. 4: Expert opinion of National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), István Horváth, 19 November 2008, at page 1.
[4] See: Annex No. 21, G. Havas, Equal opportunity, Desegregation, at page 128; available at: http://www.econ.core.hu/file/download/greenbook/chapter5.pdf.
[5] See Annex 5.: Expert opinion, Szabolcs-Szatmár-Bereg megyei Tanulási Képességet Vizsgáló 1. Sz. Szakértői Rehabilitációs Bizottság, Nyíregyháza, 2001. május 17

results is indicative of misdiagnosis. The diagnosis stated that he "is two and a half years behind normal", together with immature central nervous system. Therefore the applicant was declared with "mild mental disability" and channelled to remedial school.[6] According to World Health Organisation standards, an IQ of 70 represents the borderline of sound intellectual ability. According to the Ministry of National Resources, at the same time, expert panels in Hungary used IQ 86 as a border for mild mental disability.[7]

6. At the above mentioned examination on 17 May 2001, the parents of the first applicant had been told by the Expert Panel even before the examination took place that he was going to be placed in a remedial school and the Expert Panel asked the parent to sign the expert opinion even before the examination took place.[8]

7. On 3 December 2002 the first applicant was re-examined. However, the review did not take place in person and there are no details available about the examination, only that there is no development in the first applicant's ability, therefore the Expert Panel declared that he was still suffering from mild mental disability.

8. On 28 April 2005 the Expert Panel re-examined the first applicant in person. According to this examination his Raven test was 61. Therefore the Expert Panel declared that the first applicant's status had not changed and upheld its previous opinion.[9]

9. On 20 March 2007 the Expert Panel re-examined the first applicant. According to this examination his Raven IQ test was 71. The Expert Panel noted that the first applicant had better knowledge than this test score reflected, he has good results in school, he is integrated in the school system, active and was able to study individually, that he had no impediment in speech and only needed some reassurance. In addition, the Expert Panel noted that he was active in classes, happy, hard working and complied with all the requirements of the curriculum. The Panel also noted that the first applicant studied in a segregated school. The first applicant had good results in school year 2006 and 2007. Yet the Expert Panel, diagnosed the first applicant with mild mental disability and special educational

[6] Ibid.
[7] See: Annex No. 22, Ministry of National Resources, at page 2; available at: http://www.nefmi.gov.hu/kozoktatas/eselyegyenloseg/utolso-padbol-program
[8] See Annex No.18: Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009, page 3
[9] See Annex No. 6: Expert Opinion, István Horváth, 28 April 2005

needs. Therefore the Expert Panel upheld his placement in remedial school. The cause of the mental disability remained as unknown.[10]

10. The first applicant's parents were not allowed to participate in the diagnostic assessments. His father only signed the first Expert Panel opinion dated 17 May 2001. However the section of the form about the parental agreement with the opinion and agreement on the placement of the first applicant in a remedial school were left blank.[11] Neither did the first applicant's parents sign the two subsequent review Expert Panel opinions.[12] There was no reference as to whether the first applicant's parents were provided information about the procedure and their respective rights, nor any information on whether a copy of the opinion was handed to them. According to the testimony of the first applicant's father[13], he accompanied the son to the first examination but was not allowed to attend the examination itself. The Expert Panel had asked him to sign the opinion even before the examination took place. After the examination he was told that the first applicant could not attend mainstream school; but the Expert Panel did not provide any information about the procedure, its consequences and his rights, including his right to appeal, neither did they explain the results and consequences of the opinion.
11. On 26 September and 2 October 2008, the applicant was re-examined by the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság) as ordered by the first instance domestic court. The opinion stated that the applicant had "mild mental disability" although the causes of the disability could not be established.[14]

Applicant 2

12. The second applicant, András Kiss (born András Kóka), born on 7 February 1992, is of Romani ethnicity.

[10] See Annex No. 7, Expert Opinion, István Horváth, 20 March 2007 and also see: Annex No.: 17, Judgment, Szabolcs-Szatmár-Bereg County Court, 3.P.20.035/2008/20., 27 May 2009, at page 3
[11] See Annex No. 18., Judgment, Debrecen Appeal Court, PF.II: 20509/2009/10., at page 3
[12] Ibid.
[13] Ibid.
[14] See Annex No. 4, National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), István Horváth, 19 November 2008

13. After spending seven months in nursery, the second applicant started his elementary education in 1998 in a mainstream school, the No 13 Primary School located in the middle of Nyíregyháza's bigger Gipsy settlement. In its decision on 4 January 1999,[15] the local pedagogical advisory committee (nevelési tanácsadó) noted that the second applicant had learning difficulties "derived from his disadvantaged social and cultural background" and advised that he be enrolled in a mainstream school and be educated under a special programme (Step by Step) in order to ensure additional help to his development. On 14 December 1999[16] the No 13 Primary School (mainstream school) asked for an expert diagnosis based on the second applicant's results in the first quarter of the year, claiming that he had weak results, that he was often tired and his attention could be held only for 5 to10 minutes. The school claimed that his individual learning was weak and his vocabulary was poor. His IQ[17] was measured at 73 (falling in the "normal" rate, even by Hungarian standards), which is why he started his education in mainstream primary school.
14. The Expert Panel in it decision dated 15 May 2000 diagnosed the second applicant with "mild mental disability" caused by genetic reasons.[18] According to the Budapest Binet test his IQ 63 was, and the Raven test scored IQ 83. Based on the results the Expert Panel ordered the second applicant to be channelled to a school for children with mild mental disability (Göllesz Viktor Remedial School). As rehabilitation, the Expert Panel proposed that the applicant's concentration should be developed as well as his analytical-synthesis ability. There is no information and explanation in the Expert Panel opinion on the causes of the 10 point difference comparing to the previous score, and the 20 point difference between the two different tests administered in 1999 and 2000. Experts warn that such robust discrepancies between the Raven and Budapest Binet tests (20 points) are indicative of misdiagnosis. The assessment was carried out by one special pedagogue alone.
15. According to the witness testimony of Anna Kende, a psychologist who testified before the domestic court in an identical case and her testimony was accepted as

[15] See Annex No. 18: Judgment, Debrecen Appeal Court, PF. II.20.509/2009/10, at page 4
[16] See Annex No. 8: Examination request by No 13 Primary school, 14 December 1999
[17] There was no indication on the request which IQ test was used. See Annex No.8
[18] See Annex No. 9: Expert Opinion dated 15 May 2000., Expert and Rehabilitation Committee of Szabolcs-Szatmár –Bereg County (Szabolcs-Szatmár-Bereg megyei Tanulási Képességet Vizsgáló 1. Sz. Szakértői Rehabilitációs Bizottság)

an evidence in the domestic procedure of this case[19], the Raven test is considered to be more culturally independent, while the Budapest Binet test is more biased, for example, showing lower scores in the countryside than in the capital.[20] Both applicants live in the countryside.

16. The second applicant's parents explicitly objected to the placement of their child in the remedial school and insisted that he should be educated in a mainstream school, however they were told by the Expert Panel that the second applicant had to go to the remedial school. The second applicant's parents were unable to be present at the diagnosis and were not informed about their right to formally appeal the decision. The second applicant was placed in the remedial school.[21]

17. The Expert Panel subsequently reviewed the second applicant twice: on 14 December 2002, and on 27 April 2005. There is no available documentation of the examination held in 2002. According to the available documentation about the examination on 27 April 2005, the Expert Panel noted that, despite the fact that he achieved good results at school, his analytical thinking was underdeveloped. His IQ based on the Raven test scored 71. Yet, the Expert Panel stated that the second applicant needed to be educated in remedial school.

18. During the domestic court procedure of the present case, the first instance domestic court ordered that the second applicant be examined by the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság) According to the expert opinion dated 20 November 2008, the second applicant's mental capacity is normal, he is not mentally disabled and his SQ (social quotient) score is 90, which excludes mental disability. However, the expert opinion states that he has learning difficulties as a result of the lower curriculum under which he had been educated in the special school and because of his disadvantaged social and cultural background. Therefore he had

[19] Anna Kende is a psychologist, also employee of the Roma Education Fund (REF) who authored the amicus curiae brief submitted in the domestic procedure in this case. She was also heard as a witness in an identical case before the Bács-Kiskun County Court, and her witness testimony given in that case was accept by the domestic court as an evidence in the applicants case. See Annex No. 20: Transcript of Records ; Bács-Kiskun County Court, 20 May 2008; Witness testimony of Anna Kende, , p. 5.; See also: Judgment, Debreceni Ítélőtábla, Pf.II.20.509/2009/10., p. 11.

[20] See Annex No. 20.: Transcript of Records ; Bács-Kiskun County Court, 20 May 2008; Witness testimony of Anna Kende, p. 5. See: Debreceni Ítélőtábla, Pf.II.20.509/2009/10., at page 11.

[21] See Annex No.:18, Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009, at page 5

significant deficiency with regards to acquired knowledge (tanult ismeretbeli hiányosság). [22]

19. The second applicant had good results at school, which is proven by the transcript of records attached.[23]

20. According to the second applicant's witness testimony,[24] during his studies he won numerous competitions, including a poetry reading contest and sports competitions, and he was an A student until 7th grade. His teacher had told him that he was not able to continue his studies to be a car mechanic, as he wanted, because from the remedial school he could only choose between training courses offered by the special vocational school. The second applicant also said that he was bullied for attending the special school.[25]

21. The second applicant could not become a car mechanic; he continued his studies as a builder in a vocational school under the special "catching up" program for students who came from remedial schools.

Review of the applicants' intellectual ability by independent experts

22. In August 2005, both applicants participated in a summer camp where the testing of 61 children with special educational needs (SEN) took place. The testing was carried out by independent experts, namely Ilona Bedő Figeczki, a clinical psychologist and public education expert and two special pedagogues, Beáta Pauliczki and Borbála Theobald.

23. In the course of the testing, both applicants were assessed with various tests. With regards to the first applicant, the experts noted that his Raven test (IQ 83) was under the average, but did not correspond to a "mentally disabled" score; therefore he is not mentally disabled. The first applicant's Bender B test refers to immature nervous system which may cause behavioural problems and problems in studying but he is not mentally disabled, and can be educated in an integrated mainstream class.[26]

[22] See Annex No. 13: András Kiss, National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), 20 November 2008.
[23] See Annex No. 14, Transcript of records (Bizonyítvány), András Kiss
[24] See Annex No. 18, Judgment, Debrecen Appeal Court, PF. II.20.509/2009/10, at page 5
[25] Ibid.
[26] Annex No. 15: Expert Opinion, István Horváth, 15 September 2005

24. The second applicant's Raven IQ test score was 90, his MAVGYI-R IQ test score was 79, and his verbal intelligence was 91. According to the assessment, the second applicant suffers from an immature nervous system and dyslexia. The experts noted that he is sound of mind and can be educated in a school with a normal curriculum.[27] The independent experts suggested immediate intervention by the authorities in order to place the second applicant into mainstream school and provide the applicant with appropriate education. The experts also suggested a thorough pedagogical examination, and the development of a subsequent individual learning plan with pedagogical and psychological help. The experts noted that the second applicant had to catch up with his studies in order to alleviate the backlog he has as a result of studying under a lower curriculum.[28]
25. In the course of the testing, the independent experts noted that the diagnostic methods should be reviewed, and that Romani children could have performed better on the tests if the tests were not designed for majority children. The experts noted in particular that the Raven test, which is said to be culturally unbiased, measures intelligence only in a narrow margin and therefore it provides less data with regards to intelligence. The experts recommended that the MAVGYI-R child intelligence test should be reviewed and updated as they are outmoded and oral tests are culturally biased. The oral intelligence tests significantly differ from the present lifestyle and knowledge of children, so that the results are questionable. Experts also noted that the intelligence tests have a tight correlation with school qualification; therefore the education in remedial classes (learning according to a lower curriculum) may greatly influence the results of an intelligence test of a 13-14 year old child.[29]
26. The children tested during the summer camp in general showed much more favourable behaviour than their test results about their intelligence level. Out of 61 children with SEN tested, 17 could have been educated in normal schools, their IQ varied between 70 and 110, even after following reduced curricula.

Domestic proceedings

[27] Annex No. 16: Expert Opinion, András Kiss, 15 September 2005
[28] Ibid.
[29] Annex No. 18, Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009, page 7.

27. On 13 November 2006 the applicants filed a claim for damages at the Szabolcs-Szatmár-Bereg County Court ("First Instance Court") asking the court to establish a violation of the principal of equal treatment as a violation of their personal rights under paragraph 76 of the Civil Code and paragraph 77(3) of the Public Education Act.

28. The applicants claimed that the Expert Panel discriminated against them and misdiagnosed them as being "mild mentally disabled" based on their ethnicity, social and economic background and subsequently ordered them to be educated in special school, although applicants have normal abilities. In addition, in violation of the respective rules of procedure, the parents of the applicants were not informed about the diagnosis procedure and its consequences and about their rights to be present at the diagnosis and to appeal the decision, therefore their constitutional right to remedy was violated. The applicants claimed that the Expert Panel did not act according to international standards when using diagnostic methods standardised for majority children, ignoring the ethnic and social characteristics of Romani children and diagnosed them with mental disability. This systematic error originates form the flawed diagnostic system itself which does not take the social and cultural background of Romani children into account and therefore leads to the misdiagnosis of Romani children. The applicants also claimed that the Szabolcs-Szatmár-Bereg County Council ("County Council"), maintaining the Expert Panel, omitted to perform a real and effective control over the Expert Panel and to provide the necessary financial contribution to its operation. Therefore the County Council violated the personal rights of the applicants and caused damage under administrative jurisdiction.

29. In addition, applicants claimed that the teachers working at the Göllesz Viktor Remedial Primary and Vocational School ("Remedial School") should have noted that they were of normal ability and the Remedial School was liable by omission.

30. The applicants referred to the judgment of the European Court of Human Rights in the case *of D.H. and others v the Czech Republic*[30], as persuasive due to the close similarity in the facts of the case and the legal issues.

31. The applicants also invoked the expert opinion of Anna Kende, psychologist from the Roma Education Fund (REF), who testified before domestic court in an

[30] See: *D.H. v The Czech Republic*, app. no. 57325/00, judgment date 13 November 2007.

identical case.[31] According to Kende the diagnostic procedures could not objectively satisfy international standards which require a complex diagnostic system taking into account the child's individual characteristic, cultural and language background account. Such re-standardised tests were not available in Hungary.[32] The current tests are culturally biased, and are out of date. In addition, the fact that expert opinions may refer to the socially and cultural disadvantaged background of the child as a cause for intellectual disability is a clear reference to the ethnic origin of the child which questions the essence of mental disability. At the same time, if the expert opinion refers to the social and cultural disadvantaged background of the child, it should be taken account at the assessment of the results as well.[33]

32. The applicants submitted the expert opinion of Dr Ilona Réz Nagyné psychologist, special pedagogue and public education expert head of the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság) who in her witness testimony made in the above-mentioned identical case also stated that in fact there is no culturally unbiased diagnosis test, since the social background, the level of care necessarily influences the development and the abilities of the children.[34] She also stated that no standard protocol for diagnosing, assessing and monitoring existed before 2004, and there were no statutory expectations on how to monitor children, nor baselines on how to define a child as having special educational needs. Therefore the systemic failures originated from the failure to use other diagnostic tools and restandardise and amended according to international standards the existing ones.[35]

33. The First Instance Court ordered the applicants to be examined by the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság).[36]

34. On 27 May 2009, the First Instance Court in its decision No. 3.P.20.035/2008/20 found that defendants violated the applicants' rights to equal treatment and right to

[31] See Annex No. 18: Judgment, Debreceni Ítélőtábla, Pf.II.20.509/2009/10., p. 11.; See also: Annex No.:20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7., 20 May 2008, Witness Testimony of Anna Kende, p.5
[32] Ibid.
[33] Ibid.
[34] See Annex No. 18: Judgment, Debreceni Ítélőtábla, Pf.II.20.509/2009/10., p. 11; See Annex No. 20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7., 20 May 2008, Witness Testimony of Dr Nagyné Ilona Réz, p. 8.
[35] Ibid.
[36] See paragraph 11 and 18 above for the results.

education therefore ordered the defendants to pay 1,000,000 HUF to each applicant.[37]

35. The First Instance Court in its reasoning explained that the court had to investigate whether the defendants complied with the Constitution of Hungary and the Public Education Act, that is, the defendants ensured the applicants' civil rights without any discrimination[38], promoted the realisation of equality before the law with positive measures aiming to eliminate their inequalities of opportunity[39] and provided them education in accordance with their abilities.[40] The First Instance Court reasoned that – while the statutory definition of "special needs" was amended several times during the procedure[41] – the regulation clearly stipulates that Expert Panels shall individualise each case and decide special need in each case according to the needs and circumstances of the individual child.[42] The Expert Panels shall identify the reasons of the special need and establish the specific support services a child is in need of in according to the extent of the disability.

36. The First Instance Court accepted unequivocally that this individualisation was lacking with regards to the applicants' diagnoses and the Expert Panel failed to identify those specific professional services that would help the applicants in their education. The Expert Panel failed to establish during the examination and re-examination of the applicants the reasons for which the applicants are in need of special education in the given circumstances, the causes for their need of special education, and that whether the applicants are in need of special education as a result of their behaviour or they suffer from learning difficulties as a result of organic or non-organic type of reasons.

37. The First Instance Court highlighted that the principle of equal treatment requires that the Expert Panel decide whether children reaching school age may study in school with a standard curriculum or in remedial schools with special (lower) curriculum. At the same time the First Instance Court noted that in the present case the operation of the Expert Panel was stalled due to the on-going restructuring, expanding of the Expert Panel and the low number of professional

[37] See Annex No. 17, Judgment, Szabolcs-Szatmár-Bereg County Court, 3.P.20.035/2008/20., 27 May 2009
[38] Article 70/A of the Constitution of the Republic of Hungary, Article 4/A of the Public Education Act
[39] Article 70/A (3) of the Constitution of the Republic of Hungary
[40] Article 70/F of the Constitution of the Republic of Hungary
[41] See Annex No. 2 on Relevant Domestic Law
[42] Public Education Act, § 121. par 14 in 2001, § 121. par 28, 29 in 2004-2006

and other staff. Therefore the Expert Panel could not perform its duty of continuous control examinations.

38. The First Instance Court added that the County Council failed in its duty to perform effective control over the Expert Panel therefore it failed to note that they did not inform the parents about the examination procedure its consequences and their rights to appeal and request for re-examination. In addition, the County Council did not ensure that the expert decisions are individualised according to the law. Therefore the defendants violated the equal treatment of the applicants and as a consequence applicants suffered damage. The defendants could not exempt themselves from the responsibility of causing the damage and were also found to be responsible for causing damage under administrative jurisdiction.

Second instance procedure

39. The Expert Panel did not appeal against the first instance judgment in time, thus it became final and enforceable with regard to the Expert Panel. On appeal by the Remedial School and the County Council, the Debrecen Appeal Court ("Appeal Court") in its judgment Pf. II.20.509/2009/10 dated 5 November 2009[43] partly changed the first instance judgment and dismissed the applicants' claims against the Remedial School and the County Council.

40. The Appeal Court approved the argumentation of the Remedial School which claimed that the Remedial School only enrolled the applicants according to the decision of the Expert Panel and performed according to the law therefore it did not violate any legal provision. Teachers cannot be held responsible for not noting that the applicants were of normal ability as it was for the Expert Panel to review its decision.

41. The Appeal Court established that it was for the County Council to perform effective control over the lawful operation of the Remedial School and the Expert Panel. Therefore this omission may establish the liability of the County Council. The fact that it was not ensured that the parents be present at the diagnoses and the fact that they were not informed about their right to appeal can establish the violation of the law and the responsibility.

[43] See Annex No. 18: Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009.

42. The Appeal Court noted that in order to prevent the misdiagnosis and consequent segregation of Romani children into remedial schools there is a need for the development of a new diagnostic testing system which takes the cultural, language and social background of the child into account.[44] The Appeal Court acknowledged that such a diagnostic system did not exist during the procedure and still does not exist in Hungary.
43. Despite the above, the Appeal Court stated that the lack of appropriate diagnostic tools and the subsequent placement of the applicants into remedial schools did not have any connection with their ethnic origin and therefore found no discrimination against the applicants and concluded that their personal rights had not been violated.
44. The Appeal Court stated that applicants did not suffer any damage as a result of the unlawful conduct of the defendants as according to the court appointed experts' opinion the applicants were educated in accordance with their mental (dis)ability. According to the Appeal Court, the expert opinion presented during the court procedure confirmed the decisions of the Expert Panel. In addition, according to the Appeal Court, the expert opinions of the Expert Panel reviewing their earlier decisions were in accordance with the national professional standards in force at the time of the review. Therefore the Appeal Court declared the applicants' claims for damage to be unsubstantiated.

Judicial review before the Supreme Court

45. The applicants submitted a claim for judicial review to the Supreme Court claiming procedural violations of the law and requesting the court to annul the second instance judgment and uphold the first instance judgment.
46. Relying on the testimony of Ilona Réz Nagyné the applicants claimed that there was no national professional standard established with regards to the diagnosis system in Hungary, contrary to what was stated in the second instance judgment. The well-known systematic errors of the diagnostic system confirmed by the experts together with the disregard of the social, cultural, language and multiplied

[44] See Annex No. 18: Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009., p.29 and 30

disadvantaged background resulted in a disproportionately high number of Romani children being diagnosed as having “mild mental disability”.

47. The applicants again asked the Supreme Court to establish, as an analogy of the case of *D.H. and others v the Czech Republic*, the misdiagnosis of Romani children, that is, that the channelling Romani children with normal mental abilities into remedial schools constituted discrimination. The applicants asked the Supreme Court to find that misdiagnosis constituted direct or alternatively indirect discrimination based on the ethnic/social/economic background of the applicants.

48. The applicants claimed that the Appeal Court wrongly concluded that there was no connection between the lack of appropriate diagnostic tools and the ethnic origin of the applicants. The fact that the tests themselves have no indication with regards to ethnicity does not mean that they did not put disproportionately high number of Romani children into a disadvantaged position in comparison with majority children.[45] Therefore the applicants claimed that this practice amounted to a violation of paragraph 9 of the Equal Treatment Act (indirect discrimination). In addition, the fact that experts disregarded the specific social, cultural and language component when assessing test resulted in direct discrimination (paragraph 8 of Equal Treatment Act).

49. Therefore applicants claimed that the defendants did not act with due diligence under the given circumstances, when – being aware of the systemic error of the diagnostic system – they failed to act according to international standards. In addition, the second applicant was placed at the remedial school not only despite the fact that it was not professionally substantiated, but despite the explicit objection of the parents.

50. The Supreme Court reviewed the second instance judgment and found it partly unsubstantiated. The Supreme Court stated: “Considering the relevant provision of the Equal Treatment Act and the Public Education Act (…) the Supreme Court has to decide whether defendants discriminated the plaintiffs in connection with their ethnic, social, economic and cultural background, which resulted in the deprivation of their right to be educated in accordance with their abilities and therefore their

[45] See Annex No. 19, judgment, Hungarian Supreme Court (Magyar Köztársaság Legfelsőbb Bírósága), judgment, Pfv.IV.20.215/2010/3., page 7. „Az a körülmény, hogy az alkalmazott tesztek látszólag nem voltak kapcsolatban a felperesek etnikai származásával, a cigány gyermekeket mégis lényegesen nagyobb arányban hozták hátrányba, mint a többségi gyermekeket, az Ebktv. 9. § szerinti közvetett hátrányos megkülönböztetést megállapíthatóvá teszi.”

right to equal treatment and subsequently whether their personal rights have been violated."

51. The Supreme Court upheld the second instance judgment with regards to the findings that defendants' conduct did not violate the equal treatment of the applicants, either in terms of direct or in terms of indirect discrimination as the independent expert ordered by the court approved the expert opinion of the Expert Panel. Therefore the Supreme Court found that the applicants did not suffer any disadvantage for not being able to attend mainstream school.
52. The Supreme Court further noted: "The Supreme Court found that the systematic errors of the diagnostic system leading to misdiagnosis – regardless of its impact on the applicants – cannot impose liability on the defendants. The Supreme Court stated that the creation of an appropriate professional protocol which considers the special disadvantaged situation of Romani children and alleviates the systemic errors of the diagnostic system is a duty of the state."[46]
53. The Supreme Court noted, however, that "the failure of the state to create such a professional protocol and the human rights violations of the applicants as a result of these systematic errors exceed the competence of the Supreme Court" and stated that "the applicants may seek to establish such a violation of their human rights at the European Court of Human Rights. Therefore the Supreme Court did not decide on the merit of this issue."[47]
54. The Supreme Court further examined whether the liability of the defendants can be established according to the general rules of liability for damages regardless of the fact that the Supreme Court did not establish a violation of the applicants' personal rights. Therefore it was for the applicants to prove that they suffered damage as a result of the unlawful conduct of the defendants. And it is for the defendants to prove that they acted with due diligence under the given circumstances.
55. The Supreme Court found that the Remedial School did not act unlawfully as it was pointed out in the second instance judgment, just because its teachers did not note that the plaintiffs should have been educated in mainstream education.
56. The second instance judgment established the liability in theory of the County Council as maintainer for failing to fulfil its obligation to control and oversee the lawful operation of the Expert Panel. The Supreme Court found it indisputable that

[46] See Annex No. 19: judgment, Hungarian Supreme Court (Magyar Köztársaság Legfelsőbb Bírósága), judgment, Pfv.IV.20.215/2010/3., page 10.
[47] Ibid. page 11.

the Expert Panel did not provide that the parents be present at the tests and it failed to provide information about their right to appeal. In addition, in the case of the second applicant, the Expert Panel placed the child in a remedial school despite the explicit objection of the parents – all in violation of relevant law (No.14/1994 (VI.24.) Ministerial Decree).

57. Therefore the Supreme Court stated that "the Appeal Court wrongly concluded that the applicants did not suffer damage in relation to the unlawful conduct of defendants. By depriving applicants from their right to appeal, applicants were deprived from the possible better judgment of their abilities which establishes the disadvantage. In addition, the County Council failed to fulfil its obligation to control and oversee the lawful operation of the Expert Panel therefore both defendants' unlawful conduct and liability can be established."[48] Therefore the Supreme Court upheld the first instance judgment with regards to the payment of the damage of HUF 1,000,000 to each applicant by the Expert Panel, and the Supreme Court obliged the County Council to share the compensation amount based upon its liability and pay HUF 300,000 to each applicant out of the 1,000,000 HUF.

58. The Supreme Court found that the State failed to create an appropriate professional protocol which considers the special situation of Romani children and alleviates the systemic errors of the diagnostic system and as a result applicants' human rights may have been violated by the State. The Supreme Court found that it had no competence to decide on the merits of the case with regard to the violation of substantive rights. It pointed to the European Court of Human Rights as a forum that has the competence to judge this matter and provide effective remedy to the applicants with regards to the systematic errors of the existing diagnostic system.

III. RELEVANT DOMESTIC LAW

59. Please see Annex No. 2 for Relevant Domestic Law

IV. STATEMENT OF THE ALLEGED VIOLATIONS OF THE CONVENTION AND PROTOCOLS

[48] Ibid. at page 13.

60. The Applicants respectfully submit that there have been violations of their rights and freedoms guaranteed by the Convention:

- Applicants have been the victims of discrimination on the grounds of race in the enjoyment of their right to education (Article 14 taken in conjunction with Article 2 Protocol 1)

Article 14 taken in conjunction with Article 2 Protocol 1

61. Article 2 of Protocol 1 of the Convention provides:

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

Article 14 of the Convention provides:

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

62. The applicants submit that the Respondent State has violated their rights under Article 14 of the Convention taken in conjunction with Article 2 of Protocol 1.

63. The applicants submit that they have been discriminated against in the enjoyment of their right to education by reason of their ethnic origin which is inseparably linked to their misconceived disability. They, along with a disproportionately high number of Romani children in Hungary, were placed in remedial schools, the educational standards and physical conditions of which are substantially inferior to that of normal primary schools. The applicants regard their treatment as discrimination without an objective and reasonable justification.

64. According to the researchers since the 1970s the misdiagnosis of Romani children as mentally disabled and their placement in special schools has been a well-known and well-documented method of segregation in the Hungarian public education system. The misdiagnosis of Romani children has been known and widely discussed in professional circles as a systemic problem. Despite professional debates and ad hoc re-diagnosis programmes, misdiagnosis has

persisted and now seems to be on the rise. [49] In 1993, official school statistics showed that 42% of special school students were of Romani origin.[50] Whereas in academic year 1992/1993 Romani children represented only 8,22 % of the total student body.[51]

65. The Supreme Court of Hungary in its judgment delivered in the applicants' case stated that the creation of an appropriate professional protocol which takes into account the special situation of Romani children and alleviates the systemic failures of the diagnostic system is a duty of the Respondent State. However, the Supreme Court further noted that ruling on the failure of the State to create such a professional protocol and diagnosis system and thereby terminating the misdiagnosis of Romani children exceeds its competence. Therefore *the Supreme Court of Hungary referred the applicants to seek remedies for these violations from the European Court of Human Rights*.

66. The applicants assert that they have suffered direct and/or indirect discrimination which manifested itself in the following conduct:

    i. Failure to take into account the ethnic characteristics of the applicants during their testing and assessment
    ii. Holding paper-based reviews of the applicants
    iii. Failure to inform parents about right to remedy
    iv. Placement of the applicants in special schools designed for mentally disabled children
    v. Teaching a lower curriculum
    vi. Stigmatisation.

67. The applicants note that the Supreme Court established a violation of their rights under points ii and iii above. Therefore, they will not expand on these issues and will limit the following submissions to points i and iv-vi. The argument will be framed as follows:

I. Elements of the concept of discrimination

[49] See Annex No. 28: G. Havas, I. Kemény, and I. Liskó (2002), *Cigány gyerekek az általános iskolában,* Oktatáskutató Intézet, Új Mandátum, Budapest.
[50] See Annex No. 22: Ministry of National Resources, http://www.nefmi.gov.hu/kozoktatas/eselyegyenloseg/utolso-padbol-program
[51] According to statistics from the Hungarian Central Statistical Office in academic year 1992/93 there were 1 071 727 primary school stundents in total. (See: http://portal.ksh.hu/pls/ksh/docs/hun/xstadat/xstadat_eves/i_wdsi001a.html). Out of which 88 182 were of Romani origin (see: http://www.mtaki.hu/docs/kemeny_istvan_ed_roma_of_hungary/istvan_kemeny_bela_janky_roma_population_of_hungary_1971_2003.pdf, page 161.

II. Establishing a prima facie discrimination of the applicants

a) Direct discrimination of the applicants by

i. Failure to take into account the ethnic characteristics of the applicants during their testing and assessment

iv. Placement of the applicants in special school designed for mentally disabled children

v. Teaching a lower curriculum

vi. Stigmatisation

b) Indirect discrimination of the applicants

- The over-representation of Romani children in special education
- Domestic research on misdiagnosis
- Structural shortcomings of the diagnostic system
- Reports by international organisations

III. Lack of objective and reasonable justification for the different treatment of the applicants

1. Justification defence under ECtHR case law

2. Justification defence under Racial Equality Directive[52] ("RED") and domestic law: no justification for direct ethnicity based discrimination in education other than for the purposes of positive action.

3. Justification defence for indirect discrimination under RED and domestic law

I. Elements of the concept of discrimination

68. The applicants do not here rehearse the entirety of this Court's jurisprudence on discrimination, but recall a number of elements which are key in the present case. They also note some of the jurisprudence of the European Court of Justice, which is increasingly relevant in this course as the positions of the two courts with regards to discrimination become more mutually aligned.

69. As regards the limitations of the concept of discrimination, according to this Court's case law on Article 14, discrimination occurs when, without objective and reasonable justification, persons in relevantly similar situations are treated

[52] Council Directive 2000/43/EC of 29 June 2000

differently[53] or when States fail to treat differently persons whose situations are significantly different.[54] The Court has also stated that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures."[55]

70. The Court has also established that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, notwithstanding that it is not specifically aimed at that group[56] and, as with European Union law, in particular the RED, such a situation may amount to "indirect discrimination", which does not necessarily require discriminatory *intent*.[57] The Court also clarified that discrimination that is potentially contrary to the Convention may result from a *de facto* situation.[58]

71. The applicants belong to the Romani ethnic minority, a group that enjoys protection under Article 14 of the Convention. The Court has noted in previous cases that Roma do not only enjoy protection from discrimination, but that they also require special protection.[59] As attested by the activities of numerous European and international organisations and the recommendations of the Council of Europe bodies, this protection also extends to the sphere of education.[60]

72. In *Orsus and Others v Croatia* the Court specified that such special protection includes "positive measures" to stem the high drop out rate of Romani children from school. The Court in *Orsus and Others v Croatia* concluded that the State failed to have "sufficient regard to their special needs as members of a disadvantaged group" and found a violation of the anti-discrimination protection of the Convention.[61]

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[53] *Willis v the United Kingdom*, no. 36042/97, at para. 48, ECHR 2002-IV; and *Okpisz v Germany*, no. 59140/00, at para. 33, 25 October 2005
[54] See: *Thlimmenos v Greece* [GC], no. 34369/97, para. 44, ECHR 2000-IV, See also: *"Case relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium (Merits)*, judgment of 23 July 1968, Series A no. 6, at para. 10
[55] See: *Timishev v Russia*, nos. 55762/00 and 55974/00, at para. 58.
[56] See: *Hugh Jordan v the United Kingdom*, no. 24746/94, at para. 154, 4 May 2001; and *Hoogendijk v the Netherlands* (dec.), no. 58461/00, 6 January 2005
[57] See: *D.H. v The Czech Republic*, no. 57325/00, at para.184.
[58] See: *Zarb Adami v Malta*, no. 17209/02, para. 76
[59] *Chapman v the United Kingdom*, judgment of 18 January 2001, *Connors v the United Kingdom*, judgment of 27 May 2004
[60] See: *D.H. v the Czech Republic*, no. 57325/00, para. 182
[61] See: *Orsus and Others v Croatia*, no. 15766/03, at para. 177

73. Domestic law in the Respondent State explicitly defines segregation[62] and also defines discrimination as aligned with European Union law. The RED provides a clear definition for direct discrimination, indirect discrimination and also defines positive action measures. It stipulates that the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.[63]

74. The case law of the Court of Justice of the European Union (ECJ) has recently evolved to identify as direct discrimination cases in which a formally neutral criterion in fact affects one group only - by nature or on the basis of a rule that has the force of law. Case, C-267/06, *Maruko*[64] concerned a German law that permitted life partnership to same sex couples, but same sex couples cannot marry. Mr Maruko survived his life partner who had been making payments into an occupational pension fund. He applied for a survivor's pension from the fund but was refused. In a preliminary referral procedure the ECJ ruled that the Framework Employment Directive applied to his case. It also ruled that in relation to a survivor's pension paid out of an occupational pension fund, life partnership between persons of the same sex was a comparable situation to that of spouses.

75. Under the RED, indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[65] Discriminatory intent is not required under the RED either to establish direct or indirect discrimination.

76. Domestic law defines direct and indirect discrimination in line with the RED. Moreover, it defines segregation as: "a conduct that separates individuals or groups of individuals from other individuals or groups of individuals in a similar situation on the basis of their characteristics as defined in Article 8, without any law expressly allowing it."[66]

77. The law also defines that "the principle of equal treatment is not violated if, a) in public education, at the initiation and by the voluntary choice of the parents, b) in

[62] Article 10(2) of Act No. CXXV of 2003 on Equal treatment and the promotion of equal opportunites
[63] Article 2(1)
[64] See: *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0267:EN:HTML
[65] Article 2(2)b
[66] Article 10(2) of Act No. CXXV of 2003 on Equal treatment and the promotion of equal opportunites

institutions of higher education, by the students' voluntary participation, such education based on religious or other ideological conviction, or education for ethnic or other minorities is organized whose objective or programme justifies the creation of segregated classes or groups; provided that this does not result in any disadvantage for those participating in such an education, and the education complies with the requirements approved, laid down and subsidised by the State."[67]

78. This Court has ruled on cases revealing ethnicity based segregation, most notably in *Sampanis and Others v Greece*.[68] However, the Court has not yet provided a legal concept of segregation, nor has it clarified its stance on this most egregious form of discrimination – including the limits of its justification. The segregation of Romani children in the Respondent State in particular and in Central and Eastern Europe in general is still widespread. Given that since the 1970s, when the number of Romani children had substantially increased, one form of such segregation has been the misdiagnosis of Romani children as mentally disabled, and given also that the domestic legislation of many of the states concerned defines and outlaws ethnicity based segregation, the clarification of this Court's approach to segregation appears necessary. Moreover, in light of the concepts of discrimination applied in the applicants' case by the domestic courts, reconciling this Court's case law on discrimination with the concepts transposed from the RED seem to be a prerequisite to the domestic perception and the implementation of a ruling potentially arising in relation to the present application.

II. Establishing a prima facie case of discrimination

79. According to this Court's definition of discrimination under Article 14, applicants must show that as compared to persons in relevantly similar situations they have been treated differently or that the Respondent State has failed to treat them differently from persons whose situations are significantly different.[69] The Court then allows Respondent States to objectively justify any difference in treatment,

[67] Ibid., Article 28(2)(a) and (b)
[68] See*: Sampanis and Others v Greece*, no. 32526/05
[69] See: *Thlimmenos v Greece* [GC], no. 34369/97, para. 44, ECHR 2000-IV, See also: *"Case relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium (Merits)*, judgment of 23 July 1968, Series A no. 6, at para. 10

except when it is based exclusively or to a decisive extent on the applicants' ethnic origin.

80. The applicants seek to demonstrate firstly that, as compared to mentally able majority students (persons in relevantly similar situations), they have been treated differently, that is, they have been diagnosed as mentally disabled and placed in special school. Secondly, the applicants argue that, with regard to the choice and assessment of tests used to diagnose mental disability the Respondent State has failed to treat them differently from majority students (persons whose situations are significantly different), that is, their minority social, cultural and linguistic characteristics had not been taken into account as compared to majority characteristics. The applicants assert that by substantiating these elements, they will also comply with the onus imposed on them by European Union and domestic legislation.

81. Article 8 of the RED states: "when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court ... facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".

82. Under Article 19 of the Hungarian Equal Treatment Act victims of discrimination need to establish their protected ground (real or perceived) and less favourable treatment (disadvantage) before the burden of proof shifts to respondents.

a) Direct discrimination of the applicants

83. This Court has already established in the case of *D.H. and Others v the Czech Republic* that the misdiagnosis of Romani children and their consequent overrepresentation amongst mentally disabled is the result of diagnosing Romani children with culturally biased tests. However the Court has not considered so far the specific directly discriminatory elements of the diagnostic procedure. The applicants urge the Court to do so in the instant case and to bear strongly in mind the provisions of the RED and the jurisprudence on discrimination of the ECJ.

84. The applicants submit that they are members of the Romani community, whose children are in fundamentally different situations to majority children, due largely to the effects of long-term discrimination. Yet, common societal difficulties faced by

Romani children, as members of disadvantaged communities, often poorly educated, at risk of isolation and ostracism in majority settings and cultural differences (possibly including language)[70] have not been taken into consideration during the design of the diagnostic tools used for testing. Moreover, during the assessment of test results, due attention was not paid to such matters. The applicants submit that the failure to pay due regard to these matters amounted to treatment defined as direct discrimination in Article 2 of the RED. The failure to take into account the particularities of the Romani ethnicity in relation to the diagnostic tools is revealed by the REF amicus brief submitted in the domestic court proceedings[71] and forensic expert Ilona Réz's testimony[72] given in an analogous procedure and submitted as written evidence in the applicants' domestic court case. The failure to register and treat Romani students as ethnic minority students during the assessment phase is revealed not only by REF amicus, but also by the fact that no protocol for assessment existed until 2004 – as confirmed by forensic expert Ilona Réz[73] – therefore no provision existed to prescribe that the ethnic characteristic of the child shall be taken into account,[74]

i. Failure to take into account the ethnic characteristics of the applicants during the testing and assessment

Directly discriminatory diagnostic tools and assessment practice

85. The applicants submit that the diagnostic tools and assessment practice in use in Hungary at the material time were directly discriminatory against ethnic minority children, such as Romani children, including the applicants, which led to their misdiagnosis as mentally disabled and, as a consequence they were educated in special schools.

[70] See: *D.H. v The Czech Republic*, no. 57325/00, at paras 201-203
[71] See: Annex No. 23: REF Amicus brief submitted in the applicants' case
[72] See: Annex No. 20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7, 20 May 2008, Witness testimony of Dr Ilona Nagyné Réz psychologist, special pedagogue and public education expert head of the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság)
[73] Annex No. 20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7, 20 May 2008, Witness testimony of Dr Ilona Réz
[74] See: Annex No. 23: REF Amicus brief submitted in the applicants' case

86. The applicants assert that in the course of their diagnosis and evaluations the Expert Panels used diagnostic tools standardised for majority children. As a result, they did not take into account Romani children's, including the applicants', different ethnic origin and the different needs arising therefrom. Thus, the applicants were treated less favourably than non-Romani children in a comparable situation, which amounted in their case to direct ethnicity based discrimination.

87. The applicants note that this different treatment against Romani children, including the applicants - similarly to the *D.H*. case - did not necessarily result from an inherently discriminatory statutory background regulating special education, but rather from a *de facto* situation that affected Roma only. In other words, as explained by the ECJ in *Maruko* as a formally neutral criterion in fact and by nature affected one group only.

88. In order to establish a prima facie case, the applicants rely on the two amicus curiae briefs submitted by the Roma Education Fund (REF). One of them was submitted to this Court in the *D.H*. case[75] and another one in the applicants' case[76] during the domestic procedure. The applicants also rely on the testimony of Anna Kende, author of the domestic amicus brief and of forensic expert Ilona Réz, a distinguished special education expert who led the court appointed expert group that had re-diagnosed the applicants during the trial phase.[77]

The failure to re-standardise the diagnostic tools

89. Both amicus briefs submitted as evidence discuss the international standards for the diagnostic tools, which alleviate the misdiagnosis of children coming form a non-majority background. These requirements are the following: the assessment should be culturally and linguistically appropriate to the circumstances and competencies of the individual child, sensitive to the child's prior knowledge, experiences, and developmental stage, multifaceted (that is, not relying on single measures) and authentic (i.e., gathered in realistic settings and situations by

[75] See: Annex No. 24: Written comments by International Step by Step Association, Roma Education Fund and European Early Childhood Education Research Association
[76] See: Annex No. 23: Amicus Curiae Brief, REF, submitted int he applicants' case
[77] See: Annex No. 20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7, 20 May 2008, Witness testimony of Dr Ilona Nagyné Réz psychologist, special pedagogue and public education expert head of the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság)

familiar adults with whom the child feels at ease).[78] The briefs stress that the use of a single test is highly unlikely to produce a valid indicator of a young child's intellectual capabilities, particularly when the test is administered in a single session by an unknown person in a language unfamiliar to the child. Neither is it a good measure of a child's potential for future learning. Therefore in order to provide valid and fair results, educational testing needs to go beyond single measures and, as far as possible, must take into account children's developmental, ethnic, cultural, and language diversity.[79] The purpose for testing, including psychological assessment, must be clear and needs to focus on the best interests of the child; that is, it should support maximising a child's potential for learning and development, not on limiting his/her future opportunities, as often occurs through the use of "high stakes" intelligence testing.[80] In the case of young children the testing protocols has to be child-centred and authentic, since young children are not used to formal testing situations. Otherwise, especially for minority children who live isolated from majority culture and language, the received test results will be biased and impossible to interpret.[81]

90. In Hungary, as confirmed by forensic expert Ilona Réz, no standardised protocol existed before 2004, that is, there had been no provision of law regulating the testing, assessment and monitoring of children. No complex diagnostic system existed which would have taken the specific child's individual characteristics, cultural and linguistic background into account as required by international standards. The tools had not been reviewed and re-standardised according to these international norms.[82] Therefore, as the expert stated, "the systemic error must have manifested itself as other diagnostic tools should have been used and the tools in use should have been reviewed and re-standardised according to international standards".[83] The amicus brief submitted in the applicants' domestic case confirms that in the material time there was no test in place which would have

[78] See: Annex No. 24; Annex No. 24: Written comments by International Step by Step Association, Roma Education Fund and European Early Childhood Education Research Association submitted to the ECHR in the D.H. versus the Czech Republic
[79] Ibid.
[80] Ibid.
[81] See Annex No. 23: REF Amicus submitted in the applicants' case
[82] See: Annex No. 20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7, 20 May 2008, Witness testimony of Dr Ilona Nagyné Réz psychologist, special pedagogue and public education expert head of the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), page 9
[83] Ibid., p. 10

provided culturally unbiased test results. The tests in use at the material time were not sensitive to the linguistic and cultural knowledge of the child.[84]

91. As discussed in the witness testimony of Anna Kende[85] in an analogous domestic procedure, the tests that were most commonly used for diagnosing children in Hungary were *knowledge based intelligence tests standardised for majority children*: the Budapest-Binet Intelligence test and the colourful Raven test. In view of the international standards detailed above both of these intelligence tests are problematic. The Budapest Binet test is in particular culturally biased; its tests contain only verbal questions that are appropriate only for testing children with good verbal abilities. With regards to the Raven test, it is not as strongly culturally biased as the Budapest Binet, however it cannot be applied to children suffering from visual disorder.[86] With regards to the emphasis Expert Panels placed on intelligence tests when assessing children, the domestic amicus curiae brief stresses that the tests in use in Hungary, to a considerable extent were built on the children's previous linguistic and cultural knowledge. They were thus significantly sensitive to the children's cultural and linguistic background.[87] In addition, at the material time of the case, until 2004, the rate of IQ 86 standardised for the Raven test had been used as an upper limit for diagnosing children with mild mental disability. This was a considerably higher rate than accepted by international standards at the material time. Only in 2004 was this rate decreased to IQ 70 which was the internationally accepted upper limit.

92. The applicants stress that these shortcomings *by nature* necessarily led to the misdiagnosis of Romani children, including the applicants, as mentally disabled. The applicants too had different (minority) cultural and linguistic knowledge as compared to what had been expected by the tests in use.

Failure to assess the test results bearing in mind students' minority ethnicity

[84] See: Annex No. 23: REF Amicus submitted in the applicants case, page 7
[85] Anna Kende, psychologist, authored the amicus brief of RED and she was heard as a witness in an analogous case and her witness testimony was submitted by the applicants as evidence in the domestic procedure of the present case
[86] See: Annex No. 20:. Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7, 20 May 2008, Wittness testimony of Anna Kende
[87] See: Annex No. 23: REF Amicus submitted in the applicants case, page 7

93. The failure to register and treat Romani students as ethnic minority students during the assessment phase is also revealed by the domestic amicus curiae brief.[88]

94. As noted by Ilona Réz no standardised protocol existed before 2004.[89] No uniform rules at the material time governing the manner existed in which tests used by the expert panels were administered and the results interpreted.[90] As discussed in the witness testimony of Ilona Réz and Anna Kende, as well as in the domestic amicus brief, despite the lack of protocol governing the assessment procedure and the outdated tests, there was still a possibility to avoid the distortion by taking the social, cultural and linguistic background of ethnic minority children into account. This, however, could not be done in the present case, as the applicants' ethnic background had not been recorded, noted, or taken into account during the assessment.

95. In addition, the domestic amicus curiae brief notes that during the assessment of (dis)ability several factors may influence the diagnosis of the children and their subsequent placement in special schools such as bias and stereotyping attitude of the experts, the over-reliance on IQ rates, and the attitude of superiority of the experts and schools over minority parents.[91]

96. The amicus submitted to this Court in the case of *D.H. and Others v the Czech Republic* highlighted with regards to Hungary that "apart from the problems with the tests themselves, the examiners carrying out the tests tend to formulate stereotypical opinions on children, and interpret the test results according to their first impressions or some characteristics of the children. Children whose lower test scores were explained by their being Roma do significantly worse in all examined areas than do those whose low test scores were explained by other factors."[92] Thus, the assessment in Hungary depended at the material time to a large extent on the discretion of the experts conducting the tests.

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[88] See: Annex No. 23: REF Amicus brief submitted in the applicants' case

[89] See Annex No. 20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7., 20 May 2008, Witness testimony of Dr. Ilona Nagyné Réz psychologist, special pedagogue and public education expert head of the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), p. 9

[90] Ibid.

[91] See: Annex No. 23: REF Amicus submitted in the applicants case, page 9.

[92] See Annex No. 24: Written comments by International Step by Step Association, Roma Education Fund and European Early Childhood Education Research Association submitted to the ECHR in the D.H. versus the Czech Republic

Failure to take into account the applicants' ethnic characteristics during testing and assessment

97. The applicants were tested with intellectual tests which are culturally biased (Budapest Binet and Coloured Raven), designed for majority children and their ethnic origin and different needs arising there from were not taken into consideration when assessing their test results. Therefore the results gained from these flawed tests could not show an objective picture about the intellectual ability of the applicants.

98. The applicants submit that the Expert Panel used the tests as single evidence for their abilities rather than presenting multiple sources of evidence. The testing of the applicants did not take place in a comfortable environment where they could have best demonstrated their learning; but in an unfamiliar environment, the premises of the Expert Panel. Further, the applicants' testing was done in a single administration, not over time, and the review examinations were not performed on a biannual basis and the documentation about the reviews were deficient.

99. The first applicant[93] submits that he was diagnosed with mild mental disability based on a single test of his intellectual ability. At his first examination of his intellectual abilities he was requested to be tested by the kindergarten where he spent very little time, as he was sick most of the time.[94] However this was not taken into account when assessing his results, despite the fact that it is known as a common cause for bad performance at the tests. According to sociological research, the results of school readiness assessments assign a far higher than average proportion of children of poor and uneducated parents to special education classes or so-called reduced-size compensatory classes, and inadequate kindergarten education greatly contributes to this outcome.[95] As revealed by a study conducted in 2000, 36.8 per cent of sixth year Romani students attending special education classes had not attended kindergarten at all while the corresponding proportion for sixth year Roma students attending regular classes was only 4.9 per cent.[96]

[93] István Horváth
[94] See: Annex No. 4: Expert opinion of National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), István Horváth, 19 November 2008
[95] See: Annex No. 21: G. Havas, Equal opportunity, Desegregation, page 128; available at: http://www.econ.core.hu/file/download/greenbook/chapter5.pdf.
[96] Ibid.

100. The first applicant was tested with the Budapest Binet test and the Coloured Raven test which were known to be culturally biased as confirmed by the witness testimony of Anna Kende expert.[97] His Budapest Binet test scored IQ 64 and the Raven test scored IQ 83. There was 19 points difference in the results of the two tests, yet the Expert Panel did not elaborate in the opinion about the causes of the difference in the results. According to the witness testimony of Anna Kende, it is known that the Budapest Binet test is culturally biased and the test shows lower IQ rates in the countryside than in Budapest. The applicant's ethnic origin and the different needs arising were not taken into account when assessing the test results. The applicant was declared with mild mental disability[98] and the *cause of the mental disability was unknown.* The cause of the first applicant's disability was never established during subsequent reviews, however his mental disability was upheld.

101. The first applicant submits that he was diagnosed as being mildly mentally disabled despite the fact that under the law[99] SEN-a is a disability that originates from organic causes, whereas the organic causes of his disability had never been established. Neither did the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság) establish the organic causes of the first applicant's alleged disability.[100]

102. The first applicant has sound intellectual ability and could have been educated in normal school. This was confirmed by his examination by Ms Figeczki Ilona Bedő, an independent expert, in a camp, in a familiar environment under informal circumstances. The applicant performed much better in the intelligence tests under the familiar circumstances, his Raven IQ scored 90. The experts stated that the applicant is not mentally disabled and can be educated in normal school with normal curricula. However he suffers from neurotic immaturity and dyslexia.[101]

103. The first applicant had good results at school, he was integrated in the school system, active and able to study individually, had no impediment in speech, and

[97] Annex No. 18: Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009, page 5; see also Annex No. 20. Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7, 20 May 2008 Witness Testimony of Anna Kende

[98] See Annex No.2: Relevant Domestic Law PEA, § 121. 20. „other disability". At the time of the examination the law provided for "other disability". Later defined as a, type SEN.

[99] See Annex No.2: Relevant Domestic Law, PEA, § 121 29. a

[100] See Annex No. 4: Expert opinon of National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), István Horváth, 19 November 2008

[101] Annex No. 15: Expert Opinion, István Horváth, 15 September 2005

only needed reassurance. In addition, the first applicant was active in classes, happy, hard working and complied with all the requirements of the curriculum.[102] His low performance derives from his deficiency in acquired knowledge due to the fact that he was educated under lower curricula designed for children with mental disability.

104. The second applicant, after spending seven months in nursery, started his elementary education in 1998/99 in a mainstream school, the No 13 Primary School. The local pedagogical advisory committee (nevelési tanácsadó) noted that the applicant's learning difficulties *derived from his disadvantaged social and cultural background* and advised him to be enrolled in a mainstream school but being educated under a special programme (Step by Step) in order to ensure additional help to his development. A year later, the school requested the examination of the second applicant. His IQ[103] was measured at 73 (falling in the "normal" rate), which is why he started his education in mainstream primary school.

105. The second applicant, as well as the first applicant, was measured with the same diagnostic tools: his Budapest Binet IQ scored 63 and his Raven test scored IQ 83. The Expert Panel, as for the first applicant, did not note the difference between the two results, neither did they examine the causes of the difference in the result in the first IQ test (IQ 73) and the second one (IQ 83) despite the fact that experts warn that such robust discrepancies between the Raven and Budapest Binet tests (20 points) are indicative of misdiagnosis. The first applicant was diagnosed as having mild mental disability originating from organic causes (SEN-a).[104]

106. The next review took place in 2002, it was not a personal but a paper based review, the Expert Panel only noted that there was no development in his ability.[105] The personal review was performed only on 27 April 2005, where only a Raven intelligence test was performed. Despite the fact that the child had good results at school, the pedagogical opinion of the school saw no reason to change his

[102] See Annex No. 7: Expert Opinion, István Horváth, 20 March 2007
[103] There was no indication on the request which IQ test was used. Please See Annex No. 8
[104] See Annex No. 9: Expert Opinion dated 15 May 2000., Expert and Rehabilitation Committee of Szabolcs-Szatmár –Bereg County, András Kóka, 2000 May 15
[105] Annex No. 10. Expert opinion, András Kóka, 04 December 2002

placement. The Expert Panel declared that there was no development in the first applicant's ability, therefore the Expert Panel upheld the previous opinion.[106]

107. The second applicant was tested twice subsequently, by the independent expert Ms Figeczki Ilona Bedő in the summer camp and by the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság) during the domestic procedures. Both expert opinions underlined that the second applicant is not mentally disabled.

108. Forensic expert Ilona Réz, leading the National Expert and Rehabilitation Committee in the expert opinion, noted that the applicant is not mentally disabled; his SZQ (social abilities) score is 90 which excluded mental disability. The expert notes that the learning difficulties of the applicant derive from the fact that he was educated under the lower curriculum in the special school and *because of his disadvantaged socio and cultural background*. Therefore he has significant deficiency with regards to acquired knowledge (tanult ismeretbeli hiányosság). [107]

109. This means, in the opinion of the second applicant, that as a result of his disadvantaged socio and cultural background he was treated less favourably than majority children and was mis-diagnosed as mentally disabled and educated under a lower curriculum in a segregated environment from normal children. The deficiencies enlisted in the expert opinion do not derive from organic disability, therefore with specific pedagogic development the learning difficulties of the applicant could have been developed. The fact that he was educated in a special school under a lower curriculum resulted in the fact that the applicant has significant deficiency with regards to acquired knowledge. Had the Expert Panel at the first assessment considered his disadvantaged socio and cultural background when assessing his test results, the applicant would not have been denied his right to be educated under a normal curriculum in a normal school.

iv. Placement in special school designed for mentally disabled children

110. Under the RED, as well as domestic law, direct discrimination occurs when one person is treated less favourably than another […] in a comparable situation on

[106] See Annex No. 13: András Kiss, National Expert and Rehabilitation Committee, 20 November 2008, page 4-5.
[107] See Annex No. 13: András Kiss, National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), 20 November 2008. page 5

grounds of racial or ethnic origin.[108] Under the RED as well as domestic anti-discrimination law, ethnicity based direct discrimination in public education cannot be justified other than by positive action measures. The applicants submit that they were treated less favourably than majority children by being educated in special school, despite their normal intellectual abilities.

111. Both applicants were diagnosed as having mild mental disability and were therefore segregated from children with normal mental abilities and educated in special school. As shown by the expert opinion of the first applicant this school was a segregated school for mentally disabled children.[109] The expert opinion of Ms Figeczki Ilona Bedő in the summer camp states that *the curriculum for students with special educational needs is a lower curriculum.* The integration of such students later is more difficult, therefore it is recommended that the usual examination methodology is extended.[110] The expert also notes "based on our experience Romani children provide lower results than majority children at the beginning of their primary education due to the diagnostic tools designed for majority children, however later they catch up and adapt to learning rhythm and school life."[111]

112. The applicants submit that their segregation from children with normal intellectual ability was due to their misdiagnosis as mentally disabled. The applicants were placed in a segregated school teaching a lower curriculum and were therefore denied a free and informed choice of their education, including the ultimate choice not to be segregated from children with normal intellectual abilities.

113. The applicants submit that their segregation from children with normal intellectual ability was due to their misdiagnosis as mentally disabled. This misdiagnosis in turn was the result of their ethnicity, which for legal purposes under this Court's judgment in *D.H. and Others v the Czech Republic* is understood to comprise social, cultural and linguistic characteristics of Roma ("particularities and characteristics of Roma children", "members of disadvantaged community", "often poorly educated", "making decisions under constraint", "social and cultural differences (possibly including language)", "risk of isolation and ostracism in

[108] Article 2(2)a
[109] See Annex No. 7: Expert Opinion of István Horváth, 20 March 2007
[110] Annex No. 15: Expert Opinion, István Horváth, 15 September 2005
[111] Annex No. 15: Expert Opinion, István Horváth, 15 September 2005

majority settings")[112] living in Hungary. The testing and assessment that was used took into account those characteristics of the majority ethnic population, not of the Roma.

114. Research shows that the majority of Hungarian schools are not equipped to meet the pedagogical requirements presented by children with special educational needs. In Hungary public education funding is adjusted to the assessment of children's/students' needs and entitlements rather than to the de facto availability and quality of services. The use of funding is accordingly audited in terms of financial and accounting accuracy while its professional efficiency and outcomes are not inspected beyond the fulfilment of the pre-specified minimum conditions. A practical consequence of this model is that the diagnosis of a child as having special educational needs is not followed by compensatory instruction but the child is placed in a class where the quality of teaching and the general conditions of education may be substantially inferior to the usual standards. [113]

v. Lower Curriculum

115. The applicants submit that they were taught a curriculum far lower than the normal one. Several pieces of evidence corroborate this statement. The expert opinion about the first applicant cited in the first instance judgment stated about the Göllesz Viktor Primary School that "the first applicant studies in a segregated environment and that the curriculum for special needs students is a lower curriculum, therefore the integration of such students later is more difficult. Therefore it is recommended that the usual examination methodology is extended."[114] The second applicant also studied in the same school, finishing his studies two years prior to the first applicant.

116. Under the PEA, special curriculum means that children with SEN – based on the opinion of the expert and rehabilitation committee or the pedagogical advisory committee (nevelési tanácsadó) – are exempt from studying certain subjects fully or partially.[115] The relevant laws state that as a result of the different needs of

[112] See: *D.H. v the Czech Republic*, no. 57325/00, at paras 201-203.
[113] G. Havas, Equal opportunity, Desegregation; page 140. available at: http://oktatas.magyarorszagholnap.hu/images/Chapter5.pdf
[114] See Annex No. 17: Judgment, Szabolcs-Szatmár-Bereg County Court, 3.P.20.035/2008/20., page 2
[115] See Annex No. 2: Relevant Domestic Law, PEA, 30 § (9)

students with disability (SEN), there is a need to use different procedures, contents and provide for additional special needs and a special curriculum.[116] It is for the school educating children with disabilities to develop their own pedagogical plans on the specific educational programme under the framework of the national curriculum; but children with mild mental disability study with a reduced curriculum: instead of eight grades of primary education, may finish their obligatory education in ten grades, and students do not need to study certain subjects, for example science and foreign languages in the first six grades, only from the 7th grade.

117. Education in remedial special schools significantly limits the opportunities for further education. The PEA defines the different categories of secondary education, and stipulates that in order to educate children with special educational needs, the secondary school operates as special vocational school. The special vocational schools educate those students who as a result of their disability cannot be educated with normal students in mainstream school.[117]

118. Given that the applicants were educated in remedial special school, they could not enrol in mainstream secondary schools as neither studied science (chemistry, physics and biology) in the first eight grades and they studied foreign language only from the 7th grade.[118] Therefore, they only had the opportunity to continue their studies in a special vocational secondary school, where it is impossible to acquire a Baccalaureat necessary for tertiary education.

119. In view of the above, as a result of attending special school, the second applicant could not continue his studies as a car mechanic; he could choose only among those – not competitive - professions that the special vocational school offered to him.[119] Similarly, the first applicant could not train to become a dancer and dance teacher.

120. Research results have also proven that education provided in special classes is inferior to mainstream primary schools. According to research[120] children who are assigned to special education classes in the first year of schooling have very little chance of being transferred to regular classes at a later stage and if they remain in

[116] See Annex No. 2: Relevant Domestic Law, No 23/1997 (VI.4.) Section V. 2. in force until 15 June 2005, as of this date No 2/2005 (III. 1.) Ministry of Education. Section 5.
[117] See Annex No. 2: Relevant Domestic Law, 27.§ (9)-(14) of PEA
[118] See Annex No. 14: Transcript of records, András Kiss
[119] See: Annex No. 18: Judgment, Appeal Court of Debrecen, Pf.II.20.509/2009/10, pages 5 and 9
[120] See Annex No. 21: G. Havas, Equal opportunity, Desegregation; available at: http://www.econ.core.hu/file/download/greenbook/chapter5.pdf, page 138

special education classes their further education prospects will become impossible. On the basis of the data of a 2004 survey on special education programmes of mainstream primary schools, 16.8% of students who successfully completed the 8th grade in the previous year did not continue their studies at all, while 47.4% went on to special vocational schools, which mean a dead-end in terms of further education. The subsequent employment opportunities are practically zero. An additional 34.4% applied to normal vocational schools and only the remaining 1.4% went on to schools from which they can graduate with a Baccaéaureat (the Hungarian equivalent of the G.C.E).[121]

vi. Stigma

121. The second applicant testified that he has been bullied as a result of attending school for the mentally disabled.[122]
122. The applicants refer to the findings of professor Ladányi and his team in 1996 – published in Kritika, Vol. 7/1996, under the title "Megszüntetve megőrzött gyogyó".[123] This piece of work found that almost every child misplaced in special schools in the 1970s, when revisited in the first half of the 1990s "spoke of or mentioned in some way the severe humiliation that resulted from his history linked to special schools. Back in their school years these children were stigmatised and bullied and their peers often excluded them. Later this whole "disabled" past became something better not remembered and erased. special schools brought such severe stigmatisation and humiliation for them that they wished to forget about it, particularly those, whom – based on their intellectual abilities – should never have been transferred there.".
123. These findings are in line with the reasoning followed by the US Supreme Court in *Brown v Board of Education*, 347 U.S. 483 (1954): separation "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." This lasting effect, this never ending feeling of inferiority resulting from physical segregation and the provision of a curriculum

[121] Ibid.
[122] See: Annex No. 18: Judgment, Appeal Court of Debrecen, Pf.II.20.509/2009/10, page 9.
[123] See Annex No. 27: Kritika, Vol. 7/1996, János Ladányi, Gábor Csanádi, Zsuzsa Gerő, "Megszüntetve megőrzött gyogyó", (Preserving by shutting down schools for "retards"), page 12

of lesser quality compounded by the widespread nature of the violation attests, in the applicants' view, to such severity of degrading treatment that is able to reach the threshold required by Article 3. In the aforementioned Tiszatarján case domestic courts seem to have adopted this reasoning and found a violation of civil rights, whose concept in Hungarian civil and constitutional law is based on human dignity (see judgements No. 10.P.21.080/2001/77. of the Borsod-Abaúj-Zemplén County Court delivered on 1 June 2004 and upheld on 7 October 2004 by the Metropolitan Court of Appeals (Fővárosi Ítélőtábla) at No. 9.Pf.20.931/2004/2.).[124]

b) Indirect discrimination of the applicants

124. Sine the 1970s sociological data have shown that Romani students have been overrepresented in special schools and classes, that is they have been put at a particular disadvantage by being 15 times more likely to be diagnosed as mentally disabled or having special educational needs than majority students. Significantly, the level of disadvantage has grown since 1993, despite efforts at curtailing this trend. Given these general discriminatory trends, the applicants as members of the Romani ethnic group suffered indirect discrimination.

The over-representation of Romani children in special education

125. The applicants submit that their case is far from being unique in the country. The applicants therefore rely on the statistical data and reports presented by various sources, including the Hungarian authorities, national and international experts and inter-governmental organizations evidencing the over-representation of Romani children amongst children diagnosed as having mild mental disability and placed in special schools.
126. As to whether statistics can constitute evidence for discrimination, in *D.H.* and earlier cases[125], in which the applicants alleged a difference in the effect of a general measure or *de facto*[126] situation, the Court relied extensively on statistics

[124] See Annex No. 29: Judgements No. 10.P.21.080/2001/77 of the Borsod-Abaúj-Zemplén County Court delivered on 1 June 2004 and upheld on 7 October 2004 by the Metropolitan Court of Appeals (Fővárosi Ítélőtábla) at No. 9.Pf.20.931/2004/2
[125] See: *DH v the Czech Republic*, no. 57325/00; Hoogendijk v. the Netherlands (dec.), no. 58461/00 and *Zarb Adami v Malta*, no. 17209/02, at para. 77-78
[126] See: *Zarb Adami v Malta*, no. 17209/02,at para. 76

produced by the parties to establish a difference in treatment between two groups in similar situations.[127] The applicants submit that the practice of taking into account general trends beyond applicants' individual circumstances is as equally relevant now as before.

Domestic research on misdiagnosis

127. In 2000, sociologists, Gábor Havas, István Kemény and Ilona Liskó, in their research on Romani children in the education concluded that the misdiagnosis of Romani children as mentally disabled is a tool to segregate Romani children from non-Romani children.[128] According to the researchers since the 1970s the misdiagnosis of Romani children as mentally disabled and their placement in special schools has been a well-known and well-documented method of segregation in the Hungarian public education system. The misdiagnosis of Romani children has been known and widely discussed in professional circles as a systemic problem. Despite professional debates and ad hoc re-diagnosis programmes, misdiagnosis has persisted and now seems to be on the rise. [129] In 1993, official school statistics showed that 42% of special school students were of Romani origin.[130]
128. According to the Ministry of National Resources, in 2004 5.3% of primary school children were mentally disabled in Hungary, whereas this ratio stood at 2.5% in the European Union. The Ministry estimated that at least 42% of these children were of Romani origin, as in 1993, the last year when ethnic data were officially collected in public education. Whereas in academic year 1992/1993 Romani children represented only 8,22 % of the total student body.[131] The Ministry noted that "in the last decade the rate of mentally disabled children has been

[127] See: *Hoogendijk v the Netherlands* (dec.), no. 58461/00
[128] See Annex No. 28: G. Havas, I. Kemény, and I. Liskó (2002), *Cigány gyerekek az általános iskolában,* Oktatáskutató Intézet, Új Mandátum, Budapest.
[129] See Annex No. 28: G. Havas, I. Kemény, and I. Liskó (2002), *Cigány gyerekek az általános iskolában,* Oktatáskutató Intézet, Új Mandátum, Budapest.
[130] See Annex No. 22: Ministry of National Resources, http://www.nefmi.gov.hu/kozoktatas/eselyegyenloseg/utolso-padbol-program
[131] According to statistics from the Hungarian Central Statistical Office in academic year 1992/93 there were 1 071 727 primary school stundents in total. (See: http://portal.ksh.hu/pls/ksh/docs/hun/xstadat/xstadat_eves/i_wdsi001a.html). Out of which 88 182 were of Romani origin (see: http://www.mtaki.hu/docs/kemeny_istvan_ed_roma_of_hungary/istvan_kemeny_bela_janky_roma_population_of_hungary_1971_2003.pdf, page 161.

continuously increasing, especially under the 'mild mental disability' and 'other disability' categories. Children with disadvantaged background, who lack capability to enforce their rights, especially Romani children, are forcefully over-represented amongst children with disability. In a survey conducted in 1998 Borsod-Abaúj-Zemplén County revealed that amongst children attending remedial schools more than 94% were of Romani origin. [132]

129. The fact that the diagnostic tools have disproportionate effect on Romani children and the need for re-standardizing the diagnostic school and the practice of misdiagnosis and segregation of Romani children into special school has been subject of criticism already since the 1970s.[133] "[In the 1980s] the number of Gypsy children in special remedial schools and classes far exceeded the number of Gypsy children in Gypsy only primary school classes. The growing number of Gypsy children attending school in the 1960s motivated their referral to special schools and classes established to educate mildly intellectually disabled students. **The national Gypsy research in 1971 made it clear that a major obstacle of the education of Gypsy children was the existence of special schools**. [...] In 1974/1975 11.7% of Gypsy children attended special schools and classes. Due to the steady increase in Gypsy enrolment by 1985/1986 their proportion reached 17.5%, whereas only 2% of majority Hungarian students studied in special schools and classes. [...] Eight grades finished in special education amounted to six grades in a normal primary school. [...] In 1974 in special schools and classes the proportion of Gypsy students stood at 24%, their absolute number being 8000, by 1985 their number grew to 16.000 and their proportion to 38%. The change in proportions was not due to the deteriorating mental abilities of Gypsy children but indicated a growing effort to keep them away from normal primary schools. [...] Between 1972 and 1975 [...] almost 50% [...] of the lower grade special school students in Budapest were retested. [...] the results were published in 1978 [...]**The most significant result of the Budapest review was that if the borderline between sound and disabled mental abilities were set at IQ 70, the figure recommended by WHO, then only 49.3% of students participating in special education qualified as mentally disabled. 50.7% qualified as normal, within**

[132] See Annex No. 22: Ministry of National Resources, http://www.nefmi.gov.hu/kozoktatas/eselyegyenloseg/utolso-padbol-program

[133] See Aneex No. 28: Gábor Havas, István Kemény and Ilona Liskó: Gypsy children in primary school, Oktatási Kutatóintézet, Új Mandátum Könyvkiadó, Budapest, 2002, pp. 14-17

which 12% had average intellect and 38.7% was a borderline case on the brinks of mental retardation. [...] However, only 7% were qualified as having average mental abilities through a complex evaluation. [...] The complex evaluation qualified children intellectually disabled whose test results suggested otherwise. In order to come to this conclusion, the category of familial intellectual disability was introduced [distinct from pathological mental disability]. [...]The characteristics of familial disability are the following: 'Primarily the parents' level of intellect which is below the average [...] In these families the general economic and cultural conditions are less advantageous [...] The complex issue of familial disability is a social problem [...] Their overwhelming majority integrates into society. Therefore they are not mentally disabled during their adult life. [...] In their case the criterion of 'being incapable of independent living' does not suffice."[134]

130. According to the domestic amicus brief of REF, in Hungary, many children from disadvantaged families who have neither physical nor learning disabilities end up in special schools that have a 'lighter' curriculum."[135] The disproportionate placement specifically of Roma children in special education is also well documented, with Roma children being approximately 15 times more likely than other children to be placed in special schools.[136]

131. The shortcomings of the diagnostic system were acknowledged by state authorities as well when in the spring of 2003 the Ministry of Education launched the "Out of the Back Bench" programme with the stated aim of reviewing children and, after re-diagnosis, channelling them back to mainstream school those who had been mis-diagnosed. The programme was aiming to find out the reasons for the high proportions of disability which showed that while in the European Union this rate was 2,5 % in 2002, in Hungary it was two times higher, i.e. 5,3 %. In the framework of the program 2100 children were reassessed and 11 % of the re-diagnosed children were channelled back to normal school.[137] In Szabolcs-Szatmár-Bereg county, where the applicants are from, this rate was: 16.[138]

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[134] See Annex No. 28: Gábor Havas, István Kemény and Ilona Liskó: Gypsy children in primary school, Oktatási Kutatóintézet, Új Mandátum Könyvkiadó, Budapest, 2002, pp. 14-17
[135] See: Annex No. 23: REF Amicus submitted in the applicants case, page 8.
[136] Ibid.
[137] See: Annex No. 22: Ministry of National Resources, http://www.nefmi.gov.hu/kozoktatas/eselyegyenloseg/utolso-padbol-program [last accessed: 9 January 2011]
[138] Ibid.

132. According to Professor Havas' 2006 paper "Equal Opportunity and Desegregation in the Green Book"[139], the disadvantages of children from extremely poor Romani families are substantially exacerbated by the relentless manifestations of implicit — often subconscious — or explicit ethnic discrimination.[140] "The current institutional conditions in pre-school education are inadequate for the task of compensating for the disadvantages accumulating over the first few years in the lives of children of poor and uneducated parents. Such children, especially children of Roma ethnicity, are far more likely than the general population to delay kindergarten enrolment until the age of five or even later. [...] Institutional selection procedures applying to children starting formal education substantially increase the probability that the disadvantages children of poor and uneducated parents bring with them will become more pronounced over their primary school years. The results of school readiness assessments assign a far higher than average proportion of children of poor and uneducated parents to special education classes or so-called reduced-size compensatory classes, and inadequate kindergarten education greatly contributes to this outcome. As revealed by a study conducted in 2000, 36.8 per cent of sixth year Romani students attending special education classes had not attended kindergarten at all while the corresponding proportion for sixth year Roma students attending regular classes was only 4.9 per cent."[141] "Children who are assigned to special education classes in the first year of schooling have very little chance of being transferred to regular classes at a later stage and if they remain in special education classes their further education prospects will become fatally limited. In 2004, for instance, 16.8 per cent of eighth year special education students did not continue their studies at all and 47.4 per cent enrolled in special vocational training schools which effectively constitute a dead end."[142] "Their proportion in specialised classes providing higher than average quality educational services is very low while they are represented in compensatory and special education classes characterised by reduced academic standards in a markedly high proportion."[143] "In 2004 3.6 per cent of the total primary school population attended special education classes. Although we do not

[139] See Annex No. 21: G. Havas, Equal opportunity, Desegregation; page 131. available at: http://oktatas.magyarorszagholnap.hu/images/Chapter5.pdf
[140] Ibid.
[141] Ibid., page 138
[142] Ibid., page 140
[143] Ibid., page 139

have precise data on the corresponding proportion among Roma primary school students, a conservative estimate based on research results by HAVAS, KEMÉNY & LISKÓ (2000) and HAVAS & LISKÓ (2004) and on data from a national representative survey from 2003 (JANKY, KEMÉNY & LENGYEL, 2004) puts this figure at a minimum of 15 per cent."[144]

Structural shortcomings of the diagnostic system

133. The testing in Hungary is performed by the rehabilitation committee of experts which are maintained by the county level council. At the material time, the committees used intelligence tests as diagnostic tools which tests were calibrated for majority children and culturally biased. During the material time of the present case, until 2004 on the national level IQ 86 (Raven test) was the limit and children were declared with mild mental disability below this rate. Only in 2004 was this rate (under the same test) decreased into IQ 70. It is to be noted that the internationally accepted WHO standard is IQ 70.[145] According to experts the diagnostic procedures in Hungary at the material time could not objectively satisfy international standards which required a complex diagnostic system which takes a child's individual characteristics, cultural and language background into account.[146] Such an updated, re-standardised diagnostic tool has not been realised yet in Hungary. At the same time, the opinions of the rehabilitation expert committees may refer to the socially and cultural disadvantaged background of the child as a cause for intellectual disability. However, the tests are designed for majority children, and in the course of taking the diagnostic measurements and the assessment of the results, experts do not take into consideration the disadvantaged background of the children as well as their different needs arising wherefrom.[147]

[144] Ibid., page 139
[145] Please see webpage of World Health Organization: http://www.searo.who.int/en/Section1174/Section1199/Section1567/Section1825_8084.htm
[146] See: Annex No. 20. Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7., 20 May 2008 (Witness testimony of Anna Kende and Dr. Nagyné Ilona Réz)
[147] See: Annex No. 20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7., 20 May 2008 Wittness testimony of Anna Kende

134. In Hungary, until 2004 there had been no legal provision regulating assessment measurements, evaluations, monitoring.[148] This means that the assessment in Hungary depended to a large extent on the consideration and discretion of the experts conducting the tests.

135. Being aware of these shortcomings, the Hungarian Academy of Sciences set up a roundtable in order to review and renew the system. Its findings were included in the Green Paper I, The Renewal of Public Education written by Valéria Csépe.[149] In the book Csépe discusses the practice of the services to be provided to children requiring special education and rehabilitative development (SEN) and the necessary course of action in this field.

136. According to Csépe, the most pressing issue of SEN services is the lack of a modern and complex diagnostic system, the absence of the assignment of development methods to these and of the effect analyses, as well as the unsolved nature of professional check. The most urgent tasks are the creation of a mandatory, national diagnostic system set up in protocols and of centralised professional checks. [150] She further notes that it is also necessary to work out a decision model covering the entire range of institutional services (which would be mandatory after professional consultations), the introduction of a coordinated service provision and tracking protocol, in a breakdown according to regional differences (level of economic development, settlement structure, ethnic composition) and family situation (multiple disadvantages, deep poverty, etc.).[151]

137. The provision of complex (education, healthcare and social) services for children with special educational needs and other non-typically developing children (e.g. those with multiple disadvantages) requires coordination of the activities on the level of the region, the provision of assistance to the work of the local authorities, the creation of a professional system of conditions, as well as genuine quality assurance. Csépe claims that it should be examined how, with the maintenance of the operation of the current, strongly decentralised system, the new centralised

[148] See: Annex No. 20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7., 20 May 2008 Witness testimony, Dr Ilona Nagyné Réz psychologist, special pedagogue and public education expert head of the National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság)

[149] Hungarian Academy of Sciences, Green Book I, The Renewal of Public Education, available at: http://oktatas.magyarorszagholnap.hu/wiki/Green_Book

[150] Hungarian Academy of Sciences, Green Book I, The Renewal of Public Education, 'Scheduling'

[151] Ibid., 'Long-term and prioritised development tasks', para. 11

protocols, the controlling system and the necessary information systems could be created.[152]

138. With regards to the diagnostic tools Csépe stated that in the services provided for SEN children, the tasks, the expertise and the institutions should be connected in a uniform system with other systems of services (healthcare, social and family matters, and first and foremost, child protection services). The supply of diagnostic tools must be improved, and the statutory regulatory work must soon be completed to ensure that this network can properly perform its tasks. One of the tasks of the basic services is the application of diagnostic tools for the purposes of vetting, and referring back only children requiring pedagogical development – together with advice – to the teachers. The development of SEN-b children would also be the task of education counsellors; however, the necessary conditions for this (supply of reliable diagnostic tools, controlled development, protocols) must be provided. The first level has a broad range: according to statistics on the education counsellors, it affects 20 to 25 percent of children. The second level is the institutions of diagnostic services, for the work of which complex diagnostic tools would be necessary, which are still not available today. Uniform protocols based on professional consensus, as well as clear competence areas should be formed.[153] Csépe also highlighted that the updating of SEN diagnostics, especially in case of SEN-b, is indispensable in order to understand the reasons behind the failures of students. An especially critical area is reading where problems of different origin overlap, and the “thinning up” of the category of dyslexia hides the very complex reasons behind weak reading skills. A more understanding professional analysis would be necessary to resolve the highly politicised debate which links reading problems sometimes to dyslexia, sometimes to disadvantaged status, sometimes to the standard of the work of teachers, and sometimes to the quality of reading textbooks and the methods of teaching reading.[154]

[152] Ibid.
[153] Ibid. ’Professional Solutions’, para. 6.
[154] Ibid. ’Professional Solutions’, para. 8.

Reports by international organisations

139. In 2009, in its 4th periodic report – similarly to its earlier reports - the European Commission Against Racism and Intolerance (ECRI)[155] reiterated the findings of the national experts. ECRI expressed concerns in its report about the disproportionate representation of Romani children in special schools for children with mental disabilities. The report expresses concerns that many children are misdiagnosed due to a failure to take due account of cultural differences or of the impact of socio-economic disadvantage on the child's development, and others suffer from only very minor learning disabilities that do not warrant the child's removal from the mainstream system and the vast majority of children assessed as having "mild mental disability" could be integrated relatively easily in the ordinary school system.[156]

140. ECRI urged the Hungarian authorities to intensify their efforts to reintegrate Romani children currently enrolled in special schools into mainstream schools, to monitor the effectiveness of a new cognitive assessment instrument in taking account of socioeconomic disadvantage and cultural diversity, and to adapt it further if necessary.[157] ECRI furthermore strongly urged the Hungarian authorities to ensure that only those children who cannot cope with education in an integrated classroom are sent to special schools and called upon Hungary to this end, to explore all possible avenues, including the option of removal from the Education Act of the possibility of placing children with "mild disabilities" in special schools.[158] It also recommended that the Hungarian authorities intensify their efforts to train

[155] Available at: http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/hungary/HUN-CbC-IV-2009-003-ENG.pdf

[156] ECRI noted in its 4th periodic report on Hungary (2009): "81. Second, of the three levels of disabilities into which children in special schools may fall ("very serious" (requiring residential care), "medium-severe" or "mild disability"), the vast majority of children assessed as having a "mild disability" could, in the view of many NGOs, be integrated relatively easily in the ordinary school system: many children are misdiagnosed due to a failure to take due account of cultural differences or of the impact of socio-economic disadvantage on the child's development, and others suffer from only very minor learning disabilities that do not warrant the child's removal from the mainstream system. ECRI repeatedly heard that investments in teacher training should primarily be directed towards ensuring that teachers in the mainstream school system are equipped to deal with diverse, integrated classes, rather than towards perpetuating a system from which children, once streamed into it, are unlikely to break out, and which overwhelmingly results in low levels of educational achievement and a high risk of unemployment. Some actors have suggested that – bearing in mind that the best way of ensuring that children do not wrongly become trapped in special schools is to ensure that they are never sent down that track in the first place – the category of children with mild disabilities should simply be deleted from the Education Act and all children with mild disabilities integrated in the mainstream school system."

[157] ECRI 4th Period Report on Hungary (2009), at para. 82

[158] Ibid., at para. 83

teachers working in mainstream schools to deal with diverse classes including children from different socio-economic, cultural or ethnic backgrounds.[159]

141. In its second Opinion adopted on 9 December 2004, the Advisory Committee on the Framework Convention for National Minorities expressed it s concerns in a fashion similar to ECRI.[160] The Committee stated: "As noted by certain bodies such as the Parliamentary Commissioner for National and Ethnic Minorities and numerous NGOs, and confirmed by various court rulings, the Hungarian education system continues to create a strong phenomena of exclusion of Roma children. For example, a number of Roma children continue to be placed in special schools for mentally disabled children because of cultural differences. These and other practices contributing to the segregation of Roma children are partly due to current legislation but above all to its unsatisfactory implementation in practice, especially at the local level".[161]

142. The Commissioner for Human Rights of the Council of Europe in his report[162] (2002) and in its follow up report[163] on Hungary (2002-2005) expresses grave concerns over the practice of assigning Romani children into special classes. In his report the Commissioner states:

"According to the information I received from the community representatives and my other speakers, Roma/Gypsy children are systematically placed in so-called special, or "C", classes; these classes are also said to receive children from underprivileged backgrounds, who suffer from a social handicap as a result, and the academic level is consequently lower. About 70% of the pupils in "C" classes are said to be Roma/Gypsy children and follow a simplified curriculum, without experienced teachers and with poor facilities. Thus, poverty and Roma/Gypsy origin are allegedly a fact of discrimination in access to education, and this inevitably makes it highly likely that inequalities and social discrimination will be perpetuated. It is clear that this situation must end as soon as possible: the "C" classes must disappear and the

[159] Ibid., at para. 84.
[160] Available at: http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Hungary_en.pdf
[161] Ibid., at para. 90.
[162] See Annex: 30.: COE, Report By Mr Alvaro Gil-Robles, Commissioner For Human Rights, On His Visit To Hungary 11-14 June 2002
[163] See Annex: No. 31: Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights; Follow-up Report on Hungary (2002-2005)

State must instead provide resources for academic support and assistance to the most disadvantaged children, so that this flagrant discrimination is halted."[164]

143. In the follow-up report covering the period of 2002-2005 the Commissioner reiterates his concerns made earlier:

"Around 20% of Roma children continue to be assigned to special classes as against only 2% of Hungarian children. It should be noted that dyslexia is regarded as a serious difficulty requiring placement in a special class and that social marginality has sometimes also been treated as a handicap. As a result, whereas the proportion of handicapped children in Europe is 2.5%, it is 5.5% in Hungary on account of inappropriate or abusive placements of this kind."[165]

144. In 2002, in its concluding observations on Hungary the United Nations Human Rights Committee about called upon Hungary "to discontinue the placement of Roma children in special schools or special classes and give priority to measures that will enable them to benefit from regular schools and classes."[166]

145. The United Nations Committee on the Rights of the Child (CRC) in its concluding observations on Hungary in 2006 expressed its concern about the practice of channelling Romani children into special schools and classes: "The Committee, while recognizing certain efforts to reduce segregated education, is concerned that many Roma children are still arbitrarily placed in special institutions or classes. Furthermore, the Committee is concerned that the quality of schools suffers from regional disparities and that access to pre-schools is reportedly limited in regions where poverty is high and Roma population is dominant."

146. Therefore the CRC recommended Hungary to take all necessary measures to fully implement the Convention on the Rights of the Child and pay particular attention to abolishing segregation of Romani children.[167]

147. In the opinion of the applicants, the presented data on the over-representation of Romani children demonstrated by the sociological researches and various reports suggests a *prima facie* evidence for disproportionate prejudicial effects of a

[164] See Annex No. 30: COE, Report By Mr Alvaro Gil-Robles, Commissioner For Human Rights, On His Visit To Hungary 11-14 June 2002; para 16.
[165] See Annex No. 31.:Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights; Follow-up Report on Hungary (2002-2005); para 30.
[166] See Annex No. 25: Human Rights Committee, Concluding observations on Hungary, CCPR/CO/74/HUN, 19 April 2002
[167] See Annex No. 26: CRC, Concluding observations on Hungary, CRC/C/HUN/CO/2, 17 March 2006.

general measure resulting in indirect discrimination against Romani children, including the applicants.

148. In awareness of the statistical and sociological data in the present case, in accordance with the *D.H.* judgment[168], the position of the applicants is that they have satisfied the burden of proof upon them with respect to their discrimination on the basis of ethnic origin. Therefore the burden of proof shifts to the Government to show that this over-representation is the result of objective factors unrelated to any discrimination on grounds of ethnicity.

III. Lack of objective and reasonable justification for the different treatment of the applicants

1. Justification defence under ECtHR case law

149. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.[169] The Court has also declared that discrimination on account of a person's ethnic origin is a form of racial discrimination. The Court further noted that racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment.[170] The Court has also held that *no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified* in a contemporary democratic society built on the principles of pluralism and respect for different cultures.[171]

150. The Court has also noted in several decisions that, as a historically persecuted minority, under the ECHR Roma require special protection.[172] In *Orsus and others*

[168] See: *D.H. v the Czech Republic*, no. 57325/00, at para. 188
[169] *Willis v the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV; and *Okpisz v Germany*, no. 59140/00, § 33, 25 October 2005
[170] See: *Nachova and Others v Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-...; and *Timishev v Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005
[171] See: *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 58, ECHR 2005
[172] See at para. 70 above.

v Croatia the Court specified that such special protection includes "positive measures" to stem the high drop out rate of Romani children from school. The Court in *Orsus* concluded that the State failed to have "sufficient regard to their special needs as members of a disadvantaged group" and found a violation of the anti-discrimination protection of the Convention.[173]

151. In the instant case, applicants submit that the special protection requirement and the need for positive measures obligate the Respondent State to provide a diagnostic regime that takes into account the specificities of the Roma minority. Failure to implement such a regime, in the context of the pervasive discrimination and marginalization of Romani children in the school system, which is common knowledge to the Respondent State (as evidenced by numerous reports of Hungarian experts and international bodies), constitutes direct discrimination.

152. As to the burden of proof the applicants submit that they have shown a difference in their treatment therefore now the burden of proof is on the Government to show that the difference in treatment was justified.[174]

153. Foregoing the Government's justification defence, the applicants would like to emphasise the following. They do not assert that the diagnostic procedures were performed with the intention to discriminate on the basis of their ethnic origin. However, given the professional debate and the overrepresentation of Romani children in special education over the last 40 years, the expert panels must have been aware of the systemic shortcomings of the diagnostic tools and assessment procedures. Moreover, the Expert Panels failed to register the applicants' ethnic characteristics and accordingly assess the applicants' Romani ethnic origin and the different needs arising therefrom. Regardless of the expert panels' conduct, the Respondent State had for 40 years failed to provide culturally sensitive tests, an assessment protocol compliant with international standards and training to expert panels. Bearing in mind the length of time during which the Respondent State has been aware of the misdiagnosis of Romani children and also bearing in mind the on-going professional debate, the Government knew, or ought to have

[173] See: *Orsus and Others v Croatia*, no. 15766/03, at para. 177

[174] See: *D.H. v the Czech Republic*, no. 57325/00, at para. 177., See also: *Chassagnou and Others v France* [GC], nos. 25088/94, 28331/95 and 28443/95, at paras. 91-92, ECHR 1999-III; and *Timishev*, cited above, at para. 57

known, that misdiagnosis and discrimination were the inevitable results of its practices. This direct discrimination cannot be justified under any circumstances.

154. By nature of using the culturally biased tests and the failure to take into account Romani ethnic origin, the applicants were treated differently to majority children and this difference in treatment was decisively based on their ethnic origin. In view of the Court's jurisprudence this difference in treatment based on the applicants' ethnic origin cannot be reasonably justified.[175] What was the legitimate aim of placing the applicants in special school? The placement aimed at accommodating the applicants' mental disability. Were the applicants mentally disabled? No. The first applicant was diagnosed as mentally sound by expert Ms Figeczki, while the second applicant was diagnosed as mentally sound by the court appointed forensic expert team. Given the lack of mental disability, the Respondent State lacked the legitimate aim that would justify differential treatment.

155. Alternatively, similar to the *D.H.* case, the applicants assert that in Hungary there was also a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment.[176] The applicants submit that the results of the tests carried out at the material time are not capable of constituting objective and reasonable justification for the purposes of Article 14 of the Convention.

156. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group[177] and that in accordance with the Council Directives 97/80/EC and 2000/43/EC such a situation may amount to "*indirect discrimination*", which does not necessarily require a discriminatory *intent*.[178] The Court also clarified that discrimination potentially contrary to the Convention may result from a *de facto* situation.[179]

157. In their submission the applicants presented numerous sociological research data, reports from the government and reports of international bodies demonstrating an

[175] See: *Timishev v Russia*, nos. 55762/00 and 55974/00, at para. 58
[176] See: *D.H. v the Czech Republic*, no. 57325/00, para. 201.
[177] See: *Hugh Jordan v the United Kingdom*, no. 24746/94, § 154, 4 May 2001; and *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 6 January 2005
[178] See: *D.H. v The Czech Republic,* , no. 57325/00, para.184.
[179] See: *Zarb Adami v Malta*, no. 17209/02, § 76, ECHR 2006-...

over-representation of Romani children in special education resulting from a flawed diagnostic system and a general practice of (mis)diagnosis. This practice necessarily had an impact on the applicants. As to whether statistics can constitute evidence for discrimination, the Court in *D.H.* and earlier cases[180], in which the applicants alleged a difference in the effect of a general measure or *de facto*[181] situation, the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups in similar situations.[182] The applicants are of the view that the statistics they have relied on in the present case are adequate and extensive enough to substantiate their claim.

158. The Court in the *D.H.* case also stipulated that in case there is a general practice that potentially affects all Roma children, it is unnecessary to examine individual circumstances at all in order to establish the fact of the violation:

"Lastly, since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases." [183] The applicants believe that this practice is as equally relevant now as before.

2. Justification defence under RED and domestic law: no justification for direct ethnicity based discrimination in education, except for the purposes of positive action

159. Under the RED direct discrimination occurs where one person is treated less favourably than another […] in a comparable situation on grounds of racial or ethnic origin.[184] Under the RED, direct ethnicity based discrimination in public education cannot be justified, other than for the purposes of positive action.[185]

160. The applicants assert that they were directly discriminated when their intellectual ability was tested and assessed with diagnostic tools designed for majority children

[180] See: *DH v the Czech Republic*, no. 57325/00; *Hoogendijk v the Netherlands* (dec.), no. 58461/00 and Zarb Adami v. Malta, no. 17209/02, para. 77-78
[181] See: *Zarb Adami v Malta*, no. 17209/02, para. 76
[182] See. *Hoogendijk v the Netherlands* (dec.), no. 58461/00
[183] See: *D.H. v the Czech Republic*, no. 57325/00, para 209
[184] Article 2 (2) a of Racial Equality Directive
[185] Ibid., Article 5

and their particularities and special characteristics were not taken into account. That the test available at the material time considered only the characteristics of majority children and that during the standardisation of the tests the specific characteristics of Romani children had not been taken into consideration amounts to direct discrimination against the applicants. Less favourable treatment was manifested in them being diagnosed as mentally disabled and channelled to special school where they were segregated from children with normal abilities and were taught lower curricula.

161. Under RED and domestic law, there is no justification for direct ethnicity based discrimination in public education, except for the purposes of positive action. Applicants submit that even if one views the placement of mentally disabled children in special schools as a positive action measure based on disability, this cannot justify discrimination in their case, as they were discriminated on the basis of their ethnicity. The applicants were never mentally disabled, thus were in no need of positive action measures aimed for the disabled.

3. Justification defence for indirect discrimination under RED and domestic law

162. Under the RED, indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[186]
163. As an alternative to their primary claim of direct discrimination, the applicants assert that the overrepresentation of Romani children in special education over the last 40 years shows that the apparently ethnicity neutral procedure followed put them at a particular disadvantage. The applicants rely in this regard on numerous domestic statistics, research data and international reports.
164. The applicants submit that similar to their arguments put forward with regard to justification under this Court's definition of discrimination and relevant case law, their indirect discrimination cannot be justified.

[186] Article 2(2)b

V. STATEMENT RELATIVE TO ARTICLE 35(1) OF THE CONVENTION

165. Article 35(1) of the Convention articulates the admissibility criteria for an application to the Court stating that Court may only deal with such a matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law within a period of six months from the date on which the final decision was taken. The applicants respectfully submit that they exhausted all domestic remedies available to them, and the last domestic remedy was delivered by the Hungarian Supreme Court[187] at No. Pfv.IV.20.215/2010/3 on 9 June 2010 which was received by the applicants in writing on 11 August 2010. For further details, the Court is referred to paragraphs 27 to 58 above.

VI. STATEMENT OF THE OBJECTIVE OF THE APPLICATION

166. The objective of the application is to find the Hungarian Government in breach of Article14 read in conjunction with Article 2 of Protocol No 1 of the European Convention on Human Rights, and for the applicants to be declared as not mentally disabled. The applicants do not wish to claim non-pecuniary damages for just satisfaction. They reserve the right to seek costs and expenses in due course.

VII. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

167. No complaint has been submitted under any other international procedure of investigation or settlement.

VIII. LIST OF THE DOCUMENTS (EXHIBITS)

1. Annex No.1: Power of Attorney
2. Annex No.2: Relevant Domestic Law
3. Annex No.3: Request for examination by kindergarten, 19 April 2001.
4. Annex No.4: Expert opinion of National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), István Horváth, 19 November 2008

[187] Annex No. 19: Judgment, Hungarian Supreme Court ,Pfv.IV.20.215/2010/3., 9 June 2010

5. Annex No. 5: Expert and Rehabilitation Panel of Szabolcs-Szatmár–Bereg County, Nyíregyháza, István Horváth, 17 May 2001
6. Annex No. 6: Expert Opinion, István Horváth, 28 April 2005
7. Annex No. 7: Expert Opinion, István Horváth, 20 March 2007
8. Annex No. 8: Examination request by No 13 Primary school, 14 December 1999
9. Annex No. 9: Expert Opinion dated 15 May 2000., Expert and Rehabilitation Committee of Szabolcs-Szatmár –Bereg County, András Kóka, 2000 May 15
10. Annex No. 10: Expert opinion, András Kóka, 04 December 2002
11. Annex No. 11: Expert opinion, András Kóka, 27 April 2005
12. Annex No. 12: Pedagogical opinion, András Kóka
13. Annex No. 13: András Kiss, National Expert and Rehabilitation Committee, 20 November 2008.
14. Annex No. 14: Transcript of records (Bizonyítvány), András Kiss
15. Annex No. 15: Expert Opinion, István Horváth, 15 September 2005
16. Annex No. 16: Expert opinion, András Kiss, 15 September 2005
17. Annex No. 17: Judgment, Szabolcs-Szatmár-Bereg County Court, 3.P.20.035/2008/20., 27 May 2009
18. Annex No.18: Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009
19. Annex No. 19: Judgment, Hungarian Supreme Court ,Pfv.IV.20.215/2010/3., 9 June 2010
20. Annex No. 20: Transcript of Records, Bács-Kiskun County Court 12.P20.392/2008/7., 20 May 2008 (Witness testimony of Anna Kende and Dr. Nagyné Ilona Réz)
21. Annex No. 21: Gábor Havas: Equal opportunity, Desegregation, *The renewal of public education*-Green Book, Chapter 5.
22. Annex No. 22: From the beck Ministry of National Resources; Out of the Back Bench programme
23. Annex No. 23: Amicus brief by the Roma Education Fund
24. Annex No. 24: Written comments by International Step by Step Association, Roma Education Fund and European Early Childhood Education Research Association submitted to the ECHR in the D.H. versus the Czech Republic
25. Annex No. 25: Human Rights Committee, Concluding observations on Hungary, CCPR/CO/74/HUN, 19 April 2002

26. Annex No. 26: CRC, Concluding observations on Hungary, CRC/C/HUN/CO/2, 17 March 2006
27. Annex No. 27: Kritika, Vol. 7/1996, János Ladányi, Gábor Csanádi, Zsuzsa Gerő, "Megszüntetve megőrzött gyogyó", (Preserving by shutting down schools for "retards")
28. Annex No. 28: G. Havas, I. Kemény, and I. Liskó (2002), *Cigány gyerekek az általános iskolában,* Oktatáskutató Intézet, Új Mandátum, Budapest.
29. Annex No. 29: Judgements No. 10.P.21.080/2001/77 of the Borsod-Abaúj-Zemplén County Court delivered on 1 June 2004 and upheld on 7 October 2004 by the Metropolitan Court of Appeals (Fővárosi Ítélőtábla) at No. 9.Pf.20.931/2004/2
30. Annex No. 30: COE, Report By Mr Alvaro Gil-Robles, Commissioner For Human Rights, On His Visit To Hungary 11-14 June 2002
31. Annex No. 31: Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights; Follow-up Report on Hungary (2002-2005)

IX. PREFERRED LANGUAGE

English

X. DECLARATION AND SIGNATURE

The applicants hereby declare that, to the best of their knowledge and belief, the information given in the present application is true and correct.

Budapest, 11 February 2011

Dr Lilla Farkas
Attorney-at-law

European Roma Rights Centre
Robert Kushen
Executive Director