European Court of Human Rights
Council of Europe
Strasbourg, France

Application No. 11146/11
István HORVÁTH and András KISS v Hungary

With regards to the request of the European Court of Human Rights (the Court) dated 21 May 2012 we hereby submit the following comments in reply to the observations of the Government of Hungary (GO) concerning the Application No. 11146/11.

The applicant's comments will follow the following structure:

Part I. Summary of response to Government Observations

Part II. Comments on the relevant facts

Part III - The admissibility

The applicants' victim status
Observance of the six month time-limit
Exhaustion of domestic remedies

Part IV. Admissibility on the merits of the application

I. Ethnic - including cultural and socio-economic - characteristics specific to the applicants and to Romani children
II. Whether there was a misdiagnosis of the applicants' needs and abilities
A, Whether the diagnostic regime was adequate for Roma children (cultural and socio-economic bias in general)
B, Whether the applicants' assesment was based on tests adequate for Roma children (cultural and socio-economic bias against the applicants)
III. Whether the applicants' assesment was influenced by any racial prejudice against them
IV. Whether the applicants were subjected to less favourable treatment
V. Failure to provide objective and reasonable justification for the different treatment
A, Ethnicity based direct discrimination cannot be objectively justified by measures other than positive action
B, Government's failure to provide objective justification for indirect discrimination of the applicants and Romani children
VI. Analogy and differences between the case of D.H. and Others v the Czech Republic and the applicant's case

Part V - Conclusion

Part I. Summary of response to Government Observations

1. The applicants respectfully submit that this case is, to a large extent, analogous to that of *D. H. and Others v the Czech Republic*.[1] However, in light of the social, scientific and professional contexts specific to Hungary, it provides compelling arguments for establishing a violation of equal treatment on the basis of ethnicity constituting direct ethnicity based discrimination. In both cases psychometric tests which were not standardised for Roma were used to determine readiness for school. Moreover in this case, the concept of familial disability developed exclusively for the Roma and the concept of socio-economic disadvantage characteristic of the Roma were used as factors which legitimised placement in special schools and IQ scores on mild mental disability did not comply with WHO standards. Roma children with IQ scores between 70 and 86 – including the applicants - were regularly placed into special schools – even though since the late 1970s Hungary has adhered to the World Health Organisation's standards, which set the upper limit of mild mental retardation at IQ 70.[2] Assessment was not tailored to take into account the applicants' different background, it was colour blind while *Ad hoc* actions were taken to stem misdiagnosis, they never had a lasting impact. Moreover, based on the Respondent State's own data and the scientific and legal criticism at the domestic level that for decades preceded the applicants' placement in a special school, the Respondent State was or ought to have been aware of the ethnic segregation which resulted from the misdiagnosis of Romani children.

2. The wrongful administrative practice of misdiagnosing Romani children in Hungary originated in the 1970s. It arose in response to a quickly growing number of Romani children of primary school age. Havas pointed out that at the time a substantial portion of Romani children were not admitted to mainstream schools, being instead transferred into special schools. The transfer to special, instead of mainstream, schools was legitimised by psychological and educational arguments. The concept of familial disability (which, in essence, equated to having a deprived socio-economic background), which later became part of the definition of mental disability and then of special education needs served as a ground for transfer to special schools. The scientific conclusion spelt out by Havas forms the basis of the applicants' argument: misdiagnosis served the purpose of keeping a great number of mentally sound Romani children separated from ethnic Hungarian children who attended mainstream schools. Ultimately, the misdiagnosis of Romani children served the purpose of effecting/promoting *de facto* segregation.

3. Misdiagnosis continued unabated for decades, until a recent *ad hoc* effort to stem it through the socalled 'Out of the Back Bench' programme. In 2007, the Public Education Act was amended to strictly limit the number of mentally disabled children transferrable to special schools. Moreover, it guaranteed

[1] *D.H. v the Czech Republic*, no. 57325/00

[2] According to DSM-IV classification, IQ 71-84 is classified under the code V62.89 as Borderline intellectual functioning, whereas under code 317 is Mild Mental retardation, going from 50-55 to approximately 70. See in: *Diagnostic and statistical manual of mental disorders: DSM-IV*. Washington, DC: American Psychiatric Association. 2000. ISBN 0-89042-025-4.

inclusive education in mainstream schools for children with special educational needs. However, this reform has waivered since then. Until 2004[3] the IQ score used to determine the placement of children into special schools far exceeded the IQ score for mental disability under WHO standards (IQ 86 instead of IQ 70).

4. The basis of assessing school readiness in Hungary is an assessment using psychometric tests that are standardised for a certain population. If the population sample is not well designed, the standardised tests run the risk of being biased in favour of those participating in the sample and against those not participating. This concern was realised in the tests used to assess the applicants, especially in regards to the Budapest Binet which was standardised for the population of the capital city, but also to the Coloured Raven, which is not culture neutral, although it is less culture- and class-dependent than the Budapest Binet.[4]

5. The Roma Education Fund (REF) underlines that screening children in schools arose from the practice of early medical screening for general health purposes, used to detect disorders in order to begin with a treatment programme.[5] It emphasises that using educational screening to detect or predict a child's potential success or difficulty in school is problematic, as there are no dimensions to intelligence beyond the analytical and memory abilities typically measured by intelligence tests and that these abilities can develop and improve through school attendance and classroom experiences.[6]

6. The applicants' individual assessments were also flawed. Even though their test results from Budapest Binet and the Coloured Raven tests showed substantial differences as compared to each other, the Expert Panel failed to explain how it accounted for these substantial differences. Both applicants scored higher with the Coloured Raven, than the WHO score (IQ 70) for mild mental disability. Contrary to the Expert Panel assessments during his schooling, the second applicant was not found to suffer from mental disability under the WISC IV administered during the first instance trial. Indeed, his social IQ 90 score showed that he could not be considered mentally disabled even by national standards.[7]

7. Still today, culturally unbiased tests are not available in Hungary. REF charges that the WISC IV is also biased against children coming from a minority culture and/or social deprivation.[8]

8. The question left unanswered is whether or not children who are not mentally disabled but have special education needs can legitimately be transferred to special schools instead of being enrolled in mainstream schools. This question is linked to the definition of mental disability and/or special education needs (SEN).

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[3] In 2004, Bálint Magyar, Minister of Education wrote to Expert Panels to urge them to stop transferring children above IQ70 scores to special schools.
[4] The culturally biased nature of this test was acknowledged by leading experts developing the WISC-IV test. See: Government's Observations' (GO) Annex (G.A.) No.11. page 120.
[5] See: Annex No 1.: Roma Education Fund, *Pitfalls and Bias: Entry Testing and the Overrepresentation of Romani Children in Special Education*, April 2012, available at: http://www.romaeducationfund.hu/sites/default/files/publications/pitfalls-and-bias-screen_singlepages.pdf, page 24
[6] Ibid.
[7] Application Annex (A.A.) No. 13: András Kiss, National Expert and Rehabilitation Committee, 20 November 2008.
[8] See: Annex No.1., page 52.

At the material time the definition of SEN was amended a number of times. The definition of SEN in the Public Education Act – as well as the definition of mental disability prior to 2003 - went beyond mental disability and included educational challenge, dyslexia, behavioural problems, etc.[9]

9. The applicants do not argue that the placement of mentally disabled children into special schools instead of their enrollment in mainstream schools was, is or would be in compliance with Article 14 ECHR (mental disability) taken in conjunction with Article 2 Protocol No. 1. They assert that notwithstanding a potential violation by the Respondent State of the right of mentally disabled children to education in mainstream schools, their right to equal treatment in relation to education was violated on the basis of their Roma ethnicity.

10. As part of the broader structural problems, familial disability (essentially referring to socio-economic status) formed the basis of the applicants' diagnosis as mentally disabled, as opposed to being considered as a factor warranting special attention in mainstream education. Indeed, still today the Government (GO, para. 43) takes the socio-economic background of the applicants as warranting and/or legitimising their education in a special school.

11. REF – in line with the applicants' claims before domestic courts and before this Court – disagrees on this point, noting that educationally challenged, dyslexic, etc. children belong in normal mainstream education; under no circumstances should social deprivation result in placement in special schools.[10]

12. The applicants assert that social deprivation is in great part linked to the concept they described in their application as *familial disability* (familiáris fogyatékosság). In the Hungarian context, this notion was formulated by Czeizel et al.[11] during the first big wave of re-diagnosis of Roma children transferred to special schools in the 1970s. Relying on Havas, the applicants have argued that familial disability cannot amount to any type or form of mental disability, as it is in essence based on the social deprivation and the non-mainstream, minority cultural background of Roma families and children.[12] Indeed, as REF observes, the definition of mental disability as comprising social deprivation and/or having a minority culture amounts to bias and prejudice.[13] Under domestic and international law this qualifies as direct discrimination.

13. Under domestic and European Union law, cases in which an apparently neutral provision or practice particularly disadvantages a group that has a protected ground – such as ethnic origin – usually constitute indirect discrimination. The applicants assert that, in cases where the particular disadvantage (on a protected ground such as ethnicity) of such a provision or practice is exceedingly apparent and exclusively effects only one group of the society, it constitutes direct discrimination in line with jurisprudence of the Court of Justice of the European Union. In the Hungarian context, the overrepresentation of Romani children in

[9] See: A.A. No. 17: Judgment, Szabolcs-Szatmár-Bereg County Court, 3.P.20.035/2008/20., 27 May 2009, page 5
[10] See. Annex No.1., page 21
[11] See: A.A. . 28: G. Havas, I. Kemény, and I. Liskó (2002), *Cigány gyerekek az általános iskolában,* Oktatáskutató Intézet, Új Mandátum, Budapest., page 14-17.
[12] See: Application, para. 129.
[13] See: Annex No. 1, page 21.

special schools – including the special school the applicants attended – appears sufficiently apparent. No other (protected) group has ever been shown to have suffered wrongful placement into special schools based on the diagnostic system. Thus, the latter had adverse effects exclusively on the Roma.

14. Based on the judgment of the Court of Justice of the European Union in *Maruko*[14], the applicants argue that since it was obvious and widely known that no other group suffered an adverse impact, the impugned administrative practice amounted to direct discrimination based on ethnicity. In relation to misdiagnosis, the causal link between the administrative practice and the protected ground – ethnicity – is obvious, and it is the only causal link that has been proven to exist. Given that the criterion used for placement into special schools was a criterion that applied exclusively to Roma children, it cannot qualify as being apparently neutral in relation to their ethnicity.

Part II. Comments on the relevant facts

15. **Paragraph 3[15]:** The applicants submit that the Ottilia Solt Price received by the head of the nursery school is irrelevant and the Government does not seek to explain what relevance it may have.. With regards to the segregation of Romani children in a mainstream school and in the special school in Nyíregyháza, the applicants do not contest the Government's data. However, the applicants contest the facts relating to the closure of the 100% segregated school in Guszev telep. This school was closed down as a result of litigation by the Chance For Children Foundation.[16] The applicants note that the city council recently rented part of the school building to the Greek-Catholic Church, which reopened the school.

16. **Paragraph 4**: The applicants contest the Government's observation that children completing special school have access to mainstream secondary education providing Baccalaureate. The applicants substantiate this under paragraphs 107-112 of this Submission. The second applicant's choice of career was severly limited. In particular, he could not train to be a car mechanic, which he could only have done at a mainstream vocational schools.

17. **Paragraphs 5 – 12:** As to the assessment of the applicants, the applicants maintain their position presented in their Application. In particular, they were not examined in person by the Expert Panel until the civil proceedings commenced.

18. **Paragraph 13:** The applicants note that under paragraph 146 of the Hungarian Civil Procedure Code, the civil claims can be amended until the hearing preceding the first instance judgment and that their claims were duly amended once they were represented by a new counsel.

19. **Paragraphs 15:** The applicants submit this paragraph irrelevant to their case.

[14] *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
[15] Paragraph numbers, unless otherwise stated, refer to Government Observations, dated 2 May 2012
[16] See Annex No 2: Summary of litigation by the CFCF, availabel at: http://www.cfcf.hu/nyiregyhaza_hu.html

20. **Paragraphs 16-21:** The applicants maintain the facts as presented in the Application. They, note (GO, para 18(4)) that "borderline intellect" shall not be considered as mental retardation or a cause for placement in special school (see paragraphs 82-89 below). The applicants note (GO, para 18(5)) that in the applicants' case their ethnic characteristics – including their disadvantaged situation - were not taken into account. This was confirmed by the head of the Expert Panel (see paragraph 81 below).

21. **Paragraph 22:** The applicants note that the Supreme Court held: "[…] the systemic error leading to the misdiagnosis of the applicants – notwithstanding whether or not *it had a direct affect on the applicants* – was not attributable to the defendants"[17] (emphasis added). The Supreme Court's judgment noted 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 and the adoption of such legal background is a duty of the Respondent State.[18] In this regard the applicants assert that the Hungarian Parliament, which responsible for adopting laws could not at the material time be litigated in domestic civil courts. The applicants initiated the proceedings against **state** authorities implementing the law, as they had no other choice.

22. The applicants do not wish to comment in general on the relevant domestic legal provisions. The applicants note that the Manual itself acknowledges that the social-cultural environment has to be taken into account and cultural-free tests shall be used and "special attention must be paid to the child's capability to learn in examination situation."[19] However this was not applied in practice in the applicants' case.[20]

Part III - Admissibility

The applicants' victim status

23. **Paragraphs 26-28:** The applicants contest the Government's argument (GO para 26) that they lack victim status due to the fact that the Szabolcs-Szatmár-Bereg County Regional Court as first instance court found the Expert Panel in violation of the applicants' rights to equal treatment and education and that the Supreme Court found the County Council liable for failure to supervise the legality and functioning of the Expert Panel.[21] They contest the Government's assertion that these judgments fully and effectively remedied the violation of the applicants' rights.

24. The applicants submit that they launched civil proceedings to establish defendants' joint liability for discriminating against the applicants based on their ethnicity with regard to their access to adequate education. In their civil claim the applicants stated that due to the flawed diagnostic system in Hungary, the

[17] See: A.A. No. 19: Judgment, Hungarian Supreme Court ,Pfv.IV.20.215/2010/3., 9 June 2010, page 10.
[18] See: Application, para 65
[19] See: Government's Observations (GO), para 23
[20] See: para 81 of this Submission
[21] See: GO, para 26

applicants suffered direct/indirect discrimination based on their ethnicity and as a consequence they were not educated in accordance with their mental abilities. The applicants' claim related both to procedural as well as substantive professional flaws in the diagnostic system.

25. Given that the applicants claimed joint liability on the part of the defendants, only the final and enforceable domestic judgment – that of the Supreme Court - put an end to domestic litigation. The fact that the Expert Panel failed to appeal against the first instance judgment in time resulted in enforceability by default solely against this defendant. The first instance judgment never became final against the other two defendants. Following the Supreme Court judgment the applicants recovered damages from the County together with the Expert Panel. Indeed, had the first instance judgment been the authoritative, final decision in this dispute, the Government would have to contend with its finding in full favour of the applicants' claim relating to ethnicity-based discrimination in their access to adequate education. The contrary being the case, the applicants find the argument relating to the loss of victim status somewhat perplexing.

26. The applicants argued their case before the Szabolcs-Szatmár-Bereg County Court, relying on the *D.H. and Others v the Czech Republic*, whose relevant parts were translated by the REF and submitted to the Court in the framework of an amicus curiae brief. The applicants also relied on REF expertise to explain in a written submission the prevalence of misdiagnosis in Hungary. The County Court established that defendants violated the applicants' right to equal opportunity in relation to their right to adequate education.[22] It established that the applicants had not been educated in accordance with their abilities (Constitution of Hungary, § 70/F). The applicants note that not only had they argued discrimination based on ethnicity from the outset, but that the County Court did not dismiss their discrimination claim.

27. The Szabolcs-Szatmár-Bereg County Regional Court found that the Expert Panel failed to individualise the applicants' diagnoses and to specify the cause and nature of their special educational needs and therefore violated the applicants' rights to equal opportunity.[23] This finding was in line with the purpose of school readiness testing as understood by REF.[24]

28. The first instance judgment became final solely against the Expert Panel and only by default, because the Expert Panel failed to observe the deadline for appeal. The Expert Panel's request to reopen the case while the original litigation was still on-going was ultimately rejected by the Debrecen Appeal Court.[25]

29. As recalled above, the Expert Panel missed the deadline for appeal – although it did submit an appeal. Pursuant to timely appeals by the two other defendants, the Debrecen Appeals Court reviewed the applicants' claim. However it did not apply the relevant anti-discrimination law, and found no violation of the

[22] See: A.A. 17: page 1. "*[…] az alperesek megsértették az I. és III. rendű felpreseknek az esélyegyenlőséghez és a tanulás megválasztásához való jogát […]*"
[23] See: Application, para 36
[24] See: Annex No 1: page 5
[25] See: Annex No. 3.: Decision of the Debrecen Appeal Court

applicants' rights to equal treatment.[26] The applicants wish to note in this respect that although it dismissed both direct and indirect discrimination claims, the Appeal Court **acknowledged the adverse effects of the diagnostic regime on Roma children**. It dealt with the fact that the process of misdiagnosis leads to the segregation of Roma children in special schools and that the source of the adverse effect on Roma children is the disregard of their social and cultural background, as well as of their mother tongue. The Debrecen Appeals Court noted there was a need to develop new diagnostic methods. However, it failed to establish a link between the lack of appropriate diagnostic tools and the ethnicity of the applicants; that is, that the inadequacy of existing diagnostic tools to diagnose Roma children resulted in direct or indirect discrimination against the applicants.

30. Given that on appeal their discrimination claim was dismissed in its entirety, the applicants were compelled to ask for judicial review.

31. The applicants wish to emphasise that the misdiagnosis of Romani children – similar to the case of *D.H*.– although it may result from individual prejudice and/or biased actions of specific individuals, is first and foremost a *structural problem* of the diagnostic system in Hungary. Consequently, it cannot be remedied by establishing the liability of a single person or a single authority, such as the Expert Panel or its experts. Similar to *D.H.* the applicants did not and do not assert that the misdiagnoses and the disproportionately high number of Romani children in special schools - including the applicants - is due to the professionals' prejudice or overt discriminatory conduct. They claim that it is due to the flawed diagnostic system.

32. The applicants submit that the Supreme Court's finding of the County Council's liability for failing to supervise the functioning of the Expert Panel, whose failure to observe the legal guarantees concerning parents' rights to be present during evaluations, to be informed as to the consequences of their consent or to seek a remedy if unsatisfied with the outcome was gravely unlawful, only partially remedies the violations suffered by the applicants. It does not respond to the applicants' claim of structural direct/indirect discrimination, i.e. the flawed system of diagnosis in Hungary, or to their claim of misdiagnosis and inadequate education. Therefore the applicants continue(d) to be victims of the violation of their rights under the Convention.

33. The Supreme Court's judgment noted 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.[27]

34. It is to be noted that at the domestic level, public duties are divided between different levels of administration, all of which fulfil duties of the state. These duties in the applicants' case were performed by defendants in the domestic case: the Remedial School, the Expert Panel and the County Council. Amongst these authorities, it was the primary duty of the County Council as a state

[26] See: A.A. No. 18.: Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009, page 1.
[27] See: Application, para 65.

authority to maintain and oversee the lawful and the professional functioning of the Expert Panel. The Expert Panel performed the assessment of the children and made administrative decisions relating to their abilities. In accordance with these administrative decisions, the Remedial School educated the children. All defendants fulfilled state duties. For this reason, the applicants filed their claim against all the defendants asking the court to hold them jointly liable.

35. In accordance with the above, it was also established by the Szabolcs-Szatmár-Bereg County Regional Court that the **damage caused derived from the convergence of the actions of each of the defendants**. That is, the action of each defendant was but not sufficient in and of itself to cause the damage. Therefore, all were found jointly liable. Because of the appeals process, it was only with regards to the Expert Panel that the judgment became final by default. However, the applicants assert that a final judgment by default in respect to an authority last in line of culpability, i.e. the Expert Panel, could not effectively remedy the violation of their rights to equal treatment in education. Given that defendants' actions were inseparable, the Expert Panel alone could not have changed the structure under which the applicants were misdiagnosed.

36. The applicants note that they are not seeking further damages, thus, in their eyes, quantum need not be disputed (GO para. 27). They are seeking a finding of structural level discrimination that affected them, and a finding that pronounces that they have never been mentally disabled in line with the first instance domestic judgment.

37. The misdiagnosis of the applicants amounting to direct or indirect ethnic discrimination and resulting in de facto segregation in special school ultimately was not established at the domestic level, nor was it remedied. While the Debrecen Appeals Court noted the existence of a structural problem relating to diagnostic tools and methods, this point was later not taken up by the Supreme Court. Indeed, the latter explicitly instructed the applicants to seek a judgment in this regard from the European Court of Human Rights. Given that proceedings before the former have never been held to constitute an effective remedy in the Hungarian context, the applicants were left with no other choice than to turn to this Court for a structural remedy.

38. In summary, the applicants assert that they are still victims of a violation of their Convention rights within the meaning of Article 34 of the Convention.

Observance of the six-month time limit

39. **Paragraphs 29-30:** The Government claim that the six months ran from 27 May 2009, the date when the first instance judgment was delivered, and later became final with regards to the Expert Panel. Pursuant to the above, the applicants note that this judgment cannot be regarded as a final domestic decision remedying the violation of the applicants' rights for reasons explained above. The applicants are of the view that the admissibility flowing from the observance of the six-month time limit is inextricably linked to admissibility on account of the continued victim status.

40. In order to find redress for the violation of their rights (non-discrimination in conjunction with their right to adequate education), the applicants needed to exhaust all effective domestic remedies available to them against all defendants who bore joint liability for the breaches. Therefore the six months runs from the receipt of the Supreme Court judgment. Indeed, the Government does not claim that the review by the Supreme Court was not an effective remedy.

41. The last effective domestic remedy to exhaust in the applicants' case was the proceedings before the Supreme Court in which the judgment was delivered on 9 June 2010 and received by the applicants in writing on 11 August 2010. Consequently, the last date to observe the six-month rule was 11 February 2011, a date that was respected by the applicants.

Exhaustion of domestic remedies

42. **Paragraphs 31-35:** In their observations the Government claimed that the applicants did not institute civil proceedings against the ministry responsible for education and therefore failed to exhaust domestic remedies. However, the Government failed to provide any evidence that the civil procedure actually undertaken had not been an effective domestic remedy.

43. This Court states in *D.H.* that it "must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies."[28]

44. With regards to the general context and the structural set up in Hungary, the Court is referred to paragraph 32 of this submission.

45. The applicants submit that they did everything that reasonably could be expected from them to exhaust domestic remedies. Accordingly, they submitted their claim before the domestic court against defendants who were – each to a different extent as part of a system – all responsible for the applicants' misdiagnoses.

46. It is to be noted that the ministry responsible for education *oversees the whole education sector*, while at the local level it is the county councils which maintain, supervise and control the expert panels assessing children. In Hungary, state duties are transferred to local public authorities due to decentralisation of the public administration. Moreover, this was confirmed by the Government when it noted with regards to the alleged liability of the City Council that "[…] *domestic authorities* are better placed to determine the adequacy of an education policy to the needs of children concerned".[29] Therefore the Government cannot claim that the applicants initiated civil procedure against those defendants that did not have competence in the applicants' case.

[28] See: *D.H. v the Czech Republic*, no. 57325/00, at para. 116.
[29] See: GO, para. 34.

47. The applicants' assessment is that the Government is not arguing that the applicants litigated against the wrong defendants or that the domestic remedy they exhausted was not an effective one. The Government, in essence, claims that there was an additional potential defendant that could or should have been joined. Was this the case, there were opportunities for the court and the other defendants to raise this issue during domestic proceedings, which they did not.

48. In light of the domestic judgments, the applicants identified the defendants and the domestic judicial forum adequately. 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 system which takes the cultural, linguistic and social background of the child into account.[30] The Appeal Court acknowledged that such a diagnostic system did not exist during the procedure and is still lacking in Hungary. This was also acknowledged by the Supreme Court when the Supreme Court referred the applicants to the European Court of Human Rights stating 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". It went on to say: "the applicants may seek to establish such a violation of their human rights at the European Court of Human Rights."[31]

49. The Supreme Court identified **'the state'** as having the duty to establish an appropriate method of test and assessment. None of the courts identified the Ministry of Education as being a liable for the structural errors.

50. The defendants against whom the applicants initiated civil proceedings were all fulfilling state duties and acting on behalf of the state. The competency of the defendants in the applicants' case is clear and was not disputed by the defendants themselves or by the domestic courts, including the Supreme Court. Had any of the defendants or the ministry itself identified the ministry as the solely responsible state body for the use of biased testing and the misdiagnosis of the applicants, the defendants should have invited the ministry to join the proceedings or the ministry could have intervened. Neither of these happened. None of the domestic courts, including the Supreme Court, contested the competence of the defendants as state bodies.

51. As to the Government's observation on the applicants' claim of unconstitutionality of relevant legal provisions, the applicants are of the view that such a claim has to be necessarily initiated before 'normal' courts, as the Hungarian parliament as a body responsible for adopting laws cannot be a party to civil proceedings and cannot be held liable. The applicants initiated the proceedings against state authorities implementing the law, as they had no other choice. Nevertheless, the applicants are of the view that even if the Constitutional Court had found the provisions unconstitutional, this would not have exempted defendants from liability for misdiagnosis or the implementation of an unconstitutional provision.

52. Contrary to the Government's argument regarding the systemic error, the Supreme Court did not state that, as a result of a flawed system, the civil rights of

[30] See A.A. No. 18: Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009., page 29 and 30
[31] See: Application, para. 53

the applicants could not be violated. Indeed, it declared its lack of competence with regards to assessing professional standards. It ruled that having an adequate testing method is a state duty and consequently it referred the applicants - as a last resort - to the European Court of Human Rights to seek remedy for the violation of their rights deriving from such a state failure.

53. With respect to the domestic litigation launched before the Heves County Court in 2010 by the Chance for Children Foundation and the European Roma Rights Centre (GO para. 32), the applicants note that that procedure is a public interest action (actio popularis) without individual plaintiffs and is seeking a ruling from domestic courts on the general structural flaws of the diagnostic system resulting in huge overrepresentation of Romani children in special schools. CFCF and the ERRC are pursuing that action to revitalise the national reform relating to the education of children with special educational needs. This case has no impact on the present case and cannot be grounds to claim that between 2005 and 2010 the applicants failed to exhaust domestic remedies.

54. The applicants note that in order to succeed, the Government must prove that a civil claim launched solely against the ministry was not only available to the applicants but that it would have served as the *only* full remedy for the violation of their rights, unlike the proceedings that the applicants initiated. The Government also needs to demonstrate that the respective ministry bore sole liability for the acts of all defendants in the applicants' case and that the defendants that the applicants litigated against had no competence at all in the applicants' case.

55. The applicants note that contrary to what is suggested by the Government (GO para. 33), i.e. that the issue of segregation was not raised before the competent domestic authorities, in the case of *Vadászi and Horváth v Hungary*[32], this Court focused on rather different matters, namely that the applicants alleging a violation under their right to education shall make use of a civil remedy, which the applicants did in the present case. The applicants wish to note that although there is well-established case-law on the racial segregation of Romani children, the misdiagnosis of Romani children and their transfer to special schools as a form of segregation has not been litigated before domestic courts in Hungary. There is therefore no domestic case-law on this issue that is essentially similar to the applicants' case. The only relevant reference that can be used is the jurisprudence of this Court, in particular *D.H.*, a case that the applicants invoked and relied on during the domestic proceedings.

56. As to the Government's observation (para. 34) on the role of the Nyíregyháza City Council, the applicants note that they discontinued proceedings against this defendant as it did not have any duty connected to diagnosis, placement and oversight of the Expert Panel.

[32] *Vadászi and Horváth v Hungary, application no. 2351/06*

Part IV. Admissibility on the merits of the application

57. With regards to the Government's claim to declare the applicants' submission manifestly ill-founded the applicants submit the following.

I. Ethnic - including cultural and socio-economic - characteristics specific to the applicants and to Romani children

58. The applicants maintain that the different treatment resulted from the flawed diagnostic system in Hungary, which failed to take into account the ethnicity of the applicants - including their socio-economic situation.

59. The applicants reiterate that this Court in the *D.H.* defined Roma ethnicity as comprising of *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 majority settings")[33]. The testing and assessment that was used in the applicants' case took into account those characteristics of the majority ethnic population, not of the Roma.

60. While the relevance of social factors in the process of assessment was acknowledged historically, the concept of "familial disability' was exclusively applied to Roma children. In this respect the Court is respectfully referred to paragraph 129 of the Application.

61. The socio-cultural factors that shaped the applicants' development were social deprivation, as they lived in a poor Roma settlement and attended a Roma-only kindergarten in this settlement.

62. The Government also acknowledged the relevance of social factors. Moreover, they invoked social deprivation as a reasonable justification for the placement of Romani children into special education.[34]

63. Invoking the GO[35] the applicants continue to refer to Ms Kende's statement that the socio-cultural background was decisive for the mental development of the child, and that when the actual level of the IQ of the child was measured the result was necessary influenced by the socio – cultural background. This was also acknowledged by the NERC that in case of both applicants the socio-cultural background had played a significant role in the shaping of their status from an early age.[36]

64. This is just what the applicants claimed in their submission: given that the tests were standardised for majority children, the applicants' (and other Romani children) socio-cultural background was not taken into account either during the

[33] See: *D.H. v the Czech Republic*, no. 57325/00, at paras 201-203.
[34] See: GO, para 61-63
[35] Ibid., para 43.
[36] Ibid., para 43.

assessment or when assessing the results. This constituted direct discrimination and led to their misdiagnosis.

65. The Government acknowledged that Romani children compared to non-Roma have less experience with toys and games, their mothers had low level of education, and that these factors that contributed to their performance at the tests.[37] They also acknowledged that not only social factors but Roma ethnicity played a role in assessment, when noting that even in case of having a group of disadvantaged children who are in a situation very similar to Romani children, non-Roma enjoyed a bit better status than Roma.[38] The Government did not explain why – despite these differences – it maintained that the tests that were oblivious to such factors are adequate for the Roma.

66. The applicants note that although in Hungary, most Romani children, including the applicants, speak Hungarian, it is unquestionable that all the psychometric tests use mainstream middle-class Hungarian language and do not use or acknowledge any specific dialect or archaic language that may be used by children living in certain areas of Hungary. This is also the case with the latest WISC-IV test. The legal representatives of the applicants had the opportunity to participate at testing of Romani children with the WISC-IV, during which using dialect/archaic language was considered to be an error.[39]

67. The REF study outlines that a danger lies in the reliance for placement decisions on standardised measures that assume a child's exposure to certain cultural experiences.[40] Minority children coming from poor, socially and economically excluded families are often considered to be retarded while in school but considered to be normal within the family. Such a disability label conferred by the school has no function outside of the school.[41] Therefore tests that are standardised for the majority middle-class population carries a danger of bias against a minority population, such as the Roma. This has already been established also by this Court in the case of *D.H*.[42]

68. As REF observes, in the Eastern European region family background is repeatedly targeted as **the cause** of a child's failure in school and that the term "social disadvantage" blames Romani families for their children's perceived mental disability.[43] Given that Roma are overrepresented among the poorest, their children are destined to be tested as mentally disabled on account of their poverty, i.e. socio-economic background. Defining mental disability as comprising social deprivation and/or having a minority culture amounts to bias and prejudice.[44] Under domestic and international law, this constitutes direct discrimination.

[37] Ibid., para. 62
[38] Ibid.,para. 63.
[39] For example using different words for jar ('dunsztos üveg' , 'befőttes üveg')
[40] See: Annex No. 1. page 21
[41] Ibid. page 22.
[42] *D.H. v the Czech Republic*, no. 57325/00, at paras 201-203
[43] See: Annex No. 1. page 23.
[44] Ibid., page 21.

II. Whether there was a misdiagnosis of the applicants' needs and abilities

A, Whether the diagnostic regime was adequate for Roma children (cultural and socio-economic bias in general)

69. Relying on REF findings[45], the applicants contest the Government's observation that in Hungary there were culture-free psychometric tests available to test the applicants.

70. REF underlines that as opposed to the Czech Republic at the time in *D.H.*, in Hungary the Budapest Binet, as well as the Coloured Raven were in use to test children. Indeed, the applicants were tested with both tests.

71. The applicants submit that psychometric tests in general are standardised for a certain population. In case the population sample is not well designed, then the standardised test runs the risk of being biased for those participating in the sample and against those not participating. This was the case for the Budapest Binet test which was standardised in the capital city in the early 1970's and therefore had an adverse affect on children living in the countryside in showing lower scores in the countryside than in the capital.[46]. As the Government observed in paragraph 61 in its observations, Roma are overrepresented in the countryside in smaller settlements. The Government itself in its observations acknowledged that the Budapest Binet test is a culturally biased test.[47] Moreover, as REF notes, the Budapest Binet test has not been re-standardised since its introduction in the 1970s.[48]

72. As explained by REF, the Budapest Binet necessarily produced biased results for educationally challenged children, as it was the adaptation of the Stanford-Binet test (1916) which was based on the original Binet test (1905) and thus concentrated on questions intended to uncover areas where such children would perform worse.[49] In other words, it put far less emphasis on areas where educationally challenged children would perform well. Binet included such questions in order to determine the areas where children needed special help. However, in practice during the Soviet times and as it transpires from the applicants' case, even in the early 2000's, the Budapest Binet test was used to determine disability in the field of education.

73. Contrary to the Government's observation, REF points out that the Coloured Raven test – although perhaps less culture and class dependant than the Budapest Binet – has not and is not a culture neutral test.[50] Contrary to the Government's observation, Ms Kende did not state that the Coloured Raven test is a cultrul- fair test. What she stated is that the Raven test is considered to be more culturally independent (but not fully), while the Budapest Binet test is more

[45] See: Annex No. 1., page 52-53.
[46] See A.A. 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.
[47] Goverment's observations, para 43, 48.
[48] See: Annex No. 1., page 53.
[49] Ibid., page 53.
[50] Ibid., page 53,

biased, for example, showing lower scores in the countryside than in the capital.[51] This was also admitted by leading experts testing the WISC-IV when they noted that this test – along with the WISC-IV- should not be used as independent measures of intelligence, as they are not culture-free instruments.[52] Little is known about this test's standardisation in the Hungarian context.

74. WISC-IV, a psychometric test based indirectly on the Binet test was not used to determine the applicants' IQ while attending school. It was used by the court appointed experts to determine the applicants' abilities at the time of the first instance proceedings. Thus, the lengthy argument put forward by the Government in relation to this test bears little or no relevance in the present case.

75. In any event, though, WISC-IV is also biased towards children coming from a minority culture and/or social deprivation. Although WISC-IV has been standardised for Romani children, the authors of the standardization have pointed out several problems such as cultural and language considerations. Significantly, they observed that Romani children obtained scores one standard deviation below those of non-Romani children, the need to make the testing room as comfortable as possible for Romani children. The test developers caution against using the WISC-IV as the diagnostic to determine intelligence was that a complex assesement should be used in order to take into account cultural and linguistic factors of children, therefore they should be assessed through multiple modes, including observation in their own environment (home, school), medical exams, interviews and other education assessments, that WISC-IV alone is not capable.[53] They also recommended changes in relation to the conditions of testing, such as including items that Roma might find in their homes or communities, and allowing the children to participate in the assessment in playful ways that put them more at ease.[54] More importantly, **the authors noted that neither WISC-IV nor Coloured Raven are culture-free tests**.[55]

76. The applicants reiterate that in the domestic proceedings they relied on the expertise of Dr Ilona Réz Nagyné psychologist, special pedagogue and public education expert, head of the National Expert and Rehabilitation Committee (NERC). In her witness testimony given in a case identical to that of the applicants' she 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.[56] 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 re-standardise or amend the existing ones according to international standards.[57]

[51] See A.A. 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.
[52] See: G.A. No. 11,, page 120.
[53] See: Annex No. 1. page 53
[54] Ibid., page 52.
[55] See: G.A., No. 11, page 120.
[56] See: A.A. 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.
[57] Ibid.

77. The applicants submit the introduction of the WISC-IV was an acknowledgement by the Government of the need to re-standardise the diagnostic system in Hungary. The scientific appraisal on the WISC-IV standardisation in Hungary however states that "although the Raven as well as the WISC-IV was introduced to have culturally unbiased tests, even these tests are unable to assess children independently from their social factors."[58]

78. Even the authors of the standardisation of WISC-IV in Hungary acknowledged the problems with the diagnostic system in general. They noted: "in practice the assessment of the children was not uniform and the testing practice could be criticised, which improved in the last 30 years, however there are still some neuralgic points."[59]

79. Consequently, the applicants assert that culturally unbiased tests and methods were not available to test them.

B, Whether the applicants' assesment was based on tests adequate for Roma children (cultural and socio-economic bias against the applicants)

80. Both applicants were tested with the Budapest Binet and the Coloured Raven, which above were shown to be culturally biased. As noted above, WISC-IV was not used to determine the applicants' IQ while attending school. It was used by the court appointed experts to determine the applicants' abilities at the time of the first instance proceedings. Most importantly, however, as opposed to the Expert Panel decisions during his schooling, the second applicant was not found to suffer from mental disability under WISC-IV. Indeed, his social IQ scored 90 which showed that he could not be mentally disabled.[60]

81. Despite the fact that it was widely known that ethnicity and social factors negatively influence test results, when administering the tests, the applicants' Roma ethnicity and their different needs arising therefrom were not considered. This was acknowledged by the head of the Expert Panel in her testimony.[61]

82. The applicants note that in Hungary at the material time IQ 86 was considered as the upper score legitimising placement in special schools. This was in **clear contravention of WHO standards** adhered to by Hungary since the late 1970s. WHO set the upper score for mild mental retardation at IQ 70. For further information the Court is referred to paragraph 129 of the Application. This failure was clearly acknowledged by the Ministry of Education during the 'Out of Back Bench programme'. The Ministry admitted that expert panels in Hungary used IQ 86 as a border line for mild mental disability and reaffirmed IQ 70 as a border line score.[62]

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[58] See: G.A., No. 11, page 120.
[59] Ibid., page 127.: 'A gyakorlatban azonban a megvalósítás színvonala nem volt egyenletes, így valóban sok jogos kritika érhette azt a vizsgálati gyakorlatot, amely ugyan az elmúlt harminc évben jelentősen fejlődött, de még mindig vannak neuralgikus pontjai.'
[60] See: A.A. No. 13: András Kiss, National Expert and Rehabilitation Committee, 20 November 2008.
[61] G.A. No.1., page 7.
[62] See: A.A. No. 22: Ministry of National Resources, at page 2; available at: http://www.nefmi.gov.hu/kozoktatas/eselyegyenloseg/utolso-padbol-program

83. IQ 86 was used as a border line score when determining the applicants' mental abilities. The first applicant scored IQ 64 with the Budapest Binet Test and IQ 83 with the coloured Raven. Despite the 19 points difference between the results of the two tests, the Expert Panel failed to identify the causes of this difference. Clearly the applicant's Raven score was well above the WHO standard (IQ 70) for mild mental disability. Nothing in the documentation suggests that the first applicant's ethnic characteristics – including his social deprivation – were considered when assessing the test results. Moreover, the Expert Panel did not observe the first applicant in his own or his school environment. The cause of his mental disability was unknown and had never been established.[63]

84. The second applicant started his education in the mainstream (but – as the Government underline, 100% segregated) school. His IQ[64] was assessed at 73, which is why he started his education in mainstream primary school. Later, during the assessment by the Expert Panel the second applicant's Budapest Binet test score was IQ 63, and his Raven test scored IQ 83. He was diagnosed as having "mild mental disability", even though his Raven score was well over the WHO standard for mild mental disability. [65] The difference between the IQ scores under the two tests was not assessed. The court appointed expert Ilona Réz, leading the National Expert and Rehabilitation Committee (NERC), established that the second applicant **is not mentally disabled**; his SZQ (social abilities) score is 90 which excluded mental disability. The Government also admitted that the second applicant had no mental disability.[66] In addition, the expert noted that the learning difficulties of the second applicant derived from the fact that he was educated in a special school *because of his disadvantaged socio and cultural background*. Therefore he had significant deficiency with regards to acquired knowledge (tanult ismeretbeli hiányosság). [67]

85. Based on the documentation available and the findings of NERC during the first instance trial, the applicants submit that the Expert Panel clearly misdiagnosed the second applicant. The applicants marvel at the Government's justification argument that 'mild mental disability', 'learning disability', and 'educational challenge' are *quasi synonyms.* The applicants have not found any sound scientific proof that would equate educational challenge with mild mental disability. This is clearly misdiagnosis.

86. In this respect the applicants also contest the Government's argument under paragraph 41 that the assessment of the applicants was not carried out for medical purposes but in a view of determining whether the applicants can be successfully educated in mainstream school. If the assessments were not carried out for medical purposes then **there was no need to label the mentally sound applicants as mildly mentally disabled**, and transfer them to a special school designed for children with mental disability. REF underlines that screening children in schools arose from the practice of early medical screening, used to detect disorders in order to begin with a treatment program. It also emphasised

[63] See: Application, para. 100 -103
[64] There was no indication on the request which IQ test was used. See: A.A. No.8
[65] See: A.A. 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)
[66] GO, para 39.
[67] See: A.A. No. 13: András Kiss, National Expert and Rehabilitation Committee (Gyakorló Országos Szakértői és Rehabilitációs Bizottság), 20 November 2008. page 5

that using educational screening to detect or predict a child's potential success or difficulty in school is problematic, as there are no dimensions to intelligence beyond the analytical and memory abilities typically measured by intelligence tests and that can develop through school attendance and classroom experiences.[68]

87. The issue is not the alleged difference between the assessments for 'medical' and 'learning' purposes as provided by the Government under paragraph 41. The issue is why the Government allowed Expert Panels across the country and in Nyíregyháza – where the applicants resided - to diagnose mild mental disability in clear contravention with WHO standards. Given that the WHO standards were applicable at the time, the development of science and the changing terminology cannot serve as a reasonable justification for the misdiagnosis of the applicants and the deprivation of their rights to access adequate education. Moreover, if the applicants had learning disability or educational challenge as opposed to mild mental disability, what explained their transfer to special school? The answer is that until 2007 special schools did not only educate mentally disabled children, but also educated children with special education needs, including educational challenge and poor socio-economic background. Due to an amendment in 2007 the Public Education Act prescribed that all children who were sent to special schools based on "psychological disorder" or "learning difficulties" had to be retested in order to establish whether the disorder is the result of organic reasons - if not, those children had to be transferred back to normal schools.[69] However, the definition of special education needs has been amended since to allow more room for transfers.[70]

88. This question is linked to the definition of mental disability and/or special educational needs (SEN) for the purposes of education. SEN – and prior to 2003 mental disability[71] - in the Hungarian context went beyond mental disability and included educational challenge, dyslexia, behavioural problems, etc.

89. REF – in line with the applicants' claims before domestic courts and before this Court - disagrees on this point, noting that educationally challenged, dyslexic, etc. children belong to normal mainstream education, whereas social deprivation and consequent educational challenge should under no circumstances result in placement in special schools or classes. REF recommends to fully abolish categories of disability and argues that *"[C]urrent systems of special education focusing on treatment of individual children on the basis of disability should be replaced with a public health approach emphasizing prevention rather than cure at the population rather than individual level. Interventions should be offered to any pupil who demonstrates a need for additional support and funded on the basis of intensity of needed support without applying categories of disability. Social disadvantage should not be considered a disabling condition and should not be considered grounds for being identified as having special educational needs or for placement in special education*."[72] REF also provides several recommendations to facilitate and promote the use of assessments for

[68] See: Annex No. 1. page 24
[69] See: A.A. No.18: Judgment, Debrecen Appeal Court, Pf. II.20.509/2009/10, 5 November 2009, page 16
[70] See: Public Education Act, 121. § 1. (29)
[71] See: A.A. No. 17: Judgment, Szabolcs-Szatmár-Bereg County Court, 3.P.20.035/2008/20., 27 May 2009, page 5
[72] See: Annex No.1. page 11, point 10.

integrating rather than segregating children in order to address their education needs. For further details, the Court is respectfully referred to page 9-11 of the REF report entitled: Pitfalls and Bias: Overrepresentation of Romani Children in Special Education.[73]

90. With regards to the Government's argument on the "borderline intellect" (an IQ between 70 and 85)[74] the applicants reiterate the above said, that having persistent learning impairment must not be perceived as amounting to mental disability, resulting in automatic transfer to special schools.

91. Under paragraph 52 the Government describe the applicants[75], which in the applicants' view clearly indicates that they had normal abilities and had no behavioural problems. Therefore, neither the applicants' behaviour nor their 'apparent' mental disability could play a determinative role in their diagnosis as mentally disabled. Yet the applicants – similar to so many Romani children, as recalled by the statistics provided by the Government for the specific special school (49,3% Roma in the special school as compared to 8,7 % Roma within the total primary school age population in the city of Nyíregyháza) - were placed in special school in Nyíregyháza.

92. With regards to their actual assessment procedure, the applicants refer the Court to paragraphs 100-109 of their Application.

93. As regards the Government's observation on the complexity of the assessment in general, the applicants refer the Court to paragraphs 134-137 of the Application. The Government provided a detailed general description about the procedural safeguards of testing and assessment and how it shall take place under the relevant Hungarian provisions. The applicants note that although these legal safeguards existed on paper in the given time, the procedural requirements were not followed by the Expert Panels in the applicants' case and this was established by the domestic courts. After the first assessment based on which the applicants were transferred to special school, the applicants were not in fact re-examined. The 'review' was paper based, their diagnosis were never individualised, their parents' rights were not respected. These failures were established by domestic courts. In addition as explained in the Application and herein, the tests were culturally biased knowledge based test, putting Romani children into a particular disadvantage. None of the applicants were observed in their home, and their ethnicity was not taken into account when assessing the results. Consequently, neither was their socio-cultural disadvantaged background resulting from their ethnicity taken into account.

94. The applicants contest the Government's argument that the quality of the assessment is different from the quality of the diagnosis. They are closely interlinked, as the diagnosis is essentially the result of the assessment. Therefore, from a flawed assessment a reliable diagnosis cannot result, i.e. culturally biased tests cannot yield culturally neutral results. REF stresses: "Factors leading to misinterpretation of test results include the use of translations

[73] Ibid.
[74] See: GO, para.41.
[75] Ibid., para. 52

of tests, under-representation of certain ethnic or language groups when the test is standardised, and the failure to create a comfortable and engaging testing environment. Misdiagnosis can occur as a result of imprecise reporting of results, not following test administration protocol, or administering the test in culturally or linguistically inappropriate ways."[76]

95. The practice of misdiagnosis is reflected perfectly in the applicants' case: the use of biased tests, the failure of individualisation, labelling educationally challenged children as mentally disabled and transferring them into special education.

96. The applicants submit that while the Government provided several arguments concerning the testing system in general, as well as the so-called 'Flynn effect', they failed to show how – if at all – these general points relate to the applicants' case.

97. In particular, the applicants are of the view that the 'Flynn effect' has no relevance in their case. The applicants did not seek to 'improve' their IQ scores, as their Coloured Raven IQs were well above the WHO mild mental disability scores (83 compared to 70). What the applicants sought was to establish that they **were never mentally disabled,** that they were wrongly and unlawfully labelled as such and channelled into special schools designed for mentally disabled children. In addition, what the applicants sought was to prevent social deprivation from amounting to familial and mental disability. The Government failed to provide any evidence on the relevance of the 'Flynn effect' for Romani children. The applicants wonder how Romani children coming from "dire poverty" (see GO para.68) are exposed to the "complex and stimulating" environment, "richer optical displays", "movies, television or video games" (see GO para 67) when "Roma are disproportionately represented in the group deprived of the beneficial effects of modernisation on the mental development".[77]

III. Whether the applicants' assesment were influenced by any racial prejudice against them

98. The applicants reiterate – *similarly to D.H.* - that all the applicants needed to prove – and, in their submission, they had proved – was that the authorities had subjected the applicants to differential adverse treatment in comparison with similarly situated non-Roma, without objective and reasonable justification.

99. Under domestic law – the Equal Treatment Act of 2003 – it is not necessary to prove intent in order to establish either direct or indirect discrimination. In any case, under this Court's jurisprudence reiterated in *D.H.*, a difference in treatment without objective and reasonable justification may violate Article 14 even *absent discriminatory intent*. As this Court has stated: where it has been shown that legislation and practice produces an unjustified discriminatory effect, it is not necessary to prove any discriminatory intent on the part of the relevant authorities. At

[76] See: Annex No.1,page 30.
[77] GO, para 68.

the same time, in the applicants' view the figures available strongly suggest that - whether intentionally or out of neglect - **race or ethnicity and the social factors arising therefrom** had infected the process of assessment to a *substantial* – perhaps determining – extent.

100. In this regard the applicants note that did not need to prove that discrimination was intentional and they never claimed that the competent authorities – let alone professionals - had at the relevant time harboured invidiously racist attitudes towards Roma, or that they had the intention to discriminate against Roma. The applicants note that in their Application the applicants proved that they were both tested with culturally biased tests and the applicants' ethnic origin and the different needs arising therefrom were not taken into account when assessing the test results.[78]

101. The Government acknowledges that Roma are disproportionately overrepresented in the population living in dire poverty, suffering from mal-nutrition and ill-health, living in less modernised environment with mothers being less educated.[79] The Government however claimed that these factors are not ethnicity related or education related but they concern social development. This is in contravention with several statements presented in the observations. The Government were aware that Roma are overrepresented in social and economic exclusion, that social deprivation adversely affects their test results. The Government also acknowledged that unlike the majority population living in poverty, Roma live in small, segregated settlements, deprived of the opportunity to enjoy modernisation and its effect on mental development. Moreover the Government stated that Romani children are over-represented in special schools because they are over-represented in the population of dire poverty. The applicants observe that the Government established a clear link between social deprivation and Romani ethnicity, i.e. that although not being specific to the Roma only, social deprivation disproportionately affects Roma.

102. The Government refers to the scientific appraisal on the WISC-IV standardisation in Hungary, enlisting social factors that contribute to the low test results of Romani children.[80] In the Government's view none of these factors are 'Roma-only" factors. The applicants never maintained that these factors are characteristic exclusively of the Roma. However, as the report concludes, there remain differences between the test results of similarly disadvantaged Roma and non-Roma children.

103. The Government acknowledge this difference by stating that 'even in case of having a group of disadvantaged children who are in a very similar situation than Romani children non-Roma enjoyed a bit better status than Roma'.[81] However, there is no justification provided for this difference.

104. The Government contested the reliability of international monitoring bodies and NGOs in relation to the over-represented of Roma children in special schools. The Government also noted that this statistical data cannot be a proof of the misdiagnosis of the applicants as members of the Romani community through the use of culturally biased tests and methods. In accordance with this Court's case law,

[78] This was confirmed by the head of the Expert Panel in her witness testimony. See: G. A. No.1. p.7.
[79] GO, para 68.
[80] See: G.A. No. 11. page 120.
[81] See: GO, para. 63.

the mere over-representation of Romani children in special education can be considered as a *prima facie* evidence of indirect discrimination. Since the applicants themselves belong to the Romani community the adverse effect of the culturally biased tests and methods necessary impacted on their assessment as well.

105. The practice of misdiagnosis has received considerable attention, both at the European level and within the United Nations, whose monitoring bodies expressed their concerns in various reports as to the over-representation of Romani children in special schools in Hungary. In addition, the applicants presented not only international bodies' reports but domestic sociological research on this issue that the Government did not contest. In this respect the Court is respectfully referred to paragraphs 124-132 and139-147 of the Application. All these bodies had found that no objective and reasonable justification could legitimise the disadvantage faced by Romani children in the field of education. In the applicants' view the degree of consistency among the domestic and international institutions and quasi-judicial bodies is persuasive in confirming the existence of widespread misdiagnosis and discrimination against Romani children in Hungary.

106. Therefore the presumption that the applicants - together with other Romani children - had been the victims of discrimination on the grounds of their ethnic origin had never been rebutted.

IV. Whether the applicants were subjected to "less favourable treatment"

107. The Government under paragraphs 54-60 contested that the 'special' curriculum which was followed by the applicants amounted to a reduced curriculum.[82] However, the Government further clarified that the special curriculum allows for slower progress in acquiring knowledge and that the special curriculum can be regarded as a reduced curriculum in terms of quantity of factual knowledge taught. This, in the Government's view does not result in lower quality education.[83]

108. In the applicants' view 'quantity' and 'quality' cannot be detached from each other especially in respect of education. When looking at the qualification of children lower quantity of factual knowledge and reduced curricula necessary provide lower quality education and qualification of children. This was confirmed by the forensic expert opinion about the first applicant cited in the first instance judgment which 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." [84] The second applicant also studied in the same school, finishing his studies two years prior to the first applicant. The court appointed expert Ilona Réz established that the second applicant had significant deficiencies with regard to acquired knowledge - although he performed well at school.[85] The Government did not contest this statement. The applicants assert that the significant deficiencies in acquired knowledge necessarily derived from the lower curricula.

[82] See: GO, para. 55
[83] Ibid.
[84] See: Application para. 115
[85] See: A A. No. 13: András Kiss, National Expert and Rehabilitation Committee, 20 November 2008., page 5.

109. The Public Education Act essentially defines special curricula as reduced[86], while research results have also proven that education provided in special classes and schools is inferior to that in mainstream primary schools. In this respect the applicants further refer to paragraphs 116-120 of their Application.

110. According to statistical data in the Statistical Yearbook of Education in 2007/2008 only 0.4 – 0.6 % of special need students had the opportunity to participate in integrated mainstream secondary education providing Baccalaureate (BAC).[87] However, due to the special (lower) curricula these students need to complete additional "preparatory" courses in order to access mainstream secondary education. This was confirmed by the Government in their observations.

111. In the applicants' view data on the low admittance of special education students to mainstream education prove the inferiority of special education and that children educated in special schools have little chance to continue their studies in mainstream schools and especially in those that provide BAC. Had this not been the case, there would not be any difference in the admittance of special education and mainstream students to mainstream secondary schools.

112. The applicants submit that it is clear that special schools necessarily provide lower curricula and this drastically limited their opportunity to continue their studies in mainstream secondary education.

V. Government's failure to provide objective and reasonable justification of the different treatment of the applicants

113. Relevant domestic anti-discrimination legislation is in line with the EU Race Equality Directive (RED). Neither allows justification for direct ethnicity based discrimination in education, except for the purposes of positive action measures.[88] Positive action measures that can justify direct discrimination are spelt out in domestic law, these are religious or ethnic minority education.

114. Under domestic law, as well as 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.[89]

115. This Court has stated that a difference in treatment is discriminatory if "it has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see, among many other authorities,

[86] See: Public Education Act, 121.§ 1. (28)
[87] Source: Ministry of National Resources
[88] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin *"Article 5. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."*
[89] Ibid., Article 2(2)b RED

Larkos v. Cyprus [GC], no. 29515/95, § 29, ECHR 1999-I, and *Stec and Others*, cited above, § 51). Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.[90]

116. This Court defined indirect discrimination in line with the RED, however allowing reasonable justification for direct discrimination as well.

A, Ethnicity based direct discrimination cannot be objectively justified by measures except for positive action

117. The applicants maintain that the administrative practice of diagnosis for the purposes of determining readiness for school disregarded WHO standards and was based on ethnically biased tests. In comparison, characteristics of the majority ethnic group – including social factors – were duly taken into consideration during the standardisation of the diagnostic tools. The tests, then, cannot be found to have accommodated the special needs and characteristics of the Roma. In the applicants' view, therefore, failing for decades to accommodate ethnic characteristics relating to otherwise mentally not disabled Romani children's access to mainstream schools amounts to ethnicity based direct discrimination.

118. This Court has established that Roma as a vulnerable minority enjoy special protection under the Convention.[91] In *D.H*., this Court has stated that "as a result of their turbulent history and constant uprooting the Roma has become a specific type of disadvantaged and vulnerable minority […] and therefore require special protection".[92] It also noted that the case warranted "particular attention", since "the applicants were minor children for whom the right to education was paramount importance".[93] In *Orsus and Others v Croatia* the Court specified that such special protection includes "positive measures". In *Orsus* positive measures were deemed necessary to stem the high drop out rate of Romani children from school. The applicants assert that positive measures were also necessary to stem their transfer to special school as well as the overrepresentation Romani children in special schools. Furthermore, they have demonstrated above that - similar to *D.H.* and *Orsus* - at the material time the Respondent State failed to have "sufficient regard to their special needs as members of a disadvantaged group".[94] Indeed, as the Government noted in their Observations, the ERRC and CFCF are still pursuing public interest litigation in Hungary in order to secure a structural remedy for misdiagnosis.

119. Disregard of the Roma ethnic characteristics in relation to diagnosis continues today as the most recent WISC-IV test remains culturally biased. While today the score for mild mental disability is in compliance with international standards (IQ 70), at the material time the domestic score was set substantially higher than this (IQ 86). Thus, in general, flawed professional practice, which was not in compliance with

[90] See: *D.H. and Others v the Czech Republic,* para. 196
[91] *Chapman v the United Kingdom*, judgment of 18 January 2001, *Connors v the United Kingdom*, judgment of 27 May 2004
[92] See: *D.H. and Others v the Czech Republic,* para 182
[93] Ibid.
[94] See: *Orsus and Others v Croatia*, no. 15766/03, para. 177

international standards legitimised the transfer of mentally sound Roma children - and in the concrete case that of the applicants - into special schools.

120. The history and practice of the misdiagnosis of Roma children in Hungary is well researched (see Application paras. 127-132) with misdiagnosis serving the purpose of keeping a great number of mentally sound Romani children separated from ethnic Hungarian children who attended mainstream schools, and thus ultimately misdiagnosis resulted in *de facto* segregation.

121. Indeed, it is on this basis that Hungarian sociologists and legal experts, such as the Parliamentary Commissioner for ethnic and national minorities[95] have held that misdiagnosis resulting in placement in special schools is a form of segregation. Given that since the 1970s such segregation persisted in Hungary despite heavy criticism, the applicants are of the view that it cannot be taken to constitute indirect, rather than direct discrimination. Clearly, direct discrimination denotes situations in which unequal treatment based on a protected ground – such as ethnicity – is apparent.

122. The overrepresentation of Romani children in special schools – including the special school the applicants attended - appears sufficiently apparent. Based on the judgment of the Court of Justice of the European Union in *Maruko*[96], the applicants argue that since no other group suffered an adverse impact, the impugned administrative practice amounted to direct discrimination based on their ethnicity. In relation to misdiagnosis, the causal link between the administrative practice and the protected ground – ethnicity – is obvious, as it is the only causal link that has been proven to exist. Familial disability (deprived socio-economic status), which pertains exclusively to Roma children has formed the basis of their wrongful placement to special school since the 1970s. Indeed, in the 1970s Czeizel and his team exclusively used familial disability as a ground for the placement of Roma children into special schools. [97] The children's socio-economic status and cultural background were terms interchangeably used with familial disability in later years. Given, that the criterion used for placement into special schools was a criterion that applied exclusively to Roma children, it cannot qualify as being apparently neutral in relation to their ethnicity.

123. Under relevant domestic law, as well as the RED there is no justification for direct ethnicity-based discrimination in public education, except for the purposes of targeted positive measures. The Government has not provided evidence in relation to such measures either pertaining to the applicants' case or in general, to Roma children.

[95] See: Annual Report 1998 of the Parliamentary Commisioner on National and Ethnic Minorities, available at: http://www.kisebbsegiombudsman.hu/word/08-06-2008_13_55_16/besz%C3%A1mol%C3%B3_2008.html

[96] 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

[97] See: Application, para. 129.

B, Government's failure to provide objective justification for indirect discrimination of the applicants and Romani children

124. The applicants reiterate that similarly to *D.H*. all they needed to prove was that the authorities subjected them to differential adverse treatment in comparison with similarly situated non-Roma, without objective and reasonable justification to prove indirect discrimination on the part of the Government.

125. Based on the relevant study published by REF[98] and the applicants' diagnostic documentation, the applicants convincingly demonstrated that in Hungary the tests were biased and the assessments failed to take account of their particularities and special characteristics as Roma children. In addition, the borderline score for mild mental disability was not in line with international standards, a fact admitted by the Government. The latter, being directly discriminatory on the basis of disability was indirectly discriminatory on the basis of ethnicity. Under these circumstances, the biased tests, the individual assessments or the non-compliance with international standards cannot serve as justification for the impugned difference in treatment.[99]

126. In the instant case the Government argued that the applicants were placed in special schools on account of their specific educational needs, essentially as a result of their low intellectual capacity assessed by the Expert Panel with psychometric tests. The Government also argued that Romani children are disproportionately over-represented in special schools as a result of their socio-economic disadvantage. In particular, Romani children live in greater proportion in small settlements in the economically least developed regions of the country, etc.[100] The Government also stated that "much more Romani children live in poverty than non-Romani children and the level of their parents' (mothers') education is far below the average level of education of average Hungarian population".[101] These characteristics of Roma children were also acknowledged in the scientific appraisal on the newly introduced WISC-IV Child Intelligence Test (WISC-IV).[102]

127. The overrepresentation of Romani children in special schools in Hungary, and in particular in the special school which the applicants attended proves that the facially neutral assessment system had a disproportionate prejudicial effect on Romani children.

128. In addition to the general statistical data submitted by the applicants[103], the Government provided statistical data that clearly prove the racial segregation of Romani children in the mainstream school of Nyíregyháza's biggest Roma settlement – Guszev telep - and the clear overrepresentation of Romani children in the city's special school. In para 3 and 51 of their observations the Government acknowledged that at the material time not only the applicants and other Romani children in the special school, but also Romani children in a mainstream school were racially segregated in Nyíregyháza.

[98] See: Annex No.1.
[99] See: *D.H. v the Czech Republic*, no. 57325/00, para. 201.
[100] See: GO, para. 61.
[101] Ibid.
[102] See: G. A. No. 11, page 120
[103] See: Application para. 124-147

129. According to Government data relating to the *special school*: *'The proportion of Roma students in this school was 40% to 50% in the last ten years […]'* In par 51 the Government note *"[…] 49,4 % of the pupils in the special school was Roma"*.[104] According to the Government, the proportion of Romani children among those attending primary education at the material time in Nyíregyháza was 8,7%. These data corroborate claims pertaining to the over-representation of Romani children in the special school in Nyíregyháza. According to the Government data, in the city of Nyíregyháza Romani children were ten times more likely to attend the special school than their non-Romani peers. Admittedly, the city also maintained an exclusively Roma mainstream school in the Roma settlement. This was an unlawfully segregated school that the city closed down as a result of public interest litigation initiated by CFCF.[105] The failure to eliminate racial segregation in the mainstream school based in the Roma settlement is the only reason why the overrepresentation of Roma children in the special school appears less striking. This clearly cannot serve as a justification for the latter discrimination.

130. As to whether statistics can constitute evidence of discrimination, in *D.H.* and earlier cases[106], in which the applicants alleged a difference in the effect of a general measure or *de facto*[107] situation, the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups in similar situations.[108] The applicants are of the view that the statistics they have relied on in their application and the statistics that the Government provided are adequate and extensive enough to substantiate the applicants claim that the apparently neutral diagnostic practice in Hungary put Romani children at a particular disadvantage resulting in their disproportionately high representation in special education (indirect discrimination).

131. The applicants submit that the Government failed to provide any reasonable justification for the legitimacy of the applicants' placement in special schools. Furthermore, they failed to provide justification for the disproportionate overrepresentation of Romani children in special schools in the city and the country. On the contrary, the statistical data provided by the Government confirmed the applicants' statements of facts.

VI. Analogy and differences between the case of D.H. and Others v the Czech Republic and the applicants' case

132. The applicants respectfully submit that this case is significantly similar to that of *D.H.* on account of the bias inherent in the tests used to assess school readiness and their impact on Roma children.

133. However, in the Hungarian context more is known about the administrative practice of misdiagnosis, which in various respects appears differently from that in

[104] See: GO., para. 51.
[105] See: Annex. No.2 and also on: http://www.cfcf.hu/nyiregyhaza_hu.html
[106] 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
[107] See: *Zarb Adami v Malta*, no. 17209/02, para. 76
[108] See. *Hoogendijk v the Netherlands* (dec.), no. 58461/00

the Czech Republic. The applicants submit that there are compelling arguments for establishing a violation of equal treatment on the basis of ethnicity constituting direct ethnicity based discrimination. In both cases psychometric tests which were not standardised for Roma were used to determine readiness for school. Moreover in this case, the concept of familial disability developed exclusively for the Roma and the concept of socio-economic disadvantage characteristic of the Roma were used as factors which legitimised placement in special schools and IQ scores on mild mental disability did not comply with WHO standards. Roma children with IQ scores between 70 and 86 – including the applicants - were regularly placed into special schools – even though since the late 1970s Hungary has adhered to WHO's standards, which set the upper limit of mild mental retardation at IQ 70.[109] Assessment was not tailored to take into account the applicants' different background, it was colour blind. While some *ad hoc* actions were taken to address misdiagnosis, they never had a lasting impact, if any. Moreover, based on the Respondent State's own data and the scientific and legal criticism at the domestic level that for decades preceded the applicants' placement in a special school, the Respondent State were or ought to have been aware of the ethnic segregation which resulted from the misdiagnosis of Romani children. Indeed, to date, despite the decreasing number of primary school age children, special schools have not been reformed.

134. The applicants note that the Government failed to provide any evidence relating to the statements made under paragraph 70 of their Observations.

135. With regards to the adequacy of the assessment, the applicants refer to their Application. As established by the Regional Court, neither the tests nor the assessment of the applicants' abilities were individualised. As to the procedural safeguards, the applicants submit that the domestic courts established that while procedural safeguards existed under Hungarian law, they were not respected by the Expert Panel in the applicants' case.

136. The applicants submit their case is to an extent analogous to that of *D. H.* and Others, whereas in light of the social, scientific and professional contexts specific to Hungary, it provides compelling arguments for establishing a violation of direct ethnicity based discrimination. The differences lie in the following: familial disability and socio-economic disadvantage were used as factors which legitimise placement in special school, IQ scores on mild mental disability did not comply with WHO standards, assessment was colour blind, and although ad hoc actions were taken to stem misdiagnosis, they never had a lasting impact. Moreover, owing to their own data, the scientific and legal criticism at the domestic level that for decades preceded the applicants' placement in special school, the Respondent State ought to have been aware of the ethnic segregation the misdiagnosis of Romani children resulted in.

[109] According to DSM-IV classification, IQ 71-84 is classified under the code V62.89 as Borderline intellectual functioning, whereas under code 317 is Mild Mental retardation, going from 50-55 to approximately 70. See in: *Diagnostic and statistical manual of mental disorders: DSM-IV*. Washington, DC: American Psychiatric Association. 2000. ISBN 0-89042-025-4.

VII. Conclusion

For the reasons set out above, the applicants ask the Court

- to reject the Government's request and to declare the application admissible,
- to find violation of Article 14 read in conjunction with Article 2 of Protocol No 1 of the European Convention on Human Rights
- and to award just satisfaction and costs according to the attached claim.

Budapest, 2 July 2012

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