IN THE EUROPEAN COURT OF HUMAN RIGHTS

CASE OF D.H. AND OTHERS v. THE CZECH REPUBLIC

(APPLICATION NO. 57325/00)

REQUEST FOR REFERRAL TO THE GRAND CHAMBER ON BEHALF OF THE APPLICANTS

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STATEMENT OF THE CASE

1. This case concerns a complaint by the Applicants, 18 children of Roma origin and Czech nationality, alleging that their placement by the Czech government in "special schools" for children with learning disabilities violated their rights in breach of Articles 3, 6(1), and 14, and Article 2 of Protocol No. 1. On 1 March 2005, following a hearing on admissibility and the merits, this Court's Second Section, sitting as a Chamber ("the Chamber"), declared the application partly admissible. On 7 February 2006, the Chamber decided, by a vote of six to one, that there had been no violation of Article 14 of the Convention, taken together with Article 2 of Protocol No. 1 (hereafter "Chamber judgment"). Judge Costa, President of the Chamber, filed a concurring opinion. Judge Cabral Barreto filed a dissenting opinion.

2. The Applicants respectfully request that this case be referred to the Grand Chamber in accordance with Article 43 of the European Convention of Human Rights and Rule 73 of the Rules of Court, because this case raises both "serious question[s] affecting the interpretation or application of the Convention" and "a serious issue of general importance" – namely, the proper interpretation and application of the concept of discrimination where there exists undisputed evidence of a disproportionate adverse impact on children who are members of a highly vulnerable minority group in the Czech Republic and much of Europe. Indeed, the issues at stake in this case are not only of public importance for Roma, they also implicate the rights of all vulnerable minorities across Europe.

3. In recent years, this Court has decided several cases involving Article 14 claims in the context of policing and criminal justice.[1] The Court has had less occasion to clarify the interpretation and application of Article 14 to racial discrimination arising in other fields of public life (including but not limited to education). This case presents the Grand Chamber with its clearest and most compelling opportunity to date to do so. The Chamber's restrictive reading of the concept of discrimination within the meaning of Article 14 of the Convention is inconsistent with this Court's previous jurisprudence and the jurisprudence of other leading courts in Europe and beyond. If allowed to stand, it would render the protection given by Article 14 theoretical and illusory rather than practical and effective. The approach adopted by the Chamber is particularly inappropriate where, as here, there exists overwhelming evidence that Roma have been treated less favourably than similarly situated non-Roma for no objective and justifiable reason. The evidence included (i) actual admissions by the Czech government that disproportionate numbers of Roma were sent to special schools – on the basis of tests conceived for non-Roma – even though they were average or above-average in development; (ii) corroborating detailed and comprehensive statistical evidence that Roma in the city of Ostrava are routinely subjected to educational segregation and discrimination; and (iii) consistent findings by numerous inter-governmental bodies concerning discriminatory patterns in schools

[1] See, e.g., *Bekos and Koutropoulous v. Greece*, Judgment of 13 December 2005; *Timishev v. Russia*, Judgment of 13 December 2005; *Moldovan and Others v. Romania*, Judgment of 12 July 2005; *Nachova and Others v. Bulgaria*, [GC] Judgment of 6 July 2005.

throughout the Czech Republic as a whole. In short, if this case does not amount to discrimination under Article 14 in the enjoyment of the right to education, it is hard to see what would.

4. To the extent that the Chamber did not address these questions adequately, it is all the more necessary for the Grand Chamber do so. It is significant that the Chamber itself initially offered "to relinquish jurisdiction in favour of the Grand Chamber in accordance with Article 30 of the Convention."[2] In doing so, the Chamber rightly acknowledged that this case "raises a serious question affecting the interpretation of the Convention" or implicates a question that might "have a result inconsistent with a judgment previously delivered by the Court."[3] Although the Applicants communicated their support for direct referral to the Grand Chamber, the respondent Government objected. Accordingly, the Chamber retained jurisdiction over the case. It is also noteworthy that Judge Costa declared, in his concurring opinion, that, to the extent a "depart[ure] from the case-law" was required in this case to find a violation of the Convention as a result of the Applicants' assignment to special schools, "the Grand Chamber is better placed than a Chamber to do" this.[4] The Applicants respectfully agree with these observations.

REASONS FOR REFERRING THE CASE TO THE GRAND CHAMBER

I. This case raises four serious questions affecting the interpretation and application of Article 14 of the Convention.

5. The Chamber judgment is internally contradictory and departs from principles set forth in prior decisions of this Court with respect to four central aspects of the definition of discrimination under Article 14 of the Convention: (i) whether the differential treatment at issue is objectively and reasonably justified and what inferences of discrimination are appropriately drawn from the absence of a satisfactory explanation of apparently discriminatory conduct; (ii) the scope of conduct encompassed by the prohibition against discrimination in Article 14, specifically, whether Article 14 is violated by a showing of discriminatory impact, even absent discriminatory intent; (iii) the kinds of proof, including but not limited to statistical evidence, relevant to a claim of violation of Article 14; and (iv) the breadth of the margin of appreciation to be accorded to national governments in cases of racial or ethnic discrimination (in this case against vulnerable children belonging to an unpopular ethnic minority).

6. These problems were compounded by the Chamber's misinterpretation of key facts and its drawing of unwarranted and erroneous conclusions. They were also aggravated by the narrowly restrictive way in which the Chamber approached the question as to whether the Applicants' parents had consented to the placement of their

[2] Letter from European Court of Human Rights, 16 September 2004.
[3] European Convention for the Protection on Human Rights and Fundamental Freedoms, Article 30.
[4] Chamber Judgment, Concurring Opinion of J. Costa, § 7.

children in special schools. The Chamber did so in a manner which was inconsistent with the object and purpose of the Convention and the Court's established jurisprudence.

A. Given the independent evidence presented in this case of differential treatment of Roma children in the Czech education sector, the Grand Chamber could usefully clarify this Court's jurisprudence concerning whether, for the purposes of Article 14, the differential treatment at issue is "objectively and reasonably justified" and what inferences are appropriately drawn from the absence of a satisfactory explanation.

7. As the Chamber (at § 44) properly noted, citing *Willis v. the United Kingdom*, no. 36042/97, §48, ECHR 2002-IV, this "Court's case-law establishes that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations." Under *Willis*, a difference of treatment has no "objective and reasonable justification" for the purposes of Article 14 "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 realized.'"[5] Indeed, since *Belgian Linguistics*, it has been clear that "[a] difference in treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized."[6]

8. Moreover, in addressing a claim of racial discrimination under Article 14, this Court has made clear that, "[o]nce the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified."[7] If there is no, or no satisfactory, explanation for the difference in treatment, it is proper to infer that the different treatment was on racial grounds, in breach of Article 14 of the Convention.[8] Indeed, "no difference in

[5] *Willis*, 35 EHRR 21 (2002), p. 559, § 39; see also *Okpisz v. Germany*, 42 EHRR 32 (2006), pp. 66-67, § 33 ("According to the Court's case law, a difference of treatment is discriminatory for the purposes of Art.14 of the Convention 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 realized.' "); *Niedzwiecki v. Germany*, 42 EHRR 33 (2006), p. 684, § 32 (same).

[6] *Belgian Linguistics Case*, Judgment of 23 July 1968, § 10.

[7] *Timishev v. Russia*, Judgment of 13 December 2005, § 56. See *Hoogendijk v. Netherlands*, App. No. 58641/00, ECHR Admissibility Decision of 6 January 2005 (where applicant makes out a prima facie case of differential treatment, "it is for the Government to show that this is the result of objective factors unrelated to any discrimination"); *Anguelova v. Bulgaria*, ECHR Judgment of 26 February 2004, § 111 (proof of discrimination "may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities … strong presumptions of fact will arise" and "the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation").

[8] See, e.g., *Moldovan and Others v. Romania*, § 140 (where "Government advanced no justification for … difference in treatment of the applicants," the Court concluded "accordingly that there has been a violation of Article 14 of the Convention"). See also the recent opinion of the House of Lords in *R. v. Immigration*

treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified."[9]

9. The Chamber has not correctly interpreted or applied these principles. The Chamber considered only the "legitimate aim" prong of the *Willis* test without expressly addressing the proportionality of the Czech government's means - segregating Roma children into special schools. The Chamber observed (at § 49) "that the rules governing children's placement in special schools do not refer to the pupils' ethnic origin, but pursue the legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children."[10] Yet the Chamber avoided the question of whether the means employed – placing Roma children disproportionately in special schools, with the undisputed result that virtually no Roma graduated to secondary school or university – bore any reasonable relationship to that legitimate aim.

10. Furthermore, although the Government offered no satisfactory explanation for the massively disproportionate rate at which Roma children are deemed mentally disabled, the Chamber failed to infer, as it should have done, that the different treatment was on racial grounds, that is, that it was significantly influenced by the Applicants' Roma racial/ethnic origin. The Chamber offered three reasons for failing to draw such an inference, none of which has merit.

Officer at Prague Airport [2004] UKHL 55, Leading Speech of Baroness Hale of Richmond, § 73 - 74, where she stated as follows:
"The underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally. Thus it is just as discriminatory to treat men less favourably than women as it is to treat women less favourably than men; and it is just as discriminatory to treat whites less favourably than blacks as it is to treat blacks less favourably than whites. The ingredients of unlawful discrimination are (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group; (ii) that the treatment is less favourable to one; (iii) that their relevant circumstances are the same or not materially different; and (iv) that the difference in treatment is on racial grounds. However, *because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment less favourable than that of a comparable person (ingredients (i), (ii) and (iii)) is shown, the court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds*: see *Glasgow City Council v Zafar* [1997] 1 WLR 1659, approving *King v Great Britain-China Centre* [1992] ICR 516. If the difference is on racial grounds, the reasons or motive behind it are irrelevant: see, for example, *Nagarajan v London Regional Transport* [2000] 1 AC 501." (Emphasis added).

[9] *Timishev v. Russia*, § 58. See ECRI, *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, Explanatory Memorandum, § 8 (Differential treatment based on race or ethnic origin is so contrary to the core values of the Convention that it "may have an objective and reasonable justification only in an extremely limited number of cases").

[10] In fact, though the rules do not refer to the Applicants' ethnic origin, some of the documents concerning the Applicants and generated by the educational authorities do. See Applicants' Letter of 26 April 2005 (calling attention to document in school file of Applicant 11 which makes explicit reference to children of "Romani nationality"). In addition, copies of documents relating to Applicants 7 and 8 – made available to the Applicants only in April 2005 – made reference to the fact that these Applicants came from "low level of a socio-cultural environment, multiple Romani family."

11. First, the Chamber noted (at § 49) that, since children's needs, aptitudes and disabilities are "not legal concepts, it is only right that experts in educational psychology should be responsible for identifying them." But, under the Chamber's logic, most areas of public life – from employment to public accommodations to criminal justice – would be effectively immune from Article 14 scrutiny, since they all require individuals with specialized knowledge to make judgments based on factors particular to the field. Moreover, this Court has not hesitated to examine closely the decisions of public officials expert in certain activities – such as accounting[11] or military or police investigation[12] – and find them deficient when measured against Convention standards. The decisions of school administrators and psychologists in this case deserved similar close European scrutiny.

12. Second, the Chamber (at § 48) blithely accepted the Government's suggestion that "the criterion for selecting the applicants was not their race or ethnic origin but their learning disabilities as revealed in the psychological tests." But if this were true, it would indicate – in the light of the undisputed statistical evidence – that Roma children are 27 times more likely than non-Roma to have learning disabilities. This is hardly a credible, let alone a satisfactory, explanation. As the European Union Monitoring Center on Racism and Xenophobia has noted, "If one assumes that the distribution of pupils with disabilities is similar across all ethnic groups, an over-representation of … minority pupils in [special schools and] classes indicates that a portion of these pupils is wrongfully assigned."[13]

13. Third, the Chamber was not willing (at § 49) to "ask the Government to prove that the psychologists who examined the applicants had not adopted a particular *subjective attitude*." But the test of liability under Article 14 is objective: Was there unlike treatment of like cases, or like treatment of unlike cases, on racial grounds? The subjective attitudes of psychologists, while potentially relevant as aggravating factors, do not determine whether discrimination exists.[14]

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[11] *Thlimmenos v. Greece (34369/97)*, [2000] ECHR 161, Judgment of 6 April 2000 (finding refusal to appoint applicant to chartered accountant's post in breach of Article 14).

[12] *Nachova and Others v. Bulgaria, [*GC] Judgment of 6 July 2005 (finding military investigation in breach of Article 14); *Bekos and Koutropoulos v. Greece*, Judgment of 13 December 2005 (finding police investigation in breach of Article 14).

[13] EUMC, "Migrants, Minorities and Education: Documenting Discrimination and Integration in 15 Member States of the European Union" (June 2004), p. 64. The Government did suggest that it had not established the special school system for the purpose of segregating Roma children, and that "considerable efforts are made in these schools to help certain categories of pupils to acquire a basic education." (Chamber Judgment, § 48). But the reasons or motives behind a difference in treatment on racial grounds are irrelevant. (See *Nagarajan v. London Regional Transport* [2000] 1 AC 501; *R v Birmingham City Council, ex parte Equal Opportunities Commission* [1989] AC 1155 (HL) at 1194.).

[14] See e.g., *Nagarajan v. London Regional Transport, supra,* per Lord Nicholls of Birkenhead in the Leading Speech. As regards the question of subconscious motivation, Lord Nicholls stated as follows:

> "All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may

14. Had the Chamber properly applied the *Willis* test, it would not only have sought and explicitly weighed the Government's explanation for the Applicants' differential treatment; it would also have appropriately inferred from the absence of a satisfactory explanation that unlawful discrimination had occurred. In the instant case, the Applicants demonstrated convincingly that, like other Roma children in the Czech Republic, they were treated less favourably than other similarly situated non-Roma children by being systematically placed in special schools for the mentally retarded at grossly disproportionate rates. Under this Court's caselaw, it was thus incumbent upon the Government to explain how such an anomaly could have taken place. The Government utterly failed to do so, and under the circumstances, it was reasonable to infer that the difference of treatment was on racial grounds.

15. By failing to pursue the question of proportionality under *Willis*'s two-prong test for what constitutes an "objective and reasonable justification," and by declining to draw appropriate inferences from the absence of any plausible explanation for the Applicants' differential treatment, the Chamber contradicted this Court's own caselaw and effectively granted the Government's objectionable policies a free pass.

B. The Grand Chamber should correct the Chamber judgment's application of a confusing test of discrimination under Article 14 that contradicts this Court's prior jurisprudence.

17. In addressing the Applicants' claims that their rights of non-discriminatory access to education had been breached in violation of Article 14 together with Article 2 of Protocol No. 1, the Chamber offered contradictory conceptions of the scope of prohibited discrimination. On the one hand, the Chamber (at § 46) reaffirmed the

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> decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did…. *Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination."* (Emphasis added).

Nor is *Nachova and Others v. Bulgaria, [*GC] Judgment of 6 July 2005, to the contrary. In declining "…to ask the Government to prove that the psychologists who examined the applicants had not adopted a particular subjective attitude," the Chamber in this case tracked *Nachova*'s language but misapplied its reasoning. In *Nachova*, the Grand Chamber affirmed that, "in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis." (§ 157). In explaining why it refused to shift the burden to the Government in that case, the Grand Chamber took care to distinguish between racially-motivated violent crime and non-violent acts of racial discrimination. On the one hand, where it is alleged that "a violent act was motivated by racial prejudice," discriminatory intent is clearly in issue (as intent is an essential element of virtually all crimes), and the burden may not shift, because the Government could not reasonably "prove the absence of a particular subjective attitude." On the other hand, with respect to allegations of "discrimination in employment or the provision of services," the relevant question is "the discriminatory effect of a policy or decision," not intent or state of mind. In such cases, the Government could reasonably be expected to provide a neutral rationale for its actions. (Ibid.). The core allegation here – racial discrimination in access to education – is precisely the kind that, as *Nachova* and all related jurisprudence on the subject teach, requires Government justification of the differential treatment at issue. See section B, *infra*.

established principle that, "if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group." Yet, on the other hand, the Chamber effectively required the Applicants to prove discriminatory intent on the part of Czech officials to find a violation of Article 14 in apparent conflict with this Court's established caselaw.

18. To begin with, the Chamber declared (at § 45) that "its sole task in the instant case is to … establish on the basis of the relevant facts whether *the reason* for the applicants' placement in the special schools was their ethnic or racial origin" (emphasis added). In its view (at § 48), it was sufficient that the Government had "succeeded in establishing that the system of special schools in the Czech Republic was not introduced *solely to cater for Roma children*…" (emphasis added). As noted above, while conceding (at § 45) that the applicants had raised "a number of serious arguments," the Chamber declined to require the Government to provide a reasonable and objective justification for the disproportionate placement of Roma in special schools, as this would amount to "ask[ing] the Government to prove that the psychologists who examined the applicants had not adopted a particular *subjective attitude*" (§49, emphasis added). In short, the Chamber reasoned, the Government could not reasonably be asked to prove the absence of discriminatory intent.

19. Notably, in crediting the Government's claim (at § 48–49) that "the criterion for selecting applicants was not race or ethnic origin but their learning disabilities as revealed in the psychological tests," the Chamber placed great weight on its view that the "tests were administered by qualified professionals, who are expected to follow the rules of the profession and to be able to select suitable methods." But, some of the most common discriminatory practices are neither widely advertised nor motivated by knowing, malicious intent.[15] Six decades after the end of the Second World War, it should come as no surprise that few European policymakers openly use racial or ethnic criteria in rationing public resources. And yet, racial and ethnic discrimination remains widespread in many Council of Europe member states.[16]

20. In effect, the Chamber effectively required the Applicants to prove discriminatory intent to sustain a violation of Article 14 and thereby departed from this Court's prior caselaw.[17] In *Thlimmenos v. Greece*, this Court found a violation of Article 14 on

[15] *See Nagarajan v London Regional Transport*, *supra*; Lawrence, "The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism," 39 *Stanford Law Review* 317 (1987); W. Macpherson, *The Stephen Lawrence Inquiry Report*, § 6.6 (London Stationery Office 1999) ("practices may be adopted by public bodies as well as private individuals which are unwittingly discriminatory against black people"); see id. at § 6.12 ("All the evidence I have received, both on the subject of racial disadvantage and more generally, suggests that racialism and discrimination against black people - often hidden, sometimes unconscious - remain a major source of social tension and conflict").

[16] See, e.g., European Commission against Racism and Intolerance (Council of Europe), Country Reports (1997 to 2006) (*passim*).

[17] Without using identical terminology, the Court has at various times recognized that Article 14 prohibits both direct and indirect discrimination. Direct racial discrimination occurs where A treats B less favourably then A treats C on racial grounds; that is, where the difference in treatment complained of is significantly influenced (as a matter of causation) by the complainant's racial or ethnic origin. Indirect racial

grounds of religion where the government was held, not to have intended to engage in differential treatment absent justification, but rather to have acted without taking sufficient account of the applicant's special needs.[18] More recently, in *Nachova and Others v. Bulgaria*, the Grand Chamber observed that, "in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services."[19] Other cases have confirmed this Court's principle that a showing of intent to discriminate is not required under Article 14.[20] And, in other areas of Convention jurisprudence, the Court has explicitly recognized that Convention rights may be violated even in the absence of intention to do so, where the effect is sufficiently severe.[21]

21. To the extent that this Court has declined, on limited prior occasion, to find a violation of Article 14 where Applicants prove discriminatory impact but not discriminatory intent,[22] the Court's Article 14 standards would benefit from clarification. The question of the scope of Article 14 protection is a fundamental one. The importance of clear guidance for applicants, practitioners and judges applying the Convention in national tribunals makes this issue particularly ripe for Grand Chamber review given the recent coming into force of Protocol No. 12.

22. Furthermore, it bears emphasis that adopting a narrowly restrictive test of intentional discrimination for Article 14 would undermine this Court's clearly-expressed intention to ensure that the Convention provides practical protection for human

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discrimination occurs where A treats B and others of B's racial/ethnic group in the same way (in a formal sense) as A treats or would treat C and other members of C's ethnic group, but the practice, criterion rule or procedure at issue has a disparate impact on B and members of B's ethnic group and cannot be shown to be objectively justifiable irrespective of race or ethnicity.

[18] *Thlimmenos v. Greece*, *supra*, § 44 ("The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different").

[19] *Nachova and Others v. Bulgaria* [GC], Judgment of 6 July 2005, § 157.

[20] See *Hoogendijk v. Netherlands*, Decision of 6 January 2005 (No. 58461/00) ("where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group"); *McShane v. United Kingdom*, 35 EHRR 23 (2002), § 135 (same); *Liberal Party v. United Kingdom*, 4 EHRR 106 (1982), p. 114 ("it is well established in the case law of the European Court of Justice that the concept of discrimination includes not only overt differences of treatment but also differences in impact or effect: that is, a difference of treatment in the sense that a measure which is neutral on its face has a disproportionate adverse impact or effect upon a particular category of persons"); *D.S. v. The Netherlands*, Decision of 12 October 1992 (No. 17175/90) ("a rule, which is formally not discriminatory, can nevertheless be discriminatory in its practical application").

[21] See, e.g., *Price v. United Kingdom*, Judgment of 10 July 2001, § 30 (despite the absence of any "positive intention to humiliate or debase the applicant," detention of "a severely disabled person" may nonetheless constitute "degrading treatment" in breach of Article 3).

[22] *See, e.g., Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Judgment of 28 May 1985, § 83, 84, 85, 86 (finding violation of Article 14 on grounds of sex discrimination, but finding no violation on grounds of race discrimination where, although immigration policies at issue "affected … fewer white people than others," this was an "effect which derive[d] not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others").

rights.[23] Indeed, requiring applicants, as the Chamber did (at § 48), to show "that the system of special schools in the Czech Republic was … introduced solely to cater for Roma children," is impractical and illogical. With all due respect, it is irrelevant whether special schools were designed to segregate along ethnic lines. That is indisputably what has been their practical effect. Limiting Article 14 protection to those rare occasions where discriminatory intent is demonstrably provable would render it an empty shell, impotent before the vast array of covert and unconscious manifestations of discrimination which regularly afflict Roma and other minorities. The reality is that well-intended actors who "follow the rules" often engage in discriminatory practices through ignorance, neglect or inertia. The deprivation of equal educational opportunity endured by these 18 applicants – and the overwhelming majority of Roma children in the Czech Republic – is in no way diminished by the professedly benign intentions of school administrators.

23. The Council of Europe's European Commission against Racism and Intolerance (ECRI) has expressly recognized the concept of "indirect discrimination" through its General Policy Recommendation No. 7.[24] As senior officials of the Council of Europe have underscored, "Unequal treatment is not always the result of intentional discrimination or racist attitudes, but it may be the result of societal structures that cater primarily to the needs of the majority population, without giving sufficient attention to the particular needs that minority populations may have."[25] Moreover, as of May 2006, a clear majority of the member states of the Council of Europe expressly prohibit indirect discrimination in some part of their national legislation.[26]

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[23] See *Sporrong and Lonnroth v. Sweden*, 5 EHRR 35, 51 (1983) § 63 ("[T]he Convention is intended to guarantee rights that are 'practical and effective . . . '") (quoting *Airey v. Ireland*, 2 EHRR 305, 314 (1979), § 24 ("The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"))

[24] Art. 1(c) defines "indirect racial discrimination" as follows: "cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

[25] Office of the Commissioner for Human Rights, Council of Europe, *Final Report on the Human Rights Situation of The Roma, Sinti and Travellers in Europe* (15 February 2006), § 19. See also "Europe should fight hidden racism and discrimination," Statement by Terry Davis, Secretary General of the Council of Europe (21 March 2006) (Violent and overt forms "of racism and discrimination [are] only the tip of the iceberg. Beneath the surface of apparent equality, people belonging to ethnic … minorities, continue to be confronted with various forms of intolerance and discrimination…. The worst, of course, is institutional racism and discrimination, operated by bureaucrats and sanctioned with an official stamp from the public authorities. This phenomenon is far more widespread than we think, and it affects virtually every aspect of life, from housing to education, from health to employment").

[26] To date, twenty-two European Union member states have transposed into national legislation the EU Race and Employment Directives, which explicitly recognize claims for indirect discrimination. *See* generally the Executive Summaries of the Anti-Discrimination Country Reports prepared by the Migration Policy Group, *available at http://www.migpolgroup.com/documents/3169*.html. Yet even the three EU countries that have not implemented the directives recognize claims of indirect discrimination through constitutional court jurisprudence as in Germany, through the implementation of the EU Sex Equality Directive as in Luxembourg, or through the national labor code as in the Czech Republic. *See id*.; for a comprehensive list of antidiscrimination laws, see generally *Implementation of Anti-Discrimination*

24. Within the European Community, the European Court of Justice has consistently made clear that both direct and indirect forms of discrimination are prohibited[27] and that intent is irrelevant to an assessment of whether discrimination has occurred.[28] Since 2003, when the European Union Race Directive came into force, discrimination on grounds of racial or ethnic origin is deemed to have occurred in EU member states when, *inter alia*, "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."[29]

25. Indirect discrimination absent a showing of intent is also prohibited under international law, including the International Covenant on Civil and Political Rights,[30]

Directives into National Law, available at http://europa.eu.int/comm/employment_social/fundamental_rights/legis/lgms_en.htm#lux. In addition, other Council of Europe member states, including Bulgaria, Croatia, Romania and the Ukraine, prohibit indirect discrimination in some part of their national legislation, including their Labour Codes. See Council of Europe, *country-by-country approach*, available at http://www.coe.int/t/e/human%5Frights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry%5Fapproach.

[27] See, e.g., Case 170/84, *Bilka-Kaufhaus v. Weber von Hartz* [1986] ECR 01607, Operative part ("Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex."); Case 147/03, *Commission v. Austria* [2005], § 41 ("According to settled case-law, the principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result.") (citing Case 152/73, *Sotgiu* [1974] ECR 153, § 11; Case 65/03, *Commission* v *Belgium* [2004] ECR I-6427, § 28; Case 209/03, *Bidar* [2005] ECR I-0000, § 51); Case 313/02, *Wippel v. Peek & Cloppenburg GbmH & Co KG* [2004] (Opinion of the Advocate General), § 91 ("The wording of the AZG is gender neutral in this respect. It is well settled, however, that where national rules, although worded in neutral terms, work to the disadvantage of a much higher percentage of persons of one sex, they constitute indirect discrimination unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex.")

[28] See Case 63/91 and 94/91, *Sonia Jackson and Another v. Chief Adjudication Officer* [1992] 3 C.M.L.R. 389 ECJ, § 28 ("[I]n order for there to be indirect discrimination within the meaning of article 2(1) of Directive (76/207/E.E.C.) it is sufficient that an ostensibly neutral measure should in fact affect for the most part employees of one of the sexes and it is unnecessary to prove an intention to discriminate. That requirement would be met if it were established that the non-deductibility of child-minding expenses from a vocational training allowance or from income from a part-time job in practice mainly affected women. It is irrelevant in this connection that the contested scheme did not place an insurmountable obstacle in the way of single mothers' access to vocational training or employment, or that that was not the legislature's intention: a real impact on the possibility to engage in vocational training or take up a job is sufficient.")

[29] Directive 2000/43 implementing the principle of equal treatment or persons irrespective of race of ethnic origin, Art. 2(2). See also Directive 2000/78 (Framework Employment Directive), Art. 2 (employing similar standard for indirect discrimination, on grounds other than racial or ethnic origin).

[30] See UN Human Rights Committee, *Comment 18: Non-Discrimination 10/11/89* (1989), § 6 (definition of discrimination in ICCPR Articles 2 and 26 encompasses the "purpose or effect" of the measures at issue). This test has been applied in decisions of the UN Human Rights Committee in respect of individual complaints which have made clear that intent is irrelevant to a consideration of whether discrimination has occurred. See, e.g., UN Human Rights Committee, *Simunek et al v. Czech Republic, Communication No. 516/1992*, UN Doc. CCPR/C/54/D/516/1992, § 11.7 ("the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be

and the International Convention on the Elimination of Racial Discrimination,[31] as well as the instruments of the International Labor Organization.[32]

26. In sum, the Chamber's reasoning is in tension with the prevailing standards of discrimination long accepted by the Council of Europe, the European Court of Justice, and international law. In fact, were a group of applicants today to lodge a complaint in the Czech courts similar to that before the Chamber here, the question could well be referred to the European Court of Justice, where the EU Race Directive – and its definition of indirect discrimination – would be directly applicable. It would seem strange, at best, for this Court to adopt standards significantly less protective of human rights than other European bodies. It is respectfully submitted that the principle of equal protection without discrimination should be interpreted and applied consistently by the two European Courts.

C. The Grand Chamber should provide guidance concerning the kinds of proof, including but not limited to statistical evidence, which may be relevant to a claim of violation of Article 14.

27. The Chamber took no issue with the accuracy of the Applicants' statistics – i.e., that Roma children are more than 27 times more likely than non-Roma to be assigned to schools for children with mental disabilities. And yet, it discounted this data (at § 46), reasoning that "statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory." However, this Court has made clear that, while statistics alone "are not automatically sufficient" to prove discrimination, they may – particularly where they are, as here, undisputed – amount to prima facie

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compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory"); *Althammer v. Austria, Communication No. 998/2001*, UN Doc. CCPR/C/78/D/998/2001, § 10.2 (employing similar reasoning); *Brooks v. The Netherlands, Communication No. 172/1984*, UN Doc. CCPR/C/29/D/172/1984, § 12.3 - 16 (finding violation of ICCPR Article 26 on grounds of sex discrimination, even though State party had not intended to discriminate against women).

[31] See UN Convention on the Elimination of Racial Discrimination Article 1(1) (the term "racial discrimination" includes any distinction based on relevant grounds "which has the purpose *or effect*" of impairing the enjoyment of human rights) (emphasis added); UN CERD, General Recommendation No. 14 (1993), § 1 ("A distinction is contrary to the Convention if it has either the purpose *or the effect* of impairing particular rights and freedoms") (emphasis added); ibid., § 2 ("In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin"); *L.R. v. Slovak Republic, Communication No. 31/2003, (CERD Views of 10 March 200*5), UN Doc. CERD/C/66/D/31/2003 § 10.4 ("the definition of racial discrimination in article 1 [of the Race Convention] expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination"); UN CERD, *General Recommendation No. 19*: *Racial segregation and apartheid (Art. 3*) *18/08/95*, § 3 ("condition of [unlawful] partial segregation may also arise as an unintended by-product of the actions of private persons").

[32] See ILO Convention No. 111 on Discrimination in Respect of Employment and Occupation (1960), Art. 1(a) (defining "discrimination" to include "[a]ny distinction" on prohibited grounds "which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation").

evidence requiring the Government to provide an objective explanation of the differential treatment.[33]

28. As with respect to other issues concerning the application and interpretation of Article 14, the body of this Court's caselaw on this point is relatively limited. And yet, the question of what kinds of proof may be used in support of claims of discrimination, and what weight to attach to them, significantly affects the effectiveness of Article 14's non-discrimination guarantee. Accordingly, it is respectfully submitted that this issue too merits the attention of the Grand Chamber.

29. An increasing body of law from within Europe and beyond has underscored the centrality of statistical proof to discrimination claims. Particularly in cases where, as here, discriminatory impact is at issue, statistics are often used to facilitate assessment of the core question - how members of different groups are differently treated.[34] The European Union Race Directive expressly leaves open the possibility for indirect discrimination to be proved "by any means including on the basis of statistical evidence."[35] Statistics are accepted as proof of discrimination by the United Nations treaty bodies[36] and the European Court of Justice.[37] They are especially helpful where, as in many fields, discrimination is a systemic problem revealed in patterns over time, rather than an isolated act of an individual perpetrator.[38] And the increasing body of law underscoring the centrality of statistical proof to discrimination claims reflects the broader reality that sometimes statistics are the only way in which indirect discrimination might be proved.

30. In the instant case, the Chamber had before it not only overwhelming statistical evidence, but also the findings of independent and expert inter-governmental bodies that Roma were subjected to segregation and discrimination in Czech schools, as well as admissions by the Czech government that many Roma were sent to special schools

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[33] *Hoogendijk v. Netherlands*, Decision of 6 January 2005 (No. 58461/00).

[34] The goal in using statistical evidence is to show so great a difference of impact on a protected group that the disparity could not have occurred at random, and raises the strong possibility of discrimination. For this reason evidence in indirect discrimination cases usually focuses on "statistical disparities, rather than specific incidents, and on competing explanations for those disparities." *Watson v. Fort Worth Bank,* 487 U.S. 977, 987 (1988).

[35] EU Race Directive, Preamble, § 15.

[36] See The Committee on the Elimination of Discrimination against Women, General Recommendation 9, Statistical Data Concerning the Situation of Women (statistics are "absolutely necessary" in understanding discrimination).

[37] See, e.g., Case C-109/88, Danfoss Case [1989] ECR 3199; Case C-127/92, Enderby and Others v. Frenchay Health Authority and Anor [1993] ECR I-5535; Case C-167/97, Seymour-Smith and Perez [1999] ECR I-623; Jämställdhetsombudmannen v. Örebro Läns Landsting [Swedish Ombudsman Case] [2000] IRLR 421; Bilka-Kaufhaus, § 29.

[38] To be sure, statistics are only one form of proof, if an important one. See, e.g., N. Reuter, T. Makkonen and O. Oosi, eds., *Study on Data Collection to Measure the Extent and Impact of Discrimination in Europe* (European Commission, DG for Employment, Social Affairs and Equal Opportunities), December 2004, at 4-5 ("no particular data collection method is enough in and of itself in order to obtain a satisfactory picture of the extent and nature of discrimination"; recommending "a multi-method and multi-disciplinary approach to measuring discrimination").

in disproportionate numbers even though they were average or above-average in development.

31. In fact, the Government has unequivocally admitted that its special school policy has a discriminatory impact on Roma children. In the Czech government report lodged on 1 April 1999 under Article 25 § 1 of the Framework Convention for the Protection of National Minorities to the Council of Europe, presented to the Chamber at Applicants' Exhibit 24, the government conceded that during the relevant time period, "Romany children with average or above-average intellect [we]re often placed in such schools on the basis of results of psychological tests (this happen[ed] always with the consent of the parents)" and that "[t]hese tests [we]re conceived for the majority population and do not take Romany specifics into consideration."[39] This was not the only evidence presented confirming that Czech officials acknowledge the discriminatory impact of the special schools policy on Roma. Contemporaneous to its report to the Council of Europe, the Government acknowledged "the fact that three-quarters of Romani children attend special schools destined for children with a moderate mental deficiency and that more than 50% (estimates are that it is about three quarters) of all special school pupils are Romani…."[40] More recently, a 2002 report by the Czech School Inspectorate observed that children without significant mental retardation were placed in special schools.[41] These government admissions have been repeatedly reinforced by the findings of inter-governmental monitoring organs and the observations of Czech educational experts.[42]

32. The evidence before the Chamber convincingly demonstrated the ongoing discrimination toward Roma inherent in the Czech government's special school system and from which Applicants suffered. The Chamber, however, failed to give that evidence due consideration. The Grand Chamber should make clear the role and relative weight to be given to statistical and other forms of evidence under Article 14.

D. The Grand Chamber should make clear that the "margin of appreciation" cannot justify school segregation, in light of the Strasbourg organs' consistent affirmation of the importance of combating racial and ethnic discrimination.

[39] Chamber Judgment, Dissenting Opinion of J. Cabral Barreto, § 2.

[40] Government Resolution No. 279 of 7 April 1999 on the Draft Conception of the Government Policy Towards the Romani Community, cited in Application, § 6.14.

[41] Czech School Inspectorate, "Evaluation of the Procedure of Transfer of Pupils from Special Schools to Elementary Schools" (2002), cited at § 1.3.1 of Applicants' Written Comments, 1 June 2004.

[42] In March 1998, the United Nations Committee on the Elimination of Racial Discrimination condemned what it termed "de facto racial segregation" of Roma in Czech schools. See Application, Exhibit 21 (UN CERD, "Concluding Observations: Czech Republic" (30 March 1998) (CERD/C/304/Add.47)). See also reports of European Commission, Human Rights Commissioner of the Council of Europe, UN Human Rights Committee, UN Committee on the Rights of the Child and other bodies, cited in § 2.7 – 2.15 of Applicants' Written Comments, 1 June 2004; Application, Exhibit 11A and footnote 72 (Statement of leading Czech educator) ("Segregation of Roma in education is not new or secret. For years, the Czech authorities have known that their school system annually brands Roma as mentally retarded and that thousands of normal and capable Roma children have been wrongly assigned to special school. Yet widespread racial segregation continues to this day").

33. The Chamber granted the Czech authorities a wide margin of appreciation in explaining its refusal to subject the school placement policies and practices in question to rigorous inquiry. Indeed, the Chamber went out of its way (at § 47) to "reiterate with regard to the States' margin of appreciation in the education sphere that the States cannot be prohibited from setting up different types of school for children with difficulties or implementing special educational programmes to respond to special needs."

34. However, the principal issue in this case is whether, as applied, school placement policies unlawfully discriminate against Roma children. The Applicants have at no point challenged the Government's authority to establish and implement educational policy, or to tailor schooling to student needs. [43]

35. Moreover, it is disconcerting that the Chamber judgment acknowledged no limit whatsoever as to the margin of appreciation. This is particularly so in light of this Court's established principle that "[a]lthough the Contracting States enjoy a certain 'margin of appreciation' in assessing whether and to what extent the differences in otherwise similar situations justify a different treatment, the scope of this margin will vary according to the circumstances, the subject-matter and its background."[44] In fact, where this Court has considered equal treatment claims under Article 14, it has required that States advance "very weighty reasons" for differential treatment.[45]

36. The Applicants respectfully submit that the Chamber's broad deference to the Czech government's margin of appreciation is misplaced in light of the serious allegations of racial and ethnic discrimination at issue in this case, consistent with prior jurisprudence of this Court. The Strasbourg organs have repeatedly underscored that "[r]acial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction."[46] Unlike many other policy variables which justify deference from reviewing bodies, "a special importance should be attached to discrimination

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[43] The Chamber (at § 47) cited to *Valsamis v. Greece* for the proposition that "the setting and planning of [school] curriculum falls in principle within the competence of the Contracting states." *See Valsamis v. Greece*, judgment of 18 December 1996, *Reports* 1996-VI, § 28. But the *Valsamis* judgment is inapposite to this case. In *Valsamis* the Court was concerned with the margin of appreciation in the context of Article 2 of Protocol No. 1 in the absence of a discrimination claim raised under Article 14.

[44] *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, § 78.

[45] *Id.;* see also *Poirrez v. France*, 40 EHRR 2 (2005), § 46 (regarding nationality condition for the award of disability benefits); *Karner v. Austria*, 38 EHRR 24 (2003), § 40 (regarding national court's interpretation of tenancy provisions as not including same sex partners); *Smith v. United Kingdom*, 29 EHRR 493, § 105 (regarding discharge from the Royal Navy on basis of sexual orientation); *Camp v. Netherlands* 34 EHRR 59(2002), § 38 (regarding exclusion from inheritance on the basis of birth outside of wedlock).

[46] *Timishev v. Russia*, § 56. See also *Nachova v. Bulgaria* [GC], § 145 ("the authorities must use all available means to combat racism…"); ibid., § 160 (noting "the need to reassert continuously society's condemnation of racism and ethnic hatred…"); *Jersild v. Denmark*, Grand Chamber Judgment of 22 August 1994, § 30 ("The Court would emphasise at the outset that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations.").

based on race."[47] The frequency with which racial factors are misused to the detriment of minority group members demands heightened attention from this Court.

37. This is especially so where, as here, the substantive right at issue is the right to education under Article 2 of Protocol No. 1. The "right to education and training" is one of the core rights with respect to which the International Convention on the Elimination of All Forms of Discrimination (ICERD) commits States Parties (including the Czech Republic) to guarantee equal enjoyment without distinction as to race, colour or national or ethnic origin.[48] The obligation "to prevent, prohibit and eradicate all practices of racial segregation," contained in Article 3 of the ICERD, "includes the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments in the State."[49] The Czech Republic has also pledged to eliminate "any distinction, exclusion, limitation or preference which, being based on race, colour … or social origin, … has the purpose or effect of nullifying or impairing equality of treatment in education and in particular … of establishing or maintaining separate educational systems or institutions for persons or groups of persons."[50]

38. In view of this well-established authority, the Applicants respectfully request that the Grand Chamber confirm that the margin of appreciation should be of narrow scope in cases of racial or ethnic discrimination as in this case.

E. In addressing the above issues in the context of the instant case, the Grand Chamber should be aware of certain misinterpretations of fact in the Chamber judgment.

39. The Chamber judgment misinterpreted key facts and drew inappropriate conclusions, concerning two matters central to resolution of the discrimination claim under Article 14.

(1) Reliability of Psychological Tests/Experts' Evaluations

40. The Chamber attached undue weight to what it said (at § 49) were "experts' findings that the applicants' learning disabilities were such as to prevent them from following the ordinary primary school curriculum." In fact, the evidence actually indicated that a number of the Applicants were placed in special schools for reasons other than learning disabilities – truancy, misconduct, even parental conduct – although the applicable legislation made clear that special schools were for students "who have intellectual deficiencies."[51]

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[47] *East African Asians v. United Kingdom*, European Commission of Hum. Rts., 3 EHRR 76 (1973), § 207.
[48] Art. 5(e)(v).
[49] CERD General Recommendation No. XIX (Racial Segregation and Apartheid), 1995.
[50] Art. 1, UNESCO Convention against Discrimination in Education. The Czech Republic filed its notification of succession to the Convention on 26 March 1993.
[51] Schools Law 29/1984, Art. 31(1), cited in Chamber Judgment, § 20; Application, section 2.2. See also Decree No. 127/1997, Art. 2(4) ("special schools" are for "children and pupils suffering from mental disability"), cited in Chamber Judgment, § 21, and Application, section 2.2. See e.g., Application, § 7.27

41. Furthermore, the Chamber erred in suggesting (at § 49) that "the parties did not dispute that the [psychological] tests in the instant case were administered by qualified professionals, who are expected to follow the rules of their profession and be able to select suitable methods." To the contrary, the Applicants have consistently and vigorously argued that the psychological tests administered to them and other Roma children are scientifically flawed and educationally unreliable.[52] In fact, the Applicants' initial filing with this Court on 18 April 2000 includes ten pages detailing their arguments on this point referencing evidence provided by Czech school officials, independent psychologists, and international educational experts that document the faults of the Czech testing system.[53] The Applicants' supplemental filing to this Court on 1 June 2004 emphasized that they "dispute the reliability of the results of the psychological testing in the PPC Centers"[54] and provided supplemental factual evidence to this Court in the form of two independent studies that confirmed that the psychological tests are "inadequate, inappropriate, and possibly biased." Finally, section C, *supra*, highlights the extensive evidence refuting the accuracy and professionalism of the administration of the psychological tests on the Applicants, including the Czech government's own acknowledgement of the discriminatory impact of the application of these tests to Roma children.

(2) Consent

42. The Chamber judgment suggested that the Applicants' parents' purported consent and/or failure to appeal placement decisions somehow justified the discriminatory treatment of their children.[55] This conclusion is inconsistent with the object and purpose of the Convention and the Court's jurisprudence.

43. Governments have a legal responsibility to ensure the best interests of the child,[56] including the right to non-discriminatory education,[57] which may not be waived by

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(detailing non-germane reasons for special school placement of Applicants 3, 9 and 10); Government's Observations, 15 March 2004, § 18 (assignment to special school suggested for Applicant 3 absent evidence of mental disability, because of problems with school attendance and discipline, and because mother's cooperation was belated and inconsistent); 25-29 (assignment to special school absent evidence of mental disability for Applicant 4); § 49-59 (assignment to special school absent evidence of mental disability for Applicant 9); § 60-64 (assignment to special school absent evidence of mental disability for Applicant 10).

[52] *See* Application, 18 April 2000, §§ 7.22 – 7.42; *see also* Applicants' Written Comments, 1 June 2004, §§ 1.7 – 1.9.1.

[53] Application, pp. 32-42, § 7.22-7.42.

[54] Applicants' Written Comments, 1 June 2004, § 1.7.

[55] Chamber Judgment, § 49 – 51.

[56] See Convention on the Rights of the Child, Article 3(1) ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.)

[57] See Convention on the Rights of the Child, Article 28(1) ("States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity").

the conduct or preferences of the parents.[58] Just as a parent's consent may not lawfully justify her child's torture or detention, so it is not legitimate for the Court to treat a parent's apparent consent to her child's subjection to discriminatory treatment as waiving the child's rights under Article 14 of the Convention. Moreover, it is unrealistic to consider the question of consent without taking into account the history of segregation of Roma in education and the lack of adequate information concerning the choices open to Roma parents. The Court has, in other contexts, observed that "the vulnerable position of [g]ypsies means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases…."[59]

44. The Court has held that the waiver of a Convention right – insofar as it is permissible – is only effective if it is unequivocal[60] and has been obtained freely and without constraint.[61] The waiver must also be attended by the minimum safeguards commensurate with its importance.[62] The Court has held that a waiver "may be permissible with regard to certain rights but not with regard to certain others"[63] and must not run counter to any important public interest.[64] For example, the Court has held that the right to liberty cannot be waived.[65] It is submitted that the same applies to an alleged waiver of the right of a child not to be subjected to racial discrimination in the enjoyment of educational opportunities. The Applicants respectfully submit that the Grand Chamber should treat as persuasive the judgment of the Supreme Court of India that there can be no waiver of the fundamental right to equality.[66] It is also noteworthy that the South African Constitutional Court has expressed doubt as to whether constitutional rights can be waived.[67]

45. As regards the evidence in this case, it is submitted that the Chamber overlooked serious factual discrepancies contained in the files of a number of the Applicants, as well as the Czech Constitutional Court's express finding that the parents of Applicant 12 had not consented in writing to their child's placement in special school.[68] Indeed, the Chamber's implication (at § 50) that "the applicants' parents failed to take any action" in response to placement decisions is particularly ill-founded in view of the

[58] See Convention on the Rights of the Child, Article 28(1), supra. (affording no limitations based on parental preferences on the right to equal-opportunity education); see also Declaration of the Rights of the Child, principal 7, (providing that, although the responsibility for a child's education "lies in the first place with his parents," that responsibility is only in the "first place" and that, above all else, "[t]he best interests of the child shall be the guiding principle of those responsible for his education and guidance").
[59] *Connors v. United Kingdom*, Judgment of 27 May 2004, at § 84.
[60] *Suovaniemi v Sweden* App. No. 31737/96 Decision of 23 February 1999; *Neumeister v Austria* Series A, No. 8, 27.6.68, (1979-1980) 1 EHHR 91 at § 36 (Article 50): 'The waiver of a right, even the mere right to a sum of money, must result from unequivocal statements or documents'.
[61] *Deweer v Belgium* Series A, No. 35, 27.2.80 (1979-1980) 2 EHRR 439.
[62] *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692 § 37.
[63] *Suovaniemi v Sweden* App. No. 31737/96 Decision of 23 February 1999.
[64] *Hakansson and Sturesson v Sweden* (1990) 13 EHRR 1 § 66.
[65] *Vagrancy* cases (1978) 2 EHRR 149 § 36.
[66] *Tellis v Bombay Municipal Corp* (1987) LRC (Const) 351.
[67] *S v Shaba* 1998 (2) BCLR 220.
[68] See Applicants' Letter to the Court, 26 April 2005.

enormous effort to which the Applicants' parents have gone in pursuing legal remedies over seven years through the domestic system and before this Court. The Chamber's reliance on a parental duty to "make sure they knew the date they gave their consent to their children's placement in a particular school" is misplaced, where, as here, the Government consistently denied the Applicants' written requests for access to their school files over a period of more than five years.[69] Finally, the Chamber's conclusion (at §50) – that the possibility of transfer from special schools proved the "situation was not irreversible" – is unwarranted. The extraordinary persistence and unusual resources required for four Applicants to secure offers of transfer to ordinary schools (the Government offered this option only after the Applicants had gone to the trouble of documenting patterns of discriminatory treatment across more than 80 schools, securing legal counsel, filing a lawsuit, and publicizing their claims in the local and national media, and the three who remained in ordinary schools did so only with the help of privately-funded supplemental educational support) only underscore the practical impossibility of transfer for all but a few.

46. For the foregoing reasons, the Applicants respectfully submit that the Chamber judgment raises "serious question[s] affecting the interpretation and application of the Convention," which warrant referral to the Grand Chamber.

II. This case raises a serious issue of general importance, namely, guaranteeing the equal right to education of institutionally marginalized minority Roma children in Europe.

47. In addition to questions of the interpretation and application of Article 14 of the Convention, this case also presents a "serious issue of general importance" that warrants Grand Chamber review as provided for in Article 43 of the Convention, namely, the capacity of European governments to respond to the continent's growing racial and ethnic diversity. In this regard, there is perhaps no issue more important than equality of opportunity in the field of education. Although the problem is particularly egregious in the Czech Republic, discrimination against Roma in education persists throughout Council of Europe member states and must be addressed. "The fact that a significant number of Roma children do not have access to education of a similar standard enjoyed by other children does not only jeopardize the effective enjoyment by Roma individuals of their right to education, but negatively affects the future of whole societies."[70] Depriving Roma children of the equal opportunity to learn and to develop as capable and self-reliant citizens effectively disqualifies them from admission to certain secondary and tertiary educational and professional institutions. Isolated from their non-Romani peers, Roma children emerge from schooling scarred by their experience and ill-equipped for life in a

[69] See, e.g., Applicants' Letter to the Court, 26 April 2005.
[70] Council of Europe, Office of the Commissioner for Human Rights, *Final Report by Mr. Alvaro Gil-Robles , Commissioner for Human Rights, on the Human Rights Situation of the Roma, Sinti and Travellers in Europe* (15 February 2006), § 44.

multicultural society, suffering permanent harms as a result of their segregation on racial grounds.

A. Segregation of Roma in education remains today a widespread problem throughout Council of Europe member states that must be remedied.

48. The February 2006 report of the Council of Europe's Commissioner of Human Rights on the situation of the Roma, Sinti and Travelers in Europe focuses particular attention on the continued prevalence of segregated education, noting that "in one form or another, [it] is a common feature in many Council of Europe member States."[71] Indeed, segregation of Roma children in special schools is a particularly pervasive form of discrimination throughout Central and Eastern Europe. In the Slovak Republic, *de facto* segregation of Roma children in special schools continues to attract criticism from international bodies.[72] Approximately 80% of Roma children are placed in specialized institutions, and only 3% reach secondary schools.[73] In Romania, Roma children are systematically placed in schools of "distinctly lower standards than others, or are relegated to the back of the classroom or placed in separate classes."[74] Approximately 70% of Roma students are educated in schools in which they are the only pupils and where they receive poor quality education.[75] In Poland, separate classes for Roma in primary schools persist, notwithstanding the government's acknowledgement of the need to eradicate this practice.[76] Roma children encounter discrimination in access to education in Russia as well.[77] Roma children are also victims of discrimination in education in some Western European countries.[78]

49. To this day in the Czech Republic, the large presence of Roma children in "special schools" and classes for children suffering from slight mental disability continues to be of great concern to multiple regional and international human rights monitoring

[71] Council of Europe, Office of the Commissioner for Human Rights, *Final Report by Mr. Alvaro Gil-Robles , Commissioner for Human Rights, on the Human Rights Situation of the Roma, Sinti and Travellers in Europe* (15 February 2006), § 46.
[72] UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Slovakia 10/12/2004* (UN Doc. CERD/C/65/CO/7), §8. The CERD recommended that "the State party prevent and avoid the segregation of Roma children, while keeping open the possibility of bilingual or mother-tongue education."
[73] Council of Europe, Office of the Commissioner for Human Rights, *Follow-up Report on the Slovak Republic (2001-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights* (29 March 2006), § 31.
[74] ECRI, *Third Report on Romania* (Adopted on 24 June 2005 and made public on 21 February 2006), § 128.
[75] Id.
[76] ECRI, *Third Report on Poland* (Adopted on 17 December 2004 and made public on 14 June 2005), § 115.
[77] European Roma Rights Centre, *In Search of Happy Gypsies: Persecution of Pariah Minorities in Russia*, 171-76 (May 2005).
[78] *See Final Report by Mr. Alvaro-Gil Robles, Commissioner for Human Rights, on the Human Rights Situation of the Roma, Sinti and Travellers in Europe*, § 48 (raising concern about Roma-only classes in Denmark); ECRI, *Third Report on Spain* (Adopted on 24 June 2005 and made public on 21 February 2006), § 67-70 (noting problematic high concentrations of Roma children in certain schools in Spain).

bodies.[79] The European Commission against Racism and Intolerance (ECRI) has noted that "Roma children continue to be sent to special schools which, besides perpetuating their segregation from mainstream society, severely disadvantage them for the rest of their lives."[80] Notably, these recent reports update and confirm the evidence presented by the Applicants to the Chamber in its prior submissions that Roma children in the Czech Republic are systematically turned away from regular schools, and when they do attend these schools, they continue to be disproportionately placed in segregated classes that follow a less rigorous academic curriculum than offered in regular classes.[81]

50. Courts have an important role to play in denouncing and redressing the rights violations incumbent in discrimination against Roma in education throughout the Council of Europe region, and several national courts have rightly ruled that segregation of Roma in education amounts to discrimination, ordering that remedial measures be taken.

51. For example, in Hungary approximately 70% of students in segregated classes are reported to be Roma children who are forced to follow a simplified curriculum taught by inexperienced teachers in poor facilities.[82] A 2004 decision of the Budapest Appeals Court ruled against local education authorities in Tiszatarján for keeping a significant number of Roma in separate, lower-ability classes without any legal basis.[83] Specifically, the court found that the practice would have deleterious effects on the victims and that the school did not properly recognize or address the victims' learning difficulties by placing them in lower-ability classes.

52. Another court decision finding school segregation illegal was recently issued in Bulgaria, where "the question of education remains of particular concern owing to a *de facto* segregation in the education system."[84] A recent court ruling by the Sofia District Court found that such schools violate the prohibition of racial discrimination and unequal treatment embodied in national and international law.[85]

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[79] Council of Europe, Office of the Commissioner for Human Rights, *Follow-up Report to the Czech Republic (2003-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights* (29 March 2006), § 20. See also the UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Czech Republic.10/12/2003* (UN Doc. CERD/C/63/CO/4), § 14.

[80] European Commission against Racism and Intolerance (ECRI), *Third Report on the Czech Republic* (Adopted on 5 December 2003 and made public on 8 June 2004), § 107

[81] *See e.g.*, Applicants' written comments 1 June 2004 at §§ 2.6-2.15; Applicants' written comments 18 April 2000 at §§ 6.1-7.27.

[82] *Final Report by Mr. Alvaro-Gil Robles, Commissioner for Human Rights, on the Human Rights Situation of the Roma, Sinti and Travellers in Europe*, § 47. For additional information on discrimination against Roma in education in Hungary *see* Council of Europe, Office of the Commissioner for Human Rights, *Follow-up Report on Hungary (2002-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights* (29 March 2006), § 30.

[83] Budapest Court of Appeals (Fovárosi Itelotábla) judgment of 7 October 2004.

[84] Council of Europe, Office of the Commissioner for Human Rights, *Follow-up Report on Bulgaria (2001-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights* (29 March 2006), § 22.

[85] Sofia District Court, *Judgment 11630/2004* (rendered on 25 October 2005).

53. In sum, school segregation of Roma children is widespread and systematic throughout the Council of Europe region. Moreover, this practice lies at the heart of perpetual marginalization and discrimination of Roma in society. With tens of thousands of Roma children in Council of Europe member states affected by this practice, this case clearly presents a "serious issue of general importance," requiring review by the Grand Chamber pursuant to Article 43 of the Convention.

B. The fate of the 18 Roma Applicants exemplifies the harm that results from discriminatory placement in special schools.

54. Over seven years have passed since the 18 Roma children Applicants in this case challenged their segregation into special schools as unlawful under Czech law and the Convention. The lack of opportunity available to these children today, seven years on, painfully reveals the discriminatory harm that results from unequal access to education.

55. At this time, eight Applicants have not yet completed their primary education in the special schools.[86] Six Applicants have completed special school, and are currently unemployed.[87]

56. With respect to the four children who were allowed to attend ordinary primary school, it must be emphasized that these children were first discriminatorily tracked through faulty test and evaluation procedures into special school. Only after filing formal complaints with the assistance of legal counsel, and accompanied by substantial media attention, were they able to demonstrate their academic and intellectual capacity to attend ordinary school. Of these children, one is currently unemployed.[88] Two are in the 9th grade in the ordinary school.[89] Another will finish the 8th grade of ordinary school this year and is already enrolled in a three-year vocational school. This last child, Applicant no. 6, intends to transfer after one year to a correspondence course to train for social work with ethnic minorities. She has discussed possible part-time work as a social worker's assistant at the Ostrava municipality.

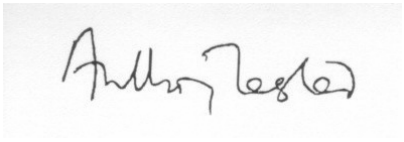
57. Applicant no. 6's desire to become a social worker working with minorities in her hometown provides a glimmer of hope. Here is a young girl with proven intellectual capabilities who harbors a desire to contribute to her society. Who knows what else she and her co-Applicants might have accomplished had they not experienced the personal humiliation of being wrongly segregated and stigmatized in special schools? It is already clear that none of the 18 Applicants will attend academic (non-vocational) secondary school, let alone university. That is an enormous loss for the Applicants, the Czech Republic, and Europe as a whole. The fate of these Roma

[86] Applicants' counsel confirmed that as of March 2006, applicant nos. 1, 2, 4, 13, 14, 15, 17 and 18 continued their education in special school.
[87] Applicants' counsel confirmed that as of March 2006, applicant nos. 3, 5, 10, 12, 7, and 8 were registered as unemployed.
[88] Applicant no. 5 was registered as unemployed in March 2006.
[89] Applicant nos. 11, 16.

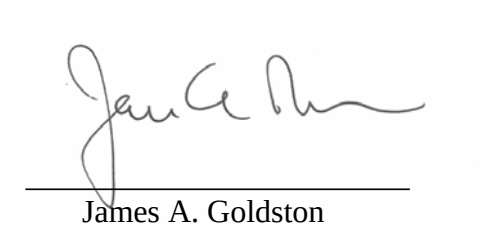
children - the futures that lie ahead of them and, sadly, those that do not – should remind this Court of the critical nature of the issues before it and the necessity that this case be reviewed by the Grand Chamber.

CONCLUSION

58. For all of the reasons set forth above, the Applicants respectfully request that this case be referred to the Grand Chamber pursuant to Article 43 of the Convention.



Lord Lester of Herne Hill, QC



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