EUROPEAN COURT OF HUMAN RIGHTS

CASE OF ORŠUŠ AND OTHERS v. CROATIA

(APPLICATION NO. 15766/03)

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

13 October 2008

Applicants' Legal Representatives

European Roma Rights Centre

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STATEMENT OF THE CASE

1. This case concerns a complaint by the Applicants, 14 (initially 15) children of Roma origin and Croatian nationality, alleging that their placement in separate classes with only Roma pupils in primary schools in the villages of Macinec and Podturen, violated their rights under Article 3, Article 2 Protocol 1, Article 14 taken together with Article 2 Protocol 1, Article 6, as well as Article 13 taken together with Article 3, Article 2 Protocol 1, Article 6 and Article 14 of the Convention. In February 2007 the first applicant Stjepan Oršuš, a pupil in a primary school in the village of Orehovica, withdrew his application.

2. On 17 July 2008, this Court's First Section, sitting as a Chamber ("the Chamber"), after decision to examine the merits of the application at the same time as its admissibility, decided unanimously that there was a violation of Article 6 of the Convention as regards the complaint about the length of proceedings before the Constitutional Court and that there was no violation of Article 2 of Protocol No.1 taken alone or in conjunction with Article 14 of the Convention, while the remainder of the claims under Articles 3, 6 and 13 of the application were declared inadmissible (hereafter "Chamber judgment").

3. 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 it raises both "serious question[s] affecting the interpretation or application of the Convention" and "a serious issue of general importance". In the instant case, as the Applicants will further demonstrate, these two grounds overlap and relate to the exact contours of the states' obligations in the field of education of Roma children.

4. The contemporary significance of equality and integration in education cannot be overstated. More specifically, this Court last year delivered two landmark rulings regarding discrimination of Roma children in the field of education.[1] The fact that these judgments concern two different Council of Europe member states, together with the Grand Chamber's succinct yet incisive analysis in the D.H and Others case of the problematic situation of Roma throughout Europe, amply attests that this is a serious issue of general importance. Furthermore, both cases, despite their different factual contexts, effectively related to a similar issue, namely on what grounds and subject to which conditions could Roma children be educated under separate educational arrangements. The Applicants respectfully submit that this issue also lies at the heart of their application and that the Chamber, as it will be demonstrated below, erred in firstly, not identifying the common aspects of all three cases and secondly, in not following what is now (following a Grand Chamber and a final judgment) a strong and clear articulation of the principles in question. This departure

[1] See *D.H. and Others v. the Czech Republic* [GC], appl. no. 57325/00, judgment of 13 November 2007 and *Sampanis et Autres c. Grece*, appl. no. 32526/05, judgment of 5 June 2008, rendered final on 5 September 2008.

from the Court's recently established case law constitutes another ground why the Grand Chamber should be seized of the present case, in order to entertain what amount to conflicting interpretations regarding a highly sensitive issue, such as the right to equal education of Roma children. The Grand Chamber should furthermore clarify that the very existence of separate educational facilities along racial lines compounded by so many other aspects cannot stand a general defence of justification, namely the margin of appreciation.

REASONS FOR REFERRING THE CASE TO THE GRAND CHAMBER

I. The present case raises serious questions affecting the interpretation and application of Article 2 of Protocol No.1 to the Convention taken alone and in conjunction with Article 14 of the Convention.

5. This judgment raises serious questions affecting the interpretation and application of the Convention and Article 2 Protocol 1 to the facts of the case. Numerous tenuous conclusions drawn by the Chamber, such as the failure on the part of the Croatian state to implement, in relation to the Applicants, both an appropriate evaluation system as well as apply in their case the educational program for Roma running since 1998, puts into question the Chamber's finding to the effect that the education provided to the Applicants was adequate and sufficient and therefore that there was no violation of Article 2 Protocol 1.[2] Indeed, the Applicants respectfully contend that the mere fact that four of the Applicants (12 to 15) spent all their mandatory education in special classes, whose purpose was allegedly to prepare them for the regular classes, is in and of itself proof that the education provided to them was neither adequate nor sufficient. Had it been adequate, they should have been allowed to transfer to mainstream classes.

"Extra-curricular activities in a mixed group organized by the schools"

6. In its description of the facts, the Chamber judgment mentions extra-curricular activities in a mixed group organized by the schools and obviously considers it as an important argument towards finding no violations of Article 2 of Protocol 1 and Article 14.[3] The Applicants agree with the Chamber to the effect that an important function of the school is to enable children from different backgrounds to socialize.[4] In the instant case however, **there were never any extra-curricular activities for any of the Applicants in any ethnically/racially mixed group organized by the schools, while no such activities were never mentioned by anyone at any stage of the proceedings**.

7. It is for the first time in the Chamber judgment that such activities are mentioned, without any reference to supporting evidence. More specifically, such activities were not mentioned in: the domestic proceedings; the procedure before the Constitutional Court; the Court's statement of facts of 6 October 2006; the Government's observations of 5 February 2007[5]; the Government's observations of 26 February 2007 or any other Government submission that the Applicants received. At no stage in any of the proceedings has the Government ever mentioned or claimed the

[2] At § 62.
[3] At § 6-14 and § 39.
[4] In this respect see also *Conrad and Others v. Germany* (dec), appl. no. 35504/03, decision of 4 November 2003.
[5] The Government only mentioned extra-curricular activities for Roma children who want to learn more about Roma culture, customs and tradition, which are not activities in an ethnically mixed group, but a Roma-only group.

existence of extra-curricular activities in an ethnically mixed group. As a result, the Applicants could hardly be expected to have raised and addressed this issue.

8. The Applicants can only speculate as to the origins of the Chamber's finding of the holding of "extra-curricular activities in a mixed group". It may be based on the notes in the school records provided by the Government where for some of the Applicants (pupils from the school in the village of Podturen), in addition to their grades and general behavioural remarks, there are notes on extra-curricular/out of school activities referred to as "*mješovita družina*". For Applicants who were pupils of the school in the village of Macinec, there are no notes or remarks on any extra-curricular activities, because there indeed were no such activities organized for the Applicants. The literal translation of "mješovita družina" is "mixed company" or "mixed group", and it is usually used for the extra-curricular activity that combines a mix of several activities and not pupils of various ethnic backgrounds. This is obvious from the same notes–the school records include comments like: "likes to act and dance"; "good in dance"; "likes to draw", "good in individual singing and reciting" etc.

9. In fact, there were extra-curricular activities organized by the school only in Podturen, and not in Macinec, and these activities were not organized in ethnically mixed groups. Those activities were not an opportunity for the Applicants to be with non-Roma pupils. In any case, even if ethnically mixed extra-curricular activities did in fact take place, this is no substitute for complete classroom integration.

"Insufficient command of the Croatian language"

10. The central axis of the Government's submissions before the Chamber was to the effect that the only reason why the Applicants were placed in Roma-only classes was their inadequate knowledge of the Croatian language. The Chamber judgment also considers that the placement of the Applicants in separate classes was based on their lack of knowledge of the Croatian language and not on their race or ethnic origin.[6] The Applicants would like to stress that school records for the Applicants with the marks given for every subject, including Croatian language, (attachment to the Government's observation of 5 February 2007) leads to a completely different conclusion.

11. In the Croatian educational system, the grading scale is 1 to 5, with 1 being the worst mark and 5 the best. Croatian language is for Roma the medium of instruction in all subjects such as physics, mathematics, etc. As borne out by the school records for the Applicants, all of them had good marks in the subject of Croatian language as well as in the other subjects. More specifically, for the subject of Croatian language, applicant Oršuš Mirjana in the first grade received a 4, in the second grade a 4, in the third grade a 5, in the fourth grade a 4. At the same time, Applicant Bogdan Jasmin in the first grade received a 4, in the second grade a 4, in the third grade a 3 and in the fourth grade a 2. Kalanjoš Danijela received in the first grade a 4, in the second grade a 4 and in the third grade a 3. All other Applicants in all their grades had either marks

[6] At § 68.

2 or 3 for Croatian language. All Applicants had good marks in other subjects as well, where Croatian was the language of instruction. That would not be possible if their command of the Croatian language was insufficient and the program was the same as in other, "regular" classes.

12. It is interesting in this respect to take the example of the pupil that was considered as the most challenged in his knowledge of Croatian, Applicant number 12, Josip Bogdan. As noted in the Chamber judgment, following the preliminary test administered to him, he scored eight out of ninety seven points and was considered as having virtually no knowledge of Croatian. Following two years at the first grade, he was able to continue at the second grade, with a grade in Croatian language of three out of five – when merely two years ago he was considered as not knowing Croatian at all. This could mean that either the initial test did not manage to adequately assess his knowledge of Croatian or that within these two years he made great strides in learning Croatian – and this despite, as mentioned in his behaviour in relation to extra-curriculum activities, "approaching his obligations superficially". It should therefore be expected that he should be transferred to the integrated second grade of his school. This however did not happen and he was assigned to the "Roma only" second grade. Similar considerations are applicable to other Applicants. Thus the first Applicant, Oršuš Mirjana, is not mentioned as undergoing a Croatian language test before being assigned to the regular first grade of her school. For reasons that are not mentioned, she had to re-sit her first year, whereupon she graduated to the second grade with a mark in Croatian of four out of five (very good). The next year however, she was assigned to a Roma-only second grade class. The Government have not put forward any explanation why this happened; it is obvious however that it was not due to her grades in Croatian language or other subjects or indeed her behaviour in extra-curricular activities.

13. In this respect, the Applicants would like to highlight the deposition of a number of witnesses before the domestic courts, amply attesting to the fact that knowledge or not of Croatian was not in fact a crucial consideration to be taken into account when assigning children to classes. Thus Ms. Milica Pongrac-Pihir, expert assistant – psychologist at the Macinec Elementary school since December 2001 - indeed, the only psychologist that testified as a witness - stated that she took up office in the Macinec Elementary school only after the classes had been formed. Asked by counsel for the Applicants as to the nature of the test used in order to ascertain whether the children speak Croatian or not, she stated that the test essentially consists of an interview, also conducted with the child's parents. There are no specific questions to be asked / issues to be ascertained; rather, the methods employed vary from case to case. Similarly, the headmistress of the Orehovica Elementary School, Ms. Senija Zandravec-Kermek, stated in her deposition that "Each member of the commission [interviewing the children] examines those abilities from their own point of view. Naturally, there is a certain gradation of those abilities within the examination, however I would not say that the abilities in question are assessed but rather that the psycho-physical abilities of the child are examined and then established descriptively." Another headmistress, Ms. Marija Tepalovic, stated in her deposition

that the teachers are responsible for the assessment of the children at the beginning of every school year and that "Every teacher has his or her own criterion and his or her own assessment scale". The Applicants cannot also but express their surprise over the deposition of the headmistress of the Podturen Elementary School, Ms. Emilija Slavkovic, whereby one of the reasons why Roma kids of different ages are placed in the same (Roma-only) class so that the older siblings can help their younger ones with their homework.

"Absence of adequate testing and assessment procedures"

14. The Applicants note that an important question relates to the non-existence of any adequate testing and assessment procedure that would enable the teachers to assess the Applicants' educational level and aptitude upon enrolment in primary school, as well as with a view to ultimately transferring them to integrated classes. The Government, either in the context of the domestic proceedings or before the Court, failed to adduce relevant information as to the nature and content of the tests to which the children were subjected before it was decided whether they should be assigned to "Roma-only" classes. Furthermore, the Government provided no information as to the tests used in order to periodically assess the progress or lack thereof of the Applicants in order to transfer them into mainstream classes. The impression given is that the teachers/school staff enjoyed almost unfettered discretion in deciding which children should be assigned to the special classes and which not. Indeed in its judgment the Chamber, after noting that the present cases is not comparable with the *D.H. and Others* case, agrees with this assessment and states that "The Croatian authorities, by keeping Roma children in ordinary schools, made the change from a separate class to a regular class more flexible, **despite it not being a matter of clearly set procedures and standards but obviously subject to individual assessment by a class teacher**".[7]

15. The Applicants respectfully submit that this is precisely the aspect of the case raising the most common points with the *D.H. and Others* case. In that case, the Grand Chamber held that the tests administered to Roma and non-Roma children alike "were not capable of constituting objective and reasonable justification for the purposes of Article 14 of the Convention"[8] since these tests "were conceived for the majority population and did not take Roma specifics into consideration"[9]; the above led the Grand Chamber to note that "… at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them".[10] In the present case, apart from a vague statement by the Government that the Applicants were assessed by a Committee, there is no information as to the tests and methods employed by it. Indeed, it is only in relation to Applicants 11 to 15 that the Government provide any information as to their scores on the relevant tests or that they were provided with

[7] At § 65. Emphasis added.
[8] See *D.H. and others*, op. cit., § 199.
[9] Ibid, at § 200.
[10] Ibid, at § 201.

additional classes of Croatian. Once again however, no details as to what these tests consisted of.

16. Moreover, the facts in the instant case suggest that the Government cannot escape its obligations by arguing that, however superficially, the aptitude and linguistic skills of the Applicants were in fact assessed. In the *Sampanis* case, the Greek authorities actually presented the Court with a document containing an assessment of the Applicants' Greek reading and writing skills, on the basis of tests they had sat. The Court however felt that this document was not of crucial importance, partly since it did not contain any information as to the nature and content of these tests, while the Government failed to provide any expert opinion as to the details of these tests and why they were considered appropriate for Roma children.[11] For the Court in *Sampanis,* an additional reason why a special assessment program, tailored to the needs of Roma children, should be drafted and adopted, was that the strict adherence to such a program and its provisions would alleviate the suspicion of Roma and their children to the effect that their segregation was due to racist motives, especially if racist incidents had in fact taken place.[12] In the instant case, it is noted that while such a program did in fact exist at the time when the Applicants were enrolled at school,[13] the school staff was merely informed of its existence but had not received any concrete instruction as to its implementation, thereby leaving the teachers to effectively improvise, as accepted during the domestic proceedings. Indeed, during the domestic proceedings, headmasters repeatedly conceded that they had not received any instruction concerning the inclusion of Roma children in mixed classes.

"Maintenance of separate educational facilities"

17. The Chamber incorrectly endorsed the Government's claim that lack of adequate Croatian language skill was the primary motivation for creating and maintaining segregated classes. As the Croatian state itself has admitted in its 2001 submission before the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Croatia, the practice of assigning Roma children to special classes in order to improve their Croatian language skills is implemented **only** (emphasis added) in the first and second grades of primary school,

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[11] See *Sampanis,* op. cit., at § 90: *"La Cour relève toutefois que les enfants concernés avaient été soumis à ces épreuves après avoir été répartis dans les classes préparatoires, à savoir « lors de leur inscription et leur scolarisation ». De plus, le Gouvernement ne donne aucune précision quant au contenu de ces tests et ne s'appuie sur aucun avis d'expert pour démontrer leur caractère adéquat (voir sur ce point, D.H. et autres c. République tchèque, précité, § 200)."*

[12] Ibid, at § 92: *"En l'occurrence, et étant donné les incidents racistes provoqués par les parents des élèves non roms d'Aspropyrgos, l'instauration d'un tel système aurait aussi fait naître chez les requérants et leurs enfants le sentiment que le placement de ceux-ci dans des classes préparatoires n'était pas inspiré par des motifs ségrégatifs. Tout en admettant qu'il ne lui appartient pas de se prononcer sur cette question de nature psychopédagogique, la Cour estime que cela aurait particulièrement contribué à l'intégration sans entraves des élèves d'origine rom non seulement dans les classes ordinaires, mais, en même temps, dans la société locale."*

[13] Program of Integration of Romani Children in the Educational and School System of the Republic of Croatia from July 1998.

"after which children attend classes together with children of other nationalities".[14] This was clearly not the case at least with Applicants 11 to 15, who spent all six of their mandatory school years in primary school at a "Roma-only" class. One can only conclude that segregation for this length of time was motivated by something other than a desire to ensure that the students' language skills were adequate, especially as the record shows that the students' language skills were in fact quite strong, and the same alleged objective, i.e. improving the language skills, could have been achieved by less drastic measures, which should definitely have not resulted in physical separation of the Applicants from other non-Roma peers.

"Transfer from Roma-only to mixed classes was a regular practice"

18. The Chamber judgment noted that transfer from a Roma-only to a mixed class was a regular practice.[15] This finding, however, is not corroborated by any piece of evidence in the case file. The Chamber judgment quoted the Constitutional Court decision which explained the decision of the Municipal court in Čakovec, the only court that directly established the facts: "The first-instance court found that the defendants had not acted against the law in that they had not changed the composition of classes once established, as **only in exceptional situations was the transfer of pupils from one class to another allowed"**(emphasis added). The first-instance court considered that this practice respected the "completeness of a class and its unity in the upper grades". In the domestic proceedings, counsels for schools failed to give any evidence of any such a transfer. Applicants 12-15, pupils in the school in Macinec, were never transferred to a regular (mixed) class – this was despite the Croatian Government's submission before the Advisory Committee of the Framework Convention that special classes could be formed only during the first and second grades. During their education until the age of 15, they never experienced being in the same room with non-Roma children. The second to seventh Applicants, pupils in the school in Podturen, were transferred to a mixed class only in the school year 2003/2004 or later; only **after** the application had been filed with the Court and long after the end of the domestic procedure.

"Applicants did not contest that they had a sufficient command of the Croatian language"

19. The Chamber judgment notes that the Applicants have never contested that at the time of their enrolment in the elementary school they did not have a sufficient command of the Croatian language.[16] The Applicants did contest that fact in the domestic proceedings, as they did contest that fact in their application to the Court. The Applicants explained in detail the law on and the procedure for enrolment in an elementary school and of forming classes and how parents did not have any remedy,

[14] Comments by the Republic of Croatia on the Opinion of the Advisory Committee on the Implementation of the Framework Convention For the Protection of National Minorities in Croatia, GVT/COM/INF/OP/I(2002)003, dated 26 September 2001, at p. 5.
[15] At § 60.
[16] At § 67.

formal or informal, to contest the results of this procedure, or even to learn what the results were. In any case, the strongest evidence of the Applicants' firm knowledge of Croatian is to be found in official documents provided by the Government, namely each Applicant's school record. It is also interesting to note that, at least at the material time, there was no law or regulation explicitly providing that pupils with an inadequate grasp of Croatian should be assigned to special classes. As noted by the headmistress of the Orehovica Elementary School, Ms. Senija Zandravec-Kermek, no such regulation existed but rather the schools themselves, by means of an established practise, would assign the pupils to regular and special classes, with the competent agencies and the Ministry of Education agreeing *ex posto facto* with this division of pupils.

"The Applicants and their parents never objected to their placement in a Roma-only class"

20. The Chamber judgment notes that there is no indication that these Applicants or their parents ever objected to their placement in a Roma-only class.[17]. In the proceedings before the Chamber the Applicants adduced evidence to the effect that there was no remedy before the school authorities to challenge the officially tolerated, if not sanctioned, practice of separate Roma-only classes.[18] The Government have not contested that fact. It is also clear that the Applicants' parents, together with Roma NGOs, had objected to such a practice for years, first with the letter to the authorities in 1994, and later in a complaint to the Ombudsman office, which then initiated an investigation and on various occasions requested the Ministry of Education to perform an analysis of the practice.

21. The Applicants do not disagree in principle with the necessity of providing additional, remedial classes in Croatian or other subjects, not only to Roma pupils but also to any other pupil who would benefit from such classes. They agree with the Chamber's finding to the effect that "The right to education is principally concerned with primary and secondary schooling and for this right to be effective the education provided must be **adequate** and **appropriate** … a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[19] They reiterate that, as they amply made clear both before the domestic courts and before the Chamber, they object to the unjustified, not accompanied by reference to any objective criterion, assignment to separate, Roma only classes. Furthermore, the finding of the Chamber that the parents of the Applicants did not object (and therefore implicitly accepted) the placement of their children into separate classes appears to summarily dispense with the thorny issue of

[17] At § 60.
[18] See mutatis mutandis *Sampanis,* op. cit., § 81: *"La Cour ne perd pas de vue à cet égard que la création de classes préparatoires et, a fortiori, d'écoles destinées exclusivement à la scolarisation des enfants roms était au moins tolérée par le droit interne : par une lettre du 2 février 2004, l'Institut de l'éducation des personnes d'origine grecque et de l'éducation interculturelle informa le représentant du Moniteur grec Helsinki que dix-huit écoles fréquentées exclusivement par des « enfants gitans » avaient été opérationnelles sur le territoire grec durant l'année scolaire 2002-2003, (paragraphe 36 ci-dessus)."*
[19] At § 58. Emphasis supplied.

informed consent that featured heavily in both the *D.H. and Others v. the Czech Republic* [20] as well as in the *Sampanis et Autres c. Grece* [21] cases.

"Equal curriculum in Roma-only and parallel classes"

22. The Chamber judgment notes that in the proceedings before the domestic courts it was established that the curriculum followed in separate Roma-only classes was equal to the curriculum followed in parallel classes in the same school.[22] .[23] Given that the language of instruction in the special classes was Croatian, it logically follows that if both regular and special classes have the same curriculum there would be no need for the existence of special classes. Therefore, the setting up and operation of separate classes for Roma where they would be following the same curriculum could only be based on direct discrimination on grounds of their racial origin.

23. In fact, the Applicants would note that the domestic courts held that a special curriculum was followed in the special classes. They nevertheless held that the deviation from the ordinary curriculum was legitimate. More specifically, the Municipal court in Čakovec in its judgment confirmed that "there have been certain deviations in realization of the curriculum plan and program, but the court believes in the statement of the representative of the respondent school that those deviations are legal (…)". It was established even if 70% of the standard curriculum was completed, then the curriculum would be considered as completed.

24. During the oral hearing before Čakovec Municipal court the representative of one of the respondent schools explained that the curriculum plan and program was regulated by the act brought by the Ministry of Education but that executive plan and program could be different and that executive plan and program (curriculum that is in fact performed and executed) could be up to 30% smaller than the formal plan and program. The supplemental 30% could be taken up by additional courses, aimed at addressing the problems faced by Roma pupils. In principle, the Applicants would like to note that such a measure is indeed to be welcomed. In the instant case however, as the same witness noted**, there are not directives or any kind of guidelines as to the supplemental activities to take place**. The supplemental curriculum's nature and content depends on every teacher who is afforded a rather wide-ranging and discretion, without being answerable to anyone or without being provided with instruction from the Ministry of Education regarding e.g. the subsequent integration of Roma children in regular classes in accordance with their progress.

[20] Op. cit, at § 202 – 204.
[21] Op. cit., at § 93 – 94.
[22] At § 59.
[23] At § 59.

II. Given the independent evidence presented in this case of differential treatment of Roma children in the Croatian education system, 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. Additionally, the Grand Chamber could usefully address the issue whether the failure of domestic authorities to apply racially neutral legislation to Roma could be considered as evidence of direct discrimination.

25. The Applicants respectfully note that the Chamber dismissed their contention under Article 14 by accepting the Government's claim that their initial placement in separate classes was based only on their lack of knowledge of the Croatian language.[24] This claim is not credible: some of the Applicants were not initially placed in separate classes at all, and the Chamber failed to examine why and under which conditions these Applicants were transferred to special classes. The Chamber also failed to examine why Applicants remained in these special classes even when their grades pointed to high achievement that would presumably warrant inclusion in mainstream classes. Furthermore, the Chamber did not examine if the way in which this facially neutral practise (namely of assigning pupils who did not speak Croatian to special classes) had an indirect, discriminatory impact on the Roma in general and the Applicants in particular. This is despite the fact that the Chamber made ample references to pertinent case law in its judgment. More specifically, as the Chamber noted in its judgment,[25] "discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations." Under *Willis v. the United Kingdom*, 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."[26]

26. The Applicants submit that the Chamber has not correctly interpreted or applied these principles. The Chamber observed that the difference in treatment was based on adequacy of language skills and that "the placement of the Applicants in separate classes was a positive measure designed to assist them in acquiring knowledge necessary for them to follow the school curriculum."[27] In this respect, the Applicants observe that both the Czech educational authorities in the *D.H and Others* case as well as the Greek educational authorities in the *Sampanis et Autres* case claimed that the measures they had taken in relation to the Roma Applicants were aimed at addressing their particular educational needs. In both cases, the Court accepted this as a valid objective nevertheless it was highly critical of the means employed by the respective authorities. More specifically, in both cases, the Court placed heavy emphasis on the need for member states to devise appropriate evaluation systems (that should have been prepared by experts), in order to assess the aptitudes of Roma

[24] At § 68.
[25] At § 63.
[26] See also *D.H. and Others v. the Czech Republic*. op.cit. at § 196.
[27] At § 68

pupils and then proceed to the implementation of any further educational measures that might be deemed necessary.

27. As the Applicants have extensively referred to above, no such tests were in fact available to the educational staff that decided the placement of Roma pupils in separate classes. The Applicants are struck by the absence of a uniform test applicable to all pupils, let alone of a special test devised with the particularities of the Roma pupils in mind. The various headmistresses have given different and at times conflicting depositions regarding the way in which these cursory "tests" were conducted. In this respect, the Chamber's judgment in the instant case sits at odds with the rationale of both the *D.H and Others* and the *Sampanis et Autres* judgments. The Chamber's judgment also runs counter to the findings of other authoritative bodies, such as the Advisory Committee on the Framework Convention, which, in its 2001 Opinion on Croatia, stressed that "…placing children in separate special classes should take place only when it is absolutely necessary and always on the basis of consistent, objective and comprehensive tests", with a view to joining the regular classes. While agreeing in principle with the Croatian Roma Education Program (implemented since 1998) and finding that it contained certain useful ideas, the Committee nevertheless called upon Croatia to "develop, implemented and evaluate further its measures aimed at improving the status of Roma in the educational system". In the Applicants' case, not even the (cursory in nature, according to the Advisory Committee) Roma Education Program was applied.[28]

28. The Applicants however note that the above approach, focused exclusively on the aspect of indirect discrimination, fails to acknowledge the following characteristic, namely that the majority of the Applicants had good or very good grades in Croatian. As a result, even if it should be accepted that the Croatian state had in fact in place at the material time an adequate and effective system of evaluating pupils in general and Roma ones in particular, with a view to identifying and addressing their educational problems, Applicants should not have been assigned to special classes but rather integrated into the regular ones. The failure of the school authorities to do so indicates that the relevant law / practise was purposefully not applied in their case, in order to channel them, due to the racial origin, to separate, Roma-only classes. Should that be the case, then the Applicants note that they should be considered as having been victims of direct discrimination.

29. The Applicants are mindful of the gravity of their allegations as well as the daunting difficulties they face in substantiating such a claim. They note however that although the Court has adopted the standard of proof of "beyond any reasonable doubt", it has also considered that since its role is not to examine the criminal liability of a person, "proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the

[28] Advisory Committee on the Framework Convention for the Protection of National Minorities. Opinion on Croatia. Adopted on 6 April 2001. ACFC/INF/OP/I(2002)003

facts, the nature of the allegation made and the Convention right at stake."[29] The Applicants furthermore note that after applying these principles, the Court recently found a violation of Article 14 in conjunction with the substantive limb of Article 3.[30] Two important factors that the Court took into account were the uttering of racist statements by police officials before the applicant's ill-treatment as well as the recourse by the investigating officials to racial stereotypes regarding the Roma. The above, together with the failure of the respondent state to adduce any evidence that the treatment in question could be due to any other ground than on a racially discriminatory one, led to the finding of the substantive limb of Article 3 in conjunction with Article 14.

30. Such statements and racist reactions were present in the instant case, strengthening the Applicants' impression that they were treated differently on the basis of their ethnicity. The first such factor relates to the racist reaction of parents of non-Roma pupils and some school officials. Some parents went as far as blocking the entrance to the school in the settlement of Drzimurec-Strelec in Cakovec and not allowing Roma children to enter the school building. Such reactions may have influenced the school authorities decisions when assigning and retaining Roma children in separate, Roma only classes.[31] Moreover, virulently racist statements put forward by educational officials in the domestic proceedings clearly point to the racial animus underlying placement decisions. In these statements, Romani parents in general are held as being alcoholics while their children are considered to be prone to stealing, cursing and fighting, and that as soon as the teachers turn their backs things go missing, usually "insignificant and useless objects - but the important thing is to steal". The Prefect (*župan*) of Međimurje County stated that he would not want his child to be sent in a school with many Roma pupils.

31. In the instant case, the Applicants reiterate that they were illegally assigned or were allowed to remain into special classes, notwithstanding their more than adequate knowledge of Croatian, as borne by official documents. Whereas they can only speculate as to why this occurred, they believe that the racist reactions by non-Roma pupils' parents, together with the sweeping statements put forward by educational official regarding the alleged unsavoury habits of Roma parents and their children, raise a prima facie impression that they were sent to special classes on grounds of their racial origin. As a result, the burden of proof should be shifted to the respondent Government. Should the latter not advance a satisfactory explanation for the difference in treatment, it is proper to infer that the different treatment racially

[29] *Nachova and Others v. Bulgaria* [GC], appl. nos. 43577/98 and 43579/98, judgment of 6 July 2005, at § 147.
[30] *Stoica v. Romania*, appl. no. 42722/02, judgment of 4 March 2008, rendered final on 4 June 2008.
[31] See, mutatis mutandis, *Sampanis,* op. cit., § 82: *"La Cour ne peut que noter sur ce point que des forces de police furent expédiées à plusieurs reprises aux écoles primaires d'Aspropyrgos afin de maintenir l'ordre et d'empêcher la commission d'actes illégaux contre des élèves d'origine rom. Cela n'empêche toutefois pas de supposer que les incidents susmentionnés ont pesé sur la décision subséquente des autorités concernées de placer les élèves d'origine rom dans des salles préfabriquées constituant une annexe de la 10e école primaire d'Aspropyrgos."*

motivated and therefore in breach of Article 14 of the Convention.[32] Indeed, "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified."[33]

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

32. The Chamber granted the Croatian authorities an unduly wide margin of appreciation in explaining its refusal to subject the placement decisions and subsequent education in question to rigorous inquiry. More specifically, although the Chamber admitted that the practise regarding placing Roma children in separate classes smacked of arbitrariness, it nevertheless conferred to the authorities (essentially the teachers) an increased degree of flexibility.[34] Always according to the Chamber, the fact that the majority of the Applicants were transferred at one time or another to and from Roma-only classes is evidence of the merits of this approach.

33. The Applicants would like to note that once again the Chamber's judgment eschews the all important issue of the conditions under which these transfers were effected. Indeed, as the Chamber itself noted, the transfers verged on the arbitrary yet the "flexibility" outweighed the shortcomings of this practise. It is noted that the term "flexibility" has a rather chequered history in the Court's case law. The Court has been very critical of States' claims to the effect reasons of flexibility or administrative expediency render it inevitable that a certain "trade-off" between these priorities and the applicant's rights should be accepted. In the *D.H.* and Others judgment, the Grand Chamber reiterated the principle that "whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation (see *Buckley v. the United Kingdom*, judgment of 25 September 1996, Reports 1996-IV, §76; and *Connors v. the United Kingdom*, §83.)"[35] The facts of the instant case are even more compelling, as there

[32] See e.g., *Moldovan and Others v. Romania*, appl. nos. 41138/98 and 64320/01, (No. 2), judgment of 12 July 2005, rendered final on 30 November 2005, at § 140 (where the decision to reduce the non-pecuniary damages granted to the Applicants was motivated by remarks related directly to their ethnic origin. Noting that the Government advanced no justification for the difference in treatment of the Applicants, the Court concluded there had been a violation of Article 14 of the Convention. See also House of Lords in *R. v. Immigration Officer at Prague Airport* [2004] UKHL 55, Leading Speech of Baroness Hale of Richmond, § 73 – 74: "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."

[33] *Timishev v. Russia*, appl. nos. 55762/00 and 55974/00, judgment of 13 December 2005, rendered final on 13 March 2005, at § 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").

[34] At § 65.

[35] At § 206.

were no statutory grounds for the Croatian language criterion, no standard regulatory procedures for making the assessment and no procedural safeguards against arbitrary decisions and abuse.

34. The Applicants respectfully submit that the Chamber's broad deference to the Croatian 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."[36] Unlike many other policy variables which justify deference from reviewing bodies, "a special importance should be attached to discrimination based on race."[37]

35. 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.

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

36. In addition to questions of the interpretation and application of Article 2 Protocol 1 and 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. 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."[38]

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

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[36] *Timishev v. Russia*, op. cit., at § 56. See also *Nachova v. Bulgaria* [GC], op. cit., at § 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 [GC], appl. no. 15890/89, judgment of 23 September 1994, at § 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.").

[37] *East African Asians v. United Kingdom*, European Commission of Hum. Rts., 3 EHRR 76 (1973), § 207.

[38] 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), at § 44.

37. The February 2006 report of the Council of Europe's Commissioner of Human Rights on the situation of the Roma, Sinti and Travellers 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."[39] 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.[40] Approximately 80% of Roma children are placed in specialized institutions, and only 3% reach secondary schools.[41] 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." Approximately 70% of Roma students are educated in schools in which they are the only pupils and where they receive poor quality education.[42] In Poland, separate classes for Roma in primary schools persist, notwithstanding the Government's acknowledgement of the need to eradicate this practice.[43] Roma children encounter discrimination in access to education in Russia as well.[44] Roma children are also victims of discrimination in education in some Western European countries.[45] Certain countries have already taken concrete steps to integrate Roma children into regular mainstream classes. Thus, in Poland, the Roma children were sent to separate classes under the pretext that they did not speak Polish, although many were fluent. The Polish Minister of Education vowed that that starting this school year (2008-2009) separate Roma classes will not be formed.[46] Similar, integration of Roma pupils into mainstream schools is also a priority for the European Union which has ascertained a strong link between the provision of substandard education to Roma (due inter alia to their segregation or over-representation in special

[39] Ibid, at § 46.
[40] 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), at §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."
[41] 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), at § 31.
[42] ECRI, *Third Report on Romania* (Adopted on 24 June 2005 and made public on 21 February 2006), § 128.
[43] ECRI, *Third Report on Poland* (Adopted on 17 December 2004 and made public on 14 June 2005), § 115.
[44] European Roma Rights Centre, *In Search of Happy Gypsies: Persecution of Pariah Minorities in Russia*, May 2005, at pp 171-76.
[45] 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).
[46] Poland ministry to close Gypsy-only classes, Warsaw, Poland, 2.8.2008, 18:06, (AP) http://romea.cz/english/index.php?id=detail&detail=2007_989

schools) with their marginalization or poverty [47] while similar have been the findings of the recent evaluation of the OSCE Roma/Sinti action plan[48]

CONCLUSION

54. 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.

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[47] Commission staff working document. Community Instruments and Policies for Roma Inclusion. Brussels 16 April 2008, SEC(2008)XXX, at http://ec.europa.eu/social/BlobServlet?docId=481&langId=en
[48] Implementation of the Action Plan on Improving the Situation of Roma and Sinti within OSCE area, at http://www.osce.org/publications/odihr/2008/09/33130_1186_en.pdf