IN THE EUROPEAN COURT OF HUMAN RIGHTS

THE GRAND CHAMBER

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

(APPLICATION NO. 57325/00)

WRITTEN OBSERVATIONS OF THE APPLICANTS

29 SEPTEMBER 2006

Applicants' Legal Representatives
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INTRODUCTION

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 was discriminatory and 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. On 5 May 2006, the Applicants submitted a written 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 the 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 ethnic minority group. On 3 July 2006, a panel of five judges of the Grand Chamber granted the Applicants' request.

3. The Applicants' request for Grand Chamber referral addressed only the issue presented by the Chamber judgment on the merits – i.e., the alleged violation of Article 14 of the Convention, taken together with Article 2 of Protocol No. 1. It did not address the alleged violations previously ruled inadmissible. The Applicants continue to maintain that they have suffered violation of their rights under Articles 3 and 6(1) of the Convention. Nonetheless, and in light of the fact that "the parties' submissions before the Chamber will be included in the case file of the Grand Chamber,"[1] this submission focuses exclusively on the question of the interpretation and application of Article 14.

4. At the outset, it is important to underscore that this case concerns not only the rights of Roma to equal educational opportunity – though those rights are squarely at issue. More broadly, this case implicates the interest of all children throughout Europe in fully developing their individual talent and ability, free from arbitrary and unfair hindrances based on their race or ethnic origin.[2]

[1] 18 July 2006 Letter to the Applicants from Mr. Michael O'Boyle, Deputy Registrar.

[2] Throughout this submission, the terms "race" and "ethnic origin," together with their derivatives, are used inter-changeably in the sense of the definition of "racial discrimination" in Article 1 of the International Convention on the Elimination of Racial Discrimination. See *Timishev v. Russia*, Judgment of 13 December 2005, § 56 ("Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination").

5. In recent years, this Court has decided several cases involving Article 14 claims in the context of policing and criminal justice.[3] 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 state-maintained 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 the European Court of Justice and leading national courts in Europe and beyond. If allowed to stand, it would render the protection given by Article 14 theoretical and illusory. 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) detailed, comprehensive and independent statistical evidence that Roma in the city of Ostrava are routinely subjected to educational segregation and discrimination; and (iii) reports by numerous inter-governmental bodies that have consistently found a pattern of institutionalised and systemic discrimination in schools throughout the Czech Republic as a whole. In short, if this case does not amount to discrimination contrary to Article 14 in the enjoyment of the right to education, it is hard to see what would.

ARGUMENT

I. *The Applicants have suffered discrimination in breach of Article 14, taken together with Article 2 of Protocol No. 1, because they have been treated less favourably than other similarly situated children on grounds of their ethnic origin, without any objective and reasonable justification.*

A. Applicable legal standards

6. The Court's case-law under Article 14 "establishes that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations."[4] 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

[3] 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.
[4] *Willis v. the United Kingdom*, no. 36042/97, 35 EHRR 21 (2002), §48.
[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

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]

7. 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 treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified."[9] When applied to the facts of this case, the evidence clearly demonstrates that the Applicants have suffered a breach of their Article 14 rights.

'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*, § 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 landmark judgment of the House of Lords in *R. v. Immigration 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." (Emphasis added).

[9] *Timishev v. Russia*, § 58. See European Commission against Racism and Intolerance (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").

8. As this Court has recognized, "[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."[10] Unlike many other differences of treatment affording a wide margin of appreciation to decision-takers, "a special importance should be attached to discrimination based on race."[11] The frequency with which racial factors are misused to the detriment of vulnerable and disadvantaged members of ethnic minority groups demands heightened attention from this Court.

9. 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.[12] 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."[13] The Czech Republic has also undertaken 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."[14]

B. The Applicants have presented overwhelming proof of differential treatment

10. The evidence before the Court shows clearly that the Applicants were treated differently from similarly situated non-Roma children.

11. In their initial Application, the Applicants presented overwhelming evidence of differential treatment which raised a presumption – never since rebutted – that they, like other Roma children in the city of Ostrava, had been the victims of discrimination on the grounds of ethnic origin. All 18 Applicants, of Roma ethnic origin, were assigned or transferred to special schools for those deemed "mentally deficient" in the mid- and late-1990s. It was and remains undisputed that, at the time

[10] *Timishev v. Russia*, § 56. See also *Nachova v. Bulgaria* [GC], § 145 ("the authorities must use all available means to combat racism…"); id., § 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.").
[11] *East African Asians v. United Kingdom*, European Commission of Hum. Rts., 3 EHRR 76 (1973), § 207.
[12] Art. 5(e)(v).
[13] CERD General Recommendation No. XIX (Racial Segregation and Apartheid), 1995.
[14] Art. 1, UNESCO Convention against Discrimination in Education. The Czech Republic filed its notification of succession to the Convention on 26 March 1993.

relevant to the Application, as a result of their assignment to special schools, the Applicants received a substantially and measurably inferior education, which effectively deprived the Applicants of the opportunity to pursue non-vocational secondary education.[15] As a result, the Applicants were condemned to second-class economic status and to the psychological "stigma" of being branded "mentally deficient."

12. Moreover, this mistreatment did not just happen. It was part and parcel of a policy which diverted the majority of Roma children away from productive education. The systematic nature of the policy, and the extent of the differential treatment, is graphically demonstrated through data from the municipality of Ostrava.[16] Although, at the time of the Application, Roma represented less than five percent of all primary school-age students in the municipality of Ostrava, they made up more than 50% of the population of special schools. Whereas fewer than two percent of non-Roma students in Ostrava were assigned to special schools, over 50% of Roma children were sent there. Overall, a Roma child was more than 27 times more likely than a similarly situated non-Roma child to be assigned to a special school. As confirmed by comparative research and the testimony of one of the leading experts worldwide on minority representation and special education, this degree of racial over-representation is unprecedented.[17] It strongly suggests that, whether through conscious design or malign neglect, race/ethnicity infected the process of school assignment, to a substantial – perhaps determining – extent.[18]

13. This evidence was not presented in isolation. To the contrary, it was corroborated by significant independent evidence from highly reputable sources.

14. 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,[19] the Government conceded that during the relevant period of time, "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."[20] This was not the only evidence confirming that Czech officials were aware of the discriminatory impact of the special schools policy on Roma. Contemporaneous with 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

[15] See Application, § 7.13 – 7.15.
[16] See Application, § 6.4 – 6.16.
[17] See Application, § 6.10, and Exhibit 15 to Application.
[18] As discussed below, under the applicable legal standards, proof of discriminatory intent is not a necessary condition or requirement in establishing unlawful discriminatory treatment. See *infra* section II.
[19] See Application, Exhibit 24.
[20] Chamber Judgment, Dissenting Opinion of Judge Cabral Barreto, § 2.

Romani…."[21] More recently, a 2002 report by the Czech School Inspectorate observed that children without significant mental retardation were placed in special schools.[22] These government admissions have been repeatedly reinforced by the findings of inter-governmental monitoring organs and the observations of Czech educational experts.[23]

15. This Court has made clear that, while statistics alone "are not automatically sufficient" to prove discrimination, they may – particularly where they are, as here, backed up by party admissions and a plethora of additional documentary proof – amount to prima facie evidence requiring the Government to provide an objective and reasonable explanation of the differential treatment.[24]

C. **The Government has offered no objective and reasonable justification**

16. The respondent Government bears the burden of demonstrating that a difference in treatment may be justified.[25] Over more than six years since the filing of this Application, the Government has consistently failed to offer an objective and reasonable justification for the differential treatment convincingly shown by the Applicants. Indeed, in its written submissions, the Government has refused to address in detail the question of whether Article 14 has been violated.[26]

17. Nor does an examination of the facts in this case yield any objective and reasonable justification.

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[21] 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.

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

[23] 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").

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

[25] See supra § 7.

[26] See, e.g., Government's Written Observations, 15 March 2004, § 211 (declining to "give any explicit answers to" Court question concerning violation of Article 14, and arguing that the Court should not consider Applicants' Article 14 claim, but rather should "view the whole case only on the basis of the provisions of Article 2 of Protocol No. 1 taken alone").

Intellectual Deficiencies

18. Although the legislation in force at the relevant time made clear that special schools were for students "who have intellectual deficiencies,"[27] such alleged "deficiencies" do not provide an objective and reasonable justification, for two reasons.

19. First, the school records at issue show that a number of the Applicants were assigned to special schools for reasons having nothing to do with their "intellectual deficiencies," including problems with school attendance and discipline, non-cooperation of parents, and a "non-stimulating family environment."[28] Indeed, in at least one instance, it appears that an Applicant was assigned to special school notwithstanding that he was determined to possess "very good verbal abilities."[29]

20. Second, it defies the laws of mathematical probability and common sense to suppose that the basis for assigning the Applicants to special schools was their intellectual deficiency. If this were true, it would indicate – in the light of the undisputed statistical evidence – that Roma children are more than 27 times more likely than non-Roma to have intellectual deficiencies. This is not a credible, let alone a satisfactory, explanation. As the European Union Monitoring Centre 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."[30]

[27] 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.

[28] See e.g., Application, § 7.27 (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).

[29] Government's Observations, § 50.

[30] 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 a difference in treatment on racial grounds is prima facie unlawful regardless of the decision-taker's intent or motive, as has been made clear by the United Kingdom House of Lords in its case law: see e.g., *Nagarajan v. London Regional Transport* [2000] 1 AC 501; *R v Birmingham City Council, ex parte Equal Opportunities Commission* [1989] AC 1155 at § 1194. See *infra* Section II.

Psychological Tests

21. As the Applicants have consistently argued,[31] the nature of the tests and their evaluation does not provide an objective and reasonable justification for the differential treatment. At the relevant time, no law or decree prescribed which test(s) should be administered – or how they should be applied – to assess students' suitability for assignment to special school.[32] Because no guidelines effectively circumscribed individual discretion in the administration of tests and the interpretation of results, the assessment process was arbitrary and open to influence – conscious or unconscious – by irrelevant factors such as racial prejudice or cultural insensitivity.[33] Indeed, some of the leading scholarship on psychological testing makes clear that the very fact that tests generate ethnically disproportionate results is itself evidence that the tests are biased or unfair, and do not provide an objective basis for placement decisions.[34]

Poverty

22. Nor does the Applicants' relatively marginal economic situation provide an objective and reasonable justification for their differential treatment. First, many poor non-Roma children study and excel in basic schools. Second, not all Roma in special schools are poor. Third, any allegedly greater risk of mental or physical disease among Roma due to malnutrition or inadequate medical care stemming from their impoverished condition does not explain a telling fact: Roma are not similarly overrepresented in schools for the more seriously – and objectively measurable – disabled. Thus, the Applicants presented data showing that, at the relevant time,

[31] The Applicants have repeatedly noted that the psychological tests administered to them and other Roma children were scientifically flawed and educationally unreliable. *See* Application, 18 April 2000, § 7.22 – 7.42; *see also* Applicants' Written Comments, 1 June 2004, §§ 1.7 – 1.9.1. Applicants provided supplemental factual evidence in the form of a major multi-country study (including the Czech Republic) that confirmed that the psychological tests were "inadequate, inappropriate, and possibly biased." Applicants' Written Comments, 1 June 2004, § 1.8., 1.11 – 1.11.2.

[32] Application, § 7.35 – 7.36.

[33] For the purposes of a claim of discrimination, it is of no moment that children's needs, aptitudes and disabilities are "not legal concepts." (Chamber Judgment, §49). Most areas of public life – from employment to public accommodations to criminal justice – require individuals with specialized knowledge to make judgments based on factors particular to the field. This does not immunize them from Convention review. This Court has not hesitated to examine closely the decisions of public officials expert in certain activities – such as accounting (see *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) or military or police investigation *(*see *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) – and find them deficient when measured against Convention standards. The decisions of school administrators and psychologists in this case deserved similar close European scrutiny.

[34] "If testing and assessment practice results in students from a particular ethnic group being placed in inferior educational programs, then the outcomes or consequences of testing are biased and unfair, no matter how accurate the tests and decision-making procedures." Linda K. Knauss, "Ethical Issues in Psychological Assessment in School Settings," 77 *Journal of Personality Assessment*, 231, 235-36 (2001).

Roma comprised only 3 of 52 students in the one "auxiliary" school in Ostrava,[35] and none of the more than 100 students in Ostrava's two specialised elementary schools.[36]

Parental Consent

23. 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.[37] This conclusion is inconsistent with the object and purpose of the Convention and the Court's jurisprudence. Purported parental consent does not constitute an objective and reasonable justification for three reasons.

24. First, the purported "consents" of the parents of several of the Applicants are undermined by discrepancies or missing documents from their children's school records. Thus, for example, Applicant 12 has maintained throughout these legal proceedings that his/her parents never consented to Applicant 12's placement in a special school in 1996. In its ruling of 20 October 1999, the Constitutional Court expressly concluded that the consent of Applicant 12's parents had not been provided in writing. The records in Applicant 12's school file raise more questions than they answer.[38] Similar discrepancies raise questions about the authenticity and veracity of the purported written consents of other Applicants.[39]

25. Second, to be effective, consent must be fully informed.[40] But, even assuming all parents had provided written consent to their children's transfer or assignment to a special school, such consents were of no legal value, because the parents at issue were never meaningfully informed of their right not to consent, the alternatives to special school, or the risks and consequences of their children's assignment to special school.[41] Some parents' purported consent appears to have been provided long after

[35] At the time of the Application, auxiliary schools were for children who were deemed seriously mentally disabled – i.e., "capable of acquiring at least some elements of education" including "habits of self-sufficiency and personal hygiene and […] the development of adequate recognition and working skills with the objects of one's daily needs." Schools Law, Art. 33(1). See Application, § 7.40 – 7.42.

[36] At the time of the Application, specialized elementary schools were for students with physical disabilities such as hearing impairment, serious behavioral problems, or long-term health problems. Schools Law, Arts. 29(1), 30(1).

[37] Chamber Judgment, § 49 – 51.

[38] See Applicants' Letter to the Court, 26 April 2005.

[39] See id. (discussing unresolved discrepancies concerning issue of parental consent in school records of Applicants 11 and 16).

[40] "Informed consent agreements should include the reasons for assessment, the type of tests and evaluation procedures to be used, what the assessment results will be used for, and who will have access to the results…. An explanation of the nature and purpose of all assessment instruments should be provided…. In addition to formal informed consent procedures, it is important to discuss the upcoming testing with the student to enlist his or her cooperation. Students should know the reason for the assessment, types of tests they will be given, and ways in which the results will be used." Linda K. Knauss, "Ethical Issues in Psychological Assessment in School Settings," 77 *Journal of Personality Assessment* 231, 232-33 (2001).

[41] See Application, § 7.49 to 7.58. The consent forms signed by the parents of the Applicants were uniformly pre-fabricated, one- or two-sentence affirmations of a "request" or "agreement" for assignment or transfer to special school. The forms do not bear the signatures of any witnesses. They offer no indication that any information had been provided to the parents prior to the forms' completion. (See

the children had already been transferred.[42] School officials made limited, if any, effort to give the Applicants' parents an adequate foundation for making informed decisions about their children's education. To the contrary, the Applicants have offered evidence that in some cases, undue pressure appears to have been placed on Roma parents by psychologists and school authorities.[43] The importance of informed consent is underscored by the 18 July 2006 "preliminary draft text" of the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation N° 10 on combating racism and racial discrimination at school, which "[r]ecommends that the governments of member States [of the Council of Europe] … [e]nsure equal access for all to quality school education," in part by "ensuring that parents of pupils from minority groups are sufficiently informed of the consequences of any special measures envisaged for their children so that they can give their informed consent."

26. Finally, as a matter of law, parents do not have the legal authority to waive their children's rights to the enjoyment of the fundamental right to equality of treatment without discrimination. Governments have a legal responsibility to ensure the best interests of the child,[44] including the right to non-discriminatory education,[45] which may not be waived by the conduct or preferences of the parents.[46] Just as a parent's consent may not lawfully excuse 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…."[47]

Exhibits attached to Government's Documents, forwarded by Court Registry to counsel for Applicants together with correspondence dated 3 April 2005 and 4 April 2005).

[42] In Applicant 12's case, for example, according to the Government's own account, the parent was informed of the consequences of special education on secondary level education *some three years after* the child had been attending special school (See Government Observations, §73).

[43] See Application, exhibits 14A (statement of E. Smékalová), 9C (article by H. Prokešová).

[44] 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").

[45] 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").

[46] 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, principle 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").

[47] *Connors v. United Kingdom*, ECHR Judgment of 27 May 2004, § 84.

27. The Court has held that the waiver of a Convention right – insofar as it is permissible – is effective only if it is unequivocal[48] and has been obtained freely and without constraint.[49] The waiver must also be attended by the minimum safeguards commensurate with its importance.[50] The Court has held that a waiver "may be permissible with regard to certain rights but not with regard to certain others"[51] and must not run counter to any important public interest.[52] For example, the Court has held that the right to liberty cannot be waived.[53]

28. It is submitted that the same logic 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.[54] It is also noteworthy that the South African Constitutional Court has expressed doubt as to whether constitutional rights can be waived.[55]

29. In sum, there is no objective and reasonable justification for the differential treatment of the Applicants.

D. In the absence of an objective and reasonable justification, there has been a violation of Article 14, taken together with Article 2 of Protocol No. 1

30. In the instant case, the Applicants have 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 case law, it is incumbent upon the Government to provide an objective and reasonable justification for this disparate treatment. The Government has failed to do so, and under the circumstances, this Court may appropriately infer that the difference of treatment was on racial grounds, in breach of Article 14.

II. *The Grand Chamber should make clear that intent is not necessary to prove discrimination under Article 14, except in cases – such as, for example, racially motivated violence – where intent is already an element of the underlying offence*

31. In order to sustain their claim under Article 14, the Applicants need not – and do not – claim that the responsible officials overseeing school placement decisions in

[48] *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").
[49] *Deweer v Belgium* Series A, No. 35, 27.2.80 (1979-1980) 2 EHRR 439.
[50] *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692 § 37.
[51] *Suovaniemi v Sweden* App. No. 31737/96 Decision of 23 February 1999.
[52] *Hakansson and Sturesson v Sweden* (1990) 13 EHRR 1 § 66.
[53] *Vagrancy* cases (1978) 2 EHRR 149 § 36.
[54] *Tellis v Bombay Municipal Corp* (1987) LRC (Const) 351.
[55] *S v Shaba* 1998 (2) BCLR 220.

Ostrava at the relevant time harbored invidiously racist attitudes towards Roma, or even that they intended to discriminate against Roma. All that is required – and, we submit, what has been proved – is that those officials subjected the Applicants to differential adverse treatment in comparison with similarly situated non-Roma, without objective and reasonable justification. Because the Chamber's judgment turned in large part on this question, it is a useful departure point for analysis.

A. **The Chamber's Approach**

32. In addressing the Applicants' claims that their rights of non-discriminatory access to education had been breached in violation of Article 14 taken 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 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 and erroneously 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 jurisprudence.

33. 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). Moreover, 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.

34. But the test of liability under Article 14 is objective: Was there unlike treatment of like cases, or like treatment of unlike cases, on grounds of ethnic origin? The subjective attitudes of psychologists, while potentially relevant as aggravating factors, do not determine whether discrimination exists.[56]

[56] See e.g., *Nagarajan v. London Regional Transport* [2000] 1 AC 501, 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 decide that the proper inference to be drawn from the evidence is that, whether the

35. Thus, it is possible even for "qualified professionals, who are expected to follow the rules of the profession and to be able to select suitable methods," (Chamber at § 49), to perpetuate discriminatory practices without harboring overtly racist or discriminatory attitudes. Indeed, some of the most common discriminatory practices are neither widely advertised nor motivated by knowing, malicious intent.[57] 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.[58]

B. **This Court's case law**

36. The suggestion that the Applicants must prove discriminatory intent to sustain a violation of Article 14 is not in accordance with the principle of equality of opportunity and treatment without discrimination; nor is it supported by this Court's case law. In *Thlimmenos v. Greece*, this Court found a violation of Article 14 on 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.[59]

37. The Grand Chamber's judgment in *Nachova and Others v. Bulgaria*,[60] is instructive. 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."[61] 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

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> 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).

See ECHR case law discussed at section II. B, *infra*.

[57] *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").

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

[59] *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").

[60] ECHR [GC] Judgment of 6 July 2005.

[61] *Nachova v. Bulgaria*, § 157.

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.[62] 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, may be proven in the absence of intent.

38. More recently, the Court's Fourth Section ruled (in a case of discrimination on grounds of sex in compulsory jury service) that a difference in treatment need not be set forth in legislative text in order to breach the Convention's non-discrimination guarantee.[63] Rather, a "well-established practice" or a "de facto situation" (§ 75 and 76) can give rise to discrimination in breach of Article 14. Furthermore, while statistics were not by themselves sufficient to disclose a practice which could be classified as discriminatory, the Court in *Adami* relied in part on a statistical showing of disproportionate impact to reach its conclusion.

39. Other cases have confirmed that a showing of intent to discriminate is not required under Article 14.[64] And, in other areas of Convention jurisprudence beyond Article 14, 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.[65]

40. A narrowly restrictive test of the concept of discrimination for purposes of Article 14 – such as requiring the Applicants to show "that the system of special schools in the Czech Republic was … introduced solely to cater for Roma children" (Chamber Judgment at § 48) – would undermine this Court's clearly-expressed goal of ensuring that the Convention provides practical protection for human rights.[66] It is irrelevant whether special schools were designed to segregate along ethnic lines. That is

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[62] Id.

[63] *Zarb Adami v. Malta*, ECHR Judgment of 20 June 2006.

[64] 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), § 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").

[65] 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).

[66] 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"))

indisputably what has been their actual effect. Limiting Article 14 protection to those rare occasions where discriminatory intent is demonstrably provable would destroy the very substance of the right to equal opportunity and treatment without discrimination. 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.

41. 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,[67] the Grand Chamber is respectfully requested to decide and declare that the principle of equal treatment without discrimination at the core of Article 14 is not restricted to cases where a discriminatory intent can be shown.

C. **Other European and International law**[68]

42. The incorporation of a requirement of proof of discriminatory intent as a condition of liability under Article 14 is at odds, not only with this Court's jurisprudence, but more generally with other European and international non-discrimination law. Within the Council of Europe, ECRI has expressly recommended that national legislation prohibit both "direct discrimination" and "indirect discrimination."[69] As defined in ECRI General Policy Recommendation No. 7, neither concept requires proof of intention to discriminate. As senior officials of the Council of Europe have

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[67] *See, e.g., Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Judgment of 28 May 1985, § 85 (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").

[68] Although this Court has not generally used the terms "direct" and "indirect" to categorize the different kinds of discrimination under Article 14, they are common reference points of non-discrimination legal doctrine in other jurisdictions, including the European Union and its member states. Accordingly, the following brief examination of comparative law on the question of intent employs these concepts. In the instant case, the Applicants respectfully submit that they have been victims of both "direct discrimination" - because they, like other Roma children, have been treated less favourably because of their ethnicity – and "indirect discrimination" – because the laws and rules relating to placement in special schools, though neutral on their face as to ethnicity, had a powerfully adverse impact on Roma, with no objective and reasonable justification. As noted herein, whether the discrimination at issue is direct or indirect, intent is not an essential element of the claim.

[69] General Policy Recommendation No. 7. Art. 1(b) defines "direct racial discrimination" as "any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised." Art. 1(c) defines "indirect racial discrimination" as "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."

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."[70]

43. Within the European Community, the European Court of Justice has consistently made clear that both direct and indirect forms of discrimination are prohibited[71] and that intent is irrelevant to an assessment of whether discrimination has occurred.[72] The European Union Race Directive, which came into force in 2003 and is applicable in 27 Council of Europe member states, similarly prohibits both "direct discrimination" and "indirect discrimination"; neither concept requires proof of intent to discriminate.[73] As of September 2006, a clear majority of the member states of the

[70] 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").

[71] 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.")

[72] 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.")

[73] Directive 2000/43 implementing the principle of equal treatment or persons irrespective of race of ethnic origin, Art. 2 (a) ("direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin"); Art. 2 (b) ("indirect discrimination" shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"). See also Directive 2000/78

Council of Europe expressly prohibit discrimination without proof of intent in some part of their national legislation.[74]

44. Discrimination absent a showing of intent is also prohibited under international law, including the International Covenant on Civil and Political Rights,[75] and the International Convention on the Elimination of Racial Discrimination,[76] as well as the instruments of the International Labor Organization.[77]

(Framework Employment Directive), Art. 2 (employing similar standards for direct and indirect discrimination, on grounds other than racial or ethnic origin).

[74] To date, twenty-three European Union member states – including Germany as recently as August 2006 – have transposed into national legislation the EU Race and Framework Employment Directives, which explicitly recognize claims for both direct and 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 two EU countries that have not implemented the directives recognize claims of indirect discrimination 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 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 discrimination absent proof of intent 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.

[75] See UN Human Rights Committee, *Comment 18: Non-Discrimination* (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 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).

[76] 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); id., § 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").

[77] 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").

45. Finally, in recent years, several national-level courts in Europe have rightly ruled that segregation of Roma in education amounts to discrimination, ordering that remedial measures be taken.

46. 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.[78] 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.[79] 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.

47. A 9 June 2006 judgment of the Appeals Court of Debrecen found that an administrative decision to merge several schools perpetuated racial segregation of Roma children in separate schools, and thus breached their right to equal treatment under Hungarian domestic legislation transposing the EU Race Directive. The Appeals Court applied the Race Directive standard in holding that, once the complainants had established that they had suffered an educational disadvantage – separate education of inferior quality – on grounds of ethnic origin, the burden shifted to the defendant municipality to provide an objective and reasonable justification – which, in this case, it failed to do.[80]

48. In Bulgaria, where "the question of education remains of particular concern owing to a *de facto* segregation in the education system,"[81] a recent court ruling by the Sofia District Court found that *de facto* segregated schools violate the prohibition of racial discrimination and unequal treatment embodied in national and international law.[82]

49. The case law of British courts reflects the long experience of the United Kingdom in combating racial discrimination through law. Since 1968, the UK has had legislation in force to make racial discrimination unlawful in education, employment, housing, and the provision of goods, services and facilities to the public. Since 2000, the controlling Race Relations Act 1976 has been extended to the provision of services by public authorities. Among other things, this legislation makes clear that

[78] *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.
[79] Budapest Court of Appeals (Fovárosi Itelotábla) judgment of 7 October 2004.
[80] Debrecen Court of Appeals judgment of 9 June 2006.
[81] 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.
[82] Sofia District Court, *Judgment 11630/2004* (rendered on 25 October 2005).

segregation constitutes unlawful discrimination.[83] As already noted, the House of Lords has consistently interpreted and applied British anti-discrimination legislation in a way that does not require proof of a discriminatory intent as a condition of liability for discrimination, whether direct or indirect.

50. In sum, the reasoning of the Chamber judgment is in tension with the prevailing standards of discrimination long accepted by the Council of Europe, the European Court of Justice, international law, and increasingly by Europe's national courts. In fact, were a group of applicants today to lodge a complaint in the Czech courts similar to that before the Court, the question could well be referred to the European Court of Justice, where the EU Race Directive – and its definitions of direct and 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 non-discrimination should be interpreted and applied consistently by the two European Courts.

III. Racial segregation of Roma children in Czech schools has not materially changed since the filing of the Application

51. Over seven years have passed since the 18 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 painfully reveals the discriminatory harm that results from unequal access to education. As of May 2006, eight Applicants (Nos. 1, 2, 4, 13, 14, 15, 17 and 18) had not completed their primary education in the special schools. Six Applicants (Nos. 3, 5, 7, 8, 10, and 12) had completed special school, and were unemployed. Of the remaining four Applicants who – after bringing a lawsuit – were allowed to attend ordinary primary school, Applicant 5 was unemployed, Applicants 11 and 16 were in the 9th grade in ordinary school, and Applicant 6 was about to complete the 8th grade of ordinary school and was enrolled in a three-year vocational school.

52. More generally, the situation of Roma children in the Czech Republic has not materially changed since the filing of the Application. To this day, the extreme overrepresentation 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 bodies.[84] ECRI has noted that "Roma children [in the Czech Republic] continue to be sent to special schools which,

[83] See Race Relations Act 1976, Part I, § 2 ("It is hereby declared that, for the purposes of this Act, segregating a person from other persons on racial grounds is treating him less favourably than they are treated").

[84] 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.

besides perpetuating their segregation from mainstream society, severely disadvantage them for the rest of their lives."[85]

53. This is so, notwithstanding the fact that a new School Law was adopted in late 2004, purporting to end the special school system.[86] By abolishing "special schools" in name,[87] the new legislation acknowledges, as the Applicants have long contended, that the very existence of schools deemed "special" imposes a badge of inferiority on those assigned there. And by re-labeling as "socially disadvantaged" a group of students whom the law had previously considered "mentally deficient,"[88] the new legislation implicitly concedes what the Government has long denied: many of the children assigned to special schools are not in fact "mentally deficient."

54. In fact, the new law has not led to new practice. Extensive research by the European Roma Rights Centre carried out in 2005 and 2006 documents that in many cases special schools have simply been renamed "remedial schools" or "practical schools," but neither the composition of their students nor the content of their curriculum has substantially changed.[89] Thus, racial segregation in education remains a pervasive reality in the Czech Republic.

[85] 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

[86] Law No. 561/2004 Coll., on pre-school, primary, middle, higher technical and other education (the "2005 School Law"), took effect 1 January 2005.

[87] 2005 School Law, Section 185, § 3.

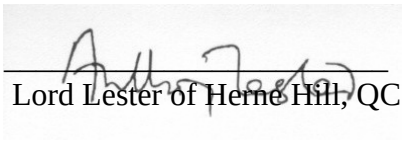
[88] Under Section 16 of the 2005 School Law, students subject to assessment by so-called Advisory Centers - those considered to have special educational needs – include, not only those with a "health disability" (including mental disability) or a "health disadvantage," but also students with what is termed a "social disadvantage." This category includes students coming from a "family environment with a low social and cultural position."

[89] ERRC research carried out under the European Commission's Community Action Programme to Combat Discrimination, publication forthcoming 2007.

CONCLUSION

55. As European societies confront growing ethnic and religious diversity, there are few issues of greater significance than equality of opportunity and treatment in the field of education. Although racial segregation in schools is particularly egregious in the Czech Republic, "in one form or another, [it] is a common feature in many Council of Europe member States."[90] And "[t]he 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."[91]

56. For all of the reasons set forth above, the Applicants respectfully request that the Grand Chamber find that all Applicants suffered violation of their rights under Article 14 taken together with Article 2 of Protocol No. 1 of the Convention, as well as of Articles 3, 6(1) and Article 2 of Protocol No. 1, and furthermore that just satisfaction be afforded, pursuant to Article 41 of the Convention and Rule 60 of the Rules of Court.[92]



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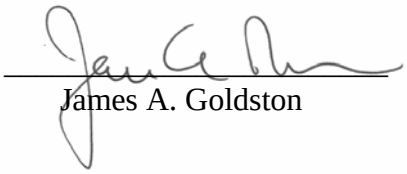

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[90] Council of Europe, Office of the Commissioner for Human Rights, *Final Report by Mr. Alvaro Gil-Robles , Commissioner for Human Rights, on the Human Rights Situation of the Roma, Sinti and Travellers in Europe* (15 February 2006), § 46.
[91] Council 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.
[92] The Applicants refer the Grand Chamber to their claim for just satisfaction and costs and expenses, submitted on 23 June 2005. Updated data concerning costs and expenses for proceedings before the Grand Chamber will be provided in due course.