II. STATEMENT ON THE ALLEGED VIOLATIONS

The applicants respectfully submit that the instant case discloses clear violations of a number of rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") - in particular of Article 6, Article 8, Article 13 taken in conjunction with Articles 8 and Article 1 Protocol 1, and Article 14 read together with Articles 6, 8, 13, as well as Article 1, Protocol 1 to the Convention, as well as Article 1, Protocol 12.

Alleged violation of Article 6

Applicability of Article 6 in the instant case

56. The applicants contend that their case reveals various violations of their rights under Article 6 to the Convention. Before proceeding to elaborate on these violations, they would respectfully like to address the issue of applicability of Article 6 in the context of their allegations.

57. The applicants note that what lies at the heart of their application is their entitlement to specific (laid down by law) and specified (in monetary terms) social benefits (namely the birth allowance, the child upbringing allowance and the allowance paid to families with more than one child). More specifically, the applicants allege that they were either denied these benefits[1] due to the illegal and arbitrary requirements to which they were expected to comply, requirements that had a discriminatory effect on them, or that they received them only when they were effectively forced to meet these illegal conditions.[2] Whereas the issue of discrimination will be addressed in the context of Article 14 below, the primary issue that needs to be addressed is whether Article 6 is applicable in a dispute of such a nature as the one related in the present application.

[1] This is the case with the newly born children's benefits in relation to all the applicants with the exception of applicant Julieta Lenuta Lacatus whose case presents the following characteristic: she was denied payment of the newly born child benefit and the child upbringing benefit for her first child only.

[2] This is case regarding the child upbringing allowance in relation to applicants Victoria Negrea, Didica Moldovan, Adriana Paula Boros, Rita Cosmina Ciurar and Julieta Lenuta Lacatus (in relation to her second child), and regarding the allowance paid to families with more than one child (in relation to applicant Victoria Negrea).

58. According to settled ECHR caselaw, entitlements to social security benefits fall squarely within Article 6 of the Convention. Thus according to the Court in the application of *Tsfayo v. the United Kingdom*,

> "…disputes over entitlement to social security and welfare benefits generally fall within the scope of Article 6 § 1 […] It agrees [the Court] with the parties that the applicant's claim for housing benefit concerned the determination of her civil rights and that Article 6 § 1 applied. The applicant therefore had a right to a fair hearing before an independent and impartial tribunal."[3]

Whether the CNCD is a tribunal for the purposes of Article 6

59. The next issue that needs to be addressed is to which extent the discrimination complaint they brought before the CNCD was related to their right to apply and be granted the aforementioned benefit and if for example they should not have brought forward a civil claim for damages. The applicants respectfully adduce two reasons why they believe that they were justified in opting for a discrimination complaint as opposed to other potentially applicable remedies. Firstly, a complaint with the CNCD constituted the single most effective legal means of redress at their disposal since the CNCD was at the time the most appropriate body in Romania to deal with allegations of discrimination. In this respect, it is noted that the Court has consistently held that especially in very complex areas of law / economic and social activity, specialized administrative authorities will (provided of course they meet certain criteria) be considered as "tribunals" for the purposes of Article 6.1,[4] under condition however that their decisions can be subjected to full blown judicial review that could lead to the higher instances remitting the case for a fresh review to the same or another body.[5] In the present case both requirements laid down in Kingsley were met: thus, the field of anti-discrimination law is clearly a very complex one (and especially so during the time when the applicants lodged their complaint). At the material time, not only was the CNCD already an independent body with wide-ranging powers[6] (including the power to mediate between

[3] Appl. No. 60860/00, judgment of 14 November 2007, paragraph 40. See also *Schuler-Zgraggen v. Switzerland,* Appl. No. 14518/89, judgment of 24 June 1993*,* paragraph 46, where the Court noted that "…(the) general rule is that Article 6 para. 1 (art. 6-1) does apply in the field of social insurance, including even welfare assistance." See also *Kostadin Mihaylov v. Bulgaria*, Appl. no. 17868/07*,* judgment of 27 March 2008.

[4] See e.g. *Kingsley v. UK*, Appl. no. 35605/97, judgment of 7 November 2002, paragraph 53: "The Court notes that the present case concerns the regulation of the gaming industry, which, due to the nature of the industry, calls for particular monitoring. In the United Kingdom, the monitoring is undertaken by the Gaming Board pursuant to the relevant legislation […] Even though the members of the Panel were not experts in the gaming industry, they were advised by officials who were experts, and the Court finds administrative regulation of the gaming industry, including questions of whether specific individuals should hold particular posts in it, to be an appropriate procedure. It should be noted that the case was subsequently referred to the Grand Chamber which upheld the Chamber's judgment." See also *Bryan v. UK,* judgment of 22 November 1995, Series A no. 335-A.

[5] Ibid, paragraph 57: "the Court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body."

[6] Thus, following O.G. 77/2003, the CNCD was tasked under the amended Article 19.4 of O.G. 137/2000 with "investigating, establishing and punishing acts of discrimination" but also with "giving specialized assistance to the victims of discrimination." Article 20 of O.G. 137/2000 gave the CNCD prosecutorial-like

the parties, a potentially very effective procedure as the Romanian government has admitted in the context of another application)[7] but it was considered as the *de facto* specialized body on discrimination; indeed, according to expert reports, Romanian courts had adopted the practice of suspending actions brought before them alleging discrimination and forwarding them to the CNCD for review.[8]

59.a. Alternatively, the applicants note that should it be considered that the CNCD did not constitute at the time a "tribunal" for the purposes of Article 6.1, then a decision issued by it would be determinative of any other remedies they could seek, all the more since as noted above, it was highly likely that at the material time, courts would remit their claim of discrimination case to the CNCD to be examined, given the latter's status as the specialized body on anti-discrimination law. Under such circumstances, a decision by the CNCD that the applicants had indeed been discriminated against would be determinative of this issue and would consequently allow them to for example raise a successful *force majeure* argument before the civil courts when requesting damages due to the failure of the Frata municipal authorities to provide them with the aforementioned benefits as well as claim damages for non-pecuniary damages. The applicants contend that their case is similar to that of the applicant in the application of *Mihailov v. Bulgaria,* where the Court held that (administrative) proceedings concerning the nature of disability of the applicant fell within Article 6.1 of the Convention as it was decisive for the nature of the social benefit (itself a "civil right") to which he was entitled.[9]

60. Concluding, the applicants respectfully believe that regardless of which approach of the two advanced above is adopted by the Court, the proceedings before the CNCD and subsequently before the administrative courts fall within Article 6 of the Convention. In their opinion therefore, Article 6 of the Convention is applicable in the instant case.

Violation of Article 6 – right to have one's case heard within a reasonable time

61. The applicants note that they lodged a complaint against the secretary of the Frata Town Hall with the National Council for Preventing and Fighting against Discrimination (CNCD) on 16 July 2003. They then made use of the ordinary and potentially effective legal means available at their disposal (such as the filing of an appeal before the Director's Collegium of the CNCD and then the filing of an administrative complaint with the Court of Appeal of Cluj and later on a complaint in cassation with the High Court of Cassation and Justice). The proceedings relating to their complaint ended domestically on 31 May 2007, when the High Court issued its No. 2832 decision, rejecting the applicants' cassation complaint. The proceedings therefore lasted 3 years, 10 months and 15 days, for effectively three levels of jurisdiction. The applicants note that

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authority when carrying out its duties; thus, it could request (on pain of sanctions) full disclosure of documents of any document it saw pertinent from both state authorities an private individuals, while its decisions are legally binding and enforceable.

[7] See Exhibit 76 - Written Observations on Admissibility and Merits, 24 May 2005, concerning Application no. 63108/00 Jehovah's Witnesses Religious Organization v. Romania, p. 25

[8] See *Report on Measures to Combat Discrimination in the 13 Candidate Countries (VT/202/47),* country Report Romania, May 2003 by Renate Weber. The report was drafted in the context of research coordinated by the MEDE European Consultancy and Migration Policy Group, available at http://www.humanconsultancy.com/ROMANIA%20Final%20ENl.pdf, page 13

[9] Appl. no. 52367/99, judgment rendered final on 21 October 2005, at paragraph 34. See also *Tsfayo v. the United Kingdom,* op. cit.

for large periods of time, their complaint was essentially neglected; thus, although they filed their complaint with the CNCD on 16 July 2003, it would be in fact almost one year later (18 May 2004) that a delegation of CNCD would start examining their complaint by paying a visit to the Frata Town Hall (see above, paragraph 17).

62. The applicants note that the issue of the reasonableness of the length of judicial proceedings is a relative one that needs to be examined in the light of the circumstances of the case at hand. In so doing, the Court takes into account parameters such as the complexity of the case and the conduct of the applicant as well as that of the relevant authorities.[10] In relation to their case, the applicants would like to highlight that it did not present any factual or procedural difficulties but was a simple and straightforward one. Thus, the applicants believe that the respondent government cannot legitimately claim that the delay was due to for example the extensive fact finding the CNCD's delegation had to carry out. Furthermore, the applicants acted with due diligence throughout the proceedings and no delays can be attributed to them. As a result, they respectfully call upon the Court to find a violation of Article 6 on grounds of the failure of the Romanian state to ensure that their complaint was heard within a reasonable time.

63. The applicants also observe that on 15 July 2003, they filed a criminal complaint with the Prosecutor's Office in Turda.[11] In their complaint, they noted that they wished to join the proceedings as civil claimants, in order to obtain damages (pecuniary and non-pecuniary) for the violation of their rights arising out of the refusal of the authorities of Frata to register their applications for the birth allowance.[12] The applicants recall that the Court has accepted that the joining of criminal proceedings by civil claimants who effectively ask to be compensated (and do not merely seek to have the defendant punished) gives rise to a civil right and therefore comes within the ambit of Article 6.1.[13] In other cases, the Court has clarified that the level of compensation claimed has no bearing on the issue; thus, in the case of *Jarnevic & Profit c. Grèce,* the Court held that the joining of criminal proceedings with the request to be compensated with the sum of merely 0,30 euros still constituted a civil right and hence attracted the safeguards of Article 6.1.[14]

64. As of the date of writing, following numerous remittals, their complaint is pending before the Prosecutor's Office Turda (see above, paragraph 55) In other words, their complaint is pending, as of the time of writing, for 4 years, 11 months and 17 days – in fact, their complaint is currently before the Cluj Tribunal, following an appeal against the decision 480 of 31 March 2008 of the Turda Court of First Instance which decided that the file should be returned to the Prosecutor's Office. The appeal is scheduled to be heard on 18 June 2008. As noted in relation to the administrative proceedings, the case does not present any particularities that would warrant such a lengthy period for deliberation, while no delays can be attributed to the applicants. In fact all the delays were caused by serious procedural mistakes committed by the Prosecutor's Office attached to the Court of First Instance of Turda and by the Court of First Instance of Turda. The Court is

[10] See e.g. *Rosegren v. Romania,* Appl. no. 70786/01, judgment of 24 April 2008, paragraph 25.
[11] See exhibit 56 - the criminal complaint filed by the applicants before the prosecutor's office Turda.
[12] The exact quantum of the moral damages requested by the applicants was declared later on a separate act registered at the prosecutor's office, namely 15 million old lei for each applicant. See exhibit 75.
[13] See *Perez c. France* [GC], Appl. no 47287/99, judgment of 12 February 2004.
[14] Appl. no. 28338/02, judgment rendered final on 7 July 2005, at paragraph 20.

respectfully referred to paragraphs 37-55 above which contain a succinct summary of these procedural (as well as substantive) mistakes. Indeed, the applicants note that all their complaints / appeals against the acts issued by the prosecutor's office (except the first one) were rejected by the Court of First Instance of Turda, but they were admitted in appeal (through final decisions) by the Cluj Tribunal. Even when after 4 years the Cluj Tribunal established through a final decision that there was no need for further investigations made by the Prosecutor's office because a substantial body of evidence against the defendants warranting their indictment before the Turda Court of First Instance, the latter ruled on 31 March 2008 that the file should be resent to the prosecutor's office.[15]

Violation of Article 6 on grounds of the inequitable and unfair character of the proceedings

65. The applicants respectfully note that the proceedings before both the CNCD and later on the Court of Appeal of Cluj and subsequently before the High Court of Cassation and Justice were marred by procedural deficiencies in breach of Article 6 of the Convention.

66. More specifically, the applicants note that one of the main principles laid down by Article 6 is that judicial proceedings should be truly adversarial; the Court has made it clear that this requirement applies equally to both criminal and civil proceedings.[16] In this respect, the applicants note that the proceedings before the CNCD did not meet these requirements since the CNCD delegates never contacted them or their legal counsel, nor did it inform them of the response of the Frata Town Hall and solicited their comments. Indeed, the applicants were informed that the CNCD was examining (or rather, had examined) their complaint only when they were served Decision No 165/8 June 2004 of the CNCD.

66.a. In its defense pleadings before the Supreme Court, CNCD underlined the fact that it took into account the evidence adduced by both sides. It then however noted that the applicants had filed a complaint and that the latter constituted effectively the only piece of evidence that the CNCD was required to examine; according to the CNCD, there was no need to either solicit further information from the applicants or present them with the account of events put forward by the secretary of the Town Hall so they could comment upon it and adduce, if need be, further proof of their allegations. The applicants respectfully submit that such a position is not only erroneous but also in sharp violation of the duties of the CNCD as laid down in Ordinance 77/2003 and especially Article 19.4 according to which the CNCD is required to provide "specialized assistance" to persons who are victims of discrimination.[17].

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[15] See paragraph 53 above.

[16] See *Dağtekin and Others v. Turkey,* Appl. no. 70516/01, judgment rendered final on 13 March 2008, paragraph 32: "The Court further reiterates that the principle of equality of arms, which is one of the elements of the broader concept of fair trial, requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports* 1997-I, p. 107, § 23). It further notes that the right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision."

[17] See exhibit 53 a and 53 b - defense pleadings lodged by the CNCD before the High Court of Cassation and Justice

66.b. Another issue that arose before the High Court related to the rules of procedure that the CNCD should follow when examining complaints of discrimination. In their defense pleadings before the High Court at the Supreme Court the CNCD contended that it did not have to follow the usual procedure prescribed by the Civil Procedure Code, except for the administration of evidence, because it had its own specialized procedure.[18] It failed however to adduce evidence that such a procedure did in fact exist didn't prove that such a procedure existed while it also failed to take into account that the provisions of the Civil Procedure Code concerning the administration of evidence are based on the principle that each part has the right and must have the opportunity to present its position and the evidence supporting their contentions. Once again, the applicants believe that his contention is erroneous: the provisions of H.G. 1194/2001, O.G. 137/2000, O.G. 27/2002, O.G. 2/2001, completed with the provisions of the Civil Procedure Code were more than enough in prescribing a concrete, specific and well detailed procedure to by followed by the CNCD. Before the High Court of Cassation and Justice CNCD explicitly admitted this too.[19]

67. The applicants note that the failure of the CNCD to solicit their opinion / ask them to present their evidence constituted a violation of the principle of equality of arms. The applicants note that the Court of Appeal implicitly admitted that there was a violation, as it allowed the applicants to propose witnesses (see above, paragraph 32). Furthermore, they note that the CNCD attached a very high probative value to the discussions its delegates had with the secretary of the Frata Town Hall. They did so notwithstanding the fact that the secretary was a party to the dispute (indeed, the defendant) and consequently had strong reasons to present a version of the events that would be favorable to her (and critical of the applicants), in order to ensure that no kind of proceedings would be brought against her for, by way of example, breach of duty.[20]

68. The applicants also cannot fail to notice that in reaching its decision, the CNCD relied equally heavily on the impromptu ethnically disaggregated data put forward the secretary of the Frata Town Hall concerning the allocations of birth allowances to Roma mothers in the years 2002, 2003 and 2004 (see above paragraph 19). The applicants note that no such data can be officially available since the ethnic identity of a newly born child is not included in his / her birth certificate, and the secretary recognized this too, later in her testimony before the Court of Appeal Cluj[21]. As a result, the secretary of the town either **illegally** and **unofficially** kept ethnically disaggregated data or the data she provided the CNCD with was in fact non-existent and constituted an attempt on her part to exonerate herself by the allegations of discrimination put forward by the applicants. In both cases however, the CNCD should have refused to admit (let alone endorse) such "data" as evidence without verifying the existence of real statistics. Furthermore, the applicants respectfully note that whereas their complaint before the CNCD related not only to the

[18] See exhibit 53 a – registered at the High Court on 14.11.2005
[19] See exhibit 53 b – registered at the High Court on 09.01.2007.
[20] The applicants note that such issues arise frequently in cases of police abuse. In such cases, the Court has rendered it clear that domestic authorities should be very critical when assigning probative value to persons directly or indirectly related to the incident in question (e.g. colleagues of the police officer charged with ill-treatment or relatives of the plaintiff). See *Stoica v. Romania,* Appl. no. 42722/02 judgment of 4 March 2008, paragraph 73; see also *Ognyanova and Choban v. Bulgaria,* Appl. no. 46317/99*,* judgment rendered final on 23 May 2006, at paragraph 99.
[21] See exhibit 45, op. cit.

newly born child benefit (that none of them received, save the fifth applicant and only in relation to her second child), but also to the other two benefits (the child upbringing allowance and the allowance paid to families with more than one child), the CNCD failed to address them, presumably because these benefits had been paid. What however the CNCD failed to investigate and ascertain (and this was an important aspect of the applicants' complaint) was that these benefits were granted only when the (abusive) requirements put forward by the secretary were met. Instead of the CNCD therefore referring to this as evidence that the applicants' allegation were in fact well-founded, it dismissed it by noting that these benefits had been granted and hence there was no cause to answer. At the same time, the CNCD proceeded at times to a very superficial examination of the applicants' allegation. Thus, in relation with Adriana Paula Boroş (the third applicant) the CNCD held that she was not allowed to register the application for the newly born benefit because she had her home address in Cluj-Napoca and she should ask there for this benefit. CNCD omitted to search the allegation of the applicant that she was living in Frata and that her home address from Frata was legally registered in her identity card (valid at that time).[22] In the same time, in relation to Julieta Lenuta Lacatus (the fifth applicant) the CNCD held that she received the newly born benefit for her second child, so her complaint was unsubstantiated, omitting to take into consideration that she complained for not receiving this benefit for her first child.[23]

69. The applicants recall that under Romanian law, they had a right to bring forward an administrative complaint before the Director of the Collegium of the CNCD, challenging the CNCD's decision. They duly did so but they did not receive an answer from CNCD; indeed, it would be only during the proceedings before the Cluj Court of Appeal that the answer from the Collegium of the CNCD would appear as part of the CNCD's file before the Court of Appeal. This prompted them to file an administrative complaint with the Court of Appeal of Cluj which was capable of fully reviewing the decision of the CNCD, both on legal and on factual grounds. In this respect, the applicants would like to reiterate that even if an administrative body does not meet the minimum criteria of objectivity and impartiality and hence does not qualify as an "impartial tribunal" for the purposes of Article 6.1, the existence of a court that will freshly examine the dispute and will be able to review all aspects of it will ensure compliance with the requirements of Article 6.1.[24] By logical extension therefore, the applicants maintain that a compliance with Article 6 almost inescapably implies compliance with Article 35 of the Convention in that a remedy that conforms to Article 6.1 of the Convention constitutes an "effective remedy" that needs to be exhausted.

70. To this effect, the applicants respectfully note that the Cluj Court of Appeal did implicitly acknowledge that the procedure before the CNCD was presented certain

[22] See exhibit 46.
[23] See exhibit 42 (the complaint addressed to CNCD) and exhibit 47 (the Decision 165 from 8 June 2004 of CNCD).
[24] See *Kostadin Mihaylov v. Bulgaria*, *op. cit.,* at paragraph 38: "Therefore, in order for the obtaining situation to be in compliance with Article 6 § 1, the commissions' decisions should have been subject to review by a judicial body having full jurisdiction." See also *Tsfayo v. UK,* op. cit, paragraph 42: "The Court recalls that even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1"

procedural shortcomings. Thus, the Court of Appeal allowed the applicants to propose witnesses to be examined while it also called upon the CNCD to do the same.

71. Unfortunately however, the Cluj Court of Appeal failed to address the issues relating not only to the procedure followed by the CNCD when investigating the applicants' complaint but also failed to perform an objective and effective assessment of the evidence before it.

72. Thus, the Court of Appeal failed to take into account numerous pieces of evidence put forward by the applicants. More specifically, the applicants brought forward evidence that they changed their I.D. cards (the first applicant, see paragraph 3 above), that they proceeded to officially register their marriage (the second and fifth applicants, paragraphs 5 and 8); that they had brought an action against the common law husbands (third and fourth applicants, paragraphs 6-7) - it is difficult to imagine why the applicants would have embarked on such actions merely on a whim. Rather, this evidence created at least a *prima facie* proof that they had indeed been asked to do so, contrary to the relevant legal provisions – at the very least, the applicants believe, the CNCD and the courts should have *proprio motu* launched an inquiry into why they (the applicants) undertook all these actions when they were clearly not required by law. The Cluj Court of Appeal nevertheless failed to examine this issue and merely asserted that it had not been convinced beyond doubt[25] that any act of discrimination had taken place nor had the applicants adduced evidence that the same (illegal) conditions were imposed on non Roma women. It also failed to take into account that even in the cases where certain of the applicants were in fact granted the relevant benefits, this happened only after they had complied with the requirements put forward by the secretary: the most indicative case here is that of applicant Julieta Lenuta Lacatus (the fifth applicant – see above paragraphs 8 and 24): as the CNCD noted (and the judicial authorities upheld it), she actually]received the newly born child allowance and as result she could not claim that she was a victim of discrimination. The authorities however did not notice that she received the benefit **only** in relation to the second child and **only** after she had registered her marriage – indeed, her anguish not to loose the benefit in relation to the second child was so great that she registered her marriage one day before giving birth.[26] At the same time however, it did acknowledge that the secretary of the Frata Town Hall had failed to follow the administrative procedures relating to the lodging of applications for the granting of the birth allowance; more specifically, the Court of Appeal accepted that the secretary orally denied accepting incomplete applications (which would be registered and hence it would be easy to ascertain when the applicants visited the Frata Town Hall).[27] In so doing however, it partially accepted the account of the events put forward by the applicants who have been claiming since the beginning of the proceedings that the secretary of the Town Hall refused to register their application or inform them in writing of the additional documents that they would have to procure in order for their applications to be registered.

73. The applicants are aware that in general the issues of admissibility and assessment of evidence are matters for the domestic courts.[28] On the other hand, the Court has rendered

[25] See above, paragraph 34.
[26] See above, paragraph 8.
[27] See above, paragraph 34.
[28] See among the many authorities *Kolláth v. Hungary*, Appl. no. 15509/05, judgment of 27 November 2007.

it clear that it will review alleged errors in order to ascertain if they infringed the applicants' rights under the Convention. In doing so, the Court might have recourse *inter alia* to the failure of domestic authorities to establish all the surrounding circumstances and / or sufficiently assess the credibility of conflicting statements / versions of events.[29]

74.. One of these grounds, in the context of Article 6, relates to whether crucial arguments put forward by the applicant were addressed by the domestic courts. Although the latter are not enjoined to provide the potential applicant with an exhaustive answer to each and every argument they present, they should specifically deal with these issues. A mere incantation by the domestic court to the effect that the impugned decision is legitimate will fail to satisfy this requirement. Indeed, the Court in the application of *Burzo v. Roumanie* proceeded to find a violation of the right to a fair trial under Article 6.1 and held that

> "Eu égard aux considérations qui précèdent, la Cour estime que la cour d'appel de Cluj, dans l'arrêt du 12 juillet 2001, n'a pas procédé à un examen approfondi et sérieux des moyens du requérant conformément aux exigences d'un procès équitable. Or, même si les tribunaux ne sauraient être tenus d'exposer les motifs de rejet de chaque argument d'une partie (*Ruiz Torija c. Espagne*, arrêt du 9 décembre 1994, série A n° 303-A, § 29), ils ne sont tout de même pas dispensés d'examiner dûment et de répondre aux principaux moyens que soulève celle-ci (voir, *mutatis mutandis*, *Donadze*, précité, § 35)."[30]

The applicants respectfully note that in that case, the Romanian government had admitted that domestic courts are enjoined to adequately examine all the arguments put forward by the parties to a trial.[31]

75. In the instant case, the Cluj Court of Appeal (and, in cassation, the High Court of Cassation and Justice) failed to assess the aforementioned points raised by the applicants but merely stated that the applicants had failed to submit their applications for the birth allowance within the deadlines laid down by law and hence the reason they were not granted was not (as they suggested) that they had been discriminated against but rather because they failed to conform with the objectively neutral deadlines. At the same time however, it also acknowledged that the Frata Town Hall secretary had, by not registering the applications by the applicants and only orally advising them, failed to perform her duties. Yet this was one of the main applicants' contentions; the applicants did not contend that extended deadlines should be available to them on grounds of their ethnicity (as the Court of Appeals appears to insinuate) but rather that the secretary of the Frata Town Hell, by **illegally** (i.e. orally) asking them to comply with preconditions **not laid down by law**, prevented them from meeting these deadlines. As it has been seen, the Cluj Court of Appeal admitted that the secretary had been negligent in the discharge of her duties since, instead of registering the applications and then the mayor would either grant the benefits or reject them (but adducing reasons for so doing), orally asked the applicants to bring forward the missing documentation – indeed, the Court of Appeals

[29] See *mutatis mutandis M.C. v. Bulgaria*, Appl. no. 39272/98, judgment of 4 December 2003, paragraphs 176-187.
[30] Appl. no. 75240/01, judgment of 4 March 2008, at paragraph 46
[31] Ibid, paragraph 37: "Le Gouvernement reconnaît que le droit à un procès équitable implique l'obligation, pour les tribunaux internes, d'examiner de manière effective les moyens et arguments des parties."

notes that due to the failure of the secretary to adequately discharge her duties, some of the applicants were not entitled any more to the birth allowance. At the same time however, the Court of Appeal held it was not convinced that the secretary had asked the applicants to comply with requirements not laid by law. Nevertheless, in so deciding, the Court of Appeal failed to take into account that the applicants had proceeded to comply with these requirements (e.g. file complaints against their common law husbands for alimony, registered their marriage etc), something that they clearly would not have done for any other reason other than having been asked to do so by the secretary. Furthermore, in rejecting the applicants' arguments to that effect, the Court uncritically assigned full probative value to the denial of the secretary that she made such requests to the applicants, notwithstanding that the secretary was a party to the dispute and had committed serious breaches of duty (such as not registering the applicants' applications as well as presented the CNCD with non-existent ethnically disaggregated data) and hence her testimony should be read with great circumspection. It is noted that the Court also failed to attach particular importance to the statement made by the secretary to the effect that she has been serving in her position for more than ten years and is therefore highly experienced, all the more since the last years she has been regularly attending courses for civil servants[32]. The Court also failed to call upon the CNCD (or the secretary that the CNCD proposed as a witness) to provide additional data, in the form for example of birth allowances granted to single mothers,[33] data that would counter the assertion of the applicants to the effect that the fulfillment of additional requirements was exacted from them. It also failed to draw to the CNCD's attention that the latter had for all intents and purposes failed, in the face of strong *prima facie* evidence, to swift the burden of proof to the secretary of the Frata Town Hall but had limited itself to a perfunctory and cursory examination of the applicants' complaint; indeed, the applicants respectfully maintain that the failure of the CNCD to shift the burden of proof constitutes one of the major shortcomings of its investigation, shortcoming that was however not taken into account by the two domestic courts that were seized of the case. The applicants would like however to note approvingly that the Court of Appeal does appear to imply in its judgment that if it was established that the secretary had exacted additional requirements from the applicants (namely to be married or to sue their men), then this would be discriminatory. They believe that this admission is particularly important when assessing the issue of the violation of Article 14 of the Convention (see below, paragraph 82).

76. As it has been noted, the above shortcomings were not remedied by the High Court of Cassation and Justice which effectively rubberstamped the Court of Appeal's decision. In fact, proceedings before the High Court of Cassation and Justice, the applicants note that they raised a very important issue which was not however addressed even summarily by the High Court. More specifically, the applicants drew the High Court's attention to the fact that in the meantime, Law 324/2006 came into effect, introducing into the domestic legal order the provision for the switching of the burden of proof provided for in Article 8 of the 2000/43/EC directive. The applicants therefore called upon the High Court to either file a reference for a preliminary ruling under Article 234 of the EC Treaty or, in

[32] See exhibit 53, defense pleadings lodged by the CNCD before the High Court of Cassation and Justice.

[33] See *mutatis mutandis E.B. v. France,* [GC], Appl. no. 43546/02, judgment of 22 January 2008, paragraph 74: "The Court observes, moreover, that the Government, on whom the burden of proof lay (see, *mutatis mutandis*, *Karner v. Austria*, no. 40016/98, §§ 41-42, ECHR 2003-IX), were unable to produce statistical information on the frequency of reliance on that ground according to the – declared or known – sexual orientation of the persons applying for adoption, which alone could provide an accurate picture of administrative practice and establish the absence of discrimination when relying on that ground."

the case that it felt that the provisions of the new Law were applicable in the case at hand, to apply them.[34] The applicants respectfully request that this point was crucial for the determination of their claims: had the Court held that the new provisions were applicable then it should have to either remit the case for a fresh investigation or directly call upon the CNCD to adduce proof to the effect that the impugned actions were not discriminatory. The Court however failed to do so and its judgment rests silent on this issue, neither approving nor rejecting either of the two alternatives put forward by the applicants. It is also noted that, as demonstrated by the European Court of Human Rights caselaw, the coming into effect of pertinent regulation during the period where proceedings are pending before the domestic court and / or the European Court of Human Rights does not automatically preclude it from have a bearing on a case that is pending. Thus in the *Stoica v. Romania* case, the European Court of Human Rights dismissed the applicant's argument concerning violations of Article 6 and 13 in relation to the impossibility of challenging the findings of the military prosecutor, notwithstanding that, as the Court noted, the relevant remedy was not available when the applicant had filed his application before the Court.[35]. By analogy therefore, the applicants believe that the High Court should have provided them with a clear and unequivocal answer on the issue of applicability of Law 324/2006. In this respect, the applicants note that the High Court failed to note into account that also in the meantime, Protocol 12 to the European Convention of Human Rights had come into effect, something that the applicants believe it should have done *proprio motu.*[36] As the European Court of Human Rights has noted in a number of cases,[37] courts should address all the main issues raised by the applicants in their submission and especially so if these issues are of crucial importance. Both issues referred to above (namely the applicability of Law 432/2006 and of Protocol 12) were crucial issues that should have been addressed by the High Court.

76.a. In conclusion, the applicants respectfully believe that the proceedings before the CNCD, the Court of Appeal and the High Court of Cassation and Justice presented numerous procedural shortcomings in violation of their right to a fair trial.

77. The applicants respectfully note that the proceedings before the prosecutor's office attached to the Turda Court of First Instance, before the Prime prosecutor of this office and before the Turda Court of First Instance were also marred by procedural deficiencies in breach of Article 6 of the Convention. As explained in detail in the paragraphs 37-55,

- the prosecutor first made the investigation without observing that the complaint of the applicants referred to two persons (the secretary and the mayor) and not only one (the secretary) and without asking the applicants to propose any proves[38]

- the prosecutor completed the first investigation after she was obliged to do so by the court[39] without observing that she was incompatible and another prosecutor should do this.[40]

[34] See exhibit 54, memorandum filed by legal counsel for the applicants before the High Court of Cassation and Justice.
[35] *Stoica v. Romania,* op. cit,, paragraphs 87-90 and 103-110.
[36] Protocol 12 came into force regarding Romania on 1 November 2006 (information available at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=1&DF=6/3/2008&CL=ENG)
[37] In relation to Romania, see e.g. *Burzo c. Roumanie,* op, cit.
[38] See exhibit 54, op.cit., paragraph 38 above.
[39] See exhibit 59, op.cit.

- the prosecutor obeyed the decision of the court which said that she should take declarations from the husbands of the applicants and from the other witness proposed by the applicants, but after doing so, she didn't analyze these declarations, but just annulled them as being made by persons who were closed to the applicants – see paragraph 41;

- the new prosecutor designed to complete the investigation (as the first one was incompatible) did not perform a single act of investigation, but took the acts of investigation made by the previous one as valid and practically copied the old resolution.[41]

- the Prime Prosecutor never answered to the complaints of the applicants in the time limit prescribed by the law.[42]

- the Turda Court of First Instance rejected all the complaints of the applicants (except the first one) against the acts issued by the prosecutor's office,[43] misinterpreting or applying the criminal procedure rules

All these breaches of the legal criminal procedure were established by the Cluj Tribunal which had admitted all the appeals of the applicants against the decisions of the Turda Court of First Instance, accepting the applicants' arguments that these decisions were illegal.[44] Despite the findings of the Cluj Tribunal however, the Turda Court of First Instance continued to treat the applicants' case with a great disrespect of the legal procedural provisions. To this effect, the applicants respectfully note that the Court is very critical of the remittal of cases for re-examination. Indeed, according to the Court in *Matica v. Romania,*

> " […] the Court has already found that, although it is not in a position to analyze the juridical quality of the case-law of the domestic courts, since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings discloses a serious deficiency in the judicial system (see *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003). Moreover, this deficiency is imputable to the authorities and not the applicants."[45]

Violation of Article 6 on grounds of lack of a reasoned judgment

78. The applicants respectfully note by implication, the failure of the domestic authorities and the courts to address either *ex officio* or following the applicants' submissions the main points of the case entails that the judgments issued have no reference to them. As a result, by failing to take into account this point and adducing even summary reasons for their rejection, the domestic authorities (and especially the High Court of Cassation and

[40] See exhibit 61., op.cit, paragraph 41 above.
[41] See exhibit 67, op.cit. paragraph 46 above.
[42] See paragraphs 39 and 43 above. Art. $278^{.1}$ of the Criminal Procedure Code establishes that the Prime Prosecutor must examine the complaint and issue a response to it within 20 days.
[43] See exhibits 64, 69 and 72., paragraphs 44, 48, 51 and 53.
[44] See exhibits 65 (paragraph 45 above), exhibit 70 (paragraph 49), and exhibit 73 (paragraph 52 above).
[45] Appl. no. 19567/02, judgment of 2 November 2006, paragraph 24.

Justice that was seized of the case at the last instance) have violated the applicants' right to a reasoned judgment.

Alleged violation of Article 8

Applicability of Article 8 in the instant case

79. The applicants note that the Court has held that social benefits granted in order to help families towards the costs of upbringing fall within Article 8:

> "By granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision (see, *mutatis mutandis*, *Petrovic*, cited above, § 30). It follows that Article 14 – taken together with Article 8- is applicable." [46]

Violation of Article 8 on procedural grounds

80. The applicants respectfully note that the Court has accepted early on its judicial history that Article 8 might entail procedural obligations for state authorities. Thus in the application of *McMichael v. the United Kingdom,* the Court referred to the

> " […] difference in the nature of the interests protected by Articles 6 para. 1 and 8 (art. 6-1, art. 8). Thus, Article 6 para. 1 (art. 6-1) affords a procedural safeguard, namely the "right to a court" in the determination of one's "civil rights and obligations" (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, para. 36); whereas not only does the procedural requirement inherent in Article 8 (art. 8) cover administrative procedures as well as judicial proceedings, but it is ancillary to the wider purpose of ensuring proper respect for, inter alia, family life (see, for example, the B. v. the United Kingdom judgment of 8 July 1987, Series A no. 121-B, pp. 72-74 and 75, paras. 63-65 and 68). The difference between the purpose pursued by the respective safeguards afforded by Articles 6 para. 1 and 8 (art. 6-1, art. 8) may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (art. 6, art. 8) (compare, for example, the above-mentioned Golder judgment, pp. 20-22, paras. 41-45, and the O. v. the United Kingdom judgment of 8 July 1987, Series A no. 120-A, pp. 28-29, paras. 65-67)."[47]

81. In other cases, the Court has held that procedural shortcomings not giving rise to issues under Article 6 might do so under Article 8. Thus in *Roche v. the United Kingdom,* the Grand Chamber held that no violation of Article 6 arose; it then proceeding to find a violation under Article 8 of the Convention as

> "[under the circumstances of the case] a positive obligation arose to provide an "**effective** and accessible procedure" enabling the applicant to have access to "all relevant and appropriate information" (*McGinley and Egan* judgment, at § 101)

[46] See *Niedzwiecki v. Germany*, Appl. no. 58453/00, judgment rendered final on 15 February 2006, paragraph 31.
[47] Appl. no. 16424/90, judgment of 24 February 1995, paragraph 91.

> which would allow him to assess any risk to which he had been exposed during his participation in the tests (*Guerra and Others*, § 60). […] the Court considers that the State has not fulfilled the positive obligation to provide an **effective** and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him to assess any risk to which he had been exposed during his participation in the tests." [48]

The applicants respectfully note that, as it was noted in the *Roche* case by the Grand Chamber, it is not necessary that such procedures be judicial (at least in the context of Article 8). Indeed, according to the Grand Chamber,

> "The Court's judgment in *McGinley and Egan* did not imply that a disclosure procedure linked to litigation could, as a matter of principle, fulfill the positive obligation of disclosure to an individual, such as the present applicant, who has consistently pursued such disclosure independently of any litigation. Consistently with judgments in *Guerra and Others* and *Gaskin* and as the applicant argued, it is an obligation of disclosure (of the nature summarized in paragraph 162 above) not requiring the individual to litigate to obtain it."[49]

82. In this respect, and in the unlikely case that their arguments regarding the application of Article 6 in relation to the proceedings before the CNCD are not accepted, the applicants contend that at the very least, the proceedings before the CNCD would allow them to obtain a determination as to whether they had been discriminated against in their access to social benefits, regardless of the need to engage in further litigation. In other words, bringing a complaint before the CNCD would in principle constitute, for the purposes of the procedural aspect (and more specifically, of the positive obligation on the part of the state) of Article 8, an accessible and potentially effective procedure capable of affording an answer to the applicants as to whether they had been discriminated against or not, all the more since this determination could be subjected to the scrutiny of courts – and indeed, of the High Court of Cassation and Justice.

83. In relation to their complaint however, and due to the numerous shortcomings already recounted (see paragraphs 65 to 76 above), the procedure cannot be said to have been effective. As a result, the applicants respectfully contend that this constitutes a violation of the procedural aspect of Article 8.

Violation of Article 8 on substantive grounds

83. The applicants respectfully allege a substantive violation of Article 8 on the following two grounds.

84. Firstly, the applicants respectfully remind the Court that as they have claimed both in their complaint to the CNCD (and their later related submissions) as well as in their criminal complaint, they were in fact coerced to proceed to actions that had an adverse effect on their lives and to which they did not consent to. Thus, the first, the second and fifth of the applicants proceeded to formally marry their until then common law husbands and then register their weddings, while the third and the fourth of the applicants were

[48] Appl. no. 32555/96 [GC], judgment of 19 October 2005, paragraphs 162 and 167. Emphasis added.
[49] Ibid, paragraph 165.

effectively forced to initiate proceedings against their common law husbands in order to be able to meet the conditions put forward by the secretary and therefore qualify for the social benefits. As the applicants have consistently maintained, they would not have embarked on these courses of action but for the fact that they forced to by the insistence of the secretary. The fact that the applicants were in a very vulnerable position as they were in dire need of these benefits and had no means of challenging the secretary, together with the fact that the belief that these conditions were in fact legal was a widespread one, prevented them from doing anything other than complying with these requirements.

85. Secondly, the applicants note that during no stage of the domestic proceedings did the authorities / courts contend that they did not fall within the group of the beneficiaries that were entitled to the birth allowance benefit. As a result, the applicants respectfully maintain that they were automatically entitled to it, provided they met the various procedural requirements,

86. The applicants also note that they are not complaining about the existence of these procedural requirements (which constitute an interference with their right to a family benefit but which are in conformity with Article 8.2) nor are they for example suggesting that the deadlines should be longer. Rather, they contend that both the refusal of the secretary of the Frata Town Hall to register their applications and her asking them to comply with additional requirements not laid down by law constituted an interference with their right to the family benefits, an interference that ultimately prevented them from applying for the benefits within due time and that furthermore this interference was not "provided by law". Indeed, as it has been noted, the domestic courts did find that the secretary of the Frata Town Hall had failed to register the applicants' applications and had therefore discharged her duties negligently.

87. In the light of the above, the applicants call upon the Court to find a substantive violation of Article 8, for the first, second, third, fourth and fifth applicants, on grounds of the imposition upon them of conditions that constituted an interference amounting to a gross violation of their right to private and / or family life and secondly (in relation to all the applicants) on grounds of the failure of the secretary to register their applications in accordance with the rules of administrative procedure (which had as a result that there was no record of when they first visited the Town Hall and that the additional requirements which they were asked to meet were not put in writing) and the imposition on them of additional requirements that they had to meet – an interference with their right to the social benefits to which they were entitled. In both cases, the applicants note that these interferences were not provided by the relevant law. As a result, the applicants content that no need to examine the conformity of these interferences with the other criteria of Article 8.2 arises.[50]

Alleged violation of Article 1 Protocol 1 to the Convention

Applicability of Article 1, Protocol 1 in the instant case

88. The applicants note that in certain cases, the Court has proceeded to hold that social benefits might constitute "possessions" for the purposes of Article 1, Protocol 1 to the

[50] See *Driha c. Roumanie,* 29556/02, judgment of 21 February 2008, paragraph 33.

Convention.[51] They also note that recently the Court held that a military pension the amount of which was statutorily defined and to which the applicant was entitled to constituted a "possession" for the purposes of Article 1, Protocol 1; the Court then proceeded to find a violation of the said article as the Romanian courts had in fact illegally deprived the applicant of his possession by virtue of imposing upon him an obligation that was not laid down by law (indeed, the pertinent law provided that the applicant's pension should be granted tax-free).[52]

Violation of Article 1, Protocol 1

89. The applicants have already noted that they were effectively deprived of the benefit to which they were automatically entitled to because of the failure of the secretary of the Frata Town Hall to register their applications (which, as has been mentioned, could have led to their being rejecting but in case they would have been informed at a must faster time of the reasons for the rejection, whereas the domestic courts acknowledged that the secretary had failed to discharge her duties in this respect) as well as the imposition of additional requirements (that, as will be seen, were more likely to have an adverse impact on Roma rather than non-Roma) were not provided by domestic law. Yet it was precisely for these reasons that the applicants failed to meet the relevant deadlines.

90. In the light of the above, the applicants respectfully believe that they did not obtain the benefit because they did not file the application within the prescribed time limit. Their failure however is not attributable to them but rather to the twofold illegal behavior of the secretary of the Frata Town Hall. As a result, they respectfully call upon the Court, should the latter examine the application under Article 1, Protocol 1, to find that they were deprived of their possessions due to circumstances not provided for by law.

Alleged violation of Article 13 in conjunction with Articles 6, Article 8, Article 1 Protocol, read alone or in conjunction with Article 14

91. The Applicants respectfully submit that the present case demonstrates clear violations of Article 13 in conjunction with Articles 8, Article 1 Protocol 1 read alone or in conjunction with Article 14 to the Convention.

General principles

92. The applicants note that the Court has consistently held that Article 13 is in effect a right subsidiary to the other rights protected under the Convention; the finding of a violation of one of the other rights is not a prerequisite for the finding of a violation of Article 13.[53] All the applicant has to do is to raise an arguable claim that one of his / her substantive rights has been violated. Furthermore, the Court has accepted that the content of Article 13 cannot be delineated precisely; thus, the scope of a state's obligations flowing from Article 13 will depend on the nature of the applicant's complaint.

[51] See e.g. *Willis v. the United Kingdom,* Appl. no. 36042/97, judgment rendered final on 11 September 2002.
[52] See *Driha c. Roumanie,* op. cit.
[53] See among many authorities, *Klass v. Germany,* Appl. no. 15473/89, judgment of 22 September 1993.

92.a. Additionally, in order for a remedy (or for that matter, an aggregate of remedies) to be in conformity with Article 13, it has to be effective both in practice and in law.[54] An aspect of this requirement is that the exercise of a remedy deemed to comply in principle with Article 13 must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.[55]

Application of the above in the instant case

In relation to the excessive length of the proceedings (Article 6.1)

93. The applicants respectfully maintain that the Romanian legal order does not provide for any remedy in relation to the excessive length of both the proceedings before the CNCD and the criminal proceedings. They note that in *Kudła v. Poland* case, the Court (sitting in as a Grand Chamber) held that in relation to complaints regarding the excessive delays of proceedings, a remedy will be considered either if it allows for the prevention of the violation or its continuation (e.g. by providing for a remedy whereby the applicant could ask for a speedier determination of his case) or if it allows for compensation, once the violation had taken place. The applicants respectfully contend that no such proactive or reactive remedies are afforded to them by the Romanian legal order; as a result, the applicants do not have access to a remedy under Article 13 that would allow them to enforce their right of having their case heard "within a reasonable time" as guaranteed by Article 6.1 of the Convention.

In relation to complaint regarding the discrimination they suffered in their attempt to secure their social benefits and challenge the illegal and discriminatory conditions imposed on them

94. The applicants would like once again to stress that their complaint was not merely a complaint relating to their loss of the birth benefits; rather, it was a complaint relating to their not securing the granting of the benefits on grounds of the discrimination they sustained. In this respect, the applicants note that in numerous cases the Court has drawn the state authorities' attention to the fact that racism is a particular affront of human dignity and that the authorities should use every means at their disposal to fight against it.[56] Thus in the seminal *D.H. and others v. the Czech Republic,* the Court (sitting in Grand Chamber formation) held that

> "Discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing

[54] See *Kudla v. Poland,* [GC] Application no. 30210/96, judgment of 26 October 2000.
[55] *Cobzaru v. Romania*, Appl. no. 48254/99, judgment rendered final on 26 October 2007, paragraph 80.
[56] In relation to Romania, see *mutatis mutandis Stoica v. Romania,* Appl. no. 42722/02, judgment of 4 March 2008, paragraph 117: "Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII)."

> democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (*Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-...; and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-...). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (*Timishev*, cited above, § 58)."[57]

As a result, they believe that their decision to file a complaint with the CNCD was rational for the following reasons. Firstly, as the Romanian Government itself through its representative argued on several occasions, the remedy provided by the Council is an effective remedy within the meaning of Article 13 of the Convention. In a submission to the Court concerning another case and dated 24 May 2005, the Government made the following statement, which was joined by ample argumentation[58]:

> "*Even if [the Council] is not a judicial [authority], the Government deems that it complies with the requirements of Article 13 of the Convention taking into consideration its powers, organizations and the binding effect of its decisions."*

94.a. Secondly, in its most recent report on Romania,[59] ECRI noted that the Criminal Code in force "does not include any provisions defining ordinary offences with a racist motive as racist offences". Furthermore, it observed that members of the judiciary "are still largely unaware of anti-racism issues". ECRI drew attention to the fact that in 2005 when the report was documented, Romania still had no case-law on discrimination issues, since "judges, prosecutors and lawyers have not included the issue of discrimination in their modus operandi, since they are not aware of the legislation". ECRI therefore recommended that the 2005-2007 Strategy for Judicial Reform "include a clear and continuous policy for training members of the judiciary regarding the legislation on discrimination and its implementation".[60]

95. The applicants maintain that they presented before the domestic authorities a significant body of evidence attesting that their allegations to the effect that they were victims of discrimination in their attempt to receive the benefits to which they were entitled were at least arguable. Nevertheless, the domestic authorities ultimately failed to adequately assess, for the reasons extensively set out in the present application, this body of evidence and consequently failed to ensure that the available remedies were effective not only in theory but also in practice. This failure on the part of the Romanian state is, in their opinion, in violation of Article 13 in relation to the discrimination arguments put forward by the applicants under Articles 8 and Article 1, Protocol 1, read in conjunction with Article 14.

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[57] Appl. no. 57325/00, judgment of 13 November 2007, paragraph 176.
[58] See exhibit 76, *Written Observations on Admissibility and Merits*, 24 May 2005, concerning Application no. 63108/00 *Jehovah's Witnesses Religious Organization v. Romania*, p. 23-26.
[59] European Commission against Racism and Intolerance, *Third Report on Romania*, adopted on 24 June 2005 and made public on 21 February 2006, available at http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/Romania/Romania_CBC_3.asp
[60] Ibid, paragraphs 27, 28 and 34,

96. Furthermore, the obtaining a positive decision from the CNCD (namely that they had indeed been discriminated against) would be for any subsequent proceedings they would bring forward. Similarly, the negative decision issued by the CNCD renders highly problematic, if not illusory the potential for them to be successful in any other proceedings as courts / judicial officials subsequently seized of the case would understandably attach an increased level of significance to the decision of the CNCD. This is not only because the CNCD is a body commanding high respect by Romanian authorities but also because the CNCD's assessment of the facts in the instant case were in fact approved and sanctioned by the Cluj Court of Appeal and ultimately the High Court of Cassation and Justice. The applicants refer *mutatis mutandis* to *Cobzaru v. Romania* where the Court held that

> " […] For the reasons set out above no effective criminal investigation can be considered to have been carried out in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 3 (see *mutatis mutandis, Buldan v. Turkey,* no. 28298/95, § 105, 20 April 2004; *Tanrıkulu v. Turkey*, no. 23763/94, § 119, ECHR 1999-IV; and *Tekdağ*, cited above, § 98). Consequently, any other remedy available to the applicant, including a claim for damages, had limited chances of success and could be considered as theoretical and illusory, and not capable of affording redress to the applicant. While the civil courts have the capacity to make an independent assessment of fact, in practice the weight attached to a preceding criminal inquiry is so important that even the most convincing evidence to the contrary furnished by a plaintiff would often be discarded and such a remedy would prove to be only theoretical and illusory (see *Menesheva v. Russia*, no. 59261/00, § 77, 9 March 2006, and *Corsacov v. Moldova*, no. 18944/02, § 82, 4 April 2006). This is illustrated by the fact that among the numerous examples of domestic case-law submitted by the Government, some dating back to the 1970s, there has not even been one case showing that a civil court would not consider itself bound by a decision of the prosecuting authorities finding that the State agents had not committed ill-treatment. The Court can therefore conclude that, in the particular circumstances of the case, the possibility of suing the police for damages is merely theoretical."[61]

97. In the light of the above, the applicants respectfully maintain that the failure of the Romanian authorities to adequately investigate their complaint will have a negative effect on their pursuing additional remedies, thereby giving rise to a violation of Article 13.

Alleged violation of Article 14 and Article 1, Protocol 12

General issues regarding discrimination against Roma in Romania

98. The applicants note that their application is submitted following the landmark Gran Chamber judgment in the case *of D.H. and others v. the Czech Republic*. Indeed, the applicants note that they belong to an ethnic group that, in the words of the Court in the *D.H. and others v. the Czech Republic:*

[61] Appl. no. 48254/99, judgment rendered final on 26 October 2007, paragraph 83.

> "[…] although they have been in Europe since the fourteenth century, often they are not recognized by the majority society as a fully-fledged European people and they have suffered throughout their history from rejection and persecution. This culminated in their attempted extermination by the Nazis, who considered them an inferior race. As a result of centuries of rejection many Roma communities today live in very difficult conditions, often on the fringe of society in the countries where they have settled, and their participation in public life is extremely limited."[62]

99. The above holds true for the Roma community of Romania; the present application comes in the wake of a series of Court judgments relating to the widespread discrimination and racism the Roma in Romania have experienced, ranging from pogroms[63] to racially motivated police abuse.[64] While examining these applications, the Court paid particular attention to the various NGO and INGO reports concerning the situation of Roma in Romania in general and concerns about increased instances of police abuse in particular.

100. The applicants note that the same reports the Court took into account in the aforementioned cases contain extensive references to the other aspects of everyday life where Roma experience discrimination. Excerpts from these reports are included in a non-exhaustive list attached as exhibit 77 to the present application.

101. Recent reports appear to highlight more the issue of interaction between Roma and state officials, especially with the ones with which Roma are likely to come more often in contact with, such as for example town hall officials. The same reports shed more light on the increased level of dependency of Roma on social benefits, especially benefits related to children.[65] Lastly, the applicants note that when their case was pending before the High Court of Cassation and Justice, Protocol 12 to the European Convention came into effect. As a result, they respectfully contend that their allegation should also be examined in light of the free-standing principle of non-discrimination introduced by Article 1 of the Protocol.

Application of the above principles to the instant case

102. The applicants respectfully contend that at least some of the above findings ought to be known to the CNCD officials as well as the courts' judges, who should have taken them into account in their deliberations. To this end, the applicants refer approvingly to the Court's dicta in the *Cobzaru* case.[66]

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[62] Op. cit., paragraph 13.

[63] See Appls. nos. 41138/98 and 64320/01, *Moldovan and others v. Romania,* judgment rendered final on 30 November 2005, Appl. no. 57884/00 *Kalanyos and others v. Romania,* judgment rendered final on 26 July 2007, Appl. no. 57885/00 *Gergely v. Romania,* judgment rendered final on 26 July 2007.

[64] See *Stoica v. Romania,* op. cit. The latter constitutes the first case where the Court found a violation of Article 14 in conjunction with the substantive limb of Article 3 (the judgment has not become final yet). For similar cases see *Cobzaru v. Romania,* op. cit.

[65] See exhibit 78, Non-exhaustive list of specialized reports addressing focused issues such as dependency on social benefits, cultural characteristics of the Roma, relationships with local officials

[66] Op. cit., at paragraph 97: "However, the Court observes that the numerous anti-Roma incidents which often involved State agents following the fall of the communist regime in 1990, and other documented evidence of repeated failure by the authorities to remedy instances of such violence were known to the public at large, as they were regularly covered by the media. It appears from the evidence submitted by the

103. More specifically, the reports amply attest to the claims made by the applicants, to the effect that common law marriages are very common among Roma[67] and that child benefits are an important source of income for Roma families[68] The combined effect of these elements (each one of which is mirrored in the facts that give rise to the present application), together with the numerous procedural shortcomings and highly flawed assessment of evidence during the proceedings before the domestic authorities make it at the very least arguable that the applicants were in fact victims of discrimination, in the form of the illegal, abusive and discriminatory requirements imposed upon them by the secretary of the Frata Town Hall.

104. In this respect, the applicants would like to note that both the CNCD and the domestic courts appear to share their opinion to the effect that their allegations, had they been established, would have amounted to discrimination. More specifically, the applicants note that the CNCD did not reject their complaint as "manifestly unfounded" when it received it but rather proceeded to investigate it; in the end, it rejected it not because it considered that the allegations put forward by the applicants did not constitute indirect discrimination, but rather because they had not been established. Similarly, the judgments of both the Court of Appeal of Cluj as well as the High Court of Cassation and Justice indicate that they both considered that these additional requirements were not only illegal but also indirectly discriminatory. Thus for example, the Cluj Court of Appeal noted that "The exclusion of some of the plaintiffs from the recognition of the right to the newly born children allowance was not based **on discrimination on the criterions invoked**, but based and justified on other considerations, but on the way the local public administrative authority through the secretary understood to apply the legal norms."[69] The applicants would like in this respect to note that Romanian authorities have admitted that Roma, due to cultural (as well as financial) reasons, often live in unofficial "common law" marriages and as a result do not enjoy full legal protection / access to the entire range of social security benefits. Indeed, one of the Romanian MPs (of Roma ethnic origin) who proposed the draft bill according to the terms of which "common law" marriages (i.e. where a couple lives together without this cohabitation however having assumed a legal form) will be equated to registered marriages, stated during an interview that he was aware of the problem (i.e. that many Roma couples fail to register their wedding and as a result are not entitled to certain benefits) and hence wanted to put these couples on an equal footing with couples that had formally registered their marriage.[70]

105. In conclusion, the applicants maintain that they have produced ample evidence that in general, Roma in Romania are subjected to discrimination in general and in their

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applicant that all these incidents had been officially brought to the attention of the authorities and that as a result, the latter had set up various programmes designed to eradicate such type of discrimination. Undoubtedly, such incidents, as well as the policies adopted by the highest Romanian authorities in order to fight discrimination against Roma were known to the investigating authorities in the present case, or should have been known, and therefore special care should have been taken in investigating possible racist motives behind the violence."

[67] See exhibit 78, op. cit. page 1, where it is noted that 36% of the Roma aged 18-39 that was questioned lived in non-registered marriages while the same percentage for non-Roma was only 9%

[68] Ibid, page 3.

[69] Exhibit 52, page 5. Emphasis added. It is reminded that the High Court of Cassation and Justice effectively upheld this reasoning.

[70] Exhibit 79, article published in Curierul National, 7 June 2003. The bill (158/26.03.2002) is currently pending before the Romanian Parliament (see http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=3074)

access to social benefits in particular. They also contend that they have raised a substantiated claim that Roma are more likely to be adversely affected by the additional requirements put forward by the secretary, whereas their vulnerable position vis-à-vis her effectively meant that they had no way to react, other than follow her instructions. The strongest proof however that these requirements did amount to discrimination is to be found in the two court judgments; the applicants would like to stress once again that both courts premised their decision not on the fact that the impugned behavior of the secretary was not discriminatory[71] but rather that the applicants' allegations had not been established. Given however the numerous procedural shortcomings of the various proceedings launched by the applicants (and especially the refusal of the High Court to respond to the applicants' request whether the then newly enacted provisions regarding the switch of the burden of proof were applicable), the latter have valid reason to content that the findings of the domestic authorities have been erroneous on this point.

106. The applicants believe that all these sufficiently reliable, significant and complementing elements combined raise a strong presumption that they (the applicants) have indeed been victims of discrimination both in their family / personal life (for those applicants that had to officially marry their common law husbands or who had to file proceedings against them) and in their access to the social benefits to which they were automatically entitled. As a result, the applicants respectfully contend that the burden of proof should now be transferred to the respondent government in order to adduce evidence rebutting this presumption. As the applicants are of the opinion that no such evidence is forthcoming as the difference in treatment was both illegal and apparently served no legitimate aim, they respectfully call upon the Court to find a violation of Article 14 in conjunction with Articles 6, 8, 13 and Article 1 Protocol 1.[72]

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

Final Decisions

107. It is reminded that the applicants pursued two different sets of proceedings. In relation to the complaint lodged with the CNCD, the final decision should be considered that of the High Court of Cassation and Justice, pronounced on 31 May 2007. We therefore submit that the starting point to be taken into consideration for the six months time limit rule is (at the earliest), the 31 May 2007. A pre-application was filed in this case on 28 November 2007, within the six months time limit. On 6 December 2007 the Court informed the applicants that the pre-application letter had been registered and assigned Reg. No. 53183/07 (Negrea and Others v. Romania).

108. Turning to the criminal proceedings, the applicants respectfully note that as there has no been any, let alone final, decision, the six months time limit has not started to run.

[71] Had that been the case, the courts would have stricken out the case as manifestly ill-founded.

[72] See *D.H. and others v. the Czech Republic,* op. cit., paragraph 196: "… difference in treatment is discriminatory if "it has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see, among many other authorities, *Larkos v. Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I; and *Stec and Others*, cited above, § 51). Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.

VI. STATEMENT OF THE OBJECTIVE OF THE APPLICATION

109. The applicants request the European Court of Human Rights to find violations of their rights protected under Articles 6, 8, Article 1 Protocol 1, Article 13 in conjunction with Article 8 and Article 1 Protocol 1 together with Article 14, and Article 14 taken together with Articles 8, Article 1 Protocol 1 and Article 13 of the Convention, and to adjudicate an effective remedy and just compensation for such violations by the Respondent Government.

VII. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

110. This complaint has not been submitted to any other international procedure of investigation or settlement.