European Court of Human Rights

Council of Europe
Strasbourg, France

Application

Under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention') and Rules 45 and 47 of the Rules of Procedure of the Court.

Request for Expedition

Applicants request that this European Court of Human Rights (the 'Court') consider their claims in the most expeditious possible manner, given their urgency. As the Court will see below, this application concerns claims of infringement of human rights in the disproportional assignment of Romani children in the Czech Republic to special schools for the mentally retarded. As each day passes, Applicants and other Roma students wrongly assigned to such schools fall academically farther and farther behind their peers in basic school. The educational, psychological and emotional burdens mount regularly, and the costs of compensatory education to overcome the damage caused by special schools climb commensurately.[1]

1. THE PARTIES

A. The Eighteen Applicants:

The names and identities of the 18 applicants have been removed, for reasons of confidentiality. At the time the Application was filed, they were all minors and represented by their legal guardians (their parents). They will be referred to as Applicant 1, Applicant 2, etc.

B. The Representatives

[1] Applicants are aware of numerous discussions underway both within the Government and without concerning the need for reform of special schools. To Applicants' knowledge, no legal reform has yet been enacted which would end racial segregation, racial discrimination and the denial of educational rights and due process which Applicants and numerous other Roma have suffered (except the Act no. 19/2000 amending the Schools Law). See Exhibit 14A (Statement of Dr. Eleonora Smékalová) ("The Ministry of Education is aware of the issue of Romani children in special schools. There are seminars, directives, but all this is not reflected in practice"). In particular, Applicants are aware of certain proposals under consideration to replace special schools with special classes within basic schools. Far from providing an adequate remedy, these proposals would simply put a new label on the same old problem. Segregation and discrimination within schools are as violative of the above-described Czech and international legal norms as segregation and discrimination among different schools. Thus, two segregated classes within one school – where one class consists of 90% Roma and the other consists of 90% non-Roma – are as much racial segregation as are two similarly segregated schools (one, 90% Roma; the other, 90% non-Roma). It would be folly – and no remedy to the problems of segregation and discrimination – to re-create within one school the racial segregation and discrimination to which Applicants and other Roma have been subjected.

Name of representatives:

1. European Roma Rights Center, Public Interest Law Organisation
2. Mgr. David Strupek., Attorney at Law

B. THE HIGH CONTRACTING PARTY

The Czech Republic[2]

---

2. Statement of the Facts

2.1 Applicants

Applicants are all pupils (or former pupils) of special schools at Ostrava as follows: Applicants 1, 2, 3, 4, 13 and 14 are pupils of the Special School A; Applicants 5, 6, 7, 8 and 15 are pupils of the Special School B; Applicants 9, 16 and 17 are pupils of the Special School C; Applicants 10 and 11 are pupils of the Special School D, and Applicants 12 and 18 are pupils of the Special School E. All Applicants are Roma.[3]

On September 10, 1999 the Applicants 5, 6, 11 and 16 passed the special exams on their request and were transferred to basic schools (Applicants 6, 11 and 16 to Basic school L, Applicant 5 to Basic school M). It has to be noted that the preparation for these exams required extensive compensatory education that was fully provided by non-governmental actors. At the time of the submission of this application, all four applicants are with success attending regular basic school classes.

The Applicants submit that the Czech authorities (hereinafter 'the Respondent State') have violated their human rights, by placing them, and/or maintaining in force and failing to monitor their placements, in the special schools named above, not because the Applicants are mentally deficient but in whole or in part because the Applicants are Roma. The Applicants submit that their human rights have been infringed, in particular their rights under Articles 3, 6(1), 14 and Article 2 of Protocol 1.

2.2 Background – The School System

In order to appreciate the extent and significance of racial segregation and discrimination against Applicants and other Roma, as well as the extent to which they have been denied their rights to education, due process and an effective remedy, it is necessary to review

---

[2] The Convention was succeeded to by the Czech Republic on 1 January, 1993.

[3] Applicants are all under the age of eighteen and are thus represented by their parent(s) or legal guardian.

briefly the structure of the school system in the Czech Republic, particularly the fundamental distinction in law and practice between basic (elementary) schools and special schools.

Special schools *(zvláštní školy)* are schools for the mentally handicapped. They are a category of schools within a larger group called "specialised schools" *(speciální školy),* itself a subset of the Czech school system. According to the Statistical Yearbook of Schooling, 1996, published by the Department for Information in Education, an official body, of the 5094 schools in the Czech Republic for 6-15 year-olds, during the 1996/1997 school year, there were 462 special schools in the Czech Republic.[4] According to Jiří Pilař, Director of the Department of Special Schools, Ministry of Education, in January 1999, this figure had expanded to 518. These special schools have a total of 35,020 pupils, 3.0% of the overall number of pupils in the country of their age.[5]

The status of Czech basic (elementary) and secondary schools is established by the 29/1984 Schools Law, as amended (hereafter the "Schools Law"). Compulsory school attendance lasts for nine years, and normally begins when a child is six; it can however be postponed for a year by the headmaster, acting on the advice of an educational psychologist or doctor.[6] Basic schools have nine years, and are made up of a first level (years 1-5) and a second (years 6-9);[7] secondary schools, which are not compulsory, have variable lengths, but a progression to full school-leaving certificate normally lasts four.[8] Various technical schools and training centres are shorter.

Article 4 of the Schools Law, devoted to 'specialized schools' at both elementary and secondary levels, provides as follows:

> Specialized schools offer, using special educational and teaching methods, means, and forms, education and teaching to pupils with mental, sensory or physical handicap, pupils with speech impediments, pupils with multiple impediments, pupils with behavioral difficulties and sick or weakened pupils placed in hospital care.[9]

The category of „specialised schools" is divided into three subcategories. First, "specialised elementary schools" and "specialised secondary schools" provide education for students with physical disability, behavioural problems or long-term health problems.[10] Second, for students with intellectual deficiencies, "special schools" are offered in the place of basic schools.[11] Finally, pupils who "cannot be successfully educated even in special schools" can be placed in "auxiliary schools" *(pomocné školy)*, which last ten years and aim to provide basic practical and social skills.[12] Auxiliary schools comprise school populations of children who are seriously mentally handicapped. They are defined by law as educating children "who are

---

[4]*Statistická ročenka školství 1996/97,* Ústav pro informace ve vzdělávání, pp. C-5, C-62.
[5]See *Statistická ročenka školství 1996/97,* Ústav pro informace ve vzdelávání, pp. C-5, C-62. See also Exhibit 8G: Extract from Teachers' Newsletter: 'Učitelské Noviny' dated 24.11.98.
[6]Schools Law, Article 34(1)-34(4); see also Exhibit 29 (standard doctor's test for school maturity).
[7] Schools Law, Article 6(1).
[8]Schools Law Articles 15, 16 and 17.
[9]Schools Law, Article 28(1).
[10]Schools Law, Article 29(1) and 30(1).
[11] Schools Law, Article 31.
[12]Schools Law, Article 33.

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."[13]

Article 31(1) of the Schools Law defines the entire second category-- special schools-- as a type of school intended for persons with "intellectual deficiencies":

> In special schools pupils are educated who have intellectual deficiencies *[rozumové nedostatky]* such that they cannot successfully be educated in basic schools, nor in specialised elementary schools.

The Specialised Schools Decree is in accord:

> For mentally handicapped children and pupils, the following are designated: specialised kindergartens, special schools, auxiliary schools, technical training centres and practical schools.[14]

Article 7(1) of the Specialized Schools Decree establishes the process by which a child is placed in a special school. Placement depends upon the decision of the director of the (destination) special school, the consent of the legal guardian of the child and the opinion of an educational psychologists' center *(pedagogicko-psychologická poradna) (*hereinafter "PPP"). Czech law does not specify what evaluation techniques or methods must provide the basis for the director's decision or the psychologist's opinion.[15]

A child may begin schooling in a special school or may be sent to special school at any time. Figures for 1996-7 show that the largest number of children are sent in Years One and Two, with a smaller peak in Year Six, the start of the second level in elementary school.[16]

2.3 Facts Relating to Each Applicant

The following represents a summary of the factual position of each Applicant in the instant case: [17]

---

[13]Schools Law, Article 33(1).

[14]Specialised Schools Decree, Article (2)4. The Decree uses 'children' [*děti*] for those at kindergarten, and 'pupils' [*žáci*] for those at elementary-level or secondary schools.

[15] Article 7(4) of the Specialised Schools Decree simply provides that PPPs "shall collect all documents necessary for qualified decision making and propose to a headmaster to place a child or student into the appropriate type of school."

[16]Ustav pro informace ve vzdelávání, *Statistická ročenka školství 1996/97*, p.C-69.

[17] The Court is requested to note that the authorities originally refused to provide the Applicants' attorney with details of the date of decision of placement in special school and information surrounding the nature of the psychological tests that were undertaken by the Applicants. It was only once the cases had been filed with the Constitutional Court, that the authorities provided these details upon a direct request from the Court itself. Prior to the lodging of the applications to the Constitutional Court, the Applicants requested from the directors of the special schools through power of attorney of their legal guardian the following information:
1. When and under what reference number was the administrative decision pursuant to section 3(2)(d) of the Act No. 564/1990 issued, pursuant to which a respective Applicant was assigned to special school.
2. Whether and when was the decision delivered to legal guardian of the Applicant.
3. Whether and when was the consent of assignment of the Applicant into special school given by his/her legal guardian and whether it was in writing.

Applicants 1 and 2 are sisters currently attending Special School A. Applicant 1 attended basic school from 1996 to 1999, at which time (April 26, 99) she was transferred to Special School A, where she has remained since. Applicant 2 attended basic school from 1997 to 1999, at which time (April 26, 99) she was transferred to Special School A, where she has remained since.

Applicant 3 currently attends Special school A. He attended basic school from 1992 to 1998, at which time (December 4, 1998) he was transferred to Special School A, where he has remained since.

Applicant 4 currently attends Special school A. At the PPP Center where Applicant 4 was tested prior to transfer to special school, the psychologist allegedly said that the Applicant was "smart" but that special school would be more appropriate for him. He has attended the special school since September 1997.

Applicant 5 currently attends the Basic school M. He attended another basic school from 1994 to 1998, at which time (September 1, 1998) he was transferred to Special School B. He was transferred to the basic school on his parents' request after passing the exams in September 99.

Applicant 6 currently attends the Basic school L. She attended another basic school -- where she suffered racial hostility – from 1997 to 1998, at which time (February 3, 1998) she was transferred to Special School B. She was transferred to the basic school on her parents' request after passing the exams in September 99.

Applicants 7 and 8 are sisters. They both currently attend Special School B. Applicant 7 attended basic school from 1996 to 1997. Applicant 8 attended basic school for one month only while at basic school, Applicant 7 was subjected to racial hostility, particularly from her schoolmates. At one point during while both Applicants 7 and 8 were attending basic school, their parents were told by the class teacher that neither of the sisters belonged in basic school and that the Special School B was "aware of them" and "waiting for them". After this, both Applicants 7 ad 8 were transferred to the special school (decision of October 6, 1997), where they have remained since.

Applicant 9 currently attends Special School C. He attended basic school -- where he continuously faced racial prejudice, particularly from his schoolmates – from 1992 to 1997, at which time he was transferred to the special school for the first time. After three months he was transferred back to the basic school. The applicant was transferred to the special school for the second time by the decision of March 15, 1999.

---

4. In which PPP Center was the Applicant's mental retardation tested and what was the type of test used and its results.
Following this request for information, the Directors of the respective Special Schools, as the state administration bodies, sent identical letters to Applicant's Attorney refusing to provide such information on the grounds that the powers of attorney were invalid. It was only when the Constitutional Court ordered that the authorities provide the missing information concerning the Applicants, that the relevant information was sent to the Court, not to counsel for the Applicants.

Applicant 10 currently attends Special School D. She attended basic school for two months only, by the decision of November 25, 1996 she was transferred to the special school, where she has remained since.

Applicant 11 currently attends the Basic school L. She attended basic school from September 1997. While at basic school, Applicant 11 experienced racial hostility from both her schoolmates and her teacher. Based on the teacher's claim that she was „weak" and „too lively", the Applicant was then tested in a PPP Centre. The psychologist recommended transfer to special school. The Applicant's parent was convinced that she could not refuse the transfer to the special school. From November 3, 1997, applicant 11 has attended Special School D. She was transferred to the basic school on her parent's request after passing the exams in September 99.

Applicant 12 has since September 1996 attended the Special School E, and is currently still attending this school. The applicant has never attended any basic school, although she was originally enrolled to one. She was transferred to special school prior to the start of the attendance of the basic school, absent written consent from her parents.

Applicant 13 has since September 1998 attended the Special School A, and is currently still attending this school. He has never attended any basic school.

Applicant 14 has since September 1997 attended the Special School A, and is currently still attending it. She has never attended any basic school. She was enrolled directly to the special school, as the Applicant's parent was allegedly informed that there were no more places at basic school.

Applicant 15 has since September 1998 attended the Special School B, and is currently still attending it. She has never attended any basic school. The Applicant's parent submits that she was not informed that she could refuse assignment to special school.

Applicant 16 currently attends the basic school L. She was enrolled directly to Special School C and started to attend it in September 1997. She was transferred to the basic school on her parents' request after passing the exams in September 99.

Applicant 17 currently attends Special School C. She enrolled directly to the special school and started to attend it in September 1996.

Applicant 18 currently attends Special School E. She attended basic school – where she experienced racial animosity -- from 1997 to 1999, at which time (May 17, 1999) she was transferred to the special school, where she has remained since.

The Court is particularly requested to note that not one of the parents of the Applicants in the instant case were given any information about the nature of the special school from either the special school director or the PPP Center. In other words, the guardians were not informed that, as of the time parental consent was allegedly given in each case, (a) that special school was for mentally retarded pupils (b) that graduates of special school were denied the right to pursue non-vocational secondary education (c) that special schools had a

vastly inferior curriculum to basic school and (d) that in practice once a pupil was assigned to special school, there was almost no possibility to transfer back to basic school.

3. Relevant Domestic Law - See Appendix A attached.

4. Statement of alleged violations of the Convention and of relevant arguments

Applicants allege that the above-described facts disclose violations of a number of rights and freedoms guaranteed by the Convention as follows:

1) the Applicants have been the victims of racial segregation and racial discrimination[18] amounting to inhuman or degrading treatment; (Article 3)
2) the Applicants have been the victims of discrimination on the grounds of race in the enjoyment of their right to education; (Article 14 together with Article 2 of Protocol 1);
3) the Applicants have been denied their right to education; (Article 2 of Protocol 1);
4) the Applicants have been subjected to a determination of their civil rights through a procedure which is fundamentally unfair and lacks basic norms of due process. (Article 6).

Each alleged violation will be examined in turn.

5. Violation of Article 3: General Comments

1.1 Article 3 of the Convention states as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

5.2 Article 3 prohibits "torture" and "inhuman or degrading treatment or punishment." Only ill-treatment which attains a "minimum level of severity" falls within the scope of this prohibition.[19] "The assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case…."[20]

18.Throughout this submission, the terms "race", "ethnicity", and "racial" and "ethnic" "identity" and "group" are used interchangeably in the sense of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), wherein "racial discrimination" is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." This definition makes clear that discrimination on grounds of "race" is not to be meaningfully distinguished – at a minimum, for the limited purpose of assessing whether certain discrimination constitutes degrading treatment under Article 3 -- from discrimination on grounds of "colour, descent, or national or ethnic origin. For an extended discussion of this question, please see Written Comments of the European Roma Rights Center, Submitted to the Supreme Court of the Czech Republic in the Matter of Lukas Ardelan and Pavel Brachacz, 7 October, 1997 .

19 Ireland v. United Kingdom, 2 EHRR 25 (1979-80), para. 162.

20 Ibid. See also Assenov v. Bulgaria, Judgment of 28 October 1998, para. 94; Aydin v. Turkey, 25 EHRR 251 (1996), para. 84; Tyrer v. United Kingdom, 2 EHRR 1 (1978), para. 30; Costello-Roberts, 19 EHRR 112 (1993), paras. 26-28.

5.3 The "general purpose" of the prohibition against "degrading treatment" "is to prevent interferences with the dignity of man of a particularly serious nature."[21] Degrading treatment may include, not only physical injury, but also mental suffering.[22] Thus, "degrading treatment" under Article 3 is treatment that "grossly humiliates [an individual] before others or drives him to act against his will or conscience."[23] It is clear that "the humiliation or debasement involved must attain a particular level" which depends on the particular facts at issue."[24]

5.4 Under certain circumstances, racial discrimination may amount to degrading treatment violative of Article 3. In East African Asians v. United Kingdom (hereinafter 'the East African Asians case'),[25] applicants – "citizens of the United Kingdom and colonies" -- challenged British immigration legislation which effectively singled out UK passport holders of Asian origin and resident in East Africa, and denied them admission to the United Kingdom. Finding that the legislation discriminated against the affected persons on "grounds of their colour or race",[26] the European Commission of Human Rights ruled that Article 3 had been violated.[27]

5.5 In reaching its decision, the Commission affirmed that "a special importance should be attached to discrimination based on race",[28] and furthermore that "discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention."[29] The Commission reasoned that "publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity."[30] It thus held that, on the facts of the case, the challenged immigration legislation had "publicly subjected" the applicants to "racial discrimination," and "constitute[d] an interference with their human dignity" amounting to "'degrading treatment' in the sense of Article 3 of the Convention."[31]

1.6 Recently, the European Commission of Human Rights has expressly confirmed the reasoning in the East African Asians case in its report on the inter-state case of Cyprus v.

---

[21] East African Asians v. UK, 3 EHRR 76 (1973), para. 189.
[22] See The Greek case, Commission Report of 5 November 1969, Yearbook XII (1969), p. 461; Ireland v. UK, 2 EHRR 25 (1978), para. 167; East African Asians v. UK, 3 EHRR 76 (1973), para. 189.
[23] The Greek case, Yearbook XII (1969), p. 186; CM Res DH (70) 1.
[24] Tyrer v. UK, para. 30. Although Tyrer concerned degrading punishment, its statements apply *mutatis mutandis* to degrading treatment as well. See Harris, O'Boyle, Law of the European Convention on Human Rights (1995), p. 80, n. 18. In Ireland v. UK, 2 EHRR 25 (1978), the kinds of ill-treatment at issue were characterised by the Court, not only as "torture" and as "inhuman", but also as "degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance." 2 EHRR 25, para. 167.
[25] 3 EHRR 76 (1973).
[26] Ibid., para. 201.
[27] The Committee of Ministers did not rule on the question of a breach. After all of the applicants were eventually admitted to the UK, the Committee decided that "no further action" was required. CM Res DH (77) 2.
[28] 3 EHRR 76, para. 207.
[29] Ibid., para. 196.
[30] Ibid., para. 207.
[31] Ibid., para. 208.

Turkey (Application No. 25781/94), adopted on June 4, 1999. (See para. 499). The East African Asians principle has also been confirmed by the Commission on other occasions.[32]

5.7 Moreover, comparative and international law beyond Strasbourg makes clear that racial discrimination is universally recognised as a singular evil not to be tolerated. Thus, the constitutions of virtually all Council of Europe member states contain bans on discrimination on the grounds of race and/or ethnic origin. And too, the European Union Consultative Commission on Racism and Xenophobia has made clear that the principles of non-discrimination and tolerance lie at the foundation of the Union itself.[33] Indeed, legal efforts to sanction and eradicate racial prejudice and discrimination have manifested in numerous binding international legal instruments[34] which today make the general prohibition against race discrimination one of the elements of *ius cogens*, a peremptory rule of international law.[35]

5.8 In raising this claim, Applicants specifically note that the European Court of Human Rights has held that Article 3 of the Convention, read in conjunction with Article 1, requires states, not merely to refrain from torture or inhuman or degrading treatment or punishment, but also to "secure" this right by providing protection against ill-treatment.[36]

It is submitted that , in considering whether racial discrimination in education amounts to degrading treatment in breach of Article 3, this Court should take into account that racial discrimination in education infringes a number of other international legal norms, including the following:

- provisions of the International Convention on the Elimination of All Forms of Racial Discrimination[37], such as:

---

[32] See Abdulazis, Cabales and Balkandali v. UK, Commission Report, 6 EHRR 28 (1983), para. 113 (expressly affirming "its opinion in the East African Asians cases that the singling out of a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity"); Hilton v. UK, No. 5613/72, Admissibility Decision of 5 March, 1976 (allegation of racial discrimination by prison officers against prisoner raised an issue under Article 3); Glimmerveen & Hagenbeek v. Netherlands, 4 EHRR 260 (1979), Admissibility Decision, para. 19 (recalling holding of East African Asians that race discrimination could amount to degrading treatment). See also Vivien Prais v. Council of the European Communities, Case 130/75, Decision of the European Court of Justice, 27 October 1976, p. 7 (referring to East African Asians). See Harris, O'Boyle, p. 82 (suggesting that, after East African Asians, "single instances or practices of direct or indirect racial discrimination, which must be inherently degrading, are contrary to Article 3").

[33] See European Council Consultative Commission on Racism and Xenophobia, Final Report, 12 April 1995.

[34] See Universal Declaration of Human Rights (1948), Art. 7; International Labour Organisation Convention No. 111 (1958); Convention Against Discrimination in Education (1960); Declaration on the Elimination of All Forms of Racial Discrimination (1965); Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966), Arts. 2, 26; International Covenant on Social, Economic and Cultural Rights (1966), Art. 2; International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

[35] See, e.g., Dissenting Opinion of Judge Tanaka in the South West Africa Cases (Second Phase), ICJ Reports (1966), p. 298.

[36] See, e.g., Costello-Roberts v. United Kingdom, 19 EHRR 112 (1993), para. 26; A v. United Kingdom, Judgment of 23 September 1998, para. 22.

[37] The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the former Czech and Slovak Federation, was succeeded to by the Czech Republic on 22 February, 1993.

- Article 2(a), which obliges States Parties to „engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."
- Article 2 (c) which requires States Parties to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;"
- Article 3, which states, in no uncertain terms, "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction";
- Article 5(e)(v), by which "States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of … [t]he right to education and training…."

- Articles 2 and 26 of the Universal Declaration of Human Rights;[38]
- Articles 2, 25, 28 and 29(a) of the International Convention on the Rights of the Child;[39]
- Articles 2 and 13(1) of the International Covenant on Economic, Social and Cultural Rights;[40]
- Articles 2, 24 and 26 of the International Covenant on Civil and Political Rights;[41] and

---

[38] Article 26 of the Universal Declaration provides, in pertinent part: "(1) Everyone has the right to education….(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms." Article 2 states, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[39] The Convention on the Rights of the Child was acceded to by the Czech Republic on 22 February, 1993. Article 2 of the Convention provides: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardians' race, colour . . . language . . . national, ethnic, or social origin . . . birth or other status."Article 25 provides: "States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement." Article 28 provides: "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, they shall in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child. . . ." Article 29(a) provides: "States Parties agree that the education of the child shall be directed to … the development of the child's personality, talents and mental and physical abilities to their fullest potential…."

[40] The ICESCR was succeeded to by the Czech Republic on 1 January, 1993. Article 2 of the Covenant provides: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour . . . national or social origin, birth or other status." Article 13(1) provides: "The States Parties to the present Covenant recognize the right of everyone to education. . . . They further agree that education shall enable all persons to participate effectively in a free society."

- Article 63 of the Concluding Document of the Vienna meeting of the Conference on Security and Cooperation in Europe.[42]

6. Breach of Article 3: Racial Segregation and Discrimination - The Applicants have been segregated into special schools and subjected to inferior education, in part, on the grounds of race, in breach of their right not to be subjected to degrading treatment

6.1 Having outlined the general principles underlying the jurisprudence of the Strasbourg organs concerning Article 3, Applicants allege that they have been subjected to degrading treatment in breach of Article 3 by having been placed in separate and inferior educational facilities,[43] at least in part, on the grounds of their race.[44]

6.2 The racial segregation to which Applicants have been subjected, though itself a kind of racial discrimination, is particularly egregious, degrading and humiliating. Roma are sent to special schools in Ostrava and other parts of the Czech Republic in such overwhelmingly disproportionate numbers that, effectively, there exist two separate school systems for members of different racial groups – special schools (schools for the mentally retarded) for Roma, and basic schools for non-Roma. The racial segregation Applicants have suffered is discrimination in its most crystallized form. Although certain kinds of different treatment are not necessarily "discrimination" under the law if there exists an objective and reasonable justification[45], a deliberate policy of racial segregation is, it is submitted, per se unlawful and there cannot ever exist an objective and reasonable justification for such treatment. Indeed, racially separate educational facilities are "inherently unequal."[46]

6.3 As recently as March 1998, the United Nations Committee on the Elimination of Racial Discrimination, in examining patterns of student placement nationwide, condemned what it

---

41 The ICCPR was succeeded to by the Czech Republic on 22 February 1993. Article 2 (1) provides: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals wtihin its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 24 (1) states: "Every child shall have, without any discrimination as to race, colour, sex, langauge, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." Article 26 states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrmination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

42 4 November 1986-17 January 1989. This document affirmed that the CSCE participating States would "ensure access by all to the various types and levels of education without discrimination as to race, colour,sex language, religion, political or other opinion, national or social origin, property, birth or other status."

43 Applicants contend that the quality of education offered in special schools to which they have been assigned is inferior. For more detail on this point, please see section 7, infra.

44. All the applicants identify as Roma and are identified as Roma by others. All applicants submit that they are victims of racial discrimination and racial segregation in their placement to schools for the mentally retarded. It is clear that Roma are among the "national minorities" governed by the Framework Convention in the Czech Republic. See, e.g., "Report Submitted by the Czech Republic pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities" (Received by the Council of Europe, April 26, 1999) (hereinafter "Framework Convention, Czech Government Report"), (at page 17).

45 Belgian Linguistics case, 1 EHRR 22552 (1968)

46 Brown v. Board of Education, 347 U.S. 483 (1954).

characterised as "de facto racial segregation" in Czech schools.[47] Similarly, the United States Supreme Court has held that racial segregation resulting from adminstrative applications of laws which are race-neutral on their face (i.e., which do not expressly make racial distinctions, but which result in racial segregation) violates the Constitutional prohibition against racial segregation.[48] East African Asians, supra, is in accord, insofar as the legislation therein – which was found to constitute racial discrimination amounting to degrading treatment – was also facially neutral.

6.4 The evidence of racial segregation in Ostrava schools is as follows:

1. Overrepresentation of Roma in Special Schools

The Ostrava School Bureau (*Školský úřad v Ostravě*) is responsible for the administration of the district of Ostrava which is divided into 23 municipalities.[49] There are eight special schools in the district of Ostrava, responsible, according to the School Bureau, for "educating mentally retarded pupils."[50]

The Applicants have collected statistics from each of the eight special schools in the city of Ostrava. Each special school has stamped and signed a document testifying to the exact number of Romani and non-Romani pupils in each special school. The data show that, of a total of 1360 students in Ostrava special schools, 762 – more than 56% -- are Roma.[51] The Applicants hereby attach as Exhibits 1A – 1H to this submission the signed and stamped statistical document from each of the eight special schools in Ostrava.

The data are as follows:

SPECIAL SCHOOL	**TOTAL PUPILS**	**TOTAL ROMA**	**% ROMA**
KPT.VAJDY	193	31	16.06%
U HALDY	166	27	16.26%
ČKALOVOVA	191	49	25.65%
NA VIZINĚ	190	110	57.89%

[47] Exhibit 21 (United Nations Committee on the Elimination of Racial Discrimination, "Concluding Observations: Czech Republic" (30 March, 1998) (CERD/C/304/Add.47).

[48] See, e.g., Keyes v. School District No. 1, 413 U.S. 189 (1973) (finding a violation of the Constitution's „equal protection" clause where many city schools were racially segregated, even though the school system had never operated under a law which mandated racial segregation). Please also see discussion, infra, section …….., of international and comparative legal standards relating to de facto racial discrimination.

[49] Exhibit 2A (Letter from Ostrava School Bureau to Claude Cahn, dated 6 May 1999).

[50] Exhibit 2A, para. 4. In addition to the eight special schools, the district of Ostrava has one auxiliary school and two specialized schools. Data gathered by the Applicants indicate that, unlike most of the special schools, these other specialized schools – for students whose disabilities are more objectively discernible than those placed in special school -- are composed exclusively or primarily of non-Roma.

[51] The School Bureau's data contained in Exhibit 2A indicate that some of the special schools contain separate auxiliary school classes and/or classes for autistic children. The total number of such pupils according to the School Bureau is 23. Because the School Bureau's data are not broken down by race or ethnicity, it is impossible to know how many of these children are Roma. However, even assuming that every single student in each of these separate classes were Roma – which is extremely unlikely -- the total number of Roma in the special school classes in each school would still amount to 739 pupils , or 49.56% of the special school population in Ostrava.

KARASOVA	156	121	77.56%
TĚŠÍNSKÁ	159	135	84.91%
IBSENOVA	136	128	94.11%
HALASOVA	169	161	95.26%
TOTALS:	1360	762	56.03%

6.5 Underrepresentation of Roma in Basic Schools

According to the Ostrava School Bureau, there are seventy basic schools in the district of Ostrava.[52] As of the date of filing this complaint, the Applicants have collected statistics from 69 of these basic schools, consisting of a stamped and signed document from each school, testifying to the exact number of Romani and non-Romani pupils. The data show that a total of 33,372 students attend the 69 basic schools, of whom only 753 – or 2.26 % -- are Roma. The Applicants hereby attach as Exhibit 3 to this submission a signed and stamped statistical document from each of the sixty-nine basic schools.[53]

The data collected by the Applicants are as follows:

ADDRESS	**TOTAL**	**ROM**	**PERCENT**
A. Hrdličky 1638	690	0	0
B. Dvorského	891	0	0
Březinova 52	559	0	0
Chrustova 24/1418	382	0	0
Družební	200	0	0
Gen. Píky	818	0	0
H. Šalichové	395	0	0
Hlučínská 136	347	0	0
Horymírova 100	730	0	0
J. Valčíka 4411	352	0	0
J. Šoupala 1609	435	0	0
Jugoslávská 23	723	0	0
Junacká	934	0	0
K. Pokorného 1284	424	0	0
K. Pokorneho 1382	550	0	0
Klegova 27	617	0	0
Kosmonautů 15	589	0	0
Krestova 36	674	0	0
Lumírova 13	318	0	0
Mitrovická	100	0	0
Mitušova 8	524	0	0

[52] See Exhibit 2A, para. 2.

[53] Applicants have been unable to obtain accurate statistical information for the one remaining basic school which the School Bureau states is located in Ostrava. If and when data from the remaining basic school is obtained, Applicants welcome the opportunity to include such data in their calculations concerning patterns of racial segregation and discrimination.

MUDr. Lukášové	550	0	0
Ostrava - Hrabová	396	0	0
Ostrčilova	707	0	0
Provaznická 64	484	0	0
Šeříkova 33	436	0	0
Srbská 2	430	0	0
Staroveská 62/66	54	0	0
Těsnohlídkova 99	56	0	0
V Zálomu	805	0	0
V. Košaře 6	1367	0	0
Výhledy 210	185	0	0
Bartovická 59	65	1	1.54
Bílovecká	303	1	0.33
Bulharská 1532	430	2	0.47
Matiční 18	208	2	0.96
Mitušova 16	548	2	0.36
I. Sekaniny 1804	639	3	0.47
Komenského 668	560	3	0.54
L. Podeště 1875	335	3	0.9
Porubská 832	585	3	0.51
Pěší 1	315	4	1.27
Ukrajinská 1533	437	4	0.92
Kosmonautů 13	625	5	0.8
Matiční 5	767	5	0.65
F. Formana 45	581	7	1.2
G. Klimenta 493	367	8	2.18
Gajdošova 9	292	8	2.74
Porubská 831	631	8	1.27
Volgogradská 6	720	8	1.11
Zelená 42	623	8	1.28
A.Kučery 20	746	9	1.21
Dětská 915	723	9	1.24
Kounicova 2	415	10	2.41
Nováka 24	520	10	1.92
Nádražní 117	642	11	1.71
U Kříže 28	530	11	2.08
Bohumínská 72	343	12	3.5
Matrosovova 14	264	19	7.12
Antošovická 55/107	172	24	13.95
Vrchlického 5	370	26	7.03
Chrjukinova 12	706	29	4.11
Rostislavova 7	334	29	8.68
Gen. Janka 1208	711	31	4.02
Trnkovecká 55	249	44	17.67
Ľudovíta Štúra 1085	516	56	10.85
Škrobálkova 51	214	69	32.24
Gebauerova 8	331	97	29.31
Nám. J. z Poděbrad 26	333	172	51.65

TOTAL	**33,372**	**753**	2.256

6.6 Comparison of Roma/Non-Roma Placements

The above statistics indicate that, whereas only 1.80% of non-Roma students in Ostrava are in special schools, 50.3% of Ostrava's Roma students are in special schools. Thus, the proportion of the Ostrava Romani school population in special schools outnumbers the proportion of the Ostrava non-Romani school population in special schools by a ratio of more than twenty-seven to one. Stated differently, Romani children in Ostrava are more than 27 times as likely to end up in special schools as are non-Romani children. This ratio is derived as follows:

$$\frac{\textbf{762}\text{ (Roma students in special schools)}}{\textbf{1515}\text{ (Total number of Roma students in basic and special schools)}} = \textbf{27.94}$$

$$\frac{\textbf{598}\text{ (Non-Roma students in special schools)}}{\textbf{33,217}\text{ (Total number of Non-Roma students in basic and special schools)}}$$

6.7 The above statistics further indicate that, although Roma represent less than five percent of all primary school-age students in Ostrava,[54] they constitute more than fifty percent of the special school population. Nationwide, as the Czech government itself concedes,[55] approximately 75% of Romani children attend special schools, and substantially more than half of all special school students are Roma. [56]

6.8 The degree of racial segregation revealed by the above statistics is reproduced within the schools. Thus, of the eight special schools in Ostrava, Roma amount to more than 50% of the student population in five schools, more than 75% of the student population in four schools, more than 80% in three schools and more than 90% in two schools. In no Ostrava special school does the Romani proportion of the student body fall below 16% -- well over triple the Romani percentage of the Ostrava student population as a whole.

6.9 By contrast, of the 69 basic schools as to which Applicants have gathered accurate information, 32 of these schools have not a single Romani student. In an additional 21 basic schools, there are Roma students, but they number fewer than two percent of the student population. Thus, in a total of 53 basic schools in Ostrava – 75% of all basic schools in the district -- Roma constitute fewer than two percent of the student population, although Roma

[54] A total of 1,515 Roma students attend the 8 special schools and the 69 basic schools whose statistics Applicants have been able to gather. A total of 33,217 non-Roma students attend those schools.

[55] See Resolution No. 279 of 7 April 1999, "Draft Conception of the Governmental Policy towards the Romani Community", para. 5 (Exhibit 8F) ("three-quarters of Romani children attend special schools destined for children with a moderate mental deficiency and … more than 50% (estimations are that it is about three quarters) of all special school pupils are Romani").

[56] The Applicants have also managed to collect data on statistics of Romany children in special schools from other parts of the Czech Republic, for example, Slaný, Sokolov, Kladno, Vítkov, Ústí nad Labem and Teplice: see Exhibits 6A -6G.

as a whole constitute more than four percent of the overall Ostrava primary school-age student population. Ostrava's special and basic schools are effectively segregated on the basis of race.

6.10 At the request of the Applicants' representatives, Professor Daniel Reschly, Chair of the Department of Special Education at Vanderbilt University in the United States, and one of the most renowned experts in the world on the overrepresentation of minorities in special education, has examined the data from the Ostrava schools and prepared a report, attached to this application as Exhibit 15A. As the report indicates, the degree of overrepresentation of Roma students in Ostrava special schools is unprecedented, and is itself prima facie evidence of racial segregation and discrimination.[57]

6.11 Official government statistics confirm this statistical finding of racial segregation. A January 1991 report prepared by Jitka Gjurišová and other members of a working group for the Federal Ministry of Work and Social Affairs in Prague, January 1991[58] covered those students attending school during the school year 1989-1990, the last before changes in the Czech constitution prohibited race- or ethnic-coded official records. Of 1,289,766 pupils in classes 1-9 of primary school, 28,872 (2.2%) were Roma. According to the same report, 46.4% of Romani children were in special schools, compared with only 3.2% of non-Romani children. Thus, according to this government report, a Romani child was approximately fifteen times more likely to end up in special school than a non-Romani child.[59]

6.12 More recent official information -- from a yearbook of statistics on the Czech education system, published by the Institute for Information on Education -- covers the school year 1996-1997.[60] According to the Institute's yearbook, of 1,149,609 pupils in primary education in 1996-97, 48,473 – 4.2% -- were in specialized schools. The Yearbook also contains records of pupils by nationality, based upon declarations made at the time of school registration. According to these figures, during the 1996-97 school year, there were 1529 Roma in primary education. While this figure, based on voluntary declaration, is judged by many experts to be 20-30 times less than the true number of Roma at primary schools,[61] the pattern is revealing: 956 of those 1529 Romani children, 62.5%, were in special schools. Again, Romani children were shown to be fifteen more likely to be in special schools than the national average.

---

[57] Professor Reschley's report (Exhibit 15A) is based on data from all eight special schools in Ostrava and fifty-three of the seventy basic schools. Following preparation of Reschley's report, Applicants managed to collect statistical information from an additional sixteen basic schools. The total number of pupils at these sixteen additional basic schools was 7883, of whom only two were recorded as Roma. Thus, Professor Reschly's conclusions as to overrepresentation and racial discrimination are, if anything, reinforced and strengthened by the additional data.

[58] "Návrh zásad státní politiky společenského vzestupu romského obyvatelstva v ČSFR.", written by a working group of the Federal Ministry of Work and Social Affairs, č. jed. F33-25653-7121, Prague 14. 1. 1991.' Quoted in Nečas *Op.cit.,* p.54.

[59] In addition, according to the same report, Romani children were 30 times more likely not to have reached the end of the ninth class by the end of their nine years of compulsory school attendance, having resat one or more years on the way.

[60] Ústav pro informace ve vzdělávání, *Statistická ročenka školství 1996/97*. The following information is taken from tables on pp. C-5, C-45 and F-11.

[61] See, for example, Uhl, Petr, "Additional Information for the Pre-Session of the Committee for the Rights of the Child in June 1997 in Geneva", *Most,* pp.2-4.

6.13 As the report of Professor Reschly demonstrates, the size of the overrepresentation of Roma in special schools in the Czech Republic is qualitatively higher – indeed, it is of a different dimension -- than analogous measures of overrepresentation of racial minorities in other contexts. Thus, a recent United States government study of overrepresentation of racial minorities in special education classes in the New York City area expressed concern about what it termed "wide discrepancies" in special education placements that appeared to based on race and ethnicity where "black students were more than twice as likely as white students to be referred to special education."[62] In Ostrava, by contrast, the percentage of Roma in some special schools is several hundred percent higher than the Romani proportion of the overall school-age population[63]. "Several laws and court cases [in the United States] testify to the fact that discrimination based on faulty tests or improper use of tests has occurred in US public schools, but never to the extent documented by the statistics from Ostrava."[64]

6.14 That overrepresentation of Roma in special schools amounts in practice to racial segregation is widely known in the Czech Republic. Thus, Government Resolution No. 279 of 7 April 1999 on the Draft Conception of the Governmental Policy towards the Romani Community, states, "The fact that three-quarters of Romani children attend special schools destined for children with a moderate mental deficiency and that more than 50% (estimations are that it is about three quarters) of all special school pupils are Romani, is a subject of increasing criticism from abroad where these schools are understood as necessarily segregating which is an apprehension of tendencies to apartheid…."[65] And the Department of the Government Commissioner for Human Rights of the Czech Republic recently stated as follows:[66]

"A Roma child is born equally endowed as any other child. Because of different traditions in Roma families (different upbringing, different mother tongue) and because of our schools' inadaptability to children the way they are, this Roma child ends up in a special school which bars the road to higher education and also to higher qualification. The current educational system can therefore be regarded as segregationist."

---

[62] A. Hartocollis, "U.S. Questions the Placement of City Pupils," The New York Times, Nov. 21, 1998, p. B-1. Under a rule commonly used by the United States Equal Employment Opportunity Commission, a selection practice (like the intelligence evaluations at issue in this case) is presumed to be unlawfully discriminatory if members of one racial group have a "pass" rate which is less than four-fifths (80%) the rate for the most successful racial group. See 2 B. Lindemann, P. Grossman, Employment Discrimination Law, p. 1729 (3d ed. 1996).

[63] See Exhibits 1A-1H

[64] Exhibit 19B (Statement of Fairtest).

[65] Exhibit 8F. See Exhibit 11A (Statement of Helena Balabánová) ("many special schools are basically Romani schools"); Exhibit 11H (Statement of a former special school teacher) ("at present, there exists a "segregated school system…. Special schools might as well be Roma schools"); Exhibit 10H (Transcript of Interview with Dr. Hubálek, 5 March, 1999 ("…but there are rather two separate school systems: the first for the Czech, i.e. white children and the second for Romani children….the children are segregated according to the color of their skin….Taking a look at some specialized schools, we see that they have classes composed of children, 95 % of whom are Rom…."). See also Exhibits 11I, 11J.

[66] Czech government document distributed at the OSCE Supplementary Human Dimension Meeting on Roma and Sinti Issues, Vienna, Austria on September 6, 1999. PC.DEL/424/99. See Exhibit 22.

6.15 In the instant case, as a result of his/her assignment to special schools for the mentally deficient, each of the Applicants attends schools where more than 50 percent of the student body is Roma:

- Special School B (Applicants 7, 8, 15, 5 and 6)
- Special School A (Applicants 1, 2, 4, 3, 13 and 14)
- Special School C (Applicants 9 and 16)
- Special School D (Applicants 10, 17 and 11)
- Special School E (Applicants 12 and 18)

As a result of their assignment to special schools for the mentally deficient, Applicants have been forced to study in racially segregated classrooms and hence denied the benefits of a multi-cultural educational environment. It is widely known that racial segregation in and of itself is detrimental to education and to a child's emotional and psychological development. In Brown v. Board of Education, the United States Supreme Court held that racial segregation in education deprived children of the minority group of equal educational opportunities, reasoning, in part, as follows: "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[67] Romani children placed in racially segregated special schools suffer similar deprivation.[68]

6.16 Furthermore, in reviewing Applicants' claims of racial segregation, it may be relevant for this Court to recall that these claims arise, not in a vacuum, but in the course of a long history of racial segregation in education in the Czech Republic since shortly after the Second World War. Thus, until 1958, it was permissible to place Romani students into schools for the intellectually deficient even if they did not satisfy the definition of intellectual deficiency.[69] It should not be surprising that, for four decades after the end of this policy,

---

[67] 347 U.S. 483 (1954). In view of the foregoing numerous and severe negative consequences flowing from assignment to special school, it is misplaced to suggest, as some have, that Article 31(1) of the Schools Law does not mandate mental deficiency as a prerequisite for assignment to special schools, but rather that the criteria is poor performance at basic school. (See text of Article 31(1), supra, Section …., Background.) First of all, this is an erroneous interpretation of Article 31, at odds with both the text of the Specialized Schools Decree (see supra, Section I, Background), and with common sense. After all, if Article 31(1) were interpreted to require merely poor basic school performance, and not mental deficiency, as a basis for special school placement, psychological evaluation by the PPP Centres would be superfluous, and a school report would be sufficient of itself. See, e.g., Exhibit 9D (Vaclav Mertin, Professor of Psychology, Charles University, "Polemics," Vychovna Poradenstvi, 1997). Second, and more importantly, whether or not Czech law says that special schools are for mentally deficient students – and Applicants believe that it does – this is not relevant to the question of whether the Applicants and other Roma have been the victims of racial discrimination. As to that, all Applicants must show is that they have been subjected to differential treatment without objective and reasonable explanation. Thus, regardless of whether the law says that Romani children sent to special schools are mentally deficient, the reality is that such children are subjected to differential treatment in a variety of ways – i.e., denied by law the right to an adequate elementary education, denied admission to ordinary secondary education, subjected to psychological and emotional harm. In this regard, the precise language of Article 31 is irrelevant for the purposes of determining whether the Applicants have been subjected to racial discrimination. The evidence clearly shows that they have been, and no reading of Article 31 can alter that.

[68] See, e.g., Exhibit 12B (Statement of Monika Horáková).

[69] See Exhibit 7 (D. Čaněk, Extract from Report on Minorities in Special Schools (1999)).

Roma children have attended segregated schools.[70] Moreover, the fact that racial segregation has been allowed to continue for so long should colour this Court's consideration of any claims that defendants are administering a race-neutral policy which just "happens" to result in the overwhelmingly disproportionate placement of Roma in special schools.[71] One leading educator in Ostrava has observed:

> "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."[72]

In cases considerating allegations of racial segregation and discrimination, an "actor is presumed to have intended the natural consequences of his deeds."[73] This consistent pattern over time of overwhelmingly disproportionate placement patterns along racial lines demonstrates, at a minimum, that responsible officials have knowingly tolerated racial segregation.

Accordingly, the Applicants request this Court to find that they have been segregated and discriminated on the basis of race in violation of Article 3 of the Convention.

7. Breach of Article 14 of the Convention together with Article 2 of Protocol 1 to the Convention

7.1 Article 2 of Protocol 1 of the Convention provides, "No person shall be denied the right to education." Article 14 states that „the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as … race, colour … national or social origin, association with a national minority … or other status."[74]

7.2 It is submitted that racial discrimination in education violates Article 14 of the European Convention, taken together with Article 2 of Protocol 1.

---

[70] In the mid-1980s, "almost every other Romani child attended a special school." (See Exhibit 7A (Čaněk's Report)). See Exhibit 12F (Statement of Michael Stewart) ("practice of racial discrimination" in the disproportionate assignment of Romani children to special schools in the Czech Republic "has been continuing for decades").

[71] See, e.g., Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979) (denial of high school diploma absent passage of functional literacy test which resulted in higher failures for blacks than for whites violated equal protection clause of United States Constitution by perpetuating prior history of institutionalised racial segregation and discrimination), aff'd in relevant part, 644 F.2d 397 (5th Cir. 1981) (Unit B).

[72] Exhibit 11A (Statement of Helena Balabánová).

[73] Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

[74] It has been suggested that the right to education without discrimination has gained sufficiently broad acceptance worldwide as to amount to a provision of customary international law. See C. de la Vega, "The Right to Equal Education: Merely as Guiding Principle of Customary International Legal Rights?" 11 Harvard Blackletter Law Journal 37 (1994).

7.3 Applicants respectfully submit that they have been discriminated against on the grounds, inter alia, of race, color, association with a national minority, and ethnicity, in the enjoyment of their right to education (under Article 2 of Protocol 1) .

7.4 The jurisprudence of the Strasbourg organs makes clear that, for the purposes of Article 14, a difference of 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 realized.[75]

7.5 The instant case is striking for its clarity and relevance to the Court's Article 14 jurisprudence. First, as to the nature of the difference in treatment, Romany children are quite simply treated in a different way in the realm of education than non-Romani. Secondly, as to the legitimacy of the aim, and/or the proportionality between the means employed and the aim sought to be realized, the placement of the Applicants in special schools does not come close to satisfying Convention standards. Thus, the history of unrelenting and continuing racial animus which underlies the placement of Romani children into special school gives cause for concern regarding the legitimacy of the aim of such placements.[76]

---

[75] See. e.g., Belgian Linguistic Case, 1 EHRR 252 (1968), para. 10 (setting forth Article 14 standard) and finding discrimination in the enjoyment of the right to education, in violation of the European Convention, where French-speaking children resident in Flemish area of Belgium were denied access to French-speaking schools outside that area and compelled to attend local Dutch-speaking schools). And see para. 10 :"the principle of equality of treatment is violated if the distinction has no objective and reasonable justification…. A difference of 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 realised". The Court is also referred to Gillow v. United Kingdom, 11 EHRR 335 (1986), para. 64 (applying Article 14 standard to alleged discrimination in the right to respect for home).
And, too, comparative jurisprudence makes clear that, in the specific area of special education, the assessment process must be nondiscriminatory in nature, and the instruments employed must be free from cultural or racial bias. See, e.g., in the United States, the Individual with Disabilities Education Act, 20 U.S.C. section 1400 (1988); Rehabilitation Act of 1973, 29 U.S.C., sec. 794 (1988 and Supp. V. 1993).

[76] Racial discrimination and violence against Roma in the Czech Republic have attracted wisdepread condemnation from a range of international monitoring bodies. See, e.g., Regular Report from the European Commission on „Progress towards Accession" of October 1999:"The situation of the Roma has not evolved markedly over the past year. It remains characterised by widespread discrimination, as anti-Roma prejudice remains high and protection from the police and the courts often inadequate, and by social exclusion.";"According to an official report, the number of followers of extremist movements has doubled … 133 crimes motivated by extremism or racism, mostly against Roma, were committed in 1998 … As illustrated by recent judgements of district courts, sentences for criminal offences motivated by racism or national intolerance often remain inadequate." Concluding Observations of the United Nations Committee on the Elimination of All Forms of Racial Discrimination: Czech Republic (30/03/98) (expressing concern at „the persistence of racial hatred and acts of violence, particularly by skinheads and others, towards persons belonging to minority groups, especially Roma"; "information indicating that the number of charges and convictions including those of skinheads, is low relative to the number of abuses reported";"reports of cases of harassment and of excessive use of force by the police against minorities, especially against members of the Roma community"; "reports indicating discrimination against Roma in areas such as housing, transport and employment"); Concluding observations of the United Nations Committee on the Rights of the Child: Czech Republic (27/10/97) (expressing concern „that no adequate measures have been taken to prevent and combat all forms of discriminatory practices against children belonging to minorities, including Roma children, and to ensure their full access to health, education and other social services. The Committee is concerned that the principles and provisions of the Convention are not fully respected as regards Roma children"); US State

Moreover, even assuming – which the applicants vigorously contest – that the placements were designed somehow to pursue a proper objective, since the placements so blatantly discriminate on the grounds of race, and so clearly degrade those affected, they can under no conceivable circumstances be considered proportionate to any legitimate aim.

7.6 In this regard, it is worth recalling that the Strasbourg organs have indicated that certain bases for distinguishing between persons in the enjoyment of Convention rights and freedoms are so "suspect" – i.e., so unlikely to be found proportionate to any legitimate aim – that they will almost invariably be violative of Article 14. Thus, this Court has reasoned that, "[n]otwithstanding any possible arguments to the contrary, a distinction based essentially on religion alone is not acceptable."[77] Similarly, the Court has indicated that the doctrine of margin of appreciation has little or no place when it comes to distinctions based upon legitimacy,[78] nationality,[79] or sex.[80] "In view of the above," one commentator has opined, "it seems highly plausible that the margin of appreciation will play little or no role in cases concerning a difference of treatment essentially or only on the ground of race."[81]

7.7 This conclusion is bolstered by the European Commission's decision in East African Asians, wherein, as discussed supra, the Commission affirmed that "a special importance should be attached to discrimination based on race."[82] Indeed, the Commission reasoned that "differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question."[83]

Department Report: Czech Republic Country Report on Human Rights Practises for 1999:"Skinhead violence against Roma and other minorities remained a problem …";"The Constitution provides for the equality of citizens and prohibits discrimination. Health care, education, retirement, and other social services generally are provided without regard to race, sex, religion, disability, or social status. In practice Roma face discrimination in such areas as education, employment, and housing.";"Romani children often are relegated to "special schools" for the mentally disabled and socially maladjusted.";"Roma suffer disproportionately from poverty, unemployment, interethnic violence, discrimination, illiteracy, and disease. They are subject to popular prejudice, as is affirmed repeatedly by public opinion polls.";"Members of skinhead organizations and their sympathizers most often perpetrate interethnic violence. Roma are the most likely targets of such crimes …". Human Rights Watch World Report 2000, pp. 265-68 („the Czech Republic continued to lag in redressing a number of serious human rights issues, most notably the widespread discrimination against the ethnic Roma minority").

[77] Hoffman v. Austria, Judgment of 23 June, 1993, A-255-C, para. 36.

[78] Marckx v. Belgium, 2 EHRR 330 (1979), para. 48; Vermeire v. Belgium, 15 EHRR 488 (1991), para. 25; Inze v. Austria, 10 EHRR 394 (1987), para. 41.

[79] See Gaygusuz v. Austria, 23 EHRR 365 (1996), para. 42 ("very weighty reasons would have to be put forward before [the Court] could regard a difference of treatment exclusively on the ground of nationality as compatible with the Convention").

[80] See, e.g., Abdulaziz, Cabales and Balkandali v. United Kingdom, 7 EHRR 471 (1985), para. 78 ("very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention"); Schuler-Zgraggen v. Switzerland, 16 EHRR 405 (1993), para. 67; Burghartz v. Switzerland, 18 EHRR 101 (1994), para. 27; Karlheinz Schmidt v. Germany, 18 EHRR 513 (1994), para. 24; Van Raalte v. Netherlands, Judgment of 21 February, 1997, para. 39.

[81] J. Schokkenbroek, "The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation," 19 Human Rights Law Journal 20, 22 (1998). See Harris, O'Boyle, p. 481 ("one can infer that discrimination on grounds of race is an example" of a badge of discrimination so serious as to amount to the equivalent of a "suspect category" in US constitutional law).

[82] 3 EHRR 76, para. 207.

[83] Ibid.

7.8 As stated at paragraph 7.4 supra, a number of Strasbourg judgments have held that a claim of discrimination is made out by the following elements: 1) different treatment from others in a comparable position; where 2) the difference cannot be objectively and reasonably justified, either as to the aim pursued, or the means chosen to pursue that aim.

7.9 In applying these and similar standards in the field of discrimination law, other international and comparative jurisprudence has made clear that the first prong of this test – "different treatment" – may be shown in either one of two ways. First, under a theory of "direct" or intentional discrimination, a claimant may seek to show that s/he has suffered adverse treatment because of her/his membership in a racial group. Second, under a theory of "indirect" discrimination or disparate impact, a claimant may seek to show that, apart from any malicious intent on the part of the alleged discriminator, s/he has been subjected to a law, procedure, policy or requirement with which a disproportionately small percentage of her/his racial group can comply. On this second theory of liability, the mere fact that a law is facially neutral as to race does not immunise it from legal challenge if it produces a racially discriminatory effect. Thus, the concept of indirect discrimination has been recognised by jurisdictions as diverse as the European Court of Justice in Luxembourg,[84] the United Nations Human Rights Committee,[85] United States courts,[86] United Kingdom courts[87] and the United Kingdom Race Relations Act.[88] Under the test employed in each of these jurisdictions, once a Applicant makes out a prima facie case of discrimination by demonstrating the discriminatory impact of a challenged, facially-neutral rule or practice, the alleged discriminator then must rebut the resulting inference of discrimination by providing a race-neutral goal served by the rule or practice at issue which is sufficiently important to warrant generating the discriminatory impact. As is demonstrated below, Applicants herein, proceeding on a theory of indirect discrimination, establish a clear and convincing case of overwhelmingly disparate impact in the process of assigning students to special schools – for which there exists no race-neutral explanation.

---

[84] See, e.g., Case 170/84, Bilka-Kaufhaus GmbH v. Weber Von Hartz (1986), 1986 ECJ CELEX LEXIS 2171 (even absent proof of discriminatory intent, once prima facie case of discriminatory result is shown, burden shifts to employer to justify result based on objective – i.e., non-discriminatory criteria).

[85] See, e.g., Simunek, Hastings, Tuziklova and Prochazka v. The Czech Republic, Communication No. 516/1992, United Nations Human Rights Committee (Views Adopted 19 July, 1995), UN Dov. CCPR/C/54/D/516/1992 (discriminatory intent "is not alone dispositive in determining a breach of Article 26 of the Covenant…. [A]n act which is not politically motivated may still contravene article 26 if its effects are discriminatory").

[86] See, e.g., Title VI, Civil Rights Act of 1964, 42 USC sec. 2000d (once a Applicant alleging racial discrimination in education has made out a prima facie case of disparate impact – i.e., that members of one racial or ethnic group perform consistently lower than members of another group on a particular test or assessment tool – the burden of persuasion shifts to the alleged discriminator to show that the challenged, policy, practice or procedure is educationally necessary or justifiable); Board of Education v. Harris, 444 U.S. 130, 151 (1979) (same).

[87] See Equal opportunites Commission v Birmingham City Council [1989] 1 All ER where the House of Lords held in relation to a sex discrimination case: "Although the intention or motive of the council to discrriminate might be relevant so far as remedies were concerned if sex discrimination was esstablished it was not a necessary condition for liability."

[88] See, e.g., G. Bindman, „Proof and Evidence of Discrimination," in B. Hepple and F. Szyczak, eds., Discrimination: The Limits of Law (1992), pp. 58-91.

7.10 Thus, in the instant case, Applicants respectfully suggest that the Court must address two principal questions: First, have the Applicants demonstrated that they suffer differential treatment in their right to education– i.e., have they made out a case of discriminatory impact resulting from the application to them, through their placement in special schools, of various provisions of the Schools Law and the Specialized Schools Decree.[89] Second, if the Court finds that the Applicants' allegations do give rise to a prima facie case of discrimination, it should then go on to consider whether the discriminatory impact can be objectively and reasonably justified by a race-neutral explanation sufficiently important and narrowly tailored to warrant generating the challenged impact. We respectfully submit that, in considering both prongs of this test, the Applicants have clearly demonstrated that they have been subjected to overwhelming racial discrimination in their right to education, which cannot be reasonably and objectively justified by reference to any conceivable goal. These two prongs will be examined in turn:

Differential Treatment

7.11 As to the question of differential treatment, Applicants again refer the Court to the statistics noted in Exhibits 1A – 1H and Exhibit 3, as well as to the attached statement of Professor Reschly (Exhibit 15A). Applicants respectfully submit that this evidence establishes, not only that they have been segregated into special schools on the basis of race (see infra, section on Racial Segregation, paras. 6.1. – 6.16.), but also that such segregation gives rise in and of itself to an inference of racial discrimination – i.e., of different and negative treatment -- in the enjoyment of the right to education. Thus, by having been segregated into special schools for the mentally deficient, Applicants have received different and inferior education solely because they are Roma. In this regard, courts in other jurisdictions have held that statistical discrepancies of an order far less serious than those presented here give rise to an inference of racial discrimination.[90]

7.12 The inference of inferior treatment suggested by the statistical evidence is bolstered by additional proof of severe and enduring harm which Applicants suffer as a result of their placement in special schools. Applicants offer proof as to four different ways in which they have received an inferior education than students in basic school, and have been harmed thereby, as follows:

---

[89] The provisions at issue are those which establish and govern the special schools and the procedure for determining placements therein. They include: Article 19(1) of the Schools Law of 1984 as subsequently amended; Article 19(5) of the Schools Law of 1984 as subsequently amended; Article 19(6) of the Schools Law of 1984 as subsequently amended; Article 28 (1) of the Schools Law of 1984 as subsequently amended; Article 28(4) of the School Law of 1984 as subsequently amended; Article 28 (5) of the Schools Law of 1984 as subsequently amended; Articles 31(1) and (2) of the Schools Law of 1984 as subsequently amended; Articles 32(1) to (5) of the Schools Law of 1984 as subsequently amended; Article 3(2)(d) of the Act of the Czech National Council 564/1990 from December 13, 1990; Article 2(4) of the 127/97 Coll. Decree of the Ministry of Education, Youth and Sports as of May 7 1997 on Specialized Schools and Kindergartens; Articles 6 (1), (2) and (3) of the 127/97 Coll. Decree of the Ministry of Education, Youth and Sports as of May 7 1997 on Specialized Schools and Kindergartens; and Articles 7(1) to 7(7) of the 127/97 Coll. Decree of the Ministry of Education, Youth and Sports as of May 7 1997 on Specialized Schools and Kindergartens.

[90] See, e.g., Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (finding racial discrimination where 22.6% of students in classes for the educable mentally retarded were black, even though 10% of the student school enrollment was black), aff'd in part, rev'd in part, 793 F.2d 969 (9th Cir. 1984).

a. Inferior Curriculum/Education

7.13 As a result of their assignment to special schools for the mentally deficient, Applicants have been subjected to a curriculum substantially inferior to that in basic schools. To begin with, the law does not afford special school students an education of the standard of a basic school. Article 28(2) of the Schools Law guarantees an education "equal to that provided by other elementary schools and secondary schools" to specialized school pupils – i.e., those with speech, hearing or vision impairments, or physical disabilities.[91] However, no similar provision is made for equal education at special schools. Quite to the contrary, Czech law expressly excludes special schools from this guarantee of equality.[92] Unlike specialized elementary and specialized secondary schools, the other four types of school, described in Article 28(4)[93] and including special schools, are denied the guarantee of equivalent education.

7.14 In fact, students in special schools are not provided with anything approaching equal education. Special school pupils receive five hours of Czech language lessons per week in the first three years of schooling as opposed to nine hours in the first class of basic school, ten hours in the second and ten hours in the third. Pupils in the second year of basic school receive Czech language lessons at a level to which the special school curriculum will not arrive until the fourth year. Similarly, the special school curriculum does not envision reading for comprehension until the fourth year, a skill expected in the first year of basic school. Special schools are not expected to know the whole Czech alphabet until the fourth year, while their colleagues in basic school are expected to have mastered this in the first two years of schooling. In Mathematics, basic school pupils are expected to recognize, read, write and count in a number of complex ways the numbers zero to twenty in their first year, while special school pupils will not acquire these skills until the third class. In principal subjects, a gap opens in the curriculum in the first three years of primary education which sets special school pupils at least two years behind their basic school colleagues by the time they reach the fourth class. Special school curriculum is also missing entirely subjects such as foreign languages. The difference between basic and special school curriculum is even reflected in the size of the books published by the Ministry of Schooling, Youth and Physical Education; special school education is described, in its entirety, in 95 pages, while basic school education requires 336.[94]

---

[91] Article 28(2) of the Schools Law states that: "Specialised schools include specialised elementary schools and specialised secondary schools; the education received in these schools is of equal value to that received in elementary schools and in other secondary schools." Students of specialized secondary schools are thus able, in theory, to continue to higher education.

[92] "The education obtained at [specialized elementary and secondary schools] is equal to that provided by elementary schools and other secondary schools. This status shall not apply to," inter alia, special schools. (Commentary, Article 28, Schools Law). Similarly, Article 29 and its Commentary require that specialized elementary schools provide an education "equal to that provided by basic schools." Thus, while Czech law generally guarantees equal education to students with disabilities, it goes out of its way to deny this same right to students at special schools.

[93] Article 28(4) of the Schools Law states: "Specialised schools also include special schools, vocational training centres, practical schools and auxiliary schools."

[94] For description of basic school curriculum, see Ministerstva školství, mládeže a tělovýchovy, *Vzdělávací program základní školy,* Prague: Nakladatelství Fortuna, 1998. For description of special school education, see Ministerstva školství, mládeže a tělovýchovy, *Vzdělávací program zvláštní školy,* Prague: Nakladatelství Septima, 1997. Indeed, the disparity between the curriculum at basic and special schools is further reflected in the

7.15 The inferior quality of the special school curriculum is acknowledged widely. For example, see Exhibit 10A (transcript of interview with Miroslav Bartošek, Director, IPPP, dated 15 February, 1999) (" … the program of special schools in this country is substantially slower, so after about two years, not talking about more, the difference in what the students at the end of the third grade of a regular or special school know is very big"); Exhibit 14A (Statement of Dr. Eleonora Smékalová) ("The curriculum of the special school is significantly inferior to that at basic school"); Exhibit 11H (Statement of former special school teacher) ("The curriculum of special school is vastly inferior to that of basic school. For example in the first year of special school, pupils are taught to count from one to five. In the second grade, from one to ten, and in the third grade, from one to twenty. In the first year of special school, pupils are taught only 12 letters of the alphabet…. The curriculum of special school is in my opinion about four years behind the basic school equivalent." Although a number of Romani children at special school are not mentally retarded when they enter, "by the time these children have been learning the inferior curriculum for two or more years, … the educational damage done is immense"); Exhibit 12F (Statement of Michael Stewart) ("Special school education is disastrous for a Romani child"); Exhibit 11 B (Record of Interview with Karel Krupa, teacher at Special School on the street U Haldy, Ostrava, 2 February, 1999) ("The curriculum in special schools is two years lower. Hence it is not possible for pupils passing the 9th year special school to attend gymnasium because they are still two years behind and only equivalent to 7th year at basic school"); Exhibit 12B (Statement of Monika Horáková, Member of Parliament, 11 May, 1999) („The curriculum in the special school is far inferior to that of the basic school. Children in special school therefore receive a sub-standard education….").[95]

b. Irrevocable Transfer - No Opportunity to Return to Basic School

7.16 As a result of their assignment to special schools for the mentally deficient, Applicants have been effectively denied the opportunity of ever returning to basic school. The law requires continual monitoring of student placements to insure necessary adjustments to changes in child development.[96] In practice, however, little to no monitoring

---

different character of the legislation giving rise to each. Article 5 of the Schools Law proclaims that basic education "ensures rational education in terms of scientific knowledge and in accordance with the rules of patriotism, humanity and democracy, and it provides, ethical, aesthetic, working, health, physical and environmental education of students…." By contrast, in outlining the tasks of special schools, Article 28 of the Schools Law makes no mention of these high human values. See also Exhibit 23: 'A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech Republic': a Report by the European Roma Rights Center dated June 1999 at page 35.

[95] See also Exhibit 11F (transcript of interview with Karel Krupa)

[96] See Specialised Schools Decree, Article 6(2) ("Should any change occur in the nature of the impairment of a child or a student attending a special kindergarten or specialised school, or a special kindergarten or specialised school no more corresponds to the degree of impairment of such child or student, the headmaster of the special kindergarten or specialised school into which the child or student was placed is obliged, following his/her consultation of the matter with the student's legal guardian, to submit proposal for placement of the child or student into another special kindergarten or specialised school or into a mainstream kindergarten or elementary school or secondary school"). See also Exhibit 10D (Transcript, Interview of Marta Teplá, Ministry of Education, 18 February, 1999) (Edict no. 127 of 1997 requires that, if the health of students assigned to special schools changes, the school director "must provide them with the optimal form of education. This means transfer them either to higher or lower form of demands in education. And all the kids, not only the Romani ones, if they are getting good grades, they are handy, well acclimatized or if the system of the special

takes place, with the result that virtually no Roma children sent to special schools ever return to basic school, no matter how well they perform or how erroneous their initial placement.[97] The situation is no better for children sent to special school for up to six months of „diagnostic stay," pursuant to Article 7(4) of the Specialized Schools Decree.[98]

c. Denial of Right to Pursue Non-Vocational Secondary Education

7.17 As a result of their assignment to special schools for the mentally deficient, Applicants have been prohibited by law and practice from entrance to non-vocational secondary educational institutions, with attendant damage to their opportunities to secure adequate employment.

7.18 Until February 18, 2000, Article 19(1) of the Schools Law expressly excluded graduates of special schools from admission to non-vocational secondary schools.[99] In fact, the law provided for only two principal educational options for pupils graduating from specialized elementary schools, including special schools -- the vocational training center and the practical school. Both belong to the specialized school system and are specifically aimed at special school children. Hence, as of the time each of the Applicants was transferred to special school, they were effectively barred by law from access to non-vocational secondary education. Since then, the Czech Parliament amended the Schools Law, deleting Article

---

school already corrected their problems, it is the director's duty to transfer them to a regular elementary school – means up – into a school with more demanding educational program….").

[97] See Exhibit 10A (Transcript, Interview with Miroslav Bartošek) ("the cases when the child from a special school is transferred back to a basic school are of a statistically insignificant number"; "practically" transfer from special to basic schools is not used"); Exhibit 10E (Transcript, Interview with Vaclav Mertin, Professor of Psychology, Charles University, Prague, 19 February, 1999) (although "possible", transfer of a child from special to basic school "happened to none of us in practice….[P]ractically it is excluded"); Exhibit 10F (Transcript, Interview with Hana Prokešová, Director, PPP, Prague 5, 10 March, 1999) (transfer from special to basic school is „practically non-realisable"); Exhibit 9A (Ministry of Education, "Alternative Educational Program of a Special School for Pupils from the Romani Ethnicity," 1998) ("Considering that at present the connection between a special school and a basic school is minimal," even those students who excel academically and developmentally at special school do not return to basic school; rather, they "stay at the special school until they finish their compulsory school attendance"); Exhibit 11A (Statement of Helena Balabánová) (once sent to special schools, students are set back in learning by "at least two years" and transfer back to basic school is impossible "because the damage has already been done. The educational harm is immense"); Exhibit 14A (Statement of Dr. Eleonora Smékalová) ("In practice … there are only very few transfers from special school to basic school"); Exhibit 11H (Statement of former special school teacher) (during four years of teaching at Podebradova Special School in Ostrava, "[t]here were never any transfers to basic school because considering the amount of the subject matter it was possible only in the first grade. There was never any monitoring of the children to check whether they could be transferred. It was simply assumed that once at special school, that was it for their lifetime opportunities").

[98] The director of a special and auxiliary school in Opava observes: "Since 1972 I have known 2 cases of children passing from the special school back to the basic school. One of them returned back to the special school within two years....Diagnostic stay of the children takes about 1 to 2 months, although it could be up to six months. In the event of such a long diagnostic stay the child would fall behind considerably in the basic school lessons, if [he] returned back. ….In the recent period, all the children being here for the diagnostic stay stayed in special school." (Exhibit 18B, 3 March, 1999 Letter of Helena Dobrusova, Headmistress, Special and Auxiliary School, Opava, to Claude Cahn).

[99] Article 19(1) provided: "The students eligible for admission to secondary schools, except for the schools mentioned under sub-section (2) are students and other applicants who have successfully completed basic school." "Schools mentioned under sub-section (2) are eight-year grammar schools and eight-year dance conservatories.

19(1), effective February 18, 2000. Accordingly, from this point forward, graduates of special schools may, in theory, apply for admission to non-vocational secondary schools. Nonetheless, in practice, the vast majority of special school graduates will continue to be denied admission to secondary school by the inferior education they receive at special elementary schools.[100] As a result, most Roma are, like the Applicants, barred from non-vocational secondary education, and deprived of equal opportunities to secure employment and economic advancement.[101]

d. Stigma

7.19 As a result of their assignment to special schools for the mentally deficient, Applicants have been stigmatized as "stupid" or "retarded" with effects that will brand them for life, including diminished self-esteem and feelings of humiliation, alienation and lack of self-worth. The law itself reinforces the negative presumptions flowing from placement in special school. Thus, Article 31(1) of the Schools Law as amended says that „special schools provide education to students with intellectual disabilities…." Article 2(4) of the Specialized Schools Decree says that „special school" is for the education of „mentally retarded children." Monika Horáková, a self-identified Romani member of the Czech Parliament, observes that "Romani children assigned to special schools suffer untold emotional, psychological, developmental and educational damage resulting from, among other things … the stigma of attending schools for the 'mentally deficient'…."[102] Helena Balabánová, a leading educator in Ostrava, comments, "Roma children … suffer emotional harm. As a result of attending special school, they have been labeled as mentally retarded, a stigma that will stay with them for life."[103] Eleonora Smékalová, a psychologist practicing for more than 15 years, warns: "Children perceive the fact that they attend special school as humiliating….

---

[100] See Exhibit 13A (Statement of Helena Jiřincová) (in practice, special school graduates cannot compete with graduates from basic school in secondary school admission procedure, "and this is because of the educational and psychological damage inflicted on a child who has attended special school").

[101] See Exhibit 12B (Statement of Monika Horáková, Member of Parliament, Czech Republic, Prague, 11 May 1999) („Romani children assigned to special schools have virtually no opportunity in practice to obtain any employment other than manual labor");Exhibit 14A (Statement of Dr. Eleonora Smékalová) (Romani children placed in special school ""have zero career chances…. [B]y attending special schools, Romani children are put on a lifelong path of limited possibilities…."); U.S. Department of Education, „Memorandum of Assistant Secretary for Civil Rights to All Staff" (6 July, 1995), Addendum: „Civil Rights Implications of Minority Students and Special Education") („[T]he inappropriate placement or misclassification of students as disabled can have significant consequences that raise civil rights concerns. For instance, when students are removed from the regular classroom and placed in a special education program for part or all of their school day, they often are removed from the core academic curriculum. Lack of access to the core curriculum can lead too often to lower levels of achievement, decreased likelihood of postsecondary advancement, and more limited employment opportunities…."); see also Exhibit 9F: "Special School is No Solution" from Učitelské Listy 5/97-98.

[102] Exhibit 12B. See also Exhibit 9B (Václav Mrštík, "What Are the Pupils in Special School Like?", Výchovné Poradenství, 1998, page 2) („The personality of the failing pupil is exposed to excessive pressure that may cause destructive processes in the structure and dynamic of the personality. The positive interception of the ego and self gradually disappears. A poor little person is forced to the opinion that s/he is bad, silly, tiresome and evil. S/he understands nothing, s/he is of no good. S/he fails to meet the school tasks represented by the teacher so that his/her approach to the teacher changes, as well. It cannot be excluded that development of the pupil's personality will follow a relatively direct line: passivity - neurotisation - neurosis - depressions").

[103] Exhibit 11A.

In this way, Romani children may lose their natural self-esteem… [and] the feeling of their own dignity."[104]

Similar detrimental effects of assignment to segregated special education have been noted in other contexts.[105]

No Objective and Reasonable Justification for Differential Treatment

7.20 In view of the foregoing, Applicants respectfully submit that they have been subjected to differential treatment in the enjoyment of their right to an education. They have, in other words, made out a prima facie case of racial discrimination. According to the legal standards outlined above, the Applicants submit that, should the Court find that they have been subjected to differential treatment in education compared with non-Roma, the burden of persuasion shifts to the defendants to provide an objective and reasonable (i.e., race-neutral) justification for their differential treatment.

7.21 In the instant case, where the consequences of assignment to special school are so permanent and life-impairing, defendants cannot meet this burden. No race-neutral explanation – the results of intelligence tests, the allegedly "inherent" intellectual inferiority of Romani children, language difficulties, poverty, or parental consent – can adequately explain the extraordinary statistical disproportions in placement in special schools. Rather, prudent reflection yields the conclusion that racial discrimination – the accumulated effects of many years of racial segregation and of the persistence of racial prejudice against Roma – plays a major role in funneling so many Romani students into special schools.

1. The Evaluations Are Scientifically Flawed and Educationally Unreliable

7.22 Like numerous other Romani children sent to special schools, a number of the Applicants were assigned to special school on the basis of a psychological test which purported to measure the child's overall intelligence level.[106] The most common tests

---

[104] Exhibit 14A

[105] See, e.g., Larry P. v. Riles, 495 F. Supp. 926, 979 (N.D. Cal. 1979) ("disproportionate enrollment of minorities in [classes for the educable mentally retarded] stigmatizes those in the classes and serves inevitably to perpetuate invidious stereotypes based on the superiority or inferiority of 'racial stocks'"); Exhibit ___ ((U.S. Department of Education, „Memorandum of Assistant Secretary for Civil Rights to All Staff" (6 July, 1995), Addendum: „Civil Rights Implications of Minority Students and Special Education") (…. Often, the more separate from the regular setting, the more limited the curriculum, the more harm occurs to minority students who do not belong in the special education program. Additionally, students who do not belong in the special education program, or who have been placed into the incorrect special education program, may experience stigma by virtue of their special education placement. For the child who is labeled incorrectly as mentally retarded, the consequences can be enormous. For a child who is labeled mentally retarded … there will be an almost automatic assumption that the child will not go to college. … The stigma of being labeled as having ‚subaverage intellectual functioning' is also likely to be a serious consequence in terms of the child's own self perception and the perception of others including family, peers, teachers and future employers").

[106] Applicants have requested in writing copies of their school records, including the results of evaluations used as a basis for their placement in special school. As of the date of filing of this submission, the Applicants' attorney was permitted to view such records at the offices of the Constitutional Court . The information filed by the Respondents indicated that the Applicants were never informed precisely which test(s) were administered to each of them.

employed appear to be variants of the Wechsler Intelligence Scale for Children (PDW and WISC III) and the Stanford-Binet Intelligence test.[107]

7.23 Neither the Applicants' own assignments to special schools, nor the statistical overrepresentation of Roma in special schools demonstrated in Exhibits 1A – 1H, can be justified by reference to the psychological and educational evaluations on which they were purportedly based. The evaluations employed for the Applicants and numerous other Roma sent to special schools in Ostrava and elsewhere are scientifically flawed and educationally unreliable, as demonstrated by the following:

a) Most Roma Placed in Special Schools Are Not Mentally Deficient

7.24 First of all, notwithstanding test results, there exists a virtual consensus among government officials and acknowledged experts that many Roma assigned to special schools are not, in fact, mentally deficient, even though they have failed tests similar or identical to those administered to Applicants. For example, the Court is requested to consider Exhibit 24, the report submitted by the Czech Republic pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities [108] (hereinafter "Framework Convention, Czech Government Report"), at page 35:

„Special schools are intended for children with intellectual deficiencies (learning difficulties). However, Romany children with average or above-average intellect are often placed in such schools on the basis of results of psychological tests (this happens always with the consent of the parents). These tests are conceived for the majority population and do not take Romany specifics into consideration. Work is being done on restructuring these tests. The number of Romany children in special schools is high; some schools have 80 to 90 percent of Romany students. It needs to be mentioned that many parents of Romany children do not view education as a priority and support these trends with their attitudes. The mother tongue of most of these children is the Roma language; they speak a Czech-Roma dialect which is not sufficiently developed."

7.25 Furthermore, Jiří Pilař, Director of the Special Schools Department in the Ministry of Education, acknowledged as recently as February 1999, that, in his opinion, "one third of children in special schools have such intelligence level that they could manage the basic school under normal conditions…."[109] Václav Mertin, Professor of Psychology at Charles University, suggests that as many as „half" of all students in special schools are „really mentally retarded" and that, among Romani special students, the proportion who are

---

[107] Although there are no guidelines issued by the Ministry of Education which mandate use of any particular tests, see infra Section II.C(1)(e), experts in the field most frequently cite PDW, WISC-III or Stanford-Binet (or, as it is otherwise known, Termann-Merill) as the most commonly used tests. See, e.g., Exhibit 10M (Transcript, Interview with Dr. Petr Klíma, 5 March, 1999, Prague); Exhibit 14A (Statement of Dr. Eleonora Smékalová, 21 May, 1999, Olomouc); Exhibit 17D (31 March, 1999 Letter from Dr. Mirka Kovaříková, Psychologist, PPP Centre, Sokolov, to Lubomir Zubak); Exhibit 9G (article entitled 'Research Results on Use of Psychological Tests in Pedagogically-Psychological Counselling Centres' by PhDr Hana Palatová and PhDr Jiří Dan) ; see also Exhibit 14D (Record of Interview with Jiří Dan dated 27.11.98); see also Exhibit 17C (letter from Slaný PPP Centre to Lubomir Zubák undated).

[108] Received by the Council of Europe, April 26, 1999

[109] Exhibit 10C (Transcript, Interview of Jiří Pilař).

retarded is „substantially less.“[110] Hana Prokešová, Director of PPP, Prague 5, affirms that, although „the special schools were and still are designed for mentally retarded children, … there are very few of them there. Here at the Ministry [of Education], unfortunately nobody can define mental retardation.“[111] Other practitioners and experts are in accord.[112]

7.26 A survey conducted by psychologist Dr. Václav Mrštík tested the intelligence of 1403 pupils in eighteen special schools in northern Bohemia and Prague, without registering their ethnicity. According to the survey, in one school, the number of mentally retarded (the term used by the survey) pupils was as low as 3%. The highest percentage of mentally retarded pupils in a school was 47.5%.[113]

7.27 Indeed, information from the court file in this case confirms that a number of the Applicants have been assigned to special school even though they are not mentally deficient:[114]

---

[110] Exhibit 10E (Transcript, Interview of Václav Mertin).

[111] Exhibit 10F (Transcript, Interview of Hana Prokešová).

[112] See, e.g., Exhibit 11A (Statement of Helena Balabánová, Director, Přemysla Pitra School, Ostrava) (("as many as 80% of Romani children are erroneously placed in special schools for the mentally retarded"); Exhibit 13A (Statement of Helena Jiřincová) (the "overwhelming majority of Romani children in the special school are not mentally retarded"); Exhibit 14E (Letter of Dr. Petr Klíma, Psychologist, to Debbie Winterbourne, 7 January, 1999) ("It is clearly stipulated in the Decree on Special Schools and para. 28 of the Education Act No. 258/96 that special schools are destined for mentally impaired children. The international classification specifies the mental impairment as intelligence quotient IQ below app.68. My opinion is that most children attending special schools have an intelligence quotient between 70-85.“); Exhibit 11B (Record of Interview of Karel Krupa, Teacher) ("I have recently read a report that states that around one-third of the children attending special school are not mentally deficient, and in my experience this is correct“); Exhibit 11C (Statement of Pavel Kuchař) ("In Zvláštní škola internátní (Special School on the street Na Vizině in Ostrava), 70-80% of pupils were Roma. In my opinion these Roma pupils were not mentally deficient. This was in clear contrast with the non-Roma pupils who had a variety of mental deficiencies and specific dysfunctions“); Exhibit 10G (Transcript, Interview with Bohumil Sumský, Former Director, Department of Basic Education, Ministry of Education, 19 April, 1999, Prague) (children who were not mentally handicapped attended special schools in order to "simplify … the work of the basic school"); Exhibit 9C (Hana Prokešová, "A Note on the Article: 'Gypsies Go to Heaven – and to the Special School'", Výchovné Poradenství, May 1998) ("…Special schools (are) designed for mentally deficient children. Nevertheless, any of the available school decrees, instructions and other regulations do not specify the nature of mental impairment. According to the international classification of illnesses, a mental impairment means an IQ level of 70 or less; however only a minority of children with corresponding impairment attend Czech special schools“); Exhibit 9H (Judita Bednářová, "Special Schools? For Whom?" Mladý Svět) ("Those times are gone when special schools educated only children with a serious mental defect.… Today you can find there clever, talented, hopeful pupils.“); Exhibit 11H (Statement of former special school teacher, currently teaching at basic school) (during four years of teaching at Special School on Poděbradova street in Ostrava, "some of the younger Romani children were not mentally retarded and … did not belong to a school for mentally retarded pupils"); Exhibit 12D (Statement of Miroslav Holub, Chairman, Democratic Union of Roms, Ostrava) ("There are many … Rom children often transferred without any reason to special schools"); Exhibit 12C (Statement of Josef Stojka) ("over 80% of Roma children are not stupid; there is not a special kind of Romani intelligence lesser to other normal citizens"); Exhibit 10I (Transcript of interview with Janíková); see also Exhibit 18A (letter from Kladno School Bureau dated 24 February 1999).

[113] See Exhibit 9B: Mrštík, PhDr. Václav, "Jací jsou žáci zvláštních škol: Příspěvek do diskuse o indikaci pro vřazování žáku do zvláštní školy", in *Výchovné poradenství,* February 1998, pp.14-19.

[114] From the court file at the Constitutional Court perused by Applicant's attorney in July 1999; for procedures at the Ostrava PPP Centre, see Exhibit 17B.

(a) In the case of Applicant 3, the PPP Center does not use the term 'mental retardation' but states instead that the Applicant's mental state is in a 'sub-standard range'. In addition, the reply of the Ministry of Education to the Constitutional Court makes clear that Applicant 3 was not mentally deficient, but that he was assigned to special school for other reasons:

"Plaintiff 3 enrolled into the basic school and after completing the first three grades problems appeared with him. According to teachers' statements the problems were not associated with the intelligence, however, but with behavior and poor attendance. Educational problems may appear in a family lacking due authority and, sometimes, legal awareness of parents. Legal representative cannot refer to the fact that she was unacquainted with the determination of the special school. A signature of parents who are responsible for upbringing of their children plays the decisive role."

(b) Similarly, Applicant 9 was transferred back to the basic school with the express statement from the PPP Center that he was not mentally retarded. Even though special schools are ostensibly for students with an Intelligence Quotient (IQ) of 70 or less,[115] The documents assessed his IQ at 84 (i.e. 'low average'). The PPP Center recommended the Applicant's second transfer to special school due to "educational failure because of non-compliance with his obligations, truancy and the lax approach of his parents". The PPP Center also stated that the cause of the Applicant's failure was "no incentive from the environment, a too benevolent method of upbringing in the Applicant's family, absenteeism and lack of motivation". It is expressly stated by the PPP Center that the reason for the transfer was not "mental insufficiency";

(c) With respect to Applicant 10, the PPP Center rated her as a 'borderline case'. The PPP Center noted that her parents wanted their daughter to be educated at basic school; however the basic school requested her transfer to special school because of "educational difficulties". During the first PPP test performed in July 1999, no comments concerning 'mental retardation' were made. Four months after this test, the School Director issued a decision stating that a further PPP test was not appropriate" although it "may be relevant with respect to the time interval". Again, reasons such as "little stimulation from the educational environment" and "failure at school" were mentioned.

b) <u>None of these tests have ever been validated for the purpose of assessing Romani children in the Czech Republic.</u>

7.28 It is fundamental that a test's results are of no value unless the test has been shown to be valid for the purpose for which it is being used.[116] "A test may be valid for one

[115] See Exhibit 17B (Reply of Ministry of Education to Constitutional Court), para. 3.

[116] By way of comparison, where, as here, use of a test causes a disparate impact upon members of a particular race, United States law is violated if the test "is clearly not being used for the purpose(s) for which it was designed." (United States Department of Education, Office of Civil Rights, "Investigative Guidance" (March 10, 1995, page 3). For this reason, the Code of Fair Testing Practices in Education encourages test developers to describe the population for which a given test is appropriate and to select tests appropriate for the testing purpose and the population of the test takers. (Ibid., Compendium of Legal and Technical Resources, page 6).

educational purpose or population of students, but not valid for another."[117] Moreover, "it is invalid scientific and educational practice to use a test designed for one purpose for an entirely different purpose."[118] However, Applicants and other Roma have been sent to special schools on the basis of tests which are not designed or standardised for Roma in the Czech Republic. In the words of the Director of the Department of Special Schools in the Ministry of Education, "…the current tests which are used in Pedagogic and Psychological Centres are designed for the Czech population only, i.e. for children who are brought up in [ethnic] Czech families and educated in [ethnic] Czech surroundings…."[119]

7.29 It is "improper to base school placement decisions … on the administration to Roma of IQ tests which have not been specifically designed to assess Roma children, and/or which may have cultural or linguistic biases."[120] Indeed, most of the tests have not even been standardised for ethnic Czechs, let alone Czech Roma.[121] Many others are out of date.[122] As a

---

[117] Ibid., page 6.

[118] Exhibit 19B (Statement of Fairtest).

[119] Exhibit 10C (Transcript, Interview of Jiří Pilař, Director, Department of Special Schools, Ministry of Education, 18 February, 1999, Prague). According to Mr. Pilař, the government has recognised the need to standardise the intelligence tests: "By standardisation I mean that we have to test a certain sample of children selected from both a destination group and a group from common Czech population. The resulting difference will be then subject to consideration and in some way it will be implemented into a point scale." (Ibid.). Although this process will allegedly be "start[ed]" this year, (ibid.), it has not yet been completed. In the meantime, Applicants and other Romani children have been placed in special schools on the basis of non-standardised tests. See Exhibit 14A (Statement of Dr. Eleonora Smékalová) (the most common intelligence tests in use "are definitely based on Czech majority culture and, to my knowledge, there has been no attempt to design standards for the Romani minority…. I believe that no standards for the Romani ethnicity have been established for any of the tests used in the Czech Republic"); Exhibit 12A (Statement of Professor Jiřina Šiklová, Faculty of Philosphy, Department of Social Work, Charles University, dated January 1999, Prague) (the questions asked on presently-used intelligence tests "correspond to other cultures than the culture the Roma children grew up in…. No different tests intended for this minority were ever processed."); Exhibit 12B (Statement of Monika Horáková) ("None of the tests have been standardised for use in the Romani population"); Exhibit 11A (Statement of Helena Balabánová) ("the tests used in the PPP Centre are geared for the majority non-Romani Czech citizens [and] are culturally biased and could not possibly measure the intelligence of a Romani child…. [A]ll of the tests used at the PPP Centres have never been tested or standardised for use on the Romani community"); Exhibit 13A (Statement of Helena Jiřincová) ("psychological tests used in the Czech Republic have never been standardised for the Romani population. Therefore, Romani children may be handicapped in both language (in so-called culture-free tests, as instructions are submitted in Czech) and types of activities required by the tests"); Exhibit 11C (Record of Interview of Pavel Kuchař) ("the psychological tests were designed to measure the intelligence of non-Roma students and were therefore culturally biased").

[120] Exhibit 19B (Statement of Fairtest).

[121] The only test in use that has been standardised to the Czech population is the Prague Children's Wechsler test, which was "last standardised in the Czech Republic in 1973." (Exhibit 10M) (Transcript, Interview with Dr. Petr Klíma, Psychologist, 5 March, 1999, Prague). See Exhibit 12 B (Statement of Monika Horáková) ("Many of the IQ tests used at the PPP Centres are out of date and have not been standardised to the Czech population, let alone for Czech Roma").

[122] "We work with Wechsler from a version that was created in the year 1947 or 1949….And we would like to use a version which was created in America and then in England in the year 1991 or something…." (Exhibit 10E) (Transcript, Interview with Václav Mertin, Professor of Psychology, Charles University, 19 February, 1999).

result, Romani are being measured by – and unfairly deemed to "fail" – tests not properly designed for them.[123]

7.30 It is for precisely this reason that, in the United States, a country still struggling with difficulty to combat racial discrimination, federal regulations require that school districts which employ tests to assess disability "must have evaluation standards and procedures that ensure that tests used in evaluating students have been validated for the purpose for which they are used… and test what they purport to measure rather than reflecting students' disabilities. Schools also must have placement procedures that use multiple sources of information and that ensure … that placement decisions are consistent with the requirement that students be educated in a regular educational setting to the greatest extent possible."[124] The regulations further require schools to conduct periodic reevaluation of students receiving special education, and to "have in place procedural safeguards to ensure that identification, evaluation and placement decisions do not discriminate. These safeguards include notice, an opportunity for parents or guardians to examine relevant records, an impartial hearing with representation by counsel, and a review procedure."[125]

c) <u>In administering tests to Applicants and other Romani children, insufficient care has been taken to account for, and overcome predictable cultural, linguistic and/or other obstacles which</u> <u>often undermine the validity of "intelligence" assessments.</u>

7.31 Many tests reflect a youth's mastery (and the ability to communicate his or her mastery) of material to which he or she has been exposed. Many factors other than raw, „innate" intelligence may interfere with the ability to gain, or express at the time of assessment, mastery of the matters assessed. "These factors include medical problems, cultural and other contents of the home experience, dominant language, traumatic experiences, and overall emotional status."[126] Law in other countries requires that these factors be identified and weighed in the course of assessment and placement decisions for youth.[127]

---

[123] See Exhibit 14A (Statement of Dr. Eleonora Smékalová). See also Exhibit 19A (Dr. Eleonora Smékalová, "Assessment of Commonly Used Intelligence Tests…") (outlining numerous linguistic, cultural and other ways in which intelligence tests, and PDW test in particular, are biased against Roma).

[124] U.S. Commission on Civil Rights, "Equal Educational Opportunity Project Series: Volume I" (1996), p. 193 (citing Volume 34, Code of Federal Regulations, section 104.35 (U.S. Department of Education regulations for Section 504 of the Rehabilitation Act of 1973, 29 United States Code, section 794 (1988 and Supp. V. 1993))).

[125] "Equal Educational Opportunity Project Series," citing Volume 34, Code of Federal Regulations, section 104.36.

[126] R. Pressman, „A Comprehensive Approach to the Issue of Disparate Special Education Placement Rates of African-American and National-Origin Minority Youth," Clearinghouse Review (1993), p. 329, n.45. See also Exhibit 9E: "The Romany- experience from psychological practice" by PhDr Petr Klima.

[127] See Volume 34, United States Code of Federal Regulations, sections 300.532(f), 300.533(1)-(2), 104.35©(1)-(2). A standard academic text in the field observes: "Test administrators should also take special care in the administration of tests to minority children. It is essential to be aware of the possibility that, in contrast to the white, middle-class examinee, the minority child … may have had less previous experience in taking tests, may be less motivated to perform well in the situation, or may be alienated by test content emphasizing white, middle-class values." Therefore, "when using tests with ethnic minorities … the possible influences of different cultures on both test performance and the meanings of various attributes and behaviors must be considered." W. Walsh and N. Betz, Tests and Assessment (3rd Ed.) (1995), pp. 417-18.

7.32 For example, it is undeniable that to the extent Romani children speak other than standard Czech, they will be "handicapped in at least the verbal component of the tests" in a way which has nothing to do with intelligence.[128] And, to the extent that language is a barrier to basic school entry, language deficiencies disproportionately and negatively affect the entry opportunities of Roma.[129] Thus, research in other contexts suggests that special education assignments among minority populations are less frequent where language programs are provided within the regular school curriculum. Data in the US suggest that Hispanic students are less likely to be placed in special education in those school districts with sizable bilingual programs. It has been suggested that Hispanic students with poor English proficiency are misclassified as educable mentally retarded when bilingual programs are not available.[130]

7.33 Indeed, the cultural/racial bias of standardized intelligence tests has been widely recognized by courts. See Columbus Board of Education v. Penick, 443 U.S. 449, n.17 (1979) ("it is well documented that minorities do not perform as well as [whites] on standardized exams – principally because of cultural and socioeconomic differences"). Thus, in certain countries with heterogeneous populations, special measures are taken to account for the most obvious language barriers which might bias intelligence test results of students who are not proficient in the dominant language. In some cases, intelligence tests must be administered by bilingual clinicians versed both in the dominant language and in the minority student's first language.

7.34 In the Czech Republic, some psychologists "have no idea about Romani culture or the upbringing of the [Romani] child, which are vital considerations to be taken into account" in undertaking educational evaluations.[131] Moreover, "the environment at the PPP Center is totally inappropriate for the Romani child. In particular, a Romani child is often intimidated and scared of a white psychologist asking questions. Usually, the Romani parents

---

[128] Cf. Larry P. v. Riles, 495 F. Supp. 926, 958 (N.D. Cal. 1979) (suggesting same concerning black children and English language skills). It is widely recognized that vocabulary is not standard, even when people use the same word. So even before one can figure out the answer to a problem, those administering the test must first must ensure that the examiner and the examinee understand the word in the same way. Ibid. (noting evidence that "black children are more likely to be exposed to nonstandard English, and that exposure will be reflected in IQ scores").

[129] See Exhibit 14A (Statement of Dr. Eleonora Smékalová) (a "language barrier" impedes the performance of some Roma on intelligence tests; many Roma in the Czech Republic "use a mixture of three languages – Romani language, Czech and Slovak"); Exhibit 11A (Statement of Helena Balabánová) (noting language difficulties for Roma children with tests); Exhibit 11H (Statement of former special school teacher) (due to language difficulties, some"Romani children do not fully understand the questions asked by the psychologist"; this has "nothing do to with mental deficiency but with a matter of language"); Exhibit 11D (Record of Interview of Libuše Krupová, Teacher, Special School Těšínská, Ostrava, 15 March, 1999) (some Roma "have problems with the Czech language and other cultural disadvantages that impede them attending basic school…. [P]sychological tests are not always properly understood by Roma children…. Certain questions asked by the psychologists were not properly understood by Roma children…. [A]ll Roma children that fail the tests of pscyhologists in the Czech language should be re-tested in the Roma language").

[130] Jeremy D. Finn, Patterns in Special Education Placement as Revealed by the OCR Surveys, in Placing Children in Special Education: A Strategy for Equity (Kirby A.Heller et al., eds. 1982); Beth Harry, „Cultural Diversity, Families and the Special Education System: Communication and Empowerment" (1992), at pp. 64-66. Of course, language deficiency in and of itself is not a reasonable and objective justification for disproportionate placement of Roma in special schools. See infra, Section III.C(2).

[131] Exhibit 11A (Statement of Helena Balabánová) (Some psychologists "make no distinctions among children…. In interpreting the tests, they do not take into account that a Romani child had a completely different life experience from that of most non-Roma children").

are not allowed to sit with their child, and there are of course no Romani psychologists in PPP Centers in the Czech Republic."[132]

d) No guidelines effectively circumscribe individual discretion in the administration of tests and the interpretation of results, leaving the assessment process vulnerable to influence by racial prejudice, cultural insensitivity and other irrelevant factors.

7.35 Tests used by psychologists are entirely at the discretion of the individual psychologist. There is no law or decree indicating which tests should be used or how they should be applied.[133] There is no universal standard of mental deficiency, or even of how psychologists should interpret test results.[134] Thus, it is possible for one psychologist, using one assessment battery, to conclude that a child belongs in special school, and for another psychologist to conclude, on the basis of another test, that the same child belongs in basic school.[135] The absence of safeguards and uniform standards to insure that the testing and evaluation process is not influenced by racial, cultural and other factors significantly undermines the reliability of the results.

7.36 Further, counsel for Applicants has had an opportunity to view the decisions made by the PPP Centers in respect of each Applicant. In no case does the written

---

[132] Ibid. See Exhibit 12B (Statement of Monika Horáková, MP) (Some psychologists "have little or no patience in testing Romani children, which can result in test inaccuracies…. Further, … the environment of the PPC Centre is such that many Romani children feel very uncomfortable and cannot perform to the best of their abilities. In particular … many Romani children are fearful of non-Romani authority figures and this fear often interferes with the performance of Roma children in responding to questions in intelligence tests"); Exhibigt 14A (Statement of Dr. Eleonora Smékalová) ("If a Romani child comes to the [psychological evluation] centre on recommendation from the school, s/he may have developed a fear of the teacher which can be transmitted to 'another white person,' and the child may be fearful of the [psychological] examination. If the Romani child has previously experienced discrimination from his/her white teacher, the more will s/he be afraid in the office of a stranger"; this is particularly true for pre-school and early school children).

[133] Exhibit 10F (Transcript, Interview with Dr Hana Prokešová, March 10, 1999, Prague). See also Exhibit 8B (Letter of 2 November 1998, from Bohumír Sumský, Ministry of Education, to Petr Horváth) ("The methodology used is not the same in each PPP Centre. Centres and particular psychologists use different methods"); Exhibit 10M (Transcript, Interview with Dr. Petr Klíma) (there exists no government directive indicating which tests to use); Exhibit 10A (Transcript, Interview with Miroslav Bartošek) (the choice of which test to use is "a matter of his [the psychologist's] own personal experience, his education"); Exhibit 10C (Transcript, Interview with Jiří Pilař) (the choice of which test to use "depends on the psychologist"); Exhibit 14A (Statement of Dr. Eleonora Smékalová) (Institute of Pedagogical and Psychological Counselling in Prague does not assist psychologists inquiring whether to use the older PDW test or the newer WISC III test); Exhibit 17A (Letter from Přerov PPP Centre, to Debbie Winterbourne, 1 April, 1999) ("Services of the Pedagogic and Psychological Counselling represented in the system of state education by, inter alia, pedagogic and psychological centres are not bound by any directives or methodical recommendations for application of particular diagnostic or therapeutic methods or procedures. Each psychologist uses methods which, according to his/her opinion, best matches the type of problem, client, situation, etc.");

[134] See Exhibit 14A (Statement of Dr. Etel Smékalová) ("there is no agreement among pedagogical psychologists on procedures and methods used for the recommendation of children to appropriate schools. Each psychologist decides in his/her own discretion…". Furthermore, there exists a lack of clarity concerning the "terminology" of mental deficiency employed in the Schools Law and the Specialised Schools Decree, and apparent conflicts between the legal terms and the scoring scales on the major tests; thus, "the Wechsler's test is not compatible with the wording of law which mentions intellectual deficiencies or mental impairment. Nevertheless, the test is used as an indicator for these factors," giving rise to "strongly misleading" test results, "especially with children who … differentiate from the majority society (i.e., different ethnicity….)").

[135] See Exhibit 10E (Transcript, Interview of Václav Mertin).

recommendation specify which particular test was used by the psychologist, how long the testing took or under what circumstances the test was performed. In fact the decision of the PPP Center that the Applicant would be better placed in special school was often based on the following reasons: (i) poor linguistic ability (ii) a 'tolerant upbringing' by the Applicant's parents and (iii) 'inappropriate social environment' (in some cases the term "social retardation" is used).

e) In practice, notwithstanding these flaws, educational evaluators and psychologists place undue weight on test results in making placement recommendations.

7.37 In Ostrava and other parts of the Czech Republic, individual test results too often form the primary or exclusive basis for student placement decisions, notwithstanding their problematic nature.[136] Thus, some "psychologists do not take into account the child's family background or social conditions."[137] In some other countries, the law expressly prohibits the evaluation and placement of students solely on the basis of tests that are designed to provide a single general intelligence quotient.[138] Professionals advise that "a decision or characterization that will have a major impact on a test taker should not automatically be made on the basis of a single test score. Other relevant information for the decision should also be taken into account by the professionals making the decision."[139] Caution in placing excessive reliance on test results is particularly warranted, given that the relativity of classifications such as "mentally deficient" or "educable mental retarded" has long been evident.[140]

f) In violation of the law, once assigned to special schools, the Applicants, like most other Romani children, have not been adequately monitored to ensure the continuing suitability of their placement; hence, any errors inherent in the initial testing and assignment procedure have been compounded and rendered permanent

7.38 "It is widely recognized that reassessment leading to the reconsideration of earlier decisions should be systematically incorporated into the program of classification and placement."[141] Nonetheless, in Ostrava and other parts of the Czech Republic, students sent

---

[136] See Exhibit 14A (Statement of Dr. Eleonora Smékalová) ("It sometimes happens that a counselling psychologist relies exclusively on the results of one test and does not take into account other factors concerning the child, including his/her surroundings and nature").
[137] Exhibit 11H (Statement of former special school teacher).
[138] See Volume 34, United States Code of Federal Regulations, section 104.35(b)(2) (containing such prohibition on misuse of tests).
[139] United States Department of Education, Office of Civil Rights, "Investigative Guidance" (March 10, 1995), page 5, quoting Standards for Educational and Psychological Testing, at 8.12. See also Exhibit 19B (Statement of Fairtest) (same).
[140] To take one example, in 1973, the American Association on Mental Deficiency changed the definition of „educable mental retarded" from one to two standard deviations below the mean on an IQ test, which resulted in the summary declassification of many students. B. Harry, "The Disproportionate Representation of Minority Students in Special Education: Theories and Recommendations" (1994), p. 28. „The argument that mild mental retardation is a reflection of cultural beliefs and attitudes at a given point in time does not deny that differences exist in individuals' cognitive and behavioral competencies. Rather, this perspective emphasizes that the point at which such differences come to be considered deviant, or ‚abnormal,' is a matter of societal definition, and that the classifications given these deviances will also vary in relation to community standards and conditions." (Ibid., p. 29).
[141] W. Walsh and N. Betz, Tests and Assessment (3rd ed.) (1995), p. 418.

to special school are rarely monitored or subsequently re-evaluated in order to determine the continuing suitability of their placement.[142] Indeed, in some cases, because of the absence of systematic monitoring and re-evaluation, some children are sent to special schools on the basis of test results produced years earlier. In the words of one experienced practitioner:

> "It may happen that a Romani child of five fails the test and is referred to special school. But his/her parents refuse to register the child in the special school. So the child starts to attend the basic school, but after a lapse of one or two years, the teacher recommends that s/he be transferred to the special school. No new testing is administered, because the responsible authorities rely on the results of the original test performed when the child was five. So the transfer of the child is undertaken without a second evaluation. I believe that a similar situation does not happen with non-Romani children."[143]

7.39 This seemingly obvious shortcoming occurs routinely, notwithstanding that Czech law obliges headmasters of special schools to recommend transfer of students should "any change" in their condition warrant.[144] Even assuming the validity of the initial tests – which the Applicants contest - the fact that a child was tested with a certain result one, two or three years ago says very little, if anything, about the continuing suitability today of that child's placement in special school.

> g) <u>The reliability of the test results leading to the overrepresentation of Roma in special schools is belied by the fact that a comparable statistical discrepancy along racial lines is NOT apparent in specialized schools for the more severely disabled, where manifestations of disability are more objectively verifiable and less subject to influence by racial prejudice.</u>

7.40 The Ostrava School Bureau reports that, in addition to eight special schools, Ostrava has one auxiliary school, located at Jeseninova 4, Ostrava-Kunčice 719 00, and two specialised schools -- one located at the City Hospital Ostrava-Fifejdy (Ostrava-Poruba, Ukrajinská 19), and one for the hearing impaired located at Ostrava-Poruba, Spartakovců 1153.[145] As noted above, auxiliary schools comprise school populations of children who are seriously mentally disabled. They are defined by law as educating children "who are 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."[146] Applicants have collected statistics from the one auxiliary school in Ostrava, which show that as of 11 February 1999, the school had 52 pupils, only three of whom were Roma.[147]

---

[142] See Exhibit 14A (Statement of Dr. Eleonora Smékalová) ("Usually the process of testing is not repeated [after placement in special school], so there is no assurance that a child's capabilities are still appropriate for the special school … after a certain period of time. In practice, it means that the placement of a child into special school is decided upon only once and forever").
[143] Exhibit 14A (Statement of Dr. Eleonora Smékalová).
[144] See Special Schools Decree 1997, Section 6(2).
[145] Exhibit 2A.
[146]Schools Law, Article 33(1).
[147] See Exhibit 4.

7.41 Specialized elementary schools provide education for students with physical disability, behavioral problems or long-term health problems.[148] Applicants have collected statistics from the above two specialized schools showing that, as of 18 May 1999, the specialized school located at the City Hospital had 46 students, none of them Roma;[149] and the specialized school for the hearing impaired had 85 students, none of them Roma.[150]

7.42 The notion that intelligence test results provide an "objective and reasonable" explanation for the overrepresentation of Roma in special schools is often premised, in part, on the assumption of a higher incidence of mental disability among Romani children than among non-Roma. And yet, this does not explain why, in Ostrava and more generally throughout the Czech Republic, patterns of disproportionate placement of Roma in special schools are not reproduced in auxiliary or other specialized schools for children with more severe forms of mental disability. Those who argue that intelligence test results offer an "objective and reasonable" explanation for disproportionate placement in special schools, have the burden of explaining why Roma purportedly more prone to milder forms of mental disability ("appropriate" for assignment to special schools) do not similarly suffer from higher incidence of more severe forms of disability. Applicants respectfully observe that determinations of more severe forms of disability are not as susceptible to irrelevant considerations such as racial prejudice, which may – and Applicants submit, do – bias placement decisions for special schools.

2. Any alleged deficiency in Czech language skills does not adequately explain why the Applicants -- and a disproportionately high number of Roma -- have been assigned to special school.

7.43 To the extent differential language capabilities exist, such problems do not warrant assignment to schools for the mentally deficient. Rather, as international law requires and other countries practice, the government must provide adequate education capable of addressing the needs of children with language difficulties. Indeed, Articles 24 and 25 of the Charter of Fundamental Rights and Freedoms, as well as Article 3 of the Schools Law, implicitly secure this right for all children in the Czech Republic.[151]

7.44 The United States Supreme Court has held that, where, inability to speak and understand the English language excludes national origin minority-group members from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional programs to these students.[152] Thus, "localities must take ‚affirmative steps' to rectify students' English-language deficiencies and enable speakers of other languages to acquire effective communication skills, so that all of the instructional programs are open to

[148]Schools Law, Articled 29(1) and 30(1).
[149] Exhibit 5A
[150] Exhibit 5B
[151] Article 24 of the Charter provides: "A person's affiliation with any national or ethnic minority may not be to her detriment." Article 25(2) provides, in relevant part: "Citizens belonging to national and ethnic minority groups are also guaranteed, under the conditions set down by law: (a) the right to education in their own language…." Article 3 of the Schools Law secures to "students who belong to national minorities" the "right to education in their mother tongue to the extent adequate to the interests of their national development."
[152] Lau v. Nichols, 414 U.S. 563 (1974).

each student. School districts' failure to enable these students to acquire effective English-language skills would be a violation of … the Civil Rights Act."[153] In litigation brought in the United States more than 25 years ago, school districts undertook reforms based in part on proof that placement decisions had been made on the basis of inappropriate English language testing for Spanish-speaking children.[154]

7.45 In Ostrava and other areas of the Czech Republic, "Psychologists administering [intelligence] tests do not speak the Romani language. Many Romani children tested at a PPP centre are at a disadvantage because of the language barrier. Notwithstanding this problem, and the fact that its existence is widely acknowledged by school and government officials in Ostrava and elsewhere," Applicants are "unaware that any PPP Centre uses bilingual psychologists or clinicians to administer tests to children whose first language is Romani."[155]

7.46 Hence, it is no excuse for a school system to send ethnic minority children to special schools for the mentally deficient, even if they are not mentally deficient, solely because they don't have the language skills to cope with basic school. It is the obligation of the school system to provide training adequate to ensure that such language-minority children can adequately perform in the basic school system.

3. Applicants' assignment to special schools – and the overrepresentation of Roma in special schools – cannot be explained by reference to their socio-economic status.

7.47 Of course, poverty and racial questions are not entirely unrelated, and it is true that many Romani children in special schools come from families in economic need. Nonetheless, poverty alone does not explain the gross overrepresentation of Roma in special schools. First of all, many poor ethnic Czech 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 and/or inadequate medical care stemming from their impoverished condition would not explain why Roma are not similarly overrepresented in schools for the more seriously disabled. If poverty puts individuals at greater risk for milder forms of mental disability for which special schools are purportedly designed, ought it not also contribute to more severe forms of mental disability such as those from which children placed in auxiliary schools are said to suffer? And yet, as noted above, the proportion of Roma students in the one auxiliary school in Ostrava is far lower than in any special school.[156]

---

[153] U.S. Commission on Civil Rights, "Equal Educational Opportunity Project Series: Volume I" (December1996), p. 107. Thus, United States law 'impose[s] an affirmative duty on school officials to provide special assistance to" students with limited English-language proficiency. "Localities are thereby charged with the responsibility for ensuring that high standards of academic performance and equal access to quality education apply to limited-English-proficient students, in addition to their more English-fluent peers." (Ibid.).
[154] See, e.g., Diana, et al., v. State Board of Education of California, Dkt. No. C-70 37 RFP, Stipulation and Order (February 5, 1970); Guadalupe Organization, et al., v. Tempe Elementary School District, Dkt. No. CIV 71-435 PHX, Stipulation of Dismissal (May 9, 1972).
[155] Exhibit 12B (Statement of Monika Horáková, MP).
[156] See Exhibit 4.

4. Applicants' assignment to special schools – and the overrepresentation of Roma in Ostrava special schools – cannot be justified by the fact that their parents may have consented to such assignment.

7.48 First of all, even if parental consent in all cases were legally valid – and Applicants dispute this (see below) – it would not justify violation of the Applicants' own rights to non-discrimination in education. The European Convention does not sanction punishing the children for the sins of their parents.

7.49 Moreover, in order to have legal effect, parental consent to government actions which affect their children's fundamental rights must be informed consent. But prior to their children's placement in special schools, the parents of all Applicants, like Roma in Ostrava and many other parts of the Czech Republic, have not been adequately informed of numerous facts of great significance, including the following:

- that they have a right not to consent to such placement;
- that, once given, for all practical purposes, parental consent may not be withdrawn;
- that, in practice, assignments to special school in Ostrava are permanent and irrevocable, given the failure of local authorities to fulfill their obligations to monitor placements regularly and the practical impossibility of transferring back to basic school;
- that graduates of special schools are effectively prohibited by law and practice from entrance to non-vocational secondary educational institutions, with attendant damage to their opportunities to secure adequate employment.

7.50 Following the child's psychological evaluation, "the parents should be informed of test results in a manner that the information is comprehensible and useful for them."[157] In fact, "this does not happen much in practice."[158] To the contrary, "'parental consent' is sometimes obtained by distorting or hiding information. Parents are not told that children are not allowed to pursue further study after they graduate from special school. Consent given by parents in this way is not only consent due to a lack of information, but often it is a response to misleading information."[159] Far from warning parents of the risks attendant to special school placement, some psychologists "often tell parents that it would be better for their child to complete special school than to graduate from a lower grade … of basic school" – as if those were the only options.

7.51 In July 1999, the Applicant's attorney took the opportunity to peruse the court files at the Constitutional Court which contained standard 'parental consent' forms. The form is usually a leaflet measuring about 6cm x 20cm with the text: "I request/agree that my child start the special school. I agree with his/her examination at the PPP Center." The forms contained no information about the consequences of education in special school.

---

[157] Exhibit 14A (Statement of Dr. Eleonora Smékalová).
[158] Ibid.
[159] Ibid.

7.52 Further, these forms have not been used for every Applicant. Thus, the court files contain no written consent form signed by the parents of Applicant 12. And in the case of Applicant 5, the school Director appears to imply that consent has been given, but no additional evidence confirms this implication.

7.53 In its reply to the Applicants' submission to the Czech Constitutional Court, the Ministry of Education conceded that not all parents are informed of the facts essential to consent, but sought unconvincingly to evade responsibility for this omission by blaming the individual schools, as if the Ministry were not legally responsible for its schools' actions and policies:

> "If some cases occurred that parents were not informed of their rights, it is the responsibility of the particular schools, as the Ministry cannot revise particular cases of assignment or transfer or pupils into special schools." [160]

7.54 As detailed above, placement in special school is tantamount to a life sentence of inadequate education and public dependency. At present, Czech law does not sufficiently protect parental rights to insure that they are aware of, and informed about, the consequences of their consent to such a crucial matter as the assignment of their child to special school. Thus, no law requires that parental consent be given in writing, or that parents certify that, prior to giving their consent, they have been adequately informed of, at a minimum, the above necessary facts. In practice, then, it should come as no surprise that, in the words of one psychologist:

> "Romani parents face relentless pressure –from teachers, school administrators, psychologists and others - to place their child in special school. In many cases, parental consent is not formally requested. Even where consent is sought explicitly, Romani parents are virtually never provided with a whole range of information essential to an informed and voluntary decision on a matter as fundamental as children's education. Thus, I am aware of numerous Romani parents who, prior to consenting to their children's assignment to special school were never informed of (a) the intelligence test used at the PPP Center; (b) the manner in which the test was administered; (c) other factors that were considered by the PPP Center in reaching its conclusion as to placement; (d) the legal prohibition against admission of special school graduates to any secondary education apart from vocational, or trade, school (e) the fact that children assigned to special schools are taught at a level far below that of children in normal schools (the curriculum in special school is vastly inferior to that of basic school);(f) the fact that, although monitoring of placements in special school is mandated by law to assess the continuing validity of initial assignment decisions, in practice this monitoring does not take place and (g) the fact that in reality, Romani children assigned to special school have no opportunity of ever transferring back to basic school."[161]

---

[160] See Exhibit 27C at page 2.

[161] Exhibit 12B (Statement of Monika Horáková, MP). See also Exhibit 9C (Hana Prokešová, "A Note on the Article, 'Gypsies Go to Heaven – and to the Special School,'" Výchovné Poradenství, May 1998) ("I am aware of the fact that certain special schools try to 'enroll children'" through, inter alia, "incompletely informing parents"); Exhibit 10E (Transcript, Interview of Václav Mertin) (although teachers and psychologists have a

7.55 An experienced psychologist offers one example of the effect of continuing pressure in shaping parental "consent":

> "The … case began in June 1996. One Romani girl at a pre-school age was placed into a foster family in Olomouc. She attended second grade and did quite well at [basic] school; she was said to have only one "three" mark in mathematics. At that time two social workers recommended to the foster parents that she be transferred to the special school, reasoning that the atmosphere there would be more convenient for her because there are many Romani children and, in addition, they stated, "she will go there sooner or later so let's just do it now". The girl was examined in the PPP Center where they issued a recommendation for transfer. The foster parents then turned to our private counseling center because in their opinion the girl was smart and the school did not refer her for transfer. I administered a new examination using the Terman-Merrill test and, according to my results, the girl received 90 points for her performance which is still average. In the first grade she got the mark "one", she could read and write well and she understood what she was reading…. I could not accept the fact that in the state-counseling center they referred her to the special school; I discourage her parents from agreeing to the transfer. This girl was not at all mentally retarded but the emotional pressure which the workers exerted on the foster parents was so immense that they considered consenting to the transfer if she would be more happy in the special school, because the child's satisfaction was the top priority for them. After approximately one year, obviously pressured from all sides, they decided for transfer."[162]

7.56 Indeed, Romani parents, like Czech society as a whole, are all too often mystified and overwhelmed by intelligence test results and evaluations by educational "experts". Parents often receive evaluation reports only at the very meeting with officials where their consent is sought – thus giving them little or no opportunity to review and assess the findings – and the reports are frequently communicated summarily, and/or in professional jargon which is unintelligible to the layperson. In a similar case in the United States, a trial court discounted the granting of parental consent as a bar to challenging racially discriminatory placements on the ground "that consent is rarely withheld, particularly by minorities, since the mystique of teacher authority and IQ scores tends to overwhelm parents."[163] Leading experts warn that "it is especially crucial in testing for educational classification and placement to ensure that the parents are informed concerning the meaning of test scores."[164]

7.57 In addition to the foregoing problems, a number of Romani parents, including parents of some of the Applicants, have consented to their children's placement in special schools out of reasonable fear of racial hostility against Roma in basic schools.

---

duty to explain to parents "what a special school means," they retain in practice the power to "pressure" parents into consenting to transfer through, for example, giving low grades to students in basic schools).

[162] Exhibit 14A (Statement of Dr. Eleonora Smékalová).

[163] Larry P. v. Riles, 495 F. Supp. 926, 950 n.51 (N.D. Cal. 1979).

[164] W. Walsh and N. Betz, Tests and Assessment (3rd ed.) (1995), p. 418.

7.58 A wealth of evidence suggests that Romani children in Ostrava basic schools routinely encounter racially-offensive speech, racial exclusion (being forced to sit in the back of the class), and threats of racial violence on the part of teachers, administrators and non-Roma students.[165] For example, in spring 1999, a basic school in Ostrava received a bomb threat targeted at presence of Roma students. The letter threatened that a bomb would be placed in the school unless the Roma pupils were removed (Exhibit 20S). The Czech government has recently acknowledged that some Romani parents "agree with assignment or transfer of their child into the special school" for a number of reasons, "in particular because children in these schools are safe from racist verbal or even physical abuse."[166] See Exhibit 12B (Statement of Monika Horáková) ("It is no wonder that Roma parents simply do not want to send their child to basic school. Those few Romani pupils who do attend basic school often face repeated racial discrimination, including verbal and physical abuse on the part of teachers and non-Roma pupils and physical segregation from non-Roma at the back of the class"); Exhibit 11G (Statement of Božena Dudi-Kot'ová, Teaching Assistant, School Přemysla Pitra, Ostrava) (detailing explicitly racist insults by teachers and pupils against two of her children who attended basic school); Exhibit 11A (Statement of Helena Balabánová) (There is a "problem of discrimination in basic schools. Several teachers are openly racist towards Romani children," as are some non-Romani pupils); Exhibit 20B (Statement of Ladislav Koky) (forced to sit alone in back of class in basic school in Ostrava; given damaged books at basic school though non-Roma received books in good condition); Exhibit 20C (Statement of Roman Bandy) (during seven years at basic school, authorities repeatedly ignored complaints of abuse by non-Roma, including physical violence leading to broken arm, racial epithets, and drawings of swastikas on blackboard); Exhibit 20D (Statement of Vera Klemparová) (at basic school in Ostrava, suffered physical violence and racial insults from non-Roma; Exhibit 20E (Statement of Iveta Kroščenová) (Romani child in basic school in Ostrava under repeated pressure from teacher to transfer to special school); Exhibit 20F (Statement of Monika Kroščenová) (Romani child at basic school in Ostrava under continual pressure from teacher to transfer to special school, repeatedly called "black Gypsy" by non-Roma classmates); Exhibit 20G (Statement of Monika Bačová) (Romani child at basic school in Ostrava forced to sit alone in back of class and subjected to racial epithets); Exhibit 20H (Statement of Nataša Poláková) (Romani child at basic school in Ostrava forced to sit in back of class, insulted as "Gypsy brat" by teacher, and under repeated teacher pressure to transfer to school with more Roma students); Exhibit 20I (Statement of Helena Čermáková) (school authorities at basic school in Ostrava ignored repeated complaints by Roma children of racial insults and physical attack by non-Roma classmates); Exhibit 20J (Statement of Aranka Čonková (authorities at basic school in Ostrava have failed to remedy repeated racist insults by non-Roma students against Roma student); Exhibit 20K (Statement of Veronika Kopalova) (Romani child at basic school in Ostrava forced to sit in back of class and under teacher pressure to transfer to special school; authorities ignored repeated complaints of verbal assaults by non-Roma students against "dirty Gypsy").; Exhibit 20L (Statement of Filip Koky) (Romani child at basic school in

---

[165] See also Exhibit 8A: 'Instruction of the deputy of the Minister of Education, Youth and Physical Education of the Czech Republic for elementary and secondary education for school and school facilities to influence against Signs of Racism, Intolerance and Xenophobia' dated 1995: "The average age of the people who show intolerance, xenophobia and racism moves to a lower level and these signs present receptive philosophy for a broader spectrum of youth, often already during the compulsory school attendance which is exceptionally disturbing" (at paragraph 1)

[166] Exhibit 8F (Government Resolution No. 279 of April 7, 1999).

Ostrava made to sit in back of class, denied permission to participate in class discussion and do classwork).[167]

5. The History of Racial Segregation

7.59 Applicants respectfully submit that one explanation for the overwhelming overrepresentation of Roma in special schools is the legacy of institutionalized racial segregation outlined in the report of David Čaněk referred to above (see Exhibit 7). It is well established that the debilitating effects of segregation and discrimination cannot be eliminated overnight, and may extend for years and decades into the future.[168] Thus, it would be unsurprising if the poor performance of many Roma on intelligence tests reflected the fact that, until 1958, it was permissible to assign Roma to special schools even if they were not mentally deficient, and that, throughout the Communist era, Roma were systematically sent to special schools in numbers way out of proportion to their percentage of the population. In an analogous case, a United States court has held that the disproportionate failure rates of black students on functional literacy tests needed to receive a high school diploma might well be attributed, in part, to the unequal education all blacks had received during a prior period of institutionalized racial segregation.[169]

6. Racism

7.60 Substantial evidence suggests that the overrepresentation of Roma in special schools and their underrepresentation in basic schools are in no insubstantial part the product of racist attitudes about Romani intelligence and culture which are widespread among government officials and school administrators. In this regard, Applicants note, as described above, that educational authorities in Ostrava and other parts of the Czech Republic have for several decades knowingly placed overwhelmingly disproportionate numbers of Romani children in special schools.

7.61 Applicants further observe that special education assignments rest on widely shared beliefs that mental deficiency has an objectively discernible nature, and hence that scientific evaluations are not in any way influenced by race. They also assume that any racial discrimination will be readily apparent in individual expressions of prejudice or manifestations of racial animus. There is a widespread assumption that racial discrimination, if it exists, can be pinned down to one or a few moments in the school lives of Romani children. In fact, however, the racism which Romani children suffer is both more pervasive and less quantifiable than that.[170]

---

[167] The Court is also requested to peruse Exhibits 20M-20R which continue the sad story of discrimination against Roma children in basic schools.

[168] Thus, United States courts have on numerous occasions invalidated facially neutral programs which perpetuate past racial segregation/discrimination, on the grounds that the racial minority who has suffered the negative effects of that past segregation/discrimination "still wear the badge of their old deprivation underachievement." McNeal v. Tate, 508 F.2d 1017, 1019 (5th Cir. 1975). See Louisiana v. U.S., 380 U.S. 145 (1965); Guinn v. U.S., 238 U.S. 347 (1915).

[169] Debra P. v. Turlington, 644 F. 2d 397, 407 (5th Cir. 1981).

[170] In this regard, it may be helpful to recall that, in other contexts, discriminatory intent "does not necessarily mean an intent to harm black children. Since Brown v. Board of Education, an intent to segregate minority children into separate schools has sufficed to prove" racial discrimination. Larry P. v. Riles, 495 F. Supp. 926, 979 (N.D. Cal. 1979) (citations omitted).

7.62 In Czech society, being ethnic Czech means being treated as "normal"; being anything other than ethnic Czech is necessarily a departure from this norm. Czech society maintains an official commitment to race- and ethnic- neutrality (See, e.g., Charter of Fundamental Rights and Freedoms, Articles 3(1), 24). However, it is no secret that being Roma in Czech society means existing within a social category that carries many negative connotations among a substantial segment of the majority population. Thus, despite official government ideology, many (though of course not all) ethnic Czechs continue to make negative assumptions about Roma – of laziness, of not wanting to work, of criminality, of stupidity, of violence, and of not being sufficiently concerned about the education of their children. Government officials and school administrators – even those who may be well meaning – are not immune from these attitudes.[171] Indeed, the fact that school and government officials for so long have tolerated disproportionate placement of Roma students in special schools – and have continued to use intelligence tests which have consistently generated racially disproportionate results -- itself reveals a complacent acceptance of those disproportions, built on easy but unsubstantiated assumptions about the incidence of mental disability in, or the "inherent" intellectual inferiority, of Roma. Applicants do not argue that race is the only reason that Roma are overrepresented in special schools in Ostrava. But the evidence amply demonstrates that race places a substantial and improper role in the assignment system, from the reduced expectations of some teachers and psychologists for Roma students to the impact of daily racism on some Roma students' capacity to perform on intelligence tests.[172]

7.63 As noted above, the extreme nature of the statistical disparity between Roma and non-Roma proportional placement in special schools in and of itself gives rise to a reasonable inference of racial discrimination. See Exhibit 1A – 1H, Exhibit 2B, Exhibit 15A (Statement of Professor Reschly); Exhibit 19B (Statement of Fairtest) (Ostrava statistics on Roma/non-Roma school placement "point to a clear case of discrimination unparalleled by any that we have witnessed in the United States" and "a virtual certainty that Roma children are not being placed in special schools due to legitimate measures or concerns, but due to long term patterns of racial/ethnic bias"). Together with the overreliance upon intelligence test results, the failure to insure that evaluations are not influenced by irrelevant considerations, and the failure to inform parents adequately about the consequences of consent to special school placement, the "disproportionate placements of Roma children in

---

[171] See Exhibit 13A (Statement of Helena Jiřincová) ("The Czech society is latently racist and, according to my experience [as a teacher for five years of both special and basic school classes], even Czech teachers are frequently not able to get rid of prejudices and stereotypes they share towards Romani children"); Exhibit 20A (Statement of David Pešta) (doctor recommended he attend special school, "solely because I am Romani. I can come to no other conclusion, since I was already able to read at the age of four and have never experienced any difficulties in following the curriculum at basic school"); Exhibit 12F (Statement of Michael Stewart) (In the Czech Republic, general racial prejudice against Roma "will obviously seep into the school system, and influence the attitudes of the people who make decisions about which children should go to special school"); Exhibit 12C (Statement of Josef Stojka) (Roma children are transferred to special schools, in part "because Czech non-Roma do not want to sit in the same classroom as the Roma children").

[172] Cf. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (in holding that racially disproportionate placement of African-American students in special education denied equal educational opportunity, Court found, inter alia, that teachers underestimated the abilities of African-American students, and that the test scores of African-Americans reflected the psychological impact of daily racism they experienced), cert. dismissed, 393 U.S. 801 (1968), afff'd sub nom., Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

sub-standard educational settings provide strong evidence of institutional educational discrimination against Roma."[173]

7.64 Applicants are by no means the first to identify racial discrimination as an important factor in the overrepresentation of Romani children in special schools. To the contrary, the inaccuracy of many special school placements of Romani children has been known and criticized within the Czech Republic for more than 20 years. In the late 1970s, commenting on the situation of Roma, the dissident group Charter 77 pointed out that "the failure of Romani pupils in Czech and Slovak schools is often solved by their transfer to special schools for children with below-average intelligence."[174] According to the Charter 77 document, however, the failure of Romani children in Czech schools was the direct result of the failure of the Czech system to provide schools appropriate to the needs and respectful of the cultural identity of Romani children[175]:

> Everything, from the pictures in their spelling-primers to the entirety of the curriculum, continually forces upon them the idea that they are a foreign, inferior race without a language, without a past and without a face.[176]

7.65 In referring to the foregoing, Applicants recognize that many persons working in special schools are genuinely interested in helping Roma. Notwithstanding, racist attitudes persist and affect the treatment of Roma throughout the school system. In Ostrava in particular, even a former special school teacher acknowledges:

> "[T]here is a problem with race discrimination against Romanis in Ostrava. Many white people have prejudices against them; for example they think that the Romanis cannot live in a normal flat because they would burn it down. The Romanis get the worst housing as a result of this prejudice."[177]

7.66 In other parts of the Czech Republic, some school authorities do not refrain from giving open voice to racist attitudes about Roma, such as the all-too-widespread false belief that, in the words of one government official,

> "the Romani … <u>really do have children with genetic indisposition. That genetic indisposition really exists</u>. You can see that just looking at their names. There are

---

[173] Exhibit 19B (Statement of Fairtest).

[174] Quoted in Nečas, 1995, *Op. cit.,* p. 87.

[175] On 26 April 1999, the Government of the Czech Republic submitted a report to the Council of Europe pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities. At page 34, the government stated as follows: "Education of the majority population about the culture, history, language and religion of national minorities has traditionally been neglected. In spite of a certain progress made during the last ten years, Czech instruction books remain largely textbooks of the Czech ethnic nation, its history, its culture, its fight for ethnic autonomy and later state sovereignty, always in contrary to the German element. It is as though the Czech Lands have not traditionally been the home of various ethnic, cultural and religious communities, especially the German and Jewish national minorities, and also the perpetually disregarded Romanies."

[176] *Ibid.*

[177] Exhibit 11H (Statement of former special school teacher).

> several clans in this republic – Lakatoš, Tancoš, Tora families – those are families, clans of people breeding among themselves, who by not enriching their clan degenerated and it shows on their children….They need a truly simple program, very specific for their environment, to learn the basic things in life such as eat well, dress, cook, shop, to learn to live in the society and to learn the basics of the social science disciplines.…"[178]

7.67 It is not uncommon for officials charged with the education of Roma to assert falsely that as a racial group, "Romani children at the age of six are immature to start school attendance. They are immature not only in terms of their knowledge but also in emotional and social respect;"[179] and furthermore to blame Romani families for the perceived „failures" of their children. Thus, in the distorted view of a number of school officials, „many Romani families are not concerned with education of their children," and "the process of upbringing in Romani families is very benevolent from early childhood without any appropriate standards, fixed borders, rules and duties set forth."[180] According to one director of a PPP center, Roma lack "motivation for the education of their children," and this "lack of motivation and of interest in education are … caused genetically."[181] Some officials believe that Romani children as a class „have troubles with self-regulation, it is difficult for them to adapt to a regime, observe certain rules and standards…….they have bigger implication to impulsive and aggressive behavior. They are lacking adequate behavioral samples and motivation…. Results of tests of intellectual capabilities performed during psychological examinations usually demonstrate moderate mental retardation. It is difficult to find out the causes of this impairment which can be due to an organic damage or just due to insufficient stimulation in the non-incentive family environment…."[182]

7.68 One former special school teacher has recently explained the extent to which racism can blind even the most well-meaning:

> "Some teachers openly expressed that to work with the Gypsies was useless…..I have no doubt in my mind that most teachers need to be better educated in order to change their ignorance and narrow-mindedness towards the Roma children….[W]e truly believed that the best prospects for the future of Roma pupils were in manual labour. I can see now that race discrimination is very real indeed and exists at all levels of our society and that our own low expectations, as educators, were partly responsible for the small number of students attending secondary education."[183]

7.69 Indeed, even official government publications have not been immune from racist attitudes and assumptions. Thus, the January 1998 "Alternative Education Program of Special Schools for Pupils of the Romani Ethnicity," a decree of the Ministry of Schooling,

---

178 Exhibit 10D (Transcript, Interview of Marta Teplá, Ministry of Education, Prague) (emphasis added).
179 Exhibit 18C (Letter from Blanka Voráčková, Headmistress, Kladno Special School, to Lubomir Zubák, 1999).
180 Exhibit 18C.
181 Exhibit 14A (Statement of Dr. Eleonora Smékalová) (relating interview with PPP Centre director).
182 Exhibit 18C.
183 Exhibit 11C (Record of Interview of Pavel Kuchař); see also Exhibit 11E (statement of Marie Čadecká, teacher).

Youth and Physical Education,[184] employed racist assumptions about Roma, such as the statement that "[t]he opinions of Romani families about education proceed from the basically lower educational levels of Romani parents, a lack of motivation on the part of Roma toward education, and their entirely different values system. [...]"[185]

7.70 Applicants note as well that one particularly perverse aspect of the overrepresentation of Romani children in special schools is the extent to which this pattern reflects the economic incentives of special school administrators. Thus, although basic schools are funded partially by local municipalities and partly by the national government, special schools are funded entirely by the Ministry of Education.[186]. By increasing the amount of funding to special schools for enrollment of additional students, the current method of financing creates incentives for special school administrators to fill their student slots in order to preserve their funding and their jobs.[187] At times, such incentives may well lead some to overlook the best interests of children:

> „……..the system of funding special schools creates a perverse economic incentive to perpetuate these racially discriminatory practices. Special schools are only given funding by the government if they fill all the places in special school. Special school administrators thus have every reason to „recruit" as many pupils as possible, regardless of the psychological or educational suitability. Unfortunately Romani children are the most common targets of this pernicious policy."[188]

Conclusion – Article 14

7.71 Applicants have shown that there exists no reasonable and objective explanation for Applicants' assignment to special schools, or for the disproportionate assignment of other Roma to special schools in Ostrava. Indeed, since well before 1989, Czech government and education officials have knowingly assigned Romani children to special schools in disproportionate numbers, aware that many were not mentally deficient. Thus, as far back as

---

184 Exhibit 9A (Ministerstva školství, mládeže a tělovýchovy, "Alternativní vzdělávací program zvláštní školy pro žáky romského etnika", program č. 35 252/97-24, January 1998).
185 *Ibid.*
186 See Exhibit 10C (Transcript, Interview of Jiří Pilař); Exhibit 10J (Transcript, Interview of J. Kavan).
187 See Exhibit 9C (Hana Prokešová, "A Note on the Article, 'Gypsies Go to Heaven – and to the Special School'") ("…the current method of financing … forces schools to fulfil their capacities at the beginning of each school year. This is rather absurd for special schools where one of the criteria is failure in the basic school; it naturally leads to the attempt to have as many children in lower grades as possible"); Exhibit 16A (Record of Interview of Olga Hrdinová, Department of Crime and Drug Abuse, Ostrava, 15 November, 1998) (describing mid-1990s effort of Ostrava special school director to fill up available student slots by obtaining for recruitment purposes lists of Romani children approaching school age).
188 Exhibit 12B (Statement of Monika Horáková, MP). See also Exhibit 9C (Hana Prokešová, , "A Note on the Article, 'Gypsies Go to Heaven – and to the Special School'") ("I am aware of the fact that certain special schools try to 'enroll children' in quite strange ways: recruitment, incomplete informing of parents, enrollment of children who do not have a recommendation from the pedagogic and psychological centre or from a doctor and their effort to obtain such recommendations retrospectively, are just some of them"); Exhibit 14A (Statement of Dr. Eleonora Smékalová) ("Recently many special schools got into a difficult situation. They lack the requisite number of pupils to continue the financial operation of the school. A few days ago, one teacher from a special school asked me whether I could refer a child to them, because noone had registered with them so far. I am afraid that if she similarly turns to the state institutions, it is mainly Romani children who will be referred").

1984, according to official government statistics, half of all Romani students were attending special school.

7.72 And today, as demonstrated above, a disproportionate number of Roma, including the Applicants, continue to be assigned to special schools for the mentally deficient, notwithstanding that a) government and school officials are well aware that many Roma assigned to special schools are not, in fact, mentally deficient; b) many of the tests used have previously been shown to generate racially-disproportionate effects; c) none of these tests have ever been validated for the purpose of assessing Romani children in the Czech Republic; d) these tests are commonly administered in ways which permit racial factors to distort the results; and e) in violation of government regulations, virtually no continuing monitoring of the suitability of special school placements occurs.

7.73 The government's maintenance in force over many years of a policy known to be producing highly discriminatory results for which there exists no reasonable and objective educational justification evidences, at a minimum, studied neglect of, and a willingness to tolerate, harm disproportionately inflicted upon the Applicants and other Romani children. Such policies are in flagrant violation of the Czech government's obligations not to discriminate on the basis of race – obligations set forth in its own Charter of Fundamental Rights and Freedoms, as in binding international law.

7.74 In view of the foregoing, the applicants submit that their placement in special schools have no objective or reasonable justification. They pursue no legitimate aim, and there is no reasonable relationship of proportionality between the placement in special schools and any legitimate objective. Accordingly, the applicants have suffered racial discrimination in their enjoyment of the right to education in violation of Article 14 and Article 2 of Protocol 1 of the Convention.

8. Breach of Article 2 of Protocol 1 of the Convention: Denial of the Right to Education - The Applicants have been denied their rights to education through their assignment to special schools

8.1 Article 2 of Protocol 1 states as follows:

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

Applicants allege that they have been denied the right to an education in violation of Article 2 of Protocol 1. [189]

[189] The Court is also requested to note that Article 33 of the Charter of Fundamental Rights and Freedoms guarantees to all „the right to education…." Similarly, by virtue of Article 10 of their Constitution, the Czech Republic is bound as well by those provisions of international law which secure the right to education, including Article 26 of the Universal Declaration of Human Rights, Articles 28 and 29(a) of the Convention on the Rights of the Child, and Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (see above for complete list).

8.2 In the case of Kjeldsen, Busk, Madsen and Pederson v Denmark, [190] the Court gave guidance on the interpretation of Article 2 of Protocol 1 as follows:

"The second sentence of Article 2 is binding upon the Contracting States in the exercise of each and every function - it speaks of 'any functions'- that they undertake in the sphere of education and teaching, including that consisting of the organization and financing of public education. Furthermore, the second sentence of Article 2 must be read together with the first which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions……."(paragraph 50).

And:

"As is shown by its very structure, Article 2 constitutes a whole that is dominated by its first sentence. By binding themselves not to 'deny the right to education', the Contracting States guarantee to anyone within their jurisdiction, 'a right of access to educational institutions existing at a given time' …The right set out in the second sentence of Article 2 is an adjunct of this fundamental right to education."(paragraph 52).

8.3 Thus, separate and apart from claims of racial segregation and racial discrimination, Applicants allege that, as a result of their placement in special schools for the mentally deficient, they have been denied the right to education. Further, it is submitted that the Respondent State clearly has not respected the right of the parents of the Applicants 'to ensure such education and teaching in conformity with their own philosophical convictions': namely that, as a broad philosophical ideal, the Applicants should have the right to equal education without race discrimination.

8.4 In support of this claim, Applicants recall that, as a result of their segregation in dead-end schools for the "retarded," the Applicants, like many other Romani children in Ostrava and around the nation, have suffered severe educational, psychological and emotional harm, as demonstrated above, including the following:

- they have been subjected to a curriculum far inferior to that in basic schools;
- they have been effectively denied the opportunity of ever returning to basic school;
- they have been prohibited by law and practice from entrance to non-vocational secondary educational institutions, with attendant damage to their opportunities to secure adequate employment;
- they have been stigmatized as "stupid" or "retarded" with effects that will brand them for life, including diminished self-esteem and feelings of humiliation, alienation and lack of self-worth;
- they have been forced to study in racially segregated classrooms and hence denied the benefits of a multi-cultural educational environment.

[190] 1 EHRR 711.

For the same reasons outlined above with respect to Applicants' claims of racial discrimination, there exists no objective and reasonable justification for this denial of the right to education. Accordingly, the denial of the right is unlawful.

9. Breach of Article 6 of the Convention: Denial of Fundamental Fairness and Due Process

9.1 Among other things, Article 6(1) guarantees to everyone "[i]n the determination of his civil rights and obligations" a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The Applicants allege that the failure of the Ostrava school authorities adequately to explain the reasons underlying their assignment to special schools for the mentally retarded is in breach of Article 6 of the Convention.

Primacy of Article 6

9.2 The Court has repeatedly held that Article 6 of the Convention is of crucial importance to human rights standards. For example, the Court in its Delcourt judgment stated: "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision." [191] Further, the Convention places a duty on states, which applies regardless of cost,[192] "to organize their legal systems so as to allow the courts to comply with the requirements of article 6 (1)."[193]

Qualification under Article 6

9.3 The Applicants allege that they fulfil the requirements of Article 6 as follows:

It is submitted that the decision to place a child in special school amounts to a 'determination of his civil rights and obligations':

(i) public v. private right

Strasbourg case law generally assumes that the term 'civil rights and obligations' means rights of a private nature. Although the decision to place the child in special school is the decision of a public body (the director of the special school), it is submitted that this decision still falls within the ambit of Article 6. It was not the intention of the drafters of the Convention that the use of the word 'civil' should restrict the scope of the right of Article 6 to determinations solely of a private law character. Indeed, there is a well-established body of case law stating that public bodies can come within the purview of Article 6(1).[194]

---

[191] Judgment of 17 January 1970, A. 11, p.15. See also Moreira de Azevdo, 23 October 1990 Series A no. 189 at para. 66 (same).
[192] Airey v. Ireland, A-32 (1979).
[193] Zimmerman and Steiner v. Switzerland A-66 (1983), para. 29.
[194] See, e.g., Zander v Sweden, ECHR Series A No 279-B (1993).

Thus, in the case of Ringeisen v. Austria,[195] the Court stated:

"For Article 6, paragraph (1) to be applicable to a case it is not necessary that both parties to the proceedings should be private persons…..The wording…..covers all proceedings the result of which is decisive for private rights and obligations…..The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence."

And in the case of Konig[196], the Court held as follows:

" In these conditions it is of little consequence that here the cases concern administrative measures taken by the competent bodies in the exercise of public authority. Neither does it appear pertinent that, under the law of the State concerned, it is for administrative courts to give decisions on these cases and to do so in proceedings which leave to the court the responsibility for the investigation and for the conduct of the trial. All that is relevant under Article 6(1) of the Convention is the fact that the object of the cases in question is the determination of rights of a private nature."[197]

(ii) nature of right to education

It is submitted that assignment to special school for the mentally retarded concerns the right to education, which is a 'civil right and obligation' within the ambit of Article 6.[198]

The Court has not yet considered expressly whether the right to education amounts to such a 'civil right'. However the Court has held that an analogous right -- the right of access of a parent to her child -- is a civil right within the ambit of Article 6. See O v U.K.[199]

(iii) Domestic legal System

The Court's case-law requires for the applicability of article 6 that rights 'can be said at least on arguable grounds, to be recognized under domestic law.'[200] In the instant case, the rights to education and the right not to be discriminated against are clearly

---

[195] 16 July 1971 Series A no.13 at paragraph 94.
[196] 28 June 1978 Series A no.27, at paragraph 94.
[197] See also Sporrong and Lonnroth, A. 52, pp. 29-30; judgment of Boden, A.125-B, pp. 40-41; judgment of 23 October 1985, Benthem, A. 97, p.16; judgment of 29 May 1986, Feldbrugge, A. 99; judgment of 8 July 1987, baraona, A. 1122, p. 18; judgment of 24 October 1989, H v France, A. 162-A, p.20.
[198] 'The fact that in legal relations between individuals great public interests may also be involved does not bar the applicability of Article 6(1)': Judgment of 28 November 1984, Rasmussen, A.87, p.13.
[199] 8 July 1987 Series A no. 120, para. 60.
[200] See, inter alia, Judgment of 21 February 1986, James and Others, A. 98, p. 46; Judgment of 12 October 1992, Salerno, A. 2245-D, p.55.

part of the Charter of Fundamental Rights and Liberties of the Czech Republic,[201] and therefore in conformity with established case law, it is submitted that the rights at issue are Article 6 'civil rights and obligations'.

(iv) Existence of Dispute

For Article 6 to apply, there must be a "dispute" at the national level between two private persons or between the applicant(s) and the state, the outcome of which is determinative of the applicant's civil rights and obligations. Thus, the applicant(s) must have an arguable claim to put before a national tribunal on a matter arising under national law, the decision concerning which will be determinative of "civil rights and obligations."[202]

In applying this standard, there can be little doubt that a genuine and a serious difference of opinion has existed, and indeed still exists, between the parties (the applicants on the one hand and the state authorities on the other). Further, the Applicants have an arguable claim to put before the courts because race discrimination in education amounts to a violation of the Constitution.

Breach of Article 6 - Failure to give reasons for assignment to special school

9.4 Having demonstrated that Article 6 is applicable to their complaint, Applicants allege that the Respondent State is in breach of Article 6 based on the failure of the authorities to (1) give adequate or any reasons for the assignment of the Applicants to special school and (2) follow correct procedural safeguards concerning the decisions to place Applicants in special school. In De Moor v Belgium,[203] the Court stated:

> "The Court … considers that the Bar Council did not give the applicant's case a fair hearing inasmuch as the reason it gave was not a legally valid one." (Para. 55).
> "In sum the contested proceedings did not satisfy the requirements of Article 6 para. 1…and there has therefore been a breach of that provision." (Para. 57).

And in the United Kingdom case of Stefan v General Medical Council [Judgment March 8 1999[204]] the House of Lords held that the health committee of the General Medical Council was obliged to give at least some brief statement of the reasons which formed the basis for its decision concerning disciplinary proceedings. The fact that there was no express or implied obligation to give reasons contained in the statute was irrelevant. The House of Lords further commented that the trend of the law had been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. The provisions of article 6(1) of the European Convention on Human Rights would require that closer attention should be paid to the duty to give reasons, at least in those cases where a person's civil rights and obligations were being determined. Another of the reasons for thus holding

---

[201] See Article 33 and Article 3(1).
[202] See P. van Dijk, G.J.H. Van Hoof, Theory and Practice of the European Convention on Human Rights (1998), pp. 394-406; D.J. Harris, M. O'Boyle, C. Warbrick, Law of the European Convention on Human Rights (1995), pp. 174, 186-187.
[203] ECHR Series A No. 292-A [6/223/94]
[204] As yet, unreported.

was the issue involved was one of considerable importance for the practitioner. It could readily be accepted that the suspension caused the Applicant considerable hardship.[205]

In the instant case, there the Applicants have undoubtedly suffered extreme hardship as a result of their assignment to special schools, counsel for the Applicants was permitted to view in the office of the Constitutional Court the documentary evidence of the special school placement decisions. The attorney was not permitted to copy such documents. The viewing of these documents confirmed that the placement decisions (1) were based on unarticulated or inadequate reasons and (2) were made in the absence of minimal procedural safeguards.

(1) Reasons

As noted above, counsel for the Applicants has had an opportunity to view the written recommendations of the PPP Centers in respect of each Applicant. It is submitted that, in each case, the PPP Center has failed in its duty to supply adequate reasons to support its recommendation for assignment to special school. In none of the cases at issue does the PPP recommendation specify which particular test was used by the psychologist, how long the testing took or under what circumstances the test was performed. Indeed, to the knowledge of the Applicants, no guidelines have been issued by the authorities that require either the school director or the PPP Center to provide reasons for the decision and recommendation to place a child in special school. Further, counsel for the Applicants has also had the opportunity to inspect the written decision from the school director authorizing the placement of each respective child in special school. In each case, the written decision states simply that it is 'based on the suggestion of the PPP Center.'[206] No further reasons are given. In view of the severe and, in practice, irrevocable nature of the decision to place a child in special school, the absence of reasons for such placement violates Article 6(1) of the Convention.

(2) Procedural Safeguards

In addition to the foregoing, the procedure underlying assignment of students to special school lacks minimal safeguards to ensure that erroneous decisions may be avoided or, in the worst case, corrected. In this regard, Applicants note the following:

- the failure of the authorities to obtain from parents written consent for placement in special school (for example see Applicant 12);
- even where written consent has been obtained, the failure of the authorities to inform the Applicants and/or their parents of the consequences and irrevocability of placement in special school;
- the failure of the PPP Center to inform parents as to what test was used, how it was administered, and what, if any, other factors formed the basis of special school placement recommendations;

[205] And likewise in the instant case, the result of a decision to place in special school affects a child's whole future.

[206] From notes taken by the Applicants' attorney during the viewing of the relevant documents at the Constitutional Court

- the absence of any guidelines circumscribing the individual discretion of the psychologist in the administration of the tests;
- the continued administration to Romani children of intelligence tests which have never been validated for the purpose of assessing Romani children in the Czech Republic;
- the absence of any safeguards to overcome predictable cultural, linguistic or other obstacles which often undermine the validity of the tests; and
- the common tendency to place undue weight on test results in making placement recommendations.

10. Just Satisfaction

The Applicants respectfully submit that the evidence attached hereto establishes violations of Articles 3, 6 and Article 2 of Protocol 1, as well as Article 2 of Protocol 1 taken together with Article 14. It is submitted that the evidence further establishes that, as a result of these violations, the Applicants have suffered severe educational, psychological and emotional harm. In view of the foregoing, the Applicants hereby request that this Court find that the Respondent state has violated the Convention as described and order payment of costs and just satisfaction, pursuant to Article 41, including adequate monetary compensation for severe educational, psychological and emotional damage, as specified above.[207] Applicants also request that the Court declare that the just satisfaction be awarded net of any attachments from the Respondent State.

11. Statement Relative to Article 34 of the Convention

11.1 Article 34 of the Convention authorizes the Court to receive applications from "any person, non-governmental organization or group of individuals claiming to be the victim of a violation…."

11.2 All applicants respectfully submit that they are victims of the violations alleged herein.

11.3 On 29 June 1999, the school authorities sent all applicants a letter informing them that if they wished to transfer from special school to basic school, then they should request further information.[208] As of the date of submission of this application, four of the Applicants have requested that they be transferred to basic school and as a result competency tests have been organized for each of the four by the basic school concerned.[209] On 10 September 1999, the four Applicants were tested. Two Applicants passed the test and entered basic school.

---

[207] Further more specific details relating to amounts of compensation requested by the Applicants will follow in due course.

[208] See Exhibit 28.

[209] Pursuant to commentary on Article 31 of the Schools Law, "A student is classified by means of a board examination, should the following situation occur: in the case of a student's transfer from a special school to an elementary school…' This Board exam is usually in the subjects of Czech language and maths.

In view of the offers of transfer, are the Applicants still 'victims' within the meaning of Article 34 ?

11.4 There has been a substantial amount of case law concerning the meaning of the word 'victim' pursuant to Article 34 of the Convention. Having regard to the European Court jurisprudence, the Applicants respectfully submit that the Court should conclude that, even if the Applicants have been offered information on a transfer or if they have in fact subsequently transferred from special school to basic school, this application is nonetheless admissible because (i) the Applicants remain today victims within the meaning of Article 34 of the Convention, and (ii) the violations at issue are of such a nature that it is in the "general interest" for the Court to consider this application on the merits.

(i) Notwithstanding the offer of information on transfer or the actual transfer to basic school in respect of any Applicants, the Applicants remain victims of several violations of the Convention, for the purposes of Article 34.

11.5 The European Court has made clear that it is not necessary that the state of affairs which initially resulted in a violation of the applicant's rights still be in existence in order for an applicant to qualify for 'victim' status. A study of the relevant case law indicates that, even where the objectionable situation has been reversed or mitigated, an applicant challenging such laws or regulations remains a "victim" for the purposes of Article 34 of the European Convention unless a) there has been an acknowledgement by the domestic courts of a violation of the substance of the Convention right(s) at issue;[210] and b) the applicant has received satisfaction with regard to the past damage suffered by reason of the violations of the Convention.[211]

11.6 In Nsona v. the Netherlands,[212] following her deportation to Zaire, the applicant – an asylum-seeker -- lodged an application with the Strasbourg organs claiming inter alia a breach of Article 8 on the grounds that the denial of a residence permit was a violation of her right to a family life. After the application had been lodged, the applicant returned to The Netherlands and was granted a residence permit. Before the Court, the Government argued that the subsequent grant of a residence permit to the applicant deprived her of the status of a victim for the purpose of admissibility. The Court found as follows:
"The word 'victim' in the context of Article 25 [now Article 34] of the Convention…denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 50. Consequently, a measure by a public authority reversing or mitigating the effect of the act or omission alleged to be in breach of the Convention in principle deprives such a person of his status as a victim only where the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, such breach …." (Ibid., para. 106). See Eckle, 15 July 1982 Series A no.51, para. 66 (same); Ludi, 15 June 1992 Series A no.238, para. 34 (same).

---

[210] See cases of Ludi, Ammur, Nsona , De Jong, Baijet and Van den Brink and Inze (infra).
[211] See cases of Lopez Ostra, Moustaquim (infra).
[212] Judgment of 28 November 1996, Reports 1996-V, Vol. 23.

11.7 In Lopez Ostra v. Spain,[213] the applicant lived near a plant for the treatment of liquid and solid waste which emitted fumes, repetitive noise and strong smells. The applicant submitted a complaint to the Strasbourg organs alleging a breach of, inter alia, Article 8 of the European Convention. The Government then closed the plant and the applicant moved to another area. The Court rejected the government's objection that the applicant had ceased to be a victim due to the closure of the plant and her move away from the affected area. The Court reasoned that neither the applicant's move nor the plant's closure altered the fact that the applicant and her family had lived for years only twelve meters away from a source of smells, noise and fumes. The Court further noted that the decision to close the plant should only be a factor to be taken into account in assessing the damage sustained, but did not deprive the applicant of victim status. (Judgment of 9 December 1994, paras. 41-42). The application was ruled admissible and the Court found a breach of Article 8 of the Convention.

11.8 In Moustaquim v. Belgium,[214] a Moroccan national living in Belgium was ordered to be deported. The Applicant submitted a claim to the Court alleging a breach of, inter alia, Article 8 of the European Convention. The deportation order was then suspended for a trial period of two years and the applicant was authorized to reside in Belgium. The Government submitted that the claim by the applicant had become devoid of purpose because the deportation order had been suspended. Nevertheless the court decided (para. 33) that the suspension of the deportation did not make reparation for its consequences, which the applicant had suffered for more than five years, and that therefore the claim had not become devoid of purpose. The Court found a violation of Article 8, even where the deportation order had been suspended.

11.9 In the case of De Jong, Baijet and Van den Brink v. Netherlands,[215] the Government argued that the applicant could not claim to be a "victim" of breaches of Article 5(3) and Article 5(4) of the European Convention for the purposes of admissibility, since the time he spent in custody on remand was, in any event, deducted in its entirety from the sentence ultimately imposed on him. Thus, according to the government, any period during which he may have been detained "unlawfully" was thereby converted into lawful imprisonment, so that he had suffered no detriment. The Court rejected the government's arguments. The Court held (para. 41) that the deduction from sentence did not in principle deprive the applicant of his status as an alleged victim. The deduction was a matter to be taken into consideration solely for the purpose of assessing the extent of any prejudice the applicant may have suffered. The Court noted that the position might be otherwise if the deduction from sentence had been based upon an acknowledgement by the national courts of a violation of the Convention. However, all the domestic courts had rejected the applicant's arguments on the Convention. Accordingly, since the applicant was directly affected by the matters which he alleged to be in breach of Articles 5(3) and (4), the Court held that he could claim to be a "victim" for purposes of admissibility.

11.10 In the case of Inze v. Austria, 28 October 1987, Series A, no. 126, the Court held that the word "victim" in Article 25 (now Article 34) of the European Convention "refers to the

---

[213] 9 December 1994, Series A, no. 303-C.
[214] 18 February 1991, A.193.
[215] 22 May 1984, Series A, no. 77.

person directly affected by the act or omission at issue; and the existence of a violation is conceivable even in the absence of prejudice, prejudice being relevant only for the purposes of Article 50….. Therefore, the fact that a judicial settlement, concluded between private parties on their own, may have mitigated the disadvantage suffered by the applicant does not in principle deprive him of his status as "victim". The position might have been otherwise if, for instance, the national authorities had acknowledged either expressly or in substance, and then afforded redress for, the alleged breach of the Convention." (Para. 32).

11.11 In the case of Appl. 8290/78, A, B, C and D v Federal Republic of Germany, D & R 18 (1980), p. 176, the applicants complained that their telephone conversations had been tapped and recorded in writing. The government contended that the records had been subsequently destroyed and that therefore the applicant could no longer claim 'victim' status. The Commission stated as follows: "…The applicants have therefore not received satisfaction with regard to their complaint that their telephone conversations should not have been recorded at all, or that they should at least have been destroyed earlier. Consequently the applicants still have to be considered as victims although the records in question no longer exist." (Ibid., p. 179). The Court then went on to consider whether the existence of the records, before they were destroyed, amounted to a breach of the Convention.[216]

11.12 In the instant case, it is submitted that none of the conditions set out above (acknowledgment and redress) have been satisfied. Accordingly, the Applicants remain victims, and this application should be deemed admissible and considered on its merits by the Court. This submission is based on the following:

- an offer of a test and the possibility of transfer at the current time does not detract from the fact that all Applicants were originally subjected to racial discrimination and sub-standard education through their assignment to special school in breach of the Convention;
- all Applicants have already been personally offended and publicly shamed by their placements, and the subsequent offer of a test upon passage of which transfer is a possibility in no way removes that degradation;
- the Applicants have all already been in special school for some time, which may mean that it is as a practical matter too late for them to transfer to basic school as their educational capabilities have been ruined due to the level of education obtained at special school;
- the Applicants were not offered the possibility to transfer to special school, merely to take a test upon passage of which they might have the possibility to transfer;
- notwithstanding offers of a test and the possibility of transfer, the fact still remains that over 50% of the pupils in special schools in Ostrava are of Romani origin. Thus, regardless of whether the Applicants have transferred schools, they still feel that their

[216] The principles set out above are also supported by the following cases: Appl. 8865/80, Verbandd Deutcher Flugleiter and Others v Federal Republic of Germany, D&R 25 (1982); Appl. 10092/822, Baaraona v Portugal, D&R 40 (1985); Appl. 10259/83, Anca and Others v Belgium, D&R 40 (1985); Appl. 13156/87, Bryn v Denmark, D&R 73 (1993); Amuur v. France, Judgment of 25 June 1996, Reports 1996-III, Vol.10; D v Federal Republic of Germany, D & R 36 (1984).

race is being publicly branded as 'stupid' or mentally retarded and that the general placement of Roma in special schools is offensive to everyone of their race;

- transfer to basic school, without carefully tailored compensatory education and without adequate measures to combat racism in basic school, is not an effective remedy for the Applicants because Romani children are discriminated against in basic school);
- at no time have the Applicants received an acknowledgment by the domestic authorities that their original placement into special school amounted to a violation of domestic law, of the Czech Charter of Fundamental Rights and Freedoms, of the European Convention of Human Rights or of any other treaty or legal instrument protecting international human rights norms; to the contrary, the Ostrava school board has decided that the Applicants' placement into special school is not a violation of any international standards;[217]
- at no time have the Applicants received satisfaction with regard to the past damage suffered by them by reason of their placement to special school and subsequent maintenance in special school without adequate monitoring.

11.14 It is therefore submitted that the Applicants still retain their 'victim' status within the ambit of Article 34 of the European Convention of Human Rights.

(ii) General Interest Rule

11.15 Further or in the alternative to the arguments made above, whether or not the Applicants are victims within the meaning of Article 34, it is submitted that the Court should in any event consider their claims for reasons of "general interest." The Court has previously ruled that it retains jurisdiction to consider a case "in view of the general interest raised" despite that fact that a claimant may not satisfy the victim requirement.[218] In Kofler v Italy, No. 8261/78, 30 DR 5, 9 (1982), the Commission indicated that a question of general interest might arise where an application concerned 'the legislation, or a legal system or practice of the defendant state.' The Applicants note in this regard that the Strasbourg organs have previously affirmed that "a special importance should be attached to discrimination based on race."[219] Accordingly, it is submitted that a case involving the placement of more than 50% of an entire ethnic group into schools for the mentally retarded is precisely the kind of case that should satisfy a 'general interest' rule.

VI. Statement Relative to Article 35(1) of the Convention

12.1 International human rights jurisprudence has made clear that the local remedies rule requires the exhaustion of remedies which are available, effective and sufficient. A remedy is considered available if it can be pursued by the petitioner without impediment;[220] it is

---

[217] See the decision of the School Bureau dated 13 September 1999 : Exhibit 26.

[218] See X v United Kingdom, 15 November 1981, Series A no. 46 ("In view of these wishes [that relatives of the applicant be permitted to continue pursuing the case after the applicant's death] and the issues of general interest raised, the Commission decided on 11 March 1979 to retain the application"); Silver and Others 25 March 1983 Series A no. 61 ("In view of the wishes expressed by Mr. Silver's next of kin, to continue the case and of the issues of general interest raised, the Commission decided on 8 May 1979 to retain the application").

[219] East African Asians v. UK, 3 EHRR 76 (1973), para. 207.

[220] Brozicek v Italy, 12 EHRR 371 (1989).

deemed effective if it offers a prospect of success;[221] and it is sufficient if it is capable of redressing the complaint.[222] A remedy which is not available, effective and sufficient need not be exhausted. And in some circumstances, it is not necessary that the Applicant exhaust domestic remedies at all.

In light of the above, Applicants submit that :

(a) there are in fact no available, effective and sufficient remedies for race discrimination in the Czech Republic;

(b) assuming such remedies exist, it is not necessary for Applicants to exhaust them in the circumstances of this case; and

(c) assuming such remedies exist, the Applicants have in fact exhausted all effective domestic remedies in compliance with Article 35(1) of the Convention.

A. There are in fact no available, effective and sufficient remedies for race discrimination in the Czech Republic.

12.2 Applicants firstly submit that there are in fact no available, effective and sufficient remedies for race discrimination in the Czech Republic at all. Indeed, the Czech government itself concedes as much, and the Council of Europe has already so found.

(a) Czech Government Report Concerning Framework Convention[223]

12.3 On 26 April 1999, the Government of the Czech Republic submitted a report to the Council of Europe pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities. The Government report admits that there are no effective domestic remedies in the field of discrimination against Roma in education:

"[D]iscrimination is commonplace in the Czech Republic, especially against Romanies. Legislative prohibition of discrimination which involves sanctions for violations is included basically only in the consumer protection law in connection to the law on trades and the law on the Czech Trade Inspection. However, sanctions for discriminatory practices provided for by these laws are unsubstantial and indirect. In legal practice, these laws have begun to be applied only recently, after several Romany citizens became members of the Czech Trade Inspection….. ……. The effective law does not define sanctions for cases of racial (and ethnic) discrimination in the educational system, in the health care system, in prisons and in

[221] See e.g. Application No. 299/57, Yearbook 2, pp. 192-193 (inter-State); Application No. 434/58, Yearbook 2, p. 374; Application No. 788/60, Yearbook 4, p. 168 (inter-State); Application No. 712/60,Yearbook 4, p. 400; Communications 210/1986 and 225/1987, HRC 1989 report, p. 228; Communication No. 220/1987, HRC 1990 report, vol. II, p. 122; Communication No. 222/1987, HRC 1990 report, vol. II, p. 130; Communication No. 306/1988, HRC 1990 report, vol. II pp. 182-183. See also Case of Akdivar, judgment of 16 September 1996, Reports 1996-IV, Vol. 15, para. 65; Aksoy, judgment of 18 December 1996, Reports 1996-VI, Vol. 26, para. 51.

[222] Appl. 11660/85, X v Portugal, D&R 59 (1983), p.85.

[223] See Exhibit 24.

other areas of the society." (Government statement at page 18 of the Report: emphasis supplied).

(b) Report of the European Commission against Racism and Intolerance ('ECRI')

12.4 ECRI's report entitled 'Legal Measures to combat racism and intolerance in the member States of the Council of Europe' dated 1998 states that there is no specific legislation with regard to (i) norms concerning discrimination in general (ii) norms concerning racism or (iii) any relevant jurisprudence concerning discrimination or racism. Further in the realm of civil and administrative law, there are again no provisions concerning discrimination.[224]

In its Second Report on the Czech Republic, of 21 March 2000, ECRI assessed the situation as regards legal remedies for racism and intolerance as follows:

"Racially motivated violence is one of the most pressing and dangerous expressions of racism and intolerance threatening particularly Roma/Gypsies but also other members of minority groups in the Czech Republic … Regrettably, many Roma/Gypsies still feel insecure in everyday life circumstances. In addition, the number of reported cases is deemed vastly to underestimate the scope of the problem as attacks often go unreported due to fear of reprisals or lack of confidence in the response of the criminal justice system ... [para. 28]

Problems arise at different levels of the judicial process. Firstly, police and investigators appear often to misclassify racially motivated crimes and do not follow through investigations … Secondly, problems arise at the level of prosecutors. These often seem to have difficulties gathering and organising the evidence necessary to prove such motivation … A certain reluctance has also been noted in some cases to prosecute this type of crime … Thirdly, the interpretation of "racial motivation" rendered by some judges is a very restrictive one … The result is that perpetrators of racially motivated crime often escape being brought before the courts … [para. 30]."

B. Not Necessary for Applicants to Exhaust Domestic Remedies

12.5 Even assuming the existence of effective, available and sufficient domestic remedies, Applicants submit the following:

1. There is no necessity to exhaust local remedies where there exists an administrative practice which permits and encourages racism. It is submitted that the system of special schools in the Czech Republic is in fact sufficient to constitute such an administrative practice and that as a result the European Court should consider the instant case immediately as a matter of the utmost importance;
2. Further or in the alternative, the rule of exhaustion of domestic remedies ought not to be applied in circumstances such as the instant case where strict application of the exhaustion rule would unreasonably subject the Applicants to further violation of their rights;

[224] See Exhibit 32.

3. Further or in the alternative, it is submitted that there are other 'special reasons' why exhaustion of domestic remedies should be deemed unnecessary.

1. Existence of administrative practice

12.6 The requirement to exhaust all domestic remedies does not apply where the violations complained of consist, as in the present case, of the existence of an administrative practice.[225] It is submitted that the material submitted to the Court herein reveals such a practice.

12.7 According to the case law of the Strasbourg organs, an 'official adminstrative practice' comprises two elements: (a) repetition of acts and (b) official tolerance. The first element is defined as: "an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system." [226] The Court has given guidance on the second element as follows:

"Though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied."[227]

12.8 And in the case of France, Norway, Denmark, Sweden and the Netherlands v Turkey,[228] the Commission added that "any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system." In this case, the Commission noted that the Applicant should give 'prima facie evidence' of the administrative practice concerned. According to the Commission:

"The question of whether the existence of an administrative practice is established or not can only be determined after an examination of the merits. At the stage of admissibility prima facie evidence, while required must also be considered as sufficient…. There is prima facie evidence of an alleged administrative practice where the allegations concerning individual cases are sufficiently substantiated, considered as a whole and in the light of the submissions of the applicant and Respondent Party."[229]

12.9 In accordance with the principles set out above, it is submitted that the Applicants' claims arise within the existence of an administrative practice of race discrimination in education for the following reasons:

(a) <u>Repetition of Acts</u>

---

[225] The rationale behind this appears to be that damages or other remedies will not end an alleged administrative practice contrary to Article 3 of the Convention (X v United Kingdom D&R 20/184).
[226] Judgment of 18 January 1987, Ireland v the United Kingdom, A.25, p.64 .
[227] Report of 5 November 1969, *Greek* case, Yearbook XII (1969), p.196.
[228] Appl. 9940-9944/82, D&R 35 (1984), p.143. See also the judgment of Akdivar, Reports 1996-IV, Vol. 15, para 67. See also Ireland v United Kingdom, Yearbook XV (1972), p.76 (242); Appl. 4448/70, Second Greek Case, Yearbook XIII (1970), p.108 (134-136).
[229] France, Norway, Denmark, Sweden and the Netherlands v Turkey case (supra) at pp. 164-165.

12.10 The violations alleged in the instant case are not merely isolated incidents and exceptions but reflect a widespread, systematic and egregious pattern of race discrimination in education for which the Respondent State is responsible. The repetition of acts is shown by the vast numbers of Romany children assigned to special schools in Ostrava and all over the Czech Republic, and the fact that such a practice has continued for decades.[230]

(b) Official tolerance

12.11 There have been no practical steps taken by the Czech authorities for decades to put an end to race discrimination for Roma children within the school system. To the contrary, the authorities have knowingly tolerated and perpetuated discriminatory assignment patterns. Even now, after the Respondent State's own data showing overwhelmingly disproportionate assignment of Romani children to special schools have been corroborated by Applicants' data (as contained in this Application), the State has done no more than to remove the formal – but not the practical – prohibition against admission of special school graduates to non-vocational secondary schools.[231] To date, however, the Respondent State has not altered the manner of testing to ensure reliable results which exclude the influence of racial or ethnic prejudice, has not enacted guidelines to circumscribe the discretion of test administrators, has not ended the practice of non-monitoring of students following assignment to special school, and has not adopted measures to assure that parental consent is knowing consent. In the face of overwhelming statistical and other evidence of segregation and race discrimination of Romany children in the education system, the Respondent State's failure to take effective measures to remedy this constitutes official tolerance by the authorities.

(c) Prima Facie Evidence

12.13 In the instant cases, the Applicants have provided prima facie or 'substantial evidence' of an administrative practice of race discrimination against Romany children in education. Accordingly, it is submitted that the Applicants have satisfied the admissibility criteria and that the Court should proceed to consider the case on its merits.

2. Risk that Applicants be subjected to further violation of their rights

12.14 Further or in the alternative, it is submitted that the rule of exhaustion of domestic remedies ought not to be applied in circumstances such as the instant case where strict application of the exhaustion rule would unreasonably subject the Applicants to further violation of their rights.[232] In the instant case, strict application of the exhaustion rule would mean that most of the Applicants would have to remain in special school for a further substantial period of time, thereby subjecting them to further violation of their rights. This would be particularly unjust, insofar as each of the applicants has already suffered substantial harm from having been assigned to special schools.

---

[230] The contents of this application document such repetition of acts in detail. In particular the Court is referred to Exhibits 1, 2A and 7.
[231] See para. 7.18, supra.
[232] See Reed v United Kingdom No 7630/76, 19DR 113 (1979); Hilton v United Kingdom No. 5613/72, 4 DR 177 (1976).

3. Other special reasons

12.15 The Court remarked in Cardot v France[233] that the former Article 26 (now Article 35) of the Convention should be applied with some degree of flexibility and without excessive formalism. In Akdivar v Turkey, the Court indicated that "special reasons" might establish that the proposed remedy was "for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement. One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again so that it becomes incumbent on the respondent government to show what it has done in response to the scale and seriousness of the matters complained of." (23 EHRR 143, 1997, para. 68.) The Court went on to observe that, in reviewing whether effective remedies had been exhausted, "it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants." (Ibid., para. 69)

12.16 In the instant case, it is submitted that the respondent state has done next to nothing in response to the scale and gravity of placing 50% of an ethnic group into schools for the mentally retarded. Moreover, the pervasive racism which undergirds discrimination against Roma in education in the Czech Republic is such that their complaints are unlikely to be taken seriously. Applicants have already drawn the Court's attention to condemnation of treatment of Roma in the Czech Republic by inter-governmental organizations.[234] In addition, the Applicants also wish to highlight the following non-exhaustive list of other examples of racism and xenophobia towards Roma:[235]

- Since 1989, Roma have been subjected to a wave of unremedied violence by state officials and private individuals. According to non-governmental monitoring organizations, 1250 racially-motivated attacks have taken place in the Czech Republic since 1991, the majority against Roma.[236] Moreover, during this time, eleven Roma, one Turk mistaken for a Rom and one Sudanese student have been killed in racially-motivated violence.
- Notwithstanding the foregoing, evidence suggests that Roma complaints are less likely to obtain a fair hearing in court, and/or will encounter more prolonged delays. The testimony of Roma witnesses and victims often confronts a pre-disposed skepticism on the part of judges and prosecutors, some of whom continue to use racial characterizations in assessing credibility. It is also submitted that Roma suffer

---

[233] A 200, para. 34 (1991).
[234] See note 76 supra.
[235] In particular, the Court is directed to Exhibit 25: 'Written Comments of the European Roma Rights Center Concerning the Czech Republic For Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its Fifty-second Session, 6-9 March 1998' dated 23 February 1998.
[236] See especially monitoring reports by the Prague-based non-governmental organization Hnutí občanské solidarity a tolerance (Movement for civic solidarity and tolerance) published in the monthly newsletter Most.

disproportionately from legal provisions that unduly limit access to legal counsel for indigent defendants.[237]

- Law enforcement officers are rarely, if ever, disciplined or prosecuted for anti-Roma violence. Even where the perpetrators are non-state actors, the racially-motivated crimes provisions of Czech law are ineffectively and all too rarely applied. In addition, in cases of group violence, prosecutors frequently charge far fewer individuals than the evidence warrants. Defendants accused of racially-motivated crime are not uncommonly released pending trial, and often commit further crimes, giving rise to reticence among Roma about reporting abuses.
- The deficiencies of the Czech justice system in punishing and deterring racially-motivated violence against Roma have been sharply criticized by inter-governmental agencies. In its Concluding Observations concerning the Czech Republic,[238] issued in March 1998, the United Nations Committee on the Elimination of Racial Discrimination expressed "alarm" at a "recorded sixfold increase in racially motivated crime between 1994 and 1996;" lamented "the persistence of racial hatred and acts of violence ... towards persons belonging to minority groups;" and chastised the government for not "effectively countering racial violence against members of minority groups." In particular, the Committee highlighted failures of the Czech criminal justice system and of law enforcement authorities in combating racially-motivated violence. The Committee expressed its concern "that the number of charges and convictions ... is low relative to the number of abuses reported," that "perpetrators of racial crime are often lightly punished," and that "in a number of cases, prosecutors have been reluctant to identify a racial motive." "[U]necessarily long proceedings," "slow investigations of acts of racial crime," and arguably "insufficient training provided to law enforcement officials" all contribute to the problem.
- Labour Code provisions formally protecting the right to "choose employment" without discrimination are not clearly binding; "no employers who infringe [these rules] have ever been fined."[239] In its March 1998 Concluding Observations, the UN CERD noted with disfavor the fact that, notwithstanding "discrimination against Roma in ... housing, transport and employment," the Czech Republic has no legal provisions "expressly outlawing discrimination" in these areas.
- The Czech Government report Concerning the Framework Convention for the Protection of National Minorities observes:

  "[I]t needs to be admitted that effective penalization of these types of criminal offenses (crimes motivated by racism) remains a pressing problem. The public as well as many police officers and other law enforcement officials often downplay racist crimes. Numerous attacks therefore remain either unpunished or attackers receive inadequately light sentences…….. Although the perception of the public and especially the media of

---

[237] Articles 36-39 of the Criminal Code provide for appointment of counsel at state expense under certain conditions, but a substantial number of criminal cases do not give rise to mandatory state-paid legal assistance. By virtue of their indigence, Roma are adversely affected by the requirement of Article 29 of the Law on the Constitutional Court, which requires that a complaint to that Court must be submitted by a qualified attorney, but creates no mechanism for appointment of counsel to those unable to secure representation on their own.

[238] UN DOC CERD/C/52/Misc. 31 (1998).

[239] Council of Europe, European Commission Against Racism and Intolerance, "Legal Measures to Combat Racism and Intolerance in the Member States of the Council of Europe" (1996), p. 81.

the social danger of racist attacks has improved in recent years, the difficulties faced by law enforcement authorities in most cases point quite definitely to persisting xenophobia, especially with regard to Romanies. Another serious problem stems from inadequate legislative possibilities of penalizing offenses which are motivated by discriminatory, racist or nationalist prejudice and which are not considered crimes due to their lesser severity and intensity. In addition, preventive measures have not been applied in a sufficient extent, especially among trade school students where neo-fascist and neo-Nazi movements continue to develop (skinheads)….. ' (Page 12).

And:

'The Government is aware of the unsatisfactory situation concerning penalization of criminal offenses motivated by racism and xenophobia……..' (Page 24).

- The Office of the Government Commissioner for Human Rights of the Czech Republic recently observed: "In frustrated groups of the population the velvet racism of a large part of the society, manifest in keeping a distance from the Roma, blends into approval or passive toleration of racially motivated attacks by extremist groups. Unfortunately, even some civil servants- including the police, prosecuting attorneys and judges - behave impassively in similar cases. This intensifies the feeling of most Roma that this country is not their country…. Fearing for their safety, some Roma emigrate, others arm up, train in Asian martial arts, and get themselves big dogs." [240]
- Roma throughout the Czech Republic are routinely denied admission to restaurants, pubs and similar establishments. In 1996, a survey conducted in five Bohemian towns by the monitoring organization *HOST* showed that well-dressed Roma were refused service in 24 of 40 restaurants. Dark-skinned foreigners mistaken for Roma have also reported being refused service in Czech public establishments.[241] Nonetheless, the government has yet to secure by law the right of access on a non-discriminatory basis to public accommodations.

C. Applicants Have Exhausted All Effective Domestic remedies

12.17 Further or in the alternative to the above, it is submitted that even if there exist theoretical remedies for allegations of race discrimination in the Czech Republic, which is denied, Applicants have exhausted all available, sufficient and effective remedies for race discrimination in education.

(a) Complaint to the administrative court

[240] Czech government paper written by Viktor Sekyt and distributed at the OSCE Supplementary Human Dimension Meeting on Roma and Sinti Issues, Vienna, Austria on September 6, 1999. PC.DEL/424/99. See Exhibit 22.
[241] See Human Rights Watch/Helsinki, "Roma in the Czech Republic: Foreigners in the Their Own Land", June 1996, p.14.

12.18 Under Czech law, the decision of the special school director to place a child in special school is not reviewable by a court. (See Appendix A referred to in section 248 of the Civil Procedure Code).

(b) Exceptional review according to the Administrative Proceedings Code

12.19. On June 15, 1999, the Applicants lodged an application for exceptional consideration with the Ostrava School Bureau, pursuant to paragraphs 65 to 68 of the Administrative Proceedings Code.[242] Such an application does not commence the proceedings itself, it is up to relevant authority to decide whether to commence the review proceedings or not. The School Bureau notified the Applicants' Attorney by letter of September 10, 1999 that it found no reasons to commence the review proceedings, as the assignments to special schools had not violated the law. (Exhibit 26).

(c) Complaint to the Constitutional Court

12.20. On 15 June 1999, the Applicants 1- 12 filed a complaint with the Constitutional Court of the Czech Republic. The complaint alleged, inter alia, that the Applicants had been subjected to racial segregation and discrimination in their assignment to special schools. Among other sources of law, the complaint relied upon the jurisprudence of the Strasbourg organs. On 20 October 1999, the Constitutional Court issued their decision.[243] The Constitutional Court found, inter alia, that the Applicants' allegations of racial segregation and discrimination were unsubstantiated. The Court, acknowledging that the "persuasiveness of the Applicants' arguments must be admitted," found that it had authority only to consider the particular circumstances of individual Applicants, and were not competent to consider evidence demonstrating a pattern and practice of racial discrimination in Ostrava or the Czech Republic. The Court observed that the Applicants had not availed themselves of the opportunity timely to appeal the initial decisions to place them in special schools, and that the Applicants' parents had – with the exception of one Applicant – consented in writing to their placement in special school. In effect, the Court held, such procedural failures barred the Applicants from obtaining any remedy as to their racial discrimination in education, however well substantiated. In so holding, the Court simply refused to apply the applicable Strasbourg legal standards for proving racial discrimination under Article 14 of the Convention, notwithstanding the binding status which Article 10 of the Czech Charter of Fundamental Rights and Freedoms accords to duly ratified international treaties. Implicitly acknowledging the force of Applicants' claims, the Court "assume[d] that the relevant authorities of the Czech Republic shall intensively and effectively deal with the plaintiffs' proposals."

13 Application in Time

13.1 Article 35 (1) of the Convention provides, "The Court may only deal with the matter…..within a period of six months from the date on which the final decision was taken."

---

[242] Act No. 71/1967 Coll. On Administrative Proceedings. See Appendix A.
[243] See Exhibit 27D.

13.2 The 'final decision' for the purposes of the six month rule will normally be the final domestic decision rejecting the applicant's claim. As to the Applicants 1 – 12, all twelve of whom filed complaints with the Czech Constitutional Court – the final domestic decision was the Constitutional Court's decision, rendered on 20 October 1999 and served to the Applicants' Attorney on 3 November 1999. As to all the Applicants, including the Applicants 13 - 18 who did not file complaints with the Constitutional Court, the Applicants further submit that, as noted above, there are no effective remedies, and hence the final decision is the act or decision complained of.[244]

13.3 In the instant case, the acts complained of are not a single decision, but rather constitute a series of continuing violations. Thus, the acts at issue are not simply the initial decision to place the Applicants in special schools, but the continued failure to monitor adequately the appropriateness of each placement and to remedy the deleterious impact on the educational health of each Applicant caused by the time spent in special school. This is especially so, insofar as Czech law obliges headmasters of special schools to recommend transfer of students should "any change" in their condition warrant.[245] In short, each Applicant alleges that his/her rights under the Convention as set forth above are violated each and every day that s/he remains subjected to racial discriminatory placement in special school, and/or (in the event s/he is no longer in special school), that s/he is denied a remedy for the harm suffered by prior discriminatory placement in special school.[246]

VII. Statement of the dObjective of the Application

The objective of the application is a finding by the European Court of Human Rights of violations of all rights allege herein, and just compensation.

VIII. Statement Concerning Other International Proceedings

No complaint has been submitted on behalf of any of these applicants to any other international procedure of investigation or settlement concerning the incidents which have given rise to this application.

IX. Documents attached

Appendix A: Domestic Law
Appendix B: Exhibits
Appendix C: Powers of Attorney

X. Statement of Preferred Language

---

[244] See Appl. 7379/76, X v United Kingdom, D&R 8 (1977), p.211 and Appl. 214/56, De Becker v Belgium, Yearbook II (1958-1959), p. 214 .
[245] See Special Schools Decree 1997, Section 6(2).
[246] Cf. McFeeley v UK, No. 8317/78, 20 DR 211 (1976) (repeated disciplinary punishments for persistent refusal to obey the prison rules was considered a continuing situation).

I prefer to receive the Court's judgment in English.

XI. Declaration and Signature

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application is correct.

Place: Budapest, Hungary Date:18 April 2000

_____

European Roma Rights Center

_____

Mgr. David Strupek