COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

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

(Application no. 57325/00)

JUDGMENT

STRASBOURG

7 February 2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of D.H. and Others v. the Czech Republic,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Ms A. MULARONI,
Ms D. JOČIENĖ,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 1 March 2005 and 10 January 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 57325/00) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eighteen Czech nationals, whose details are set out in the appendix ("the applicants"), on 18 April 2000.

2. The applicants were represented before the Court by the European Roma Rights Centre based in Budapest, by Lord Lester of Herne Hill, Q.C, Mr J. Goldston, of the New York Bar, and Mr D. Strupek, a lawyer practising in the Czech Republic. The Czech Government ("the Government") were represented by their Agent, Mr V.A. Schorm.

3. The applicants alleged, *inter alia*, that they had been discriminated against in the enjoyment of their right to education on account of their race, colour, association with a national minority and ethnic origin.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 10 May 2004 the President gave leave to two non-governmental organisations, Interights and Human Rights Watch, to intervene in the written procedure as third-party interveners (Article 36 § 2 of the Convention and Rule 44 § 2).

6. By a decision of 1 March 2005, following a hearing on admissibility and the merits (Rule 54 § 3), the Court declared the application partly admissible.

7. The applicants, but not the Government, filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants' details are set out in the Appendix.

9. Between 1996 and 1999 the applicants were placed in special schools (*zvláštní školy*) in Ostrava, either directly or after a period in an ordinary primary school (*základní školy*). Special schools are a category of specialised school (*speciální školy*) and are intended for children with learning disabilities who are unable to attend "ordinary" or specialised primary schools. By law, the decision to place a child in a special school is taken by the head teacher on the basis of the results of tests to measure the child's intellectual capacity carried out in an educational psychology and child guidance centre and requires the consent of the parent or legal guardian of the child.

10. The material before the Court shows that the applicants' parents had consented to and in some instances expressly requested their children's placement in a special school. A written decision in the appropriate form was issued by the head teachers of the schools concerned and the applicants' parents were notified of it. The decisions contained instructions on the right to appeal, a right which none of those concerned exercised.

11. On 29 June 1999 the applicants received a letter from the school authorities informing them of the possibilities available for transferring from a special school to a primary school. It appears that four of the applicants (nos. 5, 6, 11 and 16) were successful in aptitude tests and now attend ordinary schools.

12. In the review and appeals procedures referred to below, the applicants were represented by a lawyer, acting on the basis of signed written authorities from their parents.

A. Request for a reconsideration of the case outside the formal appeal procedure

13. On 15 June 1999 all the applicants apart from applicants nos. 1, 2, 10 and 12 (see Appendix) asked the Ostrava Education Authority (*Školský úřad*) to reconsider, outside the formal appeal procedure, the administrative decisions to place them in special schools (*přezkoumání mimo odvolací řízení*). They argued that their intellectual capacity had not been reliably

tested and that their representatives had not been sufficiently informed of the consequences of consenting to their placement in a special school. They therefore asked the Education Authority to revoke the impugned decisions, which they maintained did not comply with the statutory requirements and infringed their right to education without discrimination.

14. On 10 September 1999 the Education Authority informed the applicants that, as the impugned decisions complied with the legislation, they did not satisfy the conditions for bringing proceedings outside the appeal procedure.

B. Constitutional appeal

15. On 15 June 1999 applicants nos.1 to 12 in the Appendix lodged a constitutional appeal in which they complained, *inter alia*, of *de facto* discrimination in the general functioning of the special education system. In that connection, they relied, *inter alia* on Articles 3 and 14 of the Convention and Article 2 of Protocol No. 1. While acknowledging that they had not appealed against the decisions to place them in special schools, they alleged that they had not been sufficiently informed of the consequences of placement and argued (on the question of the exhaustion of remedies) that their case concerned continuing violations and issues that went far beyond their personal interests.

In their grounds of appeal, the applicants explained that they had been placed in special schools under a practice that had been established in order to implement the relevant statutory rules. In their submission, that practice had resulted in *de facto* racial segregation and discrimination that was reflected in the existence of two independent educational systems for members of different racial groups, namely special schools for the Roma and "ordinary" primary schools for the majority of the population. That difference in treatment was not based on any objective and reasonable justification, amounted to degrading treatment and had deprived them of the right to education (as the curriculum followed in special schools was inferior and pupils in special schools were unable to return to primary school or to obtain a secondary education other than in a vocational training centre). The applicants argued that they had received an inadequate education and an affront to their dignity and asked the Constitutional Court (*Ústavní soud*) to find a violation of the rights they had relied on, to quash the decisions to place them in special schools, to order the respondents (the special schools concerned, the Ostrava Education Authority and the Ministry of Education) to refrain from any further violation of their rights and to restore the *status quo ante* by offering them compensatory education.

16. In their written submissions to the Constitutional Court, the special schools concerned pointed out that all the applicants had been enrolled on the basis of a recommendation from an educational psychology and child

guidance centre and with the consent of their representatives; furthermore, the representatives had been duly informed of the relevant decisions and none of them had decided to appeal. According to the schools, the applicants' representatives had been informed of the differences between the special-school curriculum and the primary-school curriculum. Regular meetings of teaching staff were held to assess pupils (with a view to their possible transfer to primary school). They added that some of the applicants (nos. 5 to 11 in the Appendix) had been advised that there was a possibility of their being placed in primary school.

The education authority pointed out in its written submissions that the special schools had their own legal personality, that the impugned decisions contained advice on the right of appeal and that the applicants had at no stage contacted the schools inspectorate.

The Ministry for Education denied any discrimination and said that parents of Roma children tended to have a rather negative attitude to school work. It asserted that each placement in a special school was preceded by an assessment of the child's intellectual capacity and that parental consent was a decisive factor. It further noted that there were 18 educational assistants of Roma origin in schools in Ostrava.

17. In their final written submissions, the applicants pointed out (i) that there was nothing in their school files to show that their progress was being regularly monitored with a view to a possible transfer to primary school, (ii) that the reports from the educational psychology and child guidance centres contained no information on the tests that were used and (iii) that their recommendations for placement in a special school were based on grounds such as an insufficient command of the Czech language, an over-tolerant attitude on the part of the parents or an ill-adapted social environment. They also argued that the gaps in their education made a transfer to primary school impossible in practice and that social or cultural differences could not justify the alleged difference in treatment.

18. On 20 October 1999 the Constitutional Court dismissed the applicants' appeal, partly on the ground that it was manifestly unfounded and partly on the ground that it had no jurisdiction to hear it. It nevertheless invited the competent authorities to give careful and effective consideration to the applicants' proposals.

(a) With regard to the complaint of a violation of the applicants' rights as a result of their placement in special schools, the Constitutional Court held that, as only five decisions were actually referred to in the notice of appeal, it had no jurisdiction to decide the cases of the applicants who had not appealed against the decisions concerned.

As to the five applicants who had lodged constitutional appeals against the decisions to place them in special schools (nos. 1, 2, 3, 5 and 9 in the Appendix), the Constitutional Court decided to disregard the fact that they had not lodged ordinary appeals against those decisions, as it agreed that the

scope of their constitutional appeals went beyond their personal interests. However, it found that there was nothing in the material before it to show that the relevant statutory provisions had been interpreted or applied unconstitutionally, since the decisions had been taken by head teachers vested with the necessary authority on the basis of recommendations by educational psychology and child guidance centres and with the consent of the applicants' representatives.

(b) With regard to the complaints of insufficient monitoring of the applicants' progress at school and of racial discrimination, the Constitutional Court noted that it was not its role to assess the overall social context and found that the applicants had not furnished concrete evidence in support of their allegations. It further noted that the applicants had had a right of appeal against the decisions to place them in special schools, but had not exercised it. As to the objection that insufficient information had been given about the consequences of placement in a special school, the Constitutional Court considered that the applicants' representatives could have obtained the information by liaising with the schools and that there was nothing in the file to show that they had made any enquiries about the possibility of transferring to a primary school. The Constitutional Court therefore ruled that this part of the appeal was manifestly ill-unfounded.

II. RELEVANT DOMESTIC LAW

A. Law no. 29/1984 ("the Schools Act"), which was repealed by Law no. 561/2004, which came into force on 1 January 2005

19. Prior to 18 February 2000, section 19(1) provided that to be eligible for secondary-school education pupils had to have successfully completed their primary-school (*základní škola*) education.

Following amendment no. 19/2000, which came into force on 18 February 2000, the amended section 19(1) provided that to be eligible for secondary-school education pupils had to have completed their compulsory education and demonstrated during the admission procedure that they satisfied the conditions of eligibility for their chosen course.

20. Section 31(1) provided that special schools (*zvláštní školy*) were intended for children with learning disabilities that prevented them from following the curricula in ordinary primary schools or in specialised primary schools (*speciální základní škola*) intended for children suffering from sensory impairment, illness or disability.

B. Decree no. 127/1997 on specialised schools, which was repealed by Decree no. 73/2005, which came into force on 17 February 2005

21. Article 2 § 4 of the Decree laid down that the following schools were available for children and pupils suffering from mental disability: specialised nursery schools (*speciální mateřské školy*), special schools, auxiliary schools (*pomocné školy*), vocational training centres (*odborná učiliště*) and practical training schools (*praktické školy*).

22. Article 6 § 2 stipulated that if during the child's or the pupil's school career there was a change in the nature of his or her disability or if the specialised school was no longer adapted to the level of disability, the head teacher of the school attended by the child or pupil was required, after an interview with the pupil's representative, to recommend the pupil's placement in another specialised school or in an ordinary school.

23. Article 7 stipulated that the decision to enrol or place a child or pupil in, *inter alia*, a special school was to be taken by the head teacher, provided that the child's or pupil's parents or legal guardian consented. The head teacher was entitled to consult sources such as the parents or legal guardian, the school attended by the pupil, educational psychology and child guidance centres, hospitals or clinics, authorities with responsibility for family and child welfare and health centres. The educational psychology and child guidance centre was responsible for assembling all the documents required to reach a decision and required to make a recommendation to the head teacher regarding the type of school.

III. COUNCIL OF EUROPE SOURCES

A. European Commission against Racism and Intolerance (ECRI)

1. The report on the Czech Republic made public in September 1997

24. In the section of the report that dealt with the policy aspects of education and training, ECRI stated that public opinion appeared sometimes to be rather negative towards certain groups, especially the Roma/Gypsy community and suggested that further measures should be taken to raise public awareness of the issues of racism and intolerance and to improve tolerance towards all groups in society. It added that special measures should be taken as regards education and training of the members of minority groups, particularly members of the Roma/Gypsy community.

2. The report on the Czech Republic made public in June 2004

25. With regard to the access of Roma children to education, ECRI said in this report that it was concerned that Roma children continued to be sent to special schools which, besides perpetuating their segregation from mainstream society, severely disadvantaged them for the rest of their lives. The standardised test developed by the Czech Ministry of Education for assessing a child's mental level was not mandatory and was only one of a battery of tools and methods recommended to the psychological counselling centres. As far as the other element required in order to send a child to a special school – the consent of a parent or legal guardian of the child – ECRI observed that parents making such decisions continued to lack information concerning the long-term negative consequences of sending their children to such schools, which were often presented to parents as an opportunity for their children to receive specialised attention and be with other Roma children. ECRI also said that it had received reports of Roma parents being turned away from regular schools.

ECRI also noted that the School Act had entered into force in January 2000 and provided the opportunity for graduates of special schools to apply for admission to secondary schools. According to various sources, that remained largely a theoretical possibility as special schools did not provide children with the knowledge required in order for them to attend regular schools. There were no measures in place to provide additional education to students who had gone through the special school system to bring them to a level where they would be adequately prepared for regular secondary schools.

ECRI had received very positive feedback concerning the success of 'zero grade courses' (preparatory classes) at preschool level in increasing the number of Roma children who attended regular schools. It expressed its concern, however, over a new trend to maintain the system of segregated education in a new form – this involved special classes in mainstream schools. In that connection, a number of concerned actors were worried that the new draft Schools Act created the possibility for even further separation of Roma through the introduction of a new category of special programmes for the 'socially disadvantaged'.

Lastly, ECRI noted that despite initiatives taken by the Ministry of Education (assistant teachers, training programmes for teachers, revision of the primary school curriculum), the problem of low levels of Roma participation in secondary and tertiary level education described by ECRI in its second report persisted.

B. The reports submitted by the Czech Republic pursuant to Article 25 § 1 of the Framework Convention for the Protection of National Minorities

1. Report submitted on 1 April 1999

26. The document stated that the Government had adopted measures in the education sphere that were focused on providing suitable conditions especially for children from socially and culturally disadvantaged environments, in particular the Romany community, by opening preparatory classes in elementary and special schools. It was noted that "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". In some special schools Romany pupils made up between 80% and 90% of the total number of pupils.

2. Report submitted on 2 July 2004

27. The Czech Republic accepted that the Roma were particularly exposed to discrimination and social exclusion and said that it was preparing to introduce comprehensive anti-discrimination tools associated with the implementation of the EU Council Directive implementing the principle of equal treatment. New legislation was due to be enacted in 2004[1].

In the field of Roma education, the report said that the State had taken various measures of affirmative action in order to radically change the present situation of Roma children. The Government regarded the practice of referring large numbers of Roma children to special schools as untenable. The need for affirmative action was due not only to the sociocultural handicap of Roma children, but also to the nature of the whole education system, its inability to sufficiently reflect cultural differences. The draft new Schools Act would bring changes to the special education system (transforming "special schools" into "special primary schools"), providing the children targeted assistance in overcoming their sociocultural handicap. These included preparatory classes, individual study programmes for children in special schools, measures concerning preschool education, an expanded role for assistants from the Roma community and specialised teacher-training programmes. As one of the main problems encountered by Roma pupils was their poor command of the Czech language, the Ministry of Education considered that the best solution (and the only realistic one)

1. The legislation (Law no. 561/2004) was passed on 24 September 2004 and entered into force on 1 January 2005.

would be to provide preparatory classes at the preschool stage for children from a disadvantaged sociocultural background.

The report also cited a number of projects and programmes that had been implemented nationally in this sphere ('Support for Roma integration', 'Programme for Roma integration/Multicultural education reform', and 'Reintegrating Roma special school pupils in primary schools').

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

28. The Government argued that the applicants had failed to exhaust domestic remedies as they had not used all available means to remedy their position. They noted that the applicants had not exercised their right to appeal against the decisions to place them in special schools and that six of the applicants (nos. 13-18 in the Appendix) had not lodged a constitutional appeal. Further, of those who had lodged such an appeal only five (nos. 1, 2, 3, 5 and 9) had actually contested the decisions to place them in special schools. No attempt had been made by the applicants to defend their dignity by bringing an action under the Civil Code to protect their personality rights and their parents had not referred the matter to the schools inspectorate or the Ministry of Education.

29. The applicants submitted, firstly, that there was no remedy in the Czech Republic that was available, effective and sufficient to deal with the complaint of racial discrimination in education as the State had yet to introduce any genuine anti-discrimination legislation. More specifically, the right to lodge a constitutional appeal had been rendered ineffective by the Constitutional Court's reasoning and its refusal to attach any significance to the general practice that had been referred to by the applicants. In the applicants' submission, no criticism could therefore be made of those who had chosen not to lodge such an appeal. As regards the failure to lodge an administrative appeal, the applicants said that their parents had only gained access to the requisite information after the time allowed for lodging such an appeal had expired. Even the Constitutional Court had disregarded that omission. Finally, an action to protect personality rights could not be used to challenge enforceable administrative decisions and the Government had not provided any evidence that such a remedy was effective.

Further, even supposing that an effective remedy existed, the applicants submitted that it did not have to be exercised in cases in which an administrative practice, such as the system of special schools in the Czech Republic, made racism possible or encouraged it. They also alleged that the

rule requiring the exhaustion of domestic remedies should not apply in a case such as theirs in which its strict application would expose them to the risk of a further violation of their rights.

The applicants also pointed out that Article 35 had to be applied with some degree of flexibility and without excessive formalism, having regard to the general legal and political context in which the remedies operated and the personal circumstances of the applicants. In that connection, they drew the Court's attention to the fact that Roma were subject to racial hatred and numerous acts of violence in the Czech Republic and to the unsatisfactory nature of the penalties imposed for racist and xenophobic criminal offences.

30. In its decision of 1 March 2005, the Court stated that the issue whether the rule requiring the exhaustion of domestic remedies had been complied with in the instant cases was complex and linked, in particular, to the applicants' allegations of an administrative practice of discrimination and a background of racial hatred. It therefore decided to join the Government's preliminary objection to the merits of the complaint under Article 14, taken together with Article 2 of Protocol No. 1.

31. At this juncture, the Court can but reiterate that the parties' arguments on the issue of the exhaustion of domestic remedies raise questions that are closely linked to the merits of the case. Like the Czech Constitutional Court, it considers that the application raises points of considerable importance and that vital interests are at stake.

For these reasons and in view of the fact that, for the reasons set out below, it finds that there has been no violation in this case, the Court does not consider it necessary to examine whether the applicants satisfied that condition in the present case.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 2 OF PROTOCOL NO. 1

32. The applicants alleged that they had been discriminated against in the enjoyment of their right to education on account of their race, colour, association with a national minority and their ethnic origin. They relied on Article 14 of the Convention, taken together with Article 2 of Protocol No. 1, which provide:

Article 14 of the Convention

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 2 of Protocol No. 1

"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."

A. The parties' submissions

1. The Government

33. In their observations, the Government noted that the onus was on the applicant to prove a difference in treatment. In the present case, however, the applicants had not submitted any evidence to show "beyond reasonable doubt" that the domestic authorities' decisions had been prompted by the applicants' racial origin. The Government also disputed the allegation that the Czech State had not taken any effective measures to combat racial hatred and pointed out that the special schools had never been intended as schools for Roma children.

34. In the instant case, the decisions to place the applicants in special schools were neither arbitrary nor based on the applicants' ethnic origin, as the proper procedure had been followed, and the decisions were based on legitimate statutory grounds and had been approved by the parents. None of the authorities' decisions mentioned the applicants' Roma origin or had been taken without the agreement of the applicants' parents. Placements of that type were in all cases preceded by a psychological examination by an expert that was geared towards establishing the child's true mental capacity and personal characteristics. Relying on material in the relevant case files, the Government said that with the exception of the ninth applicant, who had been placed in a special school mainly because of his sociocultural background and behavioural problems, the examination had revealed a degree of mental retardation in each of the applicants.

At the hearing the Government added that they were surprised that the applicants' representatives, who were now disputing the reliability of the diagnostic tools that had been used, had not sought to have the applicants re-examined in other centres or pointed out the alleged inconsistencies when the original tests were conducted.

35. The Government noted, lastly, that according to data supplied by the Institute for Educational Information, the number of children placed in special schools had fallen considerably since 1994.

2. The applicants

36. The applicants said that Roma children were treated differently in the education sphere to children who were not of Roma origin. The

difference in treatment consisted in their being placed in special schools without justification, where they received a substantially inferior education to that provided in ordinary primary schools, with the result that they were denied access to secondary education other than in vocational training centres. They were victims of racial segregation and had thus suffered psychological damage as a result of being branded "stupid" or "retarded".

37. The applicants submitted that they amply satisfied the test the Court applied to allegations of discrimination and had provided evidence "beyond reasonable doubt". They argued, however, that that standard of proof was more relevant to the criminal law rather than to human rights. Referring to the case-law of the Court (*Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 167, ECHR 2004) and other international institutions, they argued that discrimination did not have to be intentional and that a measure could be found to be discriminatory on the basis of evidence of its impact (disproportionately harmful effects on a particular group) even if it did not specifically target that group. Accordingly, and contrary to what the Government had said, they submitted that they did not need to show that their treatment at the hands of the national authorities was due to their racial origin.

38. The applicants maintained that if prima facie evidence of discrimination was adduced by an applicant (for example, with the help of statistical data), or if, as in the present case, it came from recent reports by international organisations, the burden of proof shifted to the respondent Government, which had to prove that the difference in treatment was justified. In that connection, the applicants referred to an opinion expressed by the Court that, in certain circumstances: "the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation" (*Anguelova v. Bulgaria*, no. 38361/97, § 111, ECHR 2002-IV). Since, in the applicants' submission, neither an insufficient command of the Czech language, nor a difference in socio-economic status, nor parental consent could constitute reasonable and objective justification, the national authorities had not succeeded in furnishing such an explanation. Furthermore, even supposing that the applicants' placements in special schools pursued a legitimate aim – something they categorically denied – such a measure could under no circumstances be considered proportionate to that aim.

39. The applicants were convinced that their placement in special schools was in breach of the Convention and that no "racially neutral" explanation existed for the statistical disproportion in the number of Roma children placed in special schools. Instead, they attributed that disproportion to many years of racial segregation and continued prejudice against Roma. The applicants denied that the disproportionately large number of Roma children placed in special schools could be explained by the results of the intellectual capacity tests carried out in the educational psychology and

child guidance centres. Such tests were adapted to the Czech language and cultural environment and so disadvantaged Roma children and caused errors that distorted the findings, since the majority of the children concerned were not suffering from any learning disability. Furthermore, there were no uniform rules governing the manner in which the tests were administered and the results interpreted so that much was left to the discretion of the psychologists and there was considerable scope for racial prejudice and cultural insensitivity. On that point, the applicants pointed out that no such statistical disparity was to be found in the numbers of children placed in specialised schools for more severely disabled children, as severe disability could be diagnosed with greater objectivity.

40. With regard to the Government's argument that their parents had agreed to their placement in the special schools, the applicants pointed out that the right of the child not to suffer racial discrimination could not be overridden by parental consent. In addition, in the case of at least two of the applicants (nos. 12 and 16), there were doubts about the validity of the consents, which in both instances appeared to have been pre-dated. The applicants noted that it was important for such consent to be free and informed and alleged that their parents had not been informed of the consequences of consenting and in many cases had been put under pressure by the school.

41. The applicants said, lastly, that they were not seeking a particular form of education. However, in their submission, once the State had decided that special schools were intended for children with learning disabilities, it had an obligation to ensure that the placement of pupils in such schools was not tainted by discrimination. Nor was it of relevance to determine whether the number of Roma children placed in special schools had recently dropped, particularly as this may have been as a result of the application of the new legislation (Law no. 561/2004), which had done away with the "special school" label without, however, resolving the problem of racial segregation.

42. In their letter of 3 November 2005, the applicants drew the Court's attention to a decision that had been delivered on 25 October 2005 by the Sofia District Court (Bulgaria) in which it found that Roma children who attended a "ghetto" school in which all the pupils were of Roma origin had been victims of racial segregation and unequal treatment.

3. The interveners

43. The observations of the third-party interveners, namely the non-governmental organisations Human Rights Watch and Interights, concerned the concept of "indirect discrimination", a notion that covered cases in which racially neutral statutory provisions or a general policy or measure produced discriminatory or disproportionate results, and on the problem of the burden of proof in such cases. They stressed the importance that should

be attached to credible statistics, which constituted prima facie evidence for the applicants that should shift the burden of proof on to the respondent.

In this context, the third party interveners referred, *inter alia*, to the anti-discrimination directives that had been adopted by the European Communities and to various examples of judicial practice in individual States and invited the Court to establish a legal framework prohibiting indirect discrimination in the Council of Europe.

B. The Court's assessment

44. The Court's case-law establishes that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (*Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (*Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 42), but the final decision as to observance of the Convention's requirements rests with the Court.

45. The Court notes that the applicants' complaint under Article 14 of the Convention, taken together with Article 2 of Protocol No. 1, is based on a number of serious arguments. It also notes that several organisations, including Council of Europe bodies, have expressed concern about the arrangements whereby Roma children living in the Czech Republic are placed in special schools and about the difficulties they have in gaining access to ordinary schools. The Court points out, however, that its role is different from that of the aforementioned bodies and that, like the Czech Constitutional Court, it is not its task to assess the overall social context. Its sole task in the instant case is to examine the individual applications before it and to establish on the basis of the relevant facts whether the reason for the applicants' placement in the special schools was their ethnic or racial origin.

46. In that connection, the Court observes that, if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group. However, statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory (*Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154).

47. In its admissibility decision in the present case, the Court also reiterated that the setting and planning of the curriculum falls in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era

(*Valsamis v. Greece*, judgment of 18 December 1996, *Reports* 1996-VI, § 28).

With regard to pupils with special needs, the Court accepts that the choice between having a single type of school for everyone, highly specialised structures or unified structures with specialist sections is not an easy one and there does not appear to be an ideal solution. It involves a difficult exercise in balancing the various competing interests. The Court wishes to reiterate with regard to the States' margin of appreciation in the education sphere that the States cannot be prohibited from setting up different types of school for children with difficulties or implementing special educational programmes to respond to special needs.

48. In the Court's view, the Government have nevertheless succeeded in establishing that the system of special schools in the Czech Republic was not introduced solely to cater for Roma children and that considerable efforts are made in these schools to help certain categories of pupils to acquire a basic education. The Government said that the criterion for selecting the applicants was not their race or ethnic origin but their learning disabilities as revealed in the psychological tests.

49. The Court observes that the rules governing children's placement in special schools do not refer to the pupils' ethnic origin, but pursue the legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children. Since these are not legal concepts, it is only right that experts in educational psychology should be responsible for identifying them.

As regards the applicants' argument that there are no uniform rules governing the choice of tests used by the experts or the interpretation of the results, the Court notes that the parties did not dispute that the tests in the instant case were administered by qualified professionals, who are expected to follow the rules of their profession and to be able to select suitable methods. It would be difficult for the Court to go beyond this factual finding and to ask the Government to prove that the psychologists who examined the applicants had not adopted a particular subjective attitude. Furthermore, the applicants' representatives have not succeeded in refuting the aforementioned experts' findings that the applicants' learning disabilities were such as to prevent them from following the ordinary primary school curriculum.

By way of example, the Court notes from the file of applicant no. 9 that he was given a psychological test on 23 November 1998 at the request of the ordinary school he was then attending with a view to his possible transfer to a special school. However, after the psychologist had recommended that he should continue to follow the ordinary curriculum as his poor results were due to frequent absences, a lack of motivation and a lack of encouragement from the family, the applicant retained his place in the ordinary school. It was his mother who subsequently asked for him to be

transferred to a special school, while the applicant made a like request during a further psychological test on 26 February 1999.

50. It should also be borne in mind that, in their capacity as the applicants' lawful representatives, the applicants' parents failed to take any action, despite receiving a clear written decision informing them of their children's placement in a special school; indeed, in some instances it was the parents who asked for their children to be placed or to remain in a special school. Conversely, when as happened with applicant no.10, the parents sought a transfer to an ordinary school, their request was complied with despite the fact that she was unsuccessful in the psychological tests. Similarly, applicant no. 11 was transferred to an ordinary primary school as soon as her mother withdrew her consent to her placement in a special school. In the case of applicant no. 16, her transfer to an ordinary school was actually initiated by the special school she attended, where she had obtained good results. Conversely, an offer of a similar transfer for applicant no. 17 was turned down by her mother.

In the Court's view, the fact that some of the applicants were transferred to ordinary schools proves that, contrary to what has been alleged by the applicants, the situation was not irreversible.

51. As to the applicants' argument that the parental consent was not "informed" and, in the case of two of the applicants (nos. 12 and 16), appears to have been pre-dated, the Court notes that it was the parents' responsibility, as part of their natural duty to ensure that their children receive an education, to find out about the educational opportunities offered by the State, to make sure they knew the date they gave their consent to their children's placement in a particular school and, if necessary, to make an appropriate challenge to the decision ordering the placement if it was issued without their consent.

52. Thus, while acknowledging that these statistics disclose figures that are worrying and that the general situation in the Czech Republic concerning the education of Roma children is by no means perfect, the Court cannot in the circumstances find that the measures taken against the applicants were discriminatory. Although the applicants may have lacked information about the national education system or found themselves in a climate of mistrust, the concrete evidence before the Court in the present case does not enable it to conclude that the applicants' placement or, in some instances, continued placement, in special schools was the result of racial prejudice, as they have alleged.

53. It follows that no violation of Article 14 of the Convention, taken together with Article 2 of Protocol No. 1, has been established.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously that there is no need to examine the Government's preliminary objection;

2. *Holds* by six votes to one that there has been no violation of Article 14 of the Convention, taken together with Article 2 of Protocol No. 1.

Done in French, and notified in writing on 7 February 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ	J.-P. COSTA
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Costa and the dissenting opinion of Mr Cabral Barreto are annexed to this judgment.

J.-P.C.
S.D.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

1. I voted with the majority in this case and therefore found that the Czech Republic had not violated the applicants' rights under Article 14 of the Convention, taken together with Article 2 of Protocol No. 1. I came to that conclusion only after some hesitation and would add that I find some of the arguments in the dissenting opinion of my colleague Judge Cabral Barreto very strong.

2. Generally speaking, the situation of the Roma in the States of Central Europe, where they are much more numerous than elsewhere, undoubtedly poses problems. Whatever efforts the Governments – strongly encouraged by Council of Europe and European Union institutions – and, it seems to me, the Czech Government in particular make to improve the situation, progress is slow and difficult. The Court had occasion to note that the Roma/gypsy community is subjected, for instance, to violence and discrimination in Slovakia (see *Çonka v. Belgium*, application no. 51564/99, admissibility decision of 13 March 2001). More recently, in the case of *Nachova and Others v. Bulgaria*, the Court found that there were grounds for suspecting that racist attitudes were at the origin of violence that had resulted in the deaths of the two victims, of Roma origin. For this reason, it found a violation of Article 14, taken together with Article 2 (in so far as it lays down procedural obligations), as the authorities had not taken all possible measures to establish whether discriminatory conduct may have played a role in the events (see the Grand Chamber judgment of 5 July 2005, to be published in the *Reports of Decisions and Judgments*). We must therefore be extremely vigilant. Indeed, it is noted in paragraph 53 of the judgment that the general situation in the Czech Republic concerning the education of Roma children is by no means perfect. That is quite clear.

3. However, cases should always be examined from the perspective of the individual application. In the present case, the Court had to determine whether the decision to place or retain the 18 applicants in "special schools" was a result of "racist" attitudes. Were they victims of systematic segregation and, therefore, discrimination based on "race" or (more specifically) their association with a national minority, contrary to Article 14, or not?

4. It is here, obviously, that the doubt arises and the difficulty lies. The danger is that, under cover of psychological or intellectual tests, virtually an entire, socially disadvantaged, section of the school population finds itself condemned to low level schools, with little opportunity to mix with children

of other origins and without any hope of securing an education that will permit them to progress. There have been occasions in the past in which "tests" were used in some countries with the aim and ultimately the effect of exclude certain categories from universal suffrage. The situation that arose with the right to vote could also arise with the right to education.

5. However, it was barely contested in the instant case that the tests were carried out professionally and objectively. Nor was it disputed that the children's parents consented to their enrolment in special schools. The Court also observed, in paragraph 50, that in at least two instances, the lack of such consent resulted in the pupils concerned being transferred to an "ordinary" primary school. Lastly, although "the statistics reveal worrying figures" (§ 53), the special schools did not cater solely for children of Roma origin. The evidence therefore tends to support the arguments of the Government of the respondent State.

6. However, I nevertheless remained hesitant, as the very principle of these special schools is a cause for concern. They have become the subject of debate in many countries, a debate that is highly complex. When the system of the single lower secondary-education school (*collège*) was set up in France it had, and still has to this day, fervent supporters and resolute opponents. The establishment from 1982 onwards of "priority education areas" has to some extent succeeded in correcting, through positive discrimination in the allocation of resources, inequalities of opportunity suffered by pupils living in disadvantaged areas, whose parents are more likely to be suffering from a lack of culture or resources, or from unemployment, it also being noted that in these areas many young people of immigrant extraction do not have French as their native language.

7. Yet in spite of all this, should the education policy of the Czech Republic be judged so severely? In particular, should the applicants themselves be regarded as victims of a violation of the Convention in those schools? It seems to me to be difficult to go that far without to some extent distorting the facts and the evidence or departing from the case-law (something which, under the Convention, the Grand Chamber is better placed than a Chamber to do). The Court cited (§ 47) the *Valsamis v. Greece* judgment of 18 December 1996, *Reports* 1996-VI, in which it was pointed out that the States' educational choices were more a question of expediency than of legitimacy under the Convention. As for *positive* discrimination – which, in the present case, would have entailed increased resources for special schools to avoid the risk of their becoming, if not educational "ghettos", then at least "dead ends" where pupils remain until they reach the minimum school-leaving age, it seems to me that up till now this Court has refused to consider it a State obligation (see, with respect to

Article 8, *Chapman v. the United Kingdom*, judgment of 18 January 2001 [Grand Chamber], ECHR 2001-1). On this point, the judgments cited by Judge Cabral Barreto (*Thlimmenos v. Greece* and *Posti and Rahko v. Finland*) do not, in my view, entail any criticism of States that fail to engage in positive discrimination (nor does he suggest that they do).

8. In conclusion, while I regret that I have not been able to agree with all the points made by my colleague in his dissenting opinion, I believe that the Chamber judgment is well-founded. I therefore have overcome my hesitations and voted accordingly.

DISSENTING OPINION OF JUDGE CABRAL BARRETO

(Translation)

To my great regret, I am unable to agree with the majority's finding that there has been no violation of Article 14 of the Convention, taken together with Article 2 of Protocol No. 1.

I come to entirely the opposite conclusion for reasons which are set out below.

But I would first like to make two observations.

1. Firstly, I acknowledge the efforts made by the Czech Republic to integrate the Roma into society and to put an end to discrimination and social exclusion by incorporating the European Directive on equality of treatment (see paragraph 27 of the judgment).

Secondly, I do not wish and, indeed, am unable to make any value judgment on the conditions of life for the Roma in the Czech Republic or, in particular, to express any view on whether they are better or worse than in other member States.

The Court's role, and my own role in the present circumstances, is confined to examining and deciding whether there has been a violation of the Convention as a result of the applicants' treatment by the respondent State in the present case.

2. The factual position is straightforward enough: during the period from 1996 to 1999 the applicants were placed in "special schools" in Ostrava.

The placements were made after child psychology tests and, in some cases, with the permission or consent of the parents.

Section 31(1) of Law no. 29/1984 provided that special schools were intended for children with learning disabilities that prevented them from following the curricula in ordinary primary schools or in specialised primary schools intended for children suffering from sensory impairment, illness or disability (see paragraph 20 of the judgment).

As the Government expressly recognised in their report lodged on 1 April 1999 under Article 25 § 1 of the Framework Convention for the Protection of National Minorities, which is cited at paragraph 26 of the judgment, that at the time (which coincides with the relevant period in the instant case): "Romany children with average or above-average intellect [we]re often placed in such schools on the basis of results of psychological tests (this happen[ed] always with the consent of the parents). These tests [we]re conceived for the majority population and do not take Romany specifics into consideration".

At the time, in some "specialised schools" Romany pupils made up between 80% and 90% of the total number of pupils.

In my opinion, this constitutes an express acknowledgement by the Czech State of the discriminatory practices complained of by the applicants.

During the period from 1996 to 1999 the applicants were not placed in schools for the mentally disabled because of mental disability; on the contrary, they possessed "average or above-average intellect".

3. The judgment raises first and foremost points that warrant detailed examination, namely that the applicants were selected for placement in the schools by tests and that the placements were made with parental consent.

The Government, however, acknowledged in the 1999 report, which is cited in the judgment, that the tests did not take Romany specifics into consideration.

As to parental consent, I would refer to ECRI's Third Report on the Czech Republic, which was made public on 8 June 2004: "As far as the other element required in order to send a child to a special school – the consent of a parent or legal guardian of the child – parents making such decisions continue to lack information concerning the long-term negative consequences of sending their children to such schools." (see paragraph 108 of the report.)

In practice, pupils educated in a "special school" saw their prospects of pursuing their studies in a secondary school reduced to nil.

4. I agree with the majority's statement of the position in paragraph 47: "...with regard to the States' margin of appreciation in the education sphere ... the States cannot be prohibited from setting up different types of school for children with difficulties or implementing special educational programmes to respond to special needs".

I would even add: the State should take into account pupils who, because of their special circumstances, require a specific form of education.

These pupils who, for various reasons – whether cultural, linguistic or other – find it difficult to pursue a normal school education should be entitled to expect the State to take positive measures to compensate for their handicap and to afford them a means of resuming the normal curriculum.

However, such measures should never result in the handicap being increased as a result of the pupil being placed in a school for children with learning disabilities.

The Court stated in the *Thlimmenos v. Greece* judgment of 6 April 2000, (*Reports of Judgments and Decisions* 2000-IV, p. 317, § 44) :

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification... However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." (see also, *Postiand Rahko*, judgment of 24 September 2002, *Reports* 2002-VII, p. 351, § 82).

5. In the applicants' situation, compliance with Article 14 of the Convention required measures to be taken to make up for the differences. However, the Czech State's "different treatment" of the applicants served, in my view, to aggravate the differences between them and the pupils attending the ordinary schools. It seems to me that the measure is made all the more unjust and incomprehensible in terms of cognitive ability by the fact that the majority of these pupils were average or above-average when compared to pupils attending the ordinary schools. The Czech State thereby prevented them from achieving their cognitive and intellectual potential, as they possessed the requisite capacities.

It is not for me to stay what type of positive measures the applicants' situation called for, but what is certain is that enrolling them in schools designed and intended for children with learning disabilities does not appear to be an appropriate means of resolving these children's difficulties, which are of an entirely different order from the cognitive problems characteristic of pupils in such schools.

I note that the Czech State is now changing its position, is preparing to introduce anti-discrimination tools and regards "the practice of referring large numbers of Roma children to special schools as untenable".

The Government wish to replace "special schools" with "special primary schools" in order to provide the children targeted assistance in overcoming their sociocultural handicap (see paragraph 27 of the judgment).

I very much hope that this new system will offer prospects of civic integration and social and intellectual development in accordance with the principles which all children and their parents must be entitled to expect from the States in the education sphere. I would, however, like to refer to one of ECRI's recommendations in the aforementioned report: "ECRI recommends that the Czech authorities ensure that the new School Act does not create a new form of separated education for Roma children".

6. Lastly, the expression "**all different, all equal**" should continue to be the guiding principle in the unceasing fight against discrimination in compliance with all the aspects of Article 14 of the Convention, a provision which covers both negative discrimination and, as in the present case, positive discrimination.

A P P E N D I X

LIST OF THE APPLICANTS

1. Ms D.H. is a Czech national of Roma origin who was born in 1989 and lives in Ostrava-Přívoz;

2. Ms S.H. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava-Přívoz;

3. Mr L.B. is a Czech national of Roma origin who was born in 1985 and lives in Ostrava-Fifejdy;

4. Mr M.P. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava-Přívoz;

5. Mr J.M. is a Czech national of Roma origin who was born in 1988 and lives in Ostrava-Radvanice;

6. Ms N.P. is a Czech national of Roma origin who was born in 1989 and lives in Ostrava;

7. Ms D.B. is a Czech national of Roma origin who was born in 1988 and lives in Ostrava-Heřmanice;

8. Ms A.B. is a Czech national of Roma origin who was born in 1989 and lives in Ostrava-Heřmanice;

9. Mr R.S. is a Czech national of Roma origin who was born in 1985 and lives in Ostrava-Kunčičky;

10. Ms K.R. is a Czech national of Roma origin who was born in 1989 and lives in Ostrava-Mariánské Hory;

11. Ms Z.V. is a Czech national of Roma origin who was born in 1990 and lives in Ostrava-Hrušov;

12. Ms H.K. is a Czech national of Roma origin who was born in 1990 and lives in Ostrava-Vítkovice;

13. Mr P.D. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava;

14. Ms M.P. is a Czech national of Roma origin who was born in 1990 and lives in Ostrava-Hrušov;

15. Ms D.M. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava-Hrušov;

16. Ms M.B. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava 1;

17. Ms K.D. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava-Hrušov;

18. Ms V.Š. is a Czech national of Roma origin who was born in 1990 and lives in Ostrava-Vítkovice.