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

GRAND CHAMBER

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

(Application no. 57325/00)

JUDGMENT

STRASBOURG

13 November 2007

This judgment is final but 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 Grand Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr B.M. ZUPANČIČ,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr J. CASADEVALL,
Mrs M. TSATSA-NIKOLOVSKA,
Mr K. TRAJA,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr J. BORREGO BORREGO,
Mrs A. GYULUMYAN,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS,
Mr J. ŠIKUTA,
Mrs I. ZIEMELE,
Mr M. VILLIGER, *judges,*

and Mr M. O'BOYLE, *Deputy Registrar*,

Having deliberated in private on 17 January and 19 September 2007,

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

PROCEDURE

…

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. Details of the applicants' names and places of residence are set out in the Annex.

A. Historical background

2. According to documents available on the Internet site of the Roma and Travellers Division of the Council of Europe, the Roma originated from the regions situated between north west India and the Iranian plateau. The first written traces of their arrival in Europe date back to the fourteenth century. Today there are between eight and ten million Roma living in Europe. They are to be found in almost all Council of Europe member States and indeed, in some Central and East European countries, they represent over 5% of the population. The majority of them speak Romani, an Indo-European language that is understood by a very

large number of Roma in Europe, despite its many variants. In general, Roma also speak the dominant language of the region in which they live, or even several languages.

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

4. In the Czech Republic the Roma have national-minority status and, accordingly, enjoy the special rights associated therewith. The National Minorities Commission of the Government of the Czech Republic, a governmental consultative body without executive power, has responsibility for defending the interests of the national minorities, including the Roma.

As to the number of Roma currently living in the Czech Republic, there is a discrepancy between the official, census-based, statistics and the estimated number. According to the latter, which is available on the website of the Minorities Commission of the Government of the Czech Republic, the Roma community now numbers between 150,000 and 300,000 people.

B. Special schools

5. According to information supplied by the Czech Government, the special schools (*zvláštní školy*) were established after the First World War for children with special needs, including those suffering from a mental or social handicap. The number of children placed in these schools continued to rise (from 23,000 pupils in 1960 to 59,301 in 1988). Owing to the entrance requirements of the primary schools (*základní školy*) and the resulting selection process, prior to 1989 most Roma children attended special school.

6. Under the terms of the Schools Act (Law no. 29/1984), the legislation applicable in the present case, special schools were a category of specialised school (*speciální školy*) and were intended for children with mental deficiencies who were unable to attend "ordinary" or specialised primary schools. Under the Act, the decision to place a child in a special school was 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 centre and was subject to the consent of the child's legal guardian.

7. Following the switch to the market economy in the 1990s, a number of changes were made to the system of special schools in the Czech Republic. These changes also affected the education of Roma pupils. In 1995 the Ministry of Education issued a directive concerning the provision of additional lessons for pupils who had completed their compulsory education in a special school. Since the 1996/97 school year, preparatory classes for children from disadvantaged social backgrounds have been opened in nursery, primary and special schools. In 1998 the Ministry of Education approved an alternative educational curriculum for children of Roma origin who had been placed in special schools. Roma teaching assistants were also assigned to primary and special schools to assist the teachers and facilitate communication with the families. By virtue of amendment no. 19/2000 to the Schools Act, which came into force on 18 February 2000, pupils who had completed their compulsory education in a special school were also eligible for admission to a secondary-school education, provided they satisfied the entrance requirements for their chosen course.

8. According to data supplied by the applicants, which was obtained through questionnaires sent in 1999 to the head teachers of the 8 special schools and 69 primary schools in the town of Ostrava, the total number of pupils placed in special schools in Ostrava came to 1,360, of whom 762 (56%) were Roma. Conversely, Roma represented only 2.26% of the total of 33,372 primary-school pupils in Ostrava. Further, although only 1.8% of non-Roma pupils were placed in special schools, in Ostrava the proportion of Roma pupils assigned to such schools was 50.3%. Accordingly, a Roma child in Ostrava was 27 times more likely to be placed in a special school than a non-Roma child.

According to data from the European Monitoring Centre for Racism and Xenophobia (now the European Union Agency for Fundamental Rights), more than half of Roma children in the Czech Republic attend special schools.

The Advisory Committee on the Framework Convention for the Protection of National Minorities observed in its report of 26 October 2005 that, according to unofficial estimates, the Roma represent up to 70% of pupils enrolled in special schools.

Lastly, according to a comparison of data on fifteen countries, including countries from Europe, Asia and North America, gathered by the OECD in 1999 and cited in the observations of the International Step by Step Association, the Roma Education Fund and the European Early Childhood Research Association[1], the Czech Republic ranked second highest in terms of placing children with physiological impairments in special schools and in third place in the table of countries placing children with learning difficulties in such schools. Further, of the eight countries who had provided data on the schooling of children whose difficulties arose from social factors, the Czech Republic was the only one to use special schools. The other countries concerned almost exclusively used ordinary schools for the education of such children.

C. The facts of the instant case

9. Between 1996 and 1999 the applicants were placed in special schools in Ostrava, either directly or after a spell in an ordinary primary school.

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. Consent was indicated by signing a pre-completed form. In the case of applicants nos. 12 and 16 the dates on the forms are later than the dates of the decisions to place the children in special schools. In both instances, the date has been corrected by hand, on one occasion is accompanied by a note from the teacher citing a typing error.

The decisions on placement were then taken by the head teachers of the special schools concerned after referring to the recommendations of the educational psychology centres where the applicants had undergone psychological tests. The applicants' school files contained the report on their examination, including the results of the tests with the examiners' comments, drawings by the children and, in a number of cases, a questionnaire for the parents.

The written decision concerning the placement was sent to the children's parents. It contained instructions on the right to appeal, a right which none of the applicants exercised.

11. On 29 June 1999 the applicants received a letter from the school authorities informing them of the possibilities available for transferring from special school to primary school. It

1. P. Evans (2006), 'Educating students with special needs: A comparison of inclusion practices in OECD countries', Education Canada 44 (1): 32-35.

would appear that four of the applicants (nos. 5, 6, 11 and 16 in the Annex) were successful in aptitude tests and thereafter attended 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.

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

13. On 15 June 1999 all the applicants apart from those numbered 1, 2, 10 and 12 in the Annex asked the Ostrava Education Authority (*Školský úřad*) to reconsider, outside the formal appeal procedure (*přezkoumání mimo odvolací řízení*), the administrative decisions to place them in special schools. They argued that their intellectual capacity had not been reliably tested and that their representatives had not been adequately 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, the conditions for bringing proceedings outside the appeal procedure were not satisfied in their case.

2. Constitutional appeal

15. On 15 June 1999 applicants nos. 1 to 12 in the Annex 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 on, *inter alia*, 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.

…

16. 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 constructive 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 had actually been referred to in the notice of appeal, it had no jurisdiction to decide the cases of those 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 Annex), 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 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 this information by liaising with the schools and that there was nothing in the file to indicate that they had shown any interest in transferring to a primary school. The Constitutional Court therefore ruled that this part of the appeal was manifestly ill-founded.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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E. Domestic practice at the material time

1. Psychological examination

17. The testing of intellectual capacity in an educational psychology centre with the consent of the child's legal guardians was neither compulsory nor automatic. The recommendation for the child to sit the tests was generally made by teachers – either when the child first enrolled at the school or if difficulties were noted in its ordinary primary-school education – or by paediatricians.

18. According to the applicants, who cited experts in this field, the most commonly used tests appeared to be variants of the 'Wechsler Intelligence Scale for Children' (PDW and WISC III) and the 'Stanford-Binet Intelligence test'. Citing various opinions, including those of teachers and psychologists and the head of the special-schools department at the Czech Ministry of Education in February 1999, the applicants submitted that the tests used were neither objective nor reliable, as they had been devised solely for Czech children, and had not recently been standardised or approved for use with Roma children. Moreover, no measures had been taken to enable Roma children to overcome their cultural and linguistic disadvantages in the tests. Nor had any instructions been given to restrict the latitude that was given in the administration of the tests and the interpretation of the results. The applicants also drew attention to a 2002 report in which the Czech schools inspectorate noted that children without any significant mental deficiencies were still being placed in special schools.

19. In the report submitted by the Czech Republic on 1 April 1999 pursuant to Article 25 § 1 of the Framework Convention for the Protection of National Minorities, it was noted that the psychological tests “are conceived for the majority population and do not take Romani specifics into consideration”.

...

2. Consent to placement in a special school

20. Article 7 of Decree no. 127/1997 on specialised schools made the consent of the legal guardians a condition *sine qua non* for the child's placement in a special school. The applicants noted that the Czech legislation did not require the consent to be in writing. Nor did information on the education provided by special schools or the consequences of the child's placement in a special school have to be provided beforehand.

21. In its report on the Czech Republic published in March 2000, ECRI observed that Roma parents often favoured the channelling of Roma children to special schools, partly to avoid abuse from non-Roma children in ordinary schools and isolation of the child from other neighbourhood Roma children, and partly owing to a relatively low level of interest in education.

In its report on the Czech Republic published in June 2004, ECRI noted that when deciding whether or not to give their consent, parents of Roma children "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".

22. According to information obtained by the *FIDH* from its Czech affiliate, many schools in the Czech Republic are reluctant to accept Roma children. That reluctance is explained by the reaction of the parents of non-Roma children, which, in numerous cases, has been to remove their children from integrated schools because the parents fear that the level of the school will fall following the arrival of Roma children or, quite simply, because of prejudice against the Roma. It is in that context that Roma children undergo tests designed to ascertain their capacity to follow the ordinary curriculum, following which parents of Roma children are encouraged to place their children in special schools. The parents' choice to place their children in special schools, where that is what they choose to do, is consistent with the school authorities' desire not to admit so many Roma children that their arrival might induce the parents of non-Roma children to remove their own children from the school.

3. Consequences

23. Pupils in special schools follow a special curriculum supposedly adapted to their intellectual capacity. After completing their course of compulsory education in this type of school, they may elect to continue their studies in vocational training centres or, since 18 February 2000, in other forms of secondary school (provided they are able to establish during the admissions procedure that they satisfy the entrance requirements for their chosen course).

Further, Article 6 § 2 of Decree no. 127/1997 stipulated that if during 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 guardian, to recommend the pupil's placement in another specialised school or in an ordinary school.

24. In his final report on the Human Rights Situation of the Roma, Sinti and Travellers in Europe dated 15 February 2006, the Commissioner for Human Rights noted: "Being subjected to special schools or classes often means that these children follow a curriculum inferior to those of mainstream classes, which diminishes their opportunities for further education and for finding employment in the future. The automatic placement of Roma children in classes for children with special needs is likely to increase the stigma by labelling the Roma children as less intelligent and less capable. At the same time, segregated education denies both the Roma and non-Roma children the chance to know each other and to learn to live as equal citizens. It excludes Roma children from mainstream society at the very beginning of their lives, increasing the risk of their being caught in the vicious circle of marginalisation".

25. The Advisory Committee on the Framework Convention for the Protection of National Minorities noted in its second report on the Czech Republic, which was published on 26 October 2005, that placement in a special school "makes it more difficult for Roma children to gain access to other levels of education, thus reducing their chances of integrating in the

society. Although legislation no longer prevents children from advancing from 'special' to regular secondary schools, the level of education offered by 'special' schools generally does not make it possible to cope with the requirements of secondary schools, with the result that most drop out of the system".

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III. COUNCIL OF EUROPE SOURCES

A. The Committee of Ministers

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B. The Parliamentary Assembly

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C. The European Commission against Racism and Intolerance (ECRI)

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D. Framework Convention for the Protection of National Minorities

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E. Commissioner for Human Rights

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IV. RELEVANT COMMUNITY LAW AND PRACTICE

26. The principle prohibiting discrimination or requiring equality of treatment is well established in a large body of Community law instruments based on Article 13 of the Treaty instituting the European Community. This provision enables the Council, through a unanimous decision following a proposal/recommendation by the Commission and consultation of the European Parliament, to take the measures necessary to combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation.

27. Thus, Article 2 § 2 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex provides: "Indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex". Article 4 § 1, which concerns the burden of proof, reads: "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may

be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".

28. Similarly, the aim of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is to prohibit in their respective spheres all direct or indirect discrimination based on race, ethnic origin, religion or belief, disability, age or sexual orientation. The preambles to these Directives state as follows: "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence" and "The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought".

29. In particular, Directive 2000/43/EC provides as follows in Articles 2 (Concept of discrimination) and 8 (Burden of proof):

Article 2

"1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

..."

Article 8

"1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

...

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case."

30. Under the case-law of the Court of Justice of the European Communities (CJEC), discrimination, which entails the application of different rules to comparable situations or the application of the same rule to different situations, may be overt or covert and direct or indirect.

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31. In its judgment of 23 October 2003 in *Hilde Schönheit v. Stadt Frankfurt am Main* (Case C-4/02) and *Silvia Becker v. Land Hessen* (Case C-5/02), the CJEC noted at points 67-69 and 71:

> "... it must be borne in mind that Article 119 of the Treaty and Article 141(1) and (2) EC set out the principle that men and women should receive equal pay for equal work. That principle precludes not only the application of provisions leading to direct sex discrimination, but also the application of provisions which maintain different treatment between men and women at work as a result of the application of criteria not based on sex where those differences of treatment are not attributable to objective factors unrelated to sex discrimination...
>
> It is common ground that the provisions of the BeamtVG at issue do not entail discrimination directly based on sex. It is therefore necessary to ascertain whether they can amount to indirect discrimination...
>
> To establish whether there is indirect discrimination, it is necessary to ascertain whether the provisions at issue have a more unfavourable impact on women than on men...
>
> Therefore it is necessary to determine whether the statistics available indicate that a considerably higher percentage of women than men is affected by the provisions of the BeamtVG entailing a reduction in the pensions of civil servants who have worked part-time for at least a part of their career. Such a situation would be evidence of apparent discrimination on grounds of sex unless the provisions at issue were justified by objective factors unrelated to any discrimination based on sex."
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> …

V. RELEVANT UNITED NATIONS MATERIALS

A. International Covenant on Civil and Political Rights

32. Article 26 of the Covenant provides:

> "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 discrimination 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."

B. United Nations Human Rights Committee

33. In points 7 and 12 of its General Observations no. 18 of 10 November 1989 on Non-Discrimination, the Committee expressed the following opinion:

> "... the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.
>
> ... when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory."

34. In point 11.7 of its Views dated 31 July 1995 on Communication no. 516/1992 concerning the Czech Republic, the Committee noted:

> "The Committee is of the view, however, that the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory."

C. International Convention on the Elimination of All Forms of Racial Discrimination

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D. Committee on the Elimination of Racial Discrimination

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E. Convention on the Rights of the Child

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F. UNESCO

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VI. OTHER SOURCES

A. European Monitoring Centre on Racism and Xenophobia (now the European Union Agency for Fundamental Rights)

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B. The House of Lords

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C. The United States Supreme Court

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THE LAW

I. SCOPE OF THE GRAND CHAMBER'S JURISDICTION

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II. THE GOVERNMENT'S PRELIMINARY OBJECTION

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III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 2 OF PROTOCOL NO. 1

35. The applicants maintained that they had been discriminated against in that because of their race or ethnic origin they had been treated less favourably than other children in a comparable situation without any objective and reasonable justification. They relied in that connection on Article 14 of the Convention, read in conjunction with Article 2 of Protocol No. 1, which provisions provide as follows:

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 Chamber judgment

36. The Chamber held that there had been no violation of Article 14 of the Convention, read in conjunction with Article 2 of Protocol No 1. In its view, the Government had succeeded in establishing that the system of special schools in the Czech Republic had not been introduced solely to cater for Roma children and that considerable efforts had been made in those schools to help certain categories of pupils to acquire a basic education. In that connection, it observed that the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children.

37. The Chamber noted in particular that the applicants had not succeeded in refuting the experts' findings that their learning difficulties were such as to prevent them from following the ordinary primary school curriculum. It was further noted that the applicants' parents had failed to take any action or had themselves requested their children's placement or continued placement in a special school.

38. The Chamber accepted in its judgment that it was not easy to choose an education system that reconciled the various competing interests and that there did not appear to be an ideal solution. However, while acknowledging that the statistical evidence disclosed worrying figures and that the general situation in the Czech Republic concerning the education of Roma children was by no means perfect, it considered that the concrete evidence before it did not enable it to conclude that the applicants' placement or, in some instances, continued placement, in special schools was the result of racial prejudice.

B. The parties' submissions to the Grand Chamber

1. The applicants

39. The applicants submitted that the restrictive interpretation the Chamber had given to the notion of discrimination was incompatible not only with the aim of the Convention but also with the case-law of the Court and of other jurisdictions in Europe and beyond.

40. They firstly asked the Grand Chamber to correct the obscure and contradictory test the Chamber had used for deciding whether there had been discrimination. They noted that, while reaffirming the established principle that if a policy or general measure had disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory could not be ruled out even if it was not specifically aimed or directed at that group, the Chamber had nevertheless departed from the Court's previous case-law (*Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 6 January 2005; and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-...) by erroneously requiring the applicants to prove discriminatory intent on the part of the Czech authorities. In the applicants' submission, such a requirement was unrealistic and illogical as the question whether or not special schools were designed to segregate along ethnic lines was irrelevant since that was indisputably the effect they had in practice. The reality was that well-intentioned actors often engaged in discriminatory practices through ignorance, neglect or inertia.

…

41. In the instant case, the applicants did not claim that the competent authorities had at the relevant time harboured invidiously racist attitudes towards Roma, or that they had intended to discriminate against Roma, or even that they had failed to take positive measures. All the applicants needed to prove – and, in their submission, had proved – was that the authorities had subjected the applicants to differential adverse treatment in comparison with similarly situated non-Roma, without objective and reasonable justification. The question of a common European standard that had been raised by the Government was, in the applicants' view, more of a political issue and the existence or otherwise of such a standard was of no relevance as the principle of equality of treatment was a binding rule of international law.

42. Similarly, the applicants asked the Grand Chamber to provide guidance concerning the kinds of proof, including but not limited to statistical evidence, which might be relevant to a claim of a violation of Article 14. They noted that the Chamber had discounted the overwhelming statistical evidence they had adduced, without checking whether or not it was accurate, despite the fact that it had been corroborated by independent specialised intergovernmental bodies (ECRI, the Committee on the Elimination of Racial Discrimination, and the Advisory Committee on the Framework Convention for the Protection of National Minorities) and by the Government's own admission (see paragraphs 41 and 66 above). According to this data, although Roma represented only 5% of all primary school pupils at the time the application was lodged, they made up more than 50% of the population of special schools. Whereas fewer than 2% of non-Roma pupils in Ostrava were assigned to special schools, over 50% of Roma children were sent to such schools. Overall, a Roma child was more than 27 times more likely than a similarly situated non-Roma child to be assigned to a special school.

43. In the applicants' view, these figures strongly suggested that, whether through conscious design or reprehensible neglect, race or ethnicity had infected the process of school assignment to a substantial – perhaps determining – extent. The presumption that they, like other Roma children in the city of Ostrava, had been the victims of discrimination on the grounds of ethnic origin had never been rebutted. It was undisputed that as a result of their assignment to special schools the applicants had received a substantially inferior education as compared with non-Roma children and that this had effectively deprived them of the opportunity to pursue a secondary education other than in a vocational training centre.

44. In this context, they argued that both in Europe and beyond statistical data was often used in cases which, as here, concerned discriminatory effect, as sometimes it was the only

means of proving indirect discrimination. Statistical data was accepted as a means of proof of discrimination by the bodies responsible for supervising the United Nations treaties and by the Court of Justice of the European Communities. Council Directive 2000/43/EC expressly provided that indirect discrimination could be established by any means "including on the basis of statistical evidence".

45. With respect to the Convention institutions, the applicants noted that, in finding racial discrimination in the case of *East African Asians v. the United Kingdom* (nos. 4403/70-4530/70, Commission report of 14 December 1973, Decisions and Reports 78-B, p. 5), the Commission took into account the surrounding circumstances including statistical data on the disproportionate effect the legislation had on British citizens of Asian origin. Recently, the Court had indicated in its decision in the case of *Hoogendijk v. the Netherlands* (cited above) that while statistics alone were not sufficient to prove discrimination, they could – particularly where they were undisputed – amount to prima facie evidence requiring the Government to provide an objective explanation of the differential treatment. Further, in its decision in the case of *Zarb Adami v. Malta* (cited above), the Court had relied, *inter alia*, on statistical evidence of disproportionate effect.

…

46. Nor, in the applicants' submission, could the discriminatory treatment to which they had been subjected be justified by their parents' consent to their placement in the special schools. Governments were legally bound to protect the higher interest of the child and in particular the equal right of all children to education. Neither parental conduct nor parental choice could deprive them of that right.

The credibility of the "consent" allegedly given by the parents of several of the applicants had been called into question by inconsistencies in the school records that raised doubts as to whether they had indeed agreed. In any event, even supposing that consent had been given by all the parents, it had no legal value as the parents concerned had never been properly informed of their right to withhold their consent, of alternatives to placement in a special school or of the risks and consequences of such a placement. The procedure was largely formal: the parents were given a pre-completed form and the results of the psychological tests, results they believed they had no right to contest. As to the alleged right subsequently to request a transfer to an ordinary school, the applicants pointed out that from their very first year at school they had received a substantially inferior education that made it impossible for them subsequently to meet the requirements of the ordinary schools.

Moreover, it was unrealistic to consider the issue of consent without taking into account the history of Roma segregation in education and the absence of adequate information on the choices available to Roma parents. Referring to the view that had been expressed by the Court (in *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, § 66) that a waiver may be lawful for certain rights but not for others and that it must not run counter to any important public interest, the applicants submitted that there could be no waiver of the child's right not to be racially discriminated against in education.

….

2. The Government

47. The Government stated that the case raised complex issues concerning the social problem of the position of Roma in contemporary society. Although the Roma ostensibly enjoyed the same rights as other citizens, in reality their prospects were limited by both objective and subjective factors. There could be no improvement in their situation without the

involvement and commitment of all members of the Roma community. When they attempted to eliminate these inequalities, member States were confronted with numerous political, social, economic and technical problems which could not be confined to the question of respect for fundamental rights. It was for this reason that the courts, including the European Court of Human Rights, had to exercise a degree of restraint when examining measures adopted in this field and confine themselves to deciding whether or not the competent authorities had overstepped their margin of appreciation.

48. Referring to their previous written and oral observations, the Government reiterated that race, colour or association with a national minority had not played a determining role in the applicants' education. There was no specific evidence of any difference in treatment of the applicants on the basis of those grounds. The applicants' school files showed beyond doubt that their placement in special schools was not based on their ethnic origin, but on the results of psychological tests carried out at the educational psychology centres. Since the applicants had been placed in special schools on account of their specific educational needs resulting essentially from their intellectual capacity and, since the criteria, the process by which the criteria were applied and the system of special schools were all racially neutral, as the Chamber had confirmed in its judgment, it was not possible to speak of overt or direct discrimination in the instant case.

49. The Government next turned to the applicants' argument that the instant case was one of indirect discrimination which, in some instances, could only be established with the aid of statistics. They contended that the case of *Zarb Adami v. Malta* (cited above), in which the Court had relied extensively on statistical evidence submitted by the parties, was not comparable to the instant case. Firstly, *Zarb Adami* was far less complex. Secondly, the statistical disparities found in that case between the number of men and women called to perform jury service were the result of a decision by the State, whereas the statistics relied on by the applicants in the instant case reflected first and foremost the parents' wishes for their children to attend special school, not any act or omission on the part of the State. Had the parents not expressed such a wish (by giving their consent) the children would not have been placed in a special school.

…

50. The Government again conceded that there might have been rare situations where the reason for the placement in a special school was on the borderline between learning difficulties and a socio-culturally disadvantaged environment. Among the eighteen cases, this had apparently happened in one case only, that of the ninth applicant. Otherwise, the pedagogical-psychological diagnostics and the testing at the educational psychology centres had proved learning difficulties in the case of all the applicants.

51. The educational psychology centres that had administered the tests had only made recommendations concerning the type of school in which the child should be placed. The essential, decisive factor was the wishes of the parents. In the instant case, the parents had been informed that their children's placement in a special school depended on their consent and the consequences of such a decision had been explained to them. If the effect of their consent was not entirely clear, they could have appealed against the decision regarding placement and could at any time have required their child's transfer to a different type of school. If, as they now alleged, their consent was not informed, they should have sought information from the competent authorities. The Government noted in this respect that Article 2 of Protocol No. 1 to the Convention emphasised the primary role and responsibility of parents in the education of their children. The State could not intervene if there was nothing in the parents' conduct to indicate that they were unable or unwilling to decide on the most

appropriate form of education for their children. Interference of that sort would contravene the principle that the State had to respect parents' wishes regarding education and teaching.

In the instant case, the Government noted that apart from appealing to the Constitutional Court and lodging an application with the European Court of Human Rights, the applicants' parents had on the whole done nothing to spare their children the alleged discriminatory treatment and had played a relatively passive role in their education.

52. The Government rejected the applicants' argument that their placement in special schools had prevented them from pursuing a secondary or higher education.

…

53. In any event, since special schools had to be regarded as an alternative, but not inferior, form of education, the Government submitted that they had in the instant case adopted reasonable measures to compensate for the disabilities of the applicants, who required a special education as a result of their individual situation, and that they had not overstepped the margin of appreciation which the Convention afforded the States in the education sphere. They observed that the State had allocated twice the level of resources to special schools as to ordinary schools and that the domestic authorities had made considerable efforts to deal with the complex issue of the education of Roma children.

…

3. The interveners

(a) Interights and Human Rights Watch

….

(b) Minority Rights Group International, the European Network against Racism and the European Roma Information Office

….

(c) International Step by Step Association, the Roma Education Fund and the European Early Childhood Education Research Association

….

(d) *Fédération internationale des ligues des droits de l'Homme* (International Federation for Human Rights – *FIDH*)

….

C. The Court's assessment

1. Recapitulation of the main principles

54. The Court has established in its case-law 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; and *Okpisz v. Germany*, no. 59140/00, § 33, 25 October 2005). However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (*"Case relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*

(Merits), judgment of 23 July 1968, Series A no. 6, § 10; *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; and *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 51, ECHR 2006-...). The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group (*Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001; and *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 6 January 2005), and that discrimination potentially contrary to the Convention may result from a *de facto* situation (*Zarb Adami v. Malta*, no. 17209/02, § 76, ECHR 2006-...).

55. Discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (*Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-...; and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-...). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (*Timishev*, cited above, § 58).

56. As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see, among other authorities, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III; and *Timishev*, cited above, § 57).

57. As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court stated in *Nachova and Others* (cited above, § 147) that in proceedings before it there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.

58. The Court has also recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation – *Aktaş v. Turkey (extracts)*, no. 24351/94, § 272, ECHR 2003-V). In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Anguelova v. Bulgaria*, no. 38361/97, § 111, ECHR 2002-IV). In the case of *Nachova and Others*, cited above, § 157), the Court did not rule out requiring a respondent Government to disprove an arguable allegation of discrimination in certain cases, even though it considered that it would be difficult to do so in that particular case in which the allegation was that an act of violence had been motivated by racial prejudice. It noted in that connection that in the legal systems of

many countries proof of the discriminatory effect of a policy, decision or practice would dispense with the need to prove intent in respect of alleged discrimination in employment or in the provision of services.

59. As to whether statistics can constitute evidence, the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory (*Hugh Jordan*, cited above, § 154). However, in more recent cases on the question of discrimination, in which the applicants alleged a difference in the effect of a general measure or *de facto* situation (*Hoogendijk*, cited above; and *Zarb Adami*, cited above, §§ 77-78), the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations.

Thus, in the *Hoogendijk* decision the Court stated: "[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination."

60. Lastly, as noted in previous cases, the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (*Chapman v. the United Kingdom* [GC], no. 27238/95, § 96, ECHR 2001-I; and *Connors v. the United Kingdom*, no. 66746/01, § 84, 27 May 2004).

In *Chapman* (cited above, §§ 93-94), the Court also observed that there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

2. Application of the aforementioned principles to the instant case

61. The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority (see also the general observations in the Parliamentary Assembly's Recommendation no. 1203 (1993) on Gypsies in Europe, cited in paragraph 56 above and point 4 of its Recommendation no. 1557 (2002): 'The legal situation of Roma in Europe', cited in paragraph 58 above). As the Court has noted in previous cases, they therefore require special protection (see paragraph 60 above). As is attested by the activities of numerous European and international organisations and the recommendations of the Council of Europe bodies (see paragraphs **Chyba! Nenalezen zdroj odkazů.-Chyba! Nenalezen zdroj odkazů.** above), this protection also extends to the sphere of education. The present case therefore warrants particular attention, especially as when the applications were lodged with the Court the applicants were minor children for whom the right to education was of paramount importance.

62. The applicants' allegation in the present case is not that they were in a different situation from non-Roma children that called for different treatment or that the respondent State had failed to take affirmative action to correct factual inequalities or differences between them (*Thlimmenos*, cited above, § 44; and *Stec and Others*, cited above, § 51). In their submission, all that has to be established is that, without objective and reasonable

justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.

63. The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (*Hugh Jordan*, cited above, § 154; and *Hoogendijk*, cited above). In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC (see paragraphs 27 and 29 above) and the definition provided by ECRI (see paragraph **Chyba! Nenalezen zdroj odkazů.** above), such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent.

(a) Whether a presumption of indirect discrimination arises in the instant case

64. It was common ground that the impugned difference in treatment did not result from the wording of the statutory provisions on placements in special schools in force at the material time. Accordingly, the issue in the instant case is whether the manner in which the legislation was applied in practice resulted in a disproportionate number of Roma children – including the applicants – being placed in special schools without justification, and whether such children were thereby placed at a significant disadvantage.

65. As mentioned above, the Court has noted in previous cases that applicants may have difficulty in proving discriminatory treatment (*Nachova and Others*, cited above, §§ 147 and 157). In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination.

66. On this point, the Court observes that Council Directives 97/80/EC and 2000/43/EC stipulate that persons who consider themselves wronged because the principle of equal treatment has not been applied to them may establish, before a domestic authority, by any means, including on the basis of statistical evidence, facts from which it may be presumed that there has been discrimination (see paragraphs 27 and 28 above). The recent case-law of the Court of Justice of the European Communities (see paragraphs **Chyba! Nenalezen zdroj odkazů.**-31 above) shows that it permits claimants to rely on statistical evidence and the national courts to take such evidence into account where it is valid and significant.

The Grand Chamber further notes the information furnished by the third-party interveners that the courts of many countries and the supervisory bodies of the United Nations treaties habitually accept statistics as evidence of indirect discrimination in order to facilitate the victims' task of adducing prima facie evidence.

The Court also recognised the importance of official statistics in the aforementioned cases of *Hoogendijk* and *Zarb Adami* and has shown that it is prepared to accept and take into consideration various types of evidence (*Nachova and Others*, cited above, § 147).

67. In these circumstances, the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.

68. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory (see, *mutatis mutandis, Nachova and Others*, cited above, § 157). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (*ibid.*, § 147), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.

69. In the present case, the statistical data submitted by the applicants was obtained from questionnaires that were sent out to the head teachers of special and primary schools in the town of Ostrava in 1999. It indicates that at the time 56% of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Roma pupils in Ostrava assigned to special schools was 50.3%. According to the Government, these figures are not sufficiently conclusive as they merely reflect the subjective opinions of the head teachers. The Government also noted that no official information on the ethnic origin of the pupils existed and that the Ostrava region had one of the largest Roma populations.

70. The Grand Chamber observes that these figures are not disputed by the Government and that they have not produced any alternative statistical evidence. In view of their comment that no official information on the ethnic origin of the pupils exists, the Court accepts that the statistics submitted by the applicants may not be entirely reliable. It nevertheless considers that these figures reveal a dominant trend that has been confirmed both by the respondent State and the independent supervisory bodies which have looked into the question.

71. In their reports submitted in accordance with Article 25 § 1 of the Framework Convention for the Protection of National Minorities, the Czech authorities accepted that in 1999 Roma pupils made up between 80% and 90% of the total number of pupils in some special schools (see paragraph **Chyba! Nenalezen zdroj odkazů.** above) and that in 2004 "large numbers" of Roma children were still being placed in special schools (see paragraph **Chyba! Nenalezen zdroj odkazů.** above). The Advisory Committee on the Framework Convention observed in its report of 26 October 2005 that according to unofficial estimates Roma accounted for up to 70% of pupils enrolled in special schools. According to the report published by ECRI in 2000, Roma children were "vastly overrepresented" in special schools. The Committee on the Elimination of Racial Discrimination noted in its concluding observations of 30 March 1998 that a disproportionately large number of Roma children were placed in special schools (see paragraph **Chyba! Nenalezen zdroj odkazů.** above). Lastly, according to the figures supplied by the European Monitoring Centre on Racism and Xenophobia, more than half of Roma children in the Czech Republic attended special school.

72. In the Court's view, the latter figures, which do not relate solely to the Ostrava region and therefore provide a more general picture, show that, even if the exact percentage of Roma children in special schools at the material time remains difficult to establish, their number was disproportionately high. Moreover, Roma pupils formed a majority of the pupils in special schools. Despite being couched in neutral terms, the relevant statutory provisions therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools.

73. Where it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases concerning employment or the provision of services, it is not necessary in cases in the educational sphere (see, *mutatis mutandis*, *Nachova and Others*, cited above, § 157) to prove any discriminatory intent on the part of the relevant authorities (see paragraph 63 above).

74. In these circumstances, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. The burden of proof must therefore shift to the Government, which must show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.

(b) Objective and reasonable justification

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

76. In the instant case, the Government sought to explain the difference in treatment between Roma children and non-Roma children by the need to adapt the education system to the capacity of children with special needs. In the Government's submission, the applicants were placed in special schools on account of their specific educational needs, essentially as a result of their low intellectual capacity measured with the aid of psychological tests in educational psychology centres. After the centres had made their recommendations regarding the type of school in which the applicants should be placed, the final decision had lain with the applicants' parents and they had consented to the placements. The argument that the applicants were placed in special schools on account of their ethnic origin was therefore unsustainable.

For their part, the applicants strenuously contested the suggestion that the disproportionately high number of Roma children in special schools could be explained by the results of the intellectual capacity tests or be justified by parental consent.

77. The Court accepts that the Government's decision to retain the special-school system was motivated by the desire to find a solution for children with special educational needs. However, it shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system causes.

78. The Grand Chamber observes, further, that the tests used to assess the children's learning abilities or difficulties have given rise to controversy and continue to be the subject of scientific debate and research. While accepting that it is not its role to judge the validity of such tests, various factors in the instant case nevertheless lead the Grand Chamber to conclude that the results of the tests carried out at the material time were not capable of constituting objective and reasonable justification for the purposes of Article 14 of the Convention.

79. In the first place, it was common ground that all the children who were examined sat the same tests, irrespective of their ethnic origin. The Czech authorities themselves acknowledged in 1999 that "Romany children with average or above-average intellect" were often placed in such schools on the basis of the results of psychological tests and that the tests were conceived for the majority population and did not take Roma specifics into consideration (see paragraph **Chyba! Nenalezen zdroj odkazů.** above). As a result, they had revised the tests and methods used with a view to ensuring that they "were not misused to the detriment of Roma children" (see paragraph **Chyba! Nenalezen zdroj odkazů.** above).

In addition, various independent bodies have expressed doubts over the adequacy of the tests. Thus, the Advisory Committee on the Framework Convention for the Protection of National Minorities observed that children who were not mentally handicapped were frequently placed in these schools "[owing] to real or perceived language and cultural differences between Roma and the majority". It also stressed the need for the tests to be "consistent, objective and comprehensive" (see paragraph **Chyba! Nenalezen zdroj odkazů.** above). ECRI noted that the channelling of Roma children to special schools for the mentally-

retarded was reportedly often "quasi-automatic" and needed to be examined to ensure that any testing used was "fair" and that the true abilities of each child were "properly evaluated" (see paragraphs **Chyba! Nenalezen zdroj odkazů.-Chyba! Nenalezen zdroj odkazů.** above). The Council of Europe Commissioner for Human Rights noted that Roma children were frequently placed in classes for children with special needs "without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin" (see paragraph **Chyba! Nenalezen zdroj odkazů.** above).

Lastly, in the submission of some of the third-party interveners, placements following the results of the psychological tests reflected the racial prejudices of the society concerned.

80. The Court considers that, at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment.

81. As regards parental consent, the Court notes the Government's submission that this was the decisive factor without which the applicants would not have been placed in special schools. In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify an acceptance of the difference in treatment, even if discriminatory, in other words a waiver of the right not to be discriminated against. However, under the Court's case-law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent (*Pfeifer and Plankl v. Austria*, judgment of 25 February 1992, Series A no. 227, §§ 37-38) and without constraint (*Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, § 51).

82. In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures. It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism and special schools where the majority of the pupils were Roma.

83. In view of the fundamental importance of the prohibition of racial discrimination (see *Nachova and Others*, cited above, § 145; and *Timishev*, cited above, § 56), the Grand Chamber considers that, even assuming the conditions referred to in paragraph 81 above were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest (see, *mutatis mutandis*, *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-...).

(c) Conclusion

84. As is apparent from the documentation produced by ECRI and the report of the Commissioner for Human Rights of the Council of Europe, the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children: other European

States have had similar difficulties. The Court is gratified to note that, unlike some countries, the Czech Republic has sought to tackle the problem and acknowledges that, in its attempts to achieve the social and educational integration of the disadvantaged group which the Roma form, it has had to contend with numerous difficulties as a result of, *inter alia*, the cultural specificities of that minority and a degree of hostility on the part of the parents of non-Roma children. As the Chamber noted in its admissibility decision in the instant case, the choice between a single school for everyone, highly specialised structures and unified structures with specialised sections is not an easy one. It entails a difficult balancing exercise between the competing interests. As to the setting and planning of the curriculum, this mainly involves questions of expediency on which it is not for the Court to rule (*Valsamis v. Greece*, judgment of 18 December 1996, *Reports* 1996-VI, § 28).

85. Nevertheless, whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation (see *Buckley v. the United Kingdom*, judgment of 25 September 1996, *Reports* 1996-IV, § 76; and *Connors v. the United Kingdom*, judgment cited above, § 83).

86. The facts of the instant case indicate that the schooling arrangements for Roma children were not attended by safeguards (see paragraph 28 above) that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class (see, *mutatis mutandis, Buckley*, cited above, § 76; and *Connors*, cited above, § 84). Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.

87. In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. In that connection, it notes with interest that the new legislation has abolished special schools and provides for children with special educational needs, including socially disadvantaged children, to be educated in ordinary schools.

88. Lastly, since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases.

89. Consequently, there has been a violation in the instant case of Article 14 of the Convention, read in conjunction with Article 2 of Protocol No. 1, as regards each of the applicants.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

…

B. Costs and expenses

….

C. Default interest

….

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;

2. *Holds* by thirteen votes to four that there has been a violation of Article 14 read in conjunction with Article 2 of Protocol No. 1;

3. *Holds* by thirteen votes to four
   (a) that the respondent State is to pay the applicants, within three months, the following amounts together with any tax that may be chargeable:
      (i) to each of the eighteen applicants EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable on the date of payment;
      (ii) jointly, to all the applicants, EUR 10,000 (ten thousand euros) in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable on the date of payment;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 November 2007.

DISSENTING OPINION OF JUDGE ZUPANČIČ

I join entirely in the comprehensive dissenting opinion of Judge Karel Jungwiert. I wish only to add the following.

As the majority explicitly, and implicitly elsewhere in the judgment, admitted in §§ 198 and 205 – the Czech Republic is the only Contracting State which has in fact tackled the special educational troubles of Roma children. It then borders on the absurd to find the Czech Republic in violation of anti-discrimination principles. In other words, this "violation" would never have happened had the respondent State approached the problem with benign neglect.

No amount of politically charged argumentation can hide the obvious fact that the Court in this case has been brought into play for ulterior purposes, which have little to do with the special education of Roma children in the Czech Republic.

The future will show what specific purpose this precedent will serve.

DISSENTING OPINION OF JUDGE JUNGWIERT

(Translation)

1. I strongly disagree with the majority's finding in the present case of a violation of Article 14 of the Convention, read in conjunction with Article 2 of Protocol No. 1.

While I am able to agree to an extent with the formulation of the relevant principles under Article 14 in the judgment, I cannot accept the manner in which the majority have applied those principles in the instant case.

2. Before specifying all the matters with which I disagree, I would like to put this judgment into a more general perspective.

It represents a new development in the Court's case-law, as it set about evaluating and criticising a country's entire education system.

However authoritative the precedents cited at paragraphs 175 to 181 of the judgment may be, in practice they have very little in common with the instant case other perhaps than the Roma origin of the applicants in most of the cases (for instance in *Nachova* and *Buckley*, among others).

3. In my opinion, for the principles to be applied correctly requires, firstly, a sound knowledge of the facts and also of the circumstances of the case, primarily the historical context and the situation obtaining in other European countries.

As regards the historical context, the data presented in the judgment (paragraphs 14 to 16) provides information that is inaccurate, inadequate and of a very general nature.

The facts as presented in the judgment do not permit the slightest comparison to be made between Roma communities in Europe with respect, *inter alia*, to such matters as demographic evolution or levels of school attendance.

4. I will endeavour to supply some facts and figures to make up for this lack of information.

I should perhaps begin with the awful truth that, so far as the current territory of the Czech Republic is concerned, we are not talking about an "attempted" extermination of the Roma by the Nazis (see paragraph 13) but about their almost total annihilation. Of the nearly 7,000 Roma who were living in the country at the start of the war, scarcely 600 survived[1].

The situation is thus very different from that in other countries: the Czech Roma, almost all of whom were exterminated, were replaced from 1945 onwards by successive waves of new arrivals in their tens of thousands, mainly from Slovakia, Hungary and Romania. The vast majority of this new population were not only illiterate and completely uprooted, they did not speak the Czech language. The same is not true of other countries on whose territory the Roma have – in principle – been living for decades and even centuries and have attained a degree of familiarity with the environment and language.

To complete and close this incursion into the historical and demographic context, I believe that a further comparison, which helps to explain the scale and complexity of the problem, would be useful.

An estimation of the numbers of Roma living in certain European countries has given the following minimum and maximum figures (which of course remain approximate):

Germany	110,000 – 140,000	for a population of 80,000,000
France	300,000 – 400,000	for a population of 60,000,000

[1]. A. Frazer (M. Miklušáková), *The Gypsies (Cikáni)*, Prague 2002, p. 275.

Italy	90,000 – 120,000	for a population of 60,000,000
United Kingdom	100,000 – 150,000	for a population of 60,000,000
Poland	35,000 – 45,000	for a population of 38,000,000
Portugal	40,000 – 50,000	for a population of 10,000,000
Belgium	25,000 – 35,000	for a population of 10,000,000
Czech Republic	200,000 – 250,000	for a population of 10,000,000[1, 2]

These figures provide an indication of the scale of the problem facing the Czech Republic in the education field.

5. An important question that needs to be asked is what is the position in Europe and what standards or minimum requirements have to be met?

The question of the schooling and education of Roma children has for almost 30 years been the subject of analysis and, on the initiative of the Council of Europe, proposals by the European Commission and other institutions.

The judgment contains more than 25 pages (paragraphs 54 to 107) of citations from Council of Europe texts, Community law and practice, UN materials and other sources.

However, the majority of the recommendations, reports and other documents it cites are relatively vague, largely theoretical and, most important of all, were published **after** the period with which the instant case is concerned (1996-1999 – see paragraph 19 of the judgment).

I should therefore like to quote the author mentioned above, whose opinion I agree with. In his book *Roma in Europe*, J.-P. Liégeois stresses:

"We must avoid over-use of vague terms ('emancipation', 'autonomy', 'integration', 'inclusion', etc.) which mask reality, put things in abstract terms and have no functional value ...

> ... officials often formulate complex questions and demand immediate answers, but such an approach leads only to empty promises or knee-jerk responses that assuage the electorate, or the liberal conscience, in the short term."[3]

In this connection, the sole resolution on the subject that is concrete and accurate – a major founding text of perhaps historic value – is the **Resolution of the Council and the Ministers of Education meeting within the Council of 22 May 1989 on school provision for gypsy and traveller children**[4].

6. Regrettably and to my great surprise, this crucial document is not among the sources cited in the Grand Chamber's judgment.

I should therefore like to quote some of the passages from this resolution:

> "THE COUNCIL AND THE MINISTERS FOR EDUCATION, MEETING WITHIN THE COUNCIL,
>
> ...
>
> Considering that the present situation is disturbing in general, and in particular with regard to schooling, **that only 30 to 40 % of gypsy or traveller children attend school with any regularity, that half of them have never been to school** [emphasis added], that a very small percentage attend secondary school and beyond, that the level of educational skills, especially reading and writing, bears little relationship to the presumed length of schooling, and that the illiteracy rate among adults is frequently over 50 % and in some places 80 % or more,

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1. J.-P. Liégeois, *Roma in Europe*, to be published by Council of Europe Publishing.
2. Nevertheless, in a census taken of the population of the Czech Republic on 3 March 1991, only 32,903 people claimed to be members of the Roma (*Statistical Yearbook of the Czech Republic 1993* ,Prague 1993, p. 142).
1. Op. cit. (text subject to editorial revision).
2. *Official Journal of the European Communities* C 153 of 21/06/1989, pp. 3 and 4.

Considering that over 500 000 children are involved and that this number must constantly be revised upwards on account of the high proportion of young people in gypsy and traveller communities, half of whom are under 16 years of age,

Considering that schooling, in particular by providing the means of adapting to a changing environment and achieving personal and professional autonomy, is a key factor in the cultural, social and economic future of gypsy and traveller communities, that parents are aware of this fact and their desire for schooling for their children is increasing,

..."

7. How astonishing! In the twelve countries that formed the European Union in 1989 it is acknowledged that between 250,000 and 300,000 children had never attended school.

It is an inescapable fact that the trend since then has tended to confirm this diagnosis. There is nothing to suggest an improvement in the situation in this sphere, especially with the enlargement of the European Union. The population of the Roma community is estimated (by the same source) at 400,000 in Slovakia, 600,000 in Hungary, 750,000 in Bulgaria and 2,100,000 in Romania. In total, there are more than 4,000,000 Roma children in Europe, **more than 2,000,000 of whom will, in all probability, never attend school in their lifetimes**.

8. I am determined to bring this terrible and largely concealed truth out into the open, as I consider it shameful that such a situation should exist in Europe in the 21st century. What has caused this alarming silence?

9. Statistical data on the former Czechoslovakia indicates that in 1960 some 30% of Roma had never attended school. This figure has fallen and was only 10% in 1970.

A numerical comparison of the Czech Republic data on the number of children born and the number attending school shows school attendance levels attaining almost 100% twenty years later[1].

10. Nevertheless, in this sorry state of affairs, some people consider it necessary to focus criticism on the Czech Republic, one of the few countries in Europe where virtually all children, including Roma children, attend school.

Further, for the school year 1989-1990 there were 7,957 teachers for 58,889 pupils and for the school year 1992-1993 8,325 teachers for 48,394 pupils[2], that is to say **one teacher for every seven pupils.**

11. For years, European States have produced an often strange mix of achievements and projects which combine successes with failures. The problem concerns the education systems of many countries, not just the special schools[3].

The Czech Republic has chosen to develop a system that was introduced back in the 1920s (see paragraph 15 of the judgment), and to improve it while providing the following procedural safeguards for placements in special schools (paragraphs 20 and 21) :

– parental consent,
– recommendations of the educational psychology centres,
– a right of appeal,
– an opportunity to transfer back to an ordinary primary school from a special school.

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1. *Statistical Yearbook of the Czech Republic 1993,* Prague 1993, pp. 88 and 302
2. *Statistical Yearbook of the Czech Republic 1993,* Prague 1993, p. 307.
3. In the public debate currently underway in France, it has been noted that "40% of pupils entering the first form do not have a basic education. At the end of the fourth form, 150,000 young people leave the system without mastering any subject (Editorial in the 'Figaro', 4 September 2007). The same newspaper related in an article on 7 September 2007 that "according to the Education Board, 40% of primary-school pupils – 300,000 children in all – leave each year with severe failings or in great dificulty".

In a way, the Czech Republic has thereby established an education system that is inegalitarian. However, this inegalitarianism has a positive aim: to get children to attend school in order to have a chance to succeed through positive discrimination in favour of a disadvantaged population.

Despite this, the majority feel compelled to say that it is not satisfied that the difference in treatment between Roma children and non-Roma children pursued a legitimate aim of adapting the education system to the needs of the former and that there existed a reasonable relationship of proportionality between the means used and the aim pursued (see paragraph 208 of the judgment).

No one has conveyed the following opinion better than Arthur Schopenhauer, who was the first to express it:

> "This peculiar satisfaction in words contributes more than anything else to the perpetuation of errors. For, relying on the words and phrases received from his predecessors, each one confidently passes over obscurities and problems..."[1]

…

15. I find the conclusions reached by the majority (see paragraphs 205 to 210 of the judgment) somewhat contradictory. They note that difficulties exist in the education of Roma children not just in the Czech Republic but in other European States as well.

To describe **the total absence of a school education for half of Roma children** (see points 6 and 7 above) in a number of States as "difficulties" is an extraordinary euphemism. To explain this illogical approach, the majority note with satisfaction that, unlike some countries, the Czech Republic has chosen to tackle the problem (see paragraph 205 of the judgment).

The implication is that it is probably preferable and less risky to do nothing and to leave things as they are elsewhere, in other words to make no effort to confront the problems with which a large section of the Roma community is faced.

16. In my view, such abstract, theoretical reasoning renders the majority's conclusions wholly unacceptable.

1. A. Schopenhauer, *The World as Will and Representation (Volume II),* this tranlsation by EFJ Payne, Dover, New York 1966, p. 145.

DISSENTING OPINION OF JUDGE BORREGO BORREGO

(Translation)

1. I am somewhat saddened by the judgment in the present case.

2. In 2002 Judge Bonello said that he found it "*particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny, has not, to date, found one single instance of violation of the right [guaranteed by] ... Article 2 or ... Article 3 induced by the race ... of the victim*" (*Anguelova v. Bulgaria*, judgment of 13 June 2002, no. 38361/97, dissenting opinion). While I agree with Judge Bonello's criticism that the absence, five years ago, of a single case of racial discrimination concerning the core Convention rights was disturbing, the judgment in the present case has now got the Court off to a flying start. The Grand Chamber has in this judgment behaved like a Formula One car, hurtling at high speed into the new and difficult terrain of education and, in so doing, has inevitably strayed far from the line normally followed by the Court.

3. In my opinion, the Second Section's judgment of 17 February 2006 in the present case was sound and wise and a good example of the Court's case-law. Regrettably, I cannot say the same of the Grand Chamber judgment. (The Chamber judgment is 17 pages long, the Grand Chamber's, 78 pages, which all goes to show that the length of a judgment is no measure of its sagacity).

I will focus on two points only.

4. The approach:

After noting the concerns of various organisations about the realities of the Roma's situation, the Chamber stated: "*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*..." (at paragraph 45).

5. Yet the Grand Chamber does the exact opposite. In contradiction with the role which all judicial bodies assume, the entire judgment is devoted to assessing the overall social context – from the first page ("historical background") to the last paragraph, including a review of the "Council of Europe sources" (14 pages), "Community law and practice" (5 pages), United Nations materials (7 pages) and "other sources" (3 pages, which, curiously, with the exception of the reference to the European Monitoring Centre, are taken exclusively from the Anglo-American system, that is, the House of Lords and the United States Supreme Court). Thus, to cite but one example, the Court states at the start of paragraph 182: "*The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority*". Is it the Court's role to be doing this?

6. Following this same line, which to my mind is not one appropriate for a court, the Grand Chamber stated in paragraph 209 after finding a discriminatory difference in treatment between Roma and non-Roma children: "*... since it has been established that the relevant legislation ... had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases*".

7. This, then, is the Court's new role: to become a second ECRI (European Commission against Racism and Intolerance) and dispense with an examination of the individual applications, for example the situation of applicants nos. 9, 10, 11, 16 and 17, in complete contrast to the procedure followed by the Chamber in paragraphs 49 and 50 of its judgment.

8. At the hearing on 17 January 2007 the representatives (from London and New York) of the applicant children (from Ostrava) confined themselves in their oral submissions to an account of the discrimination which they say the Roma are subjected to in Europe.

9. None of the applicant children or the parents of those applicants who were still minors were present at the hearing. The individual circumstances of the applicants and their parents were forgotten. Since Rule 36 § 4 of the Rules of Court states that representatives act on behalf of the applicants, I put a very simple question to the two British and American representatives – had they met the minor applicants and/or their parents? And had they been to Ostrava? I did not receive an answer.

10. I still have the same impression: the hearing room of the Grand Chamber had become an ivory tower, divorced from the life and problems of the minor applicants and their parents, a place where those in attendance could display their superiority over the absentees.

11. The Roma parents and the education of their children:

On the subject of the children's education, the Chamber judgment states: *"[T]he Court notes that it was the parents' responsibility, as part of their natural duty to ensure that their children receive an education...*" (at paragraph 51). After an analysis of the facts the Chamber went on to hold that there had been no violation of Article 14, read in conjunction with Article 2 of Protocol No. 1.

12. I consider the stance taken by the Grand Chamber with respect to the parents of the minor applicants to be extremely preoccupying and, since it concerned all the Roma parents, one that is quite frankly, unacceptable. It represents a major deviation from the norm and reflects a sentiment of superiority that ought to be inconceivable in a court of human rights and strikes at the human dignity of the Roma parents.

13. The Grand Chamber begins by calling into question the capacity of Roma parents to perform their parental duty. The judgment states: "*The Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent*" (at paragraph 203). Such assertions are unduly harsh, superfluous and, above all, unwarranted.

14. The Grand Chamber then proceeds to compound its negative appraisal of the Roma parents: " *The Grand Chamber considers that, even assuming the conditions referred to in paragraph 201 above were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest...*" (paragraph 204).

I find this particularly disquieting. The Grand Chamber asserts that **all** parents of Roma children, "even assuming" them to be capable of giving informed consent, are unable to choose their children's school. Such a view can lead to the awful experiences with which we are only too familiar of children being "abducted" from their parents when the latter belong to a particular social group because certain "well-intentioned" people feel constrained to impose their conception of life on all. An example of the sad human tradition of fighting racism through racism.

16. How cynical: the parents of the applicant minors are not qualified to bring up their children, even though they are qualified to sign an authority in favour of British and North American representatives whom they do not even know!

17. Clearly, I agree with the dissenting opinions expressed by my colleagues, whose views I wholly subscribe to.

18. Any departure by the European Court from its judicial role will lead it into a state of confusion and that can only have negative consequences for Europe. The deviation from the

norm implicit in this judgment is substantial and the fact that all Roma parents are deemed unfit to educate their children is, in my view, insulting. I therefore take my place alongside the victims of that insult and declare: "*Jsem český Rom*" (I am a Czech Roma).

DISSENTING OPINION OF JUDGE ŠIKUTA

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