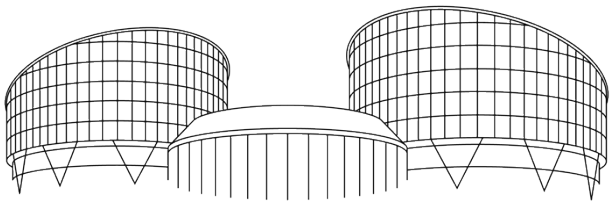

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF ORŠUŠ AND OTHERS v. CROATIA

(Application no. 15766/03)

JUDGMENT

STRASBOURG

16 March 2010

In the case of Oršuš and Others v. Croatia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Karel Jungwiert,
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Alvina Gyulumyan,
Renate Jaeger,
Egbert Myjer,
Davíd Thór Björgvinsson,
Ineta Ziemele,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Işıl Karakaş,
Nebojša Vučinić, *judges*,
and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 1 April 2009 and on 27 January 2010,

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

PROCEDURE

1. The case originated in an application (no. 15766/03) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by fifteen Croatian nationals ("the applicants"), on 8 May 2003.

2. The applicants were represented before the Court by the European Roma Rights Centre based in Budapest, Mrs L. Kušan, a lawyer practising in Ivanić-Grad, and Mr J.A. Goldston, of the New York Bar. The Croatian Government ("the Government") were represented by their Agent, Mrs Š. Stažnik.

3. The applicants alleged, in particular, that the length of the proceedings before the national authorities had been excessive and that they had been denied the right to education and discriminated against in the enjoyment of that right on account of their race or ethnic origin.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 17 July 2008 a Chamber of that Section, consisting of Christos Rozakis, Nina Vajić, Khanlar Hajiyev, Dean Spielmann, Sverre Erik Jebens, Giorgio Malinverni and George Nicolaou, judges, and Søren Nielsen, Section Registrar, found unanimously that there had been a violation of Article 6 § 1 of the Convention on account of the excessive length of the proceedings, and that there had not been a violation of Article 2 of Protocol No. 1 taken alone or in conjunction with Article 14 of the Convention. The Chamber also found that the first applicant had withdrawn his application on 22 February 2007 and it therefore discontinued the examination of the application in so far as it concerned the first applicant.

5. On 13 October 2008 the applicants requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. On 1 December 2008 a panel of the Grand Chamber accepted that request.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicants and the Government each filed observations on the admissibility and merits of the case. In addition, third-party comments were received from the Government of the Slovak Republic, Interights and Greek Helsinki Monitor.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 April 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs Š. STAŽNIK, *Agent*,
Mr D. MARIČIĆ, *Co-Agent*,
Mrs N. JAKIR,
Mrs I. IVANIŠEVIĆ, *Advisers*;

(b) *for the applicants*

Mrs L. KUŠAN,
Mr J.A. GOLDSTON, *Counsel*,
Mr A. DOBRUSHI,
Mr T. ALEXANDRIDIS, *Advisers*.

The Court heard addresses by Mr Goldston, Mrs Kušan and Mrs Stažnik.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born between 1988 and 1994 and live respectively in Orehovica, Podturen and Trnovec. Their names and details are set out in the appendix.

10. During their education, the applicants at times attended separate classes, comprising only Roma pupils, at a primary school in the village of Podturen for nine applicants (the second to tenth applicants) and at a primary school in the village of Macinec, in Međimurje County, for five applicants (the eleventh to fifteenth applicants). In Croatia, primary education consists of eight grades and children are obliged to attend school from the age of seven to fifteen. The first four grades are considered as lower grades and each class is assigned a class teacher who in principle teaches all subjects. The fifth to eighth grades are upper grades in which, in addition to a class teacher assigned to each class, different teachers teach different subjects. The curriculum taught in any primary school class, including the Roma-only classes which the applicants attended, may be reduced by up to 30% in comparison to the regular, full curriculum.

A. General overview of the two primary schools in question

1. Podturen Primary School

11. The proportion of Roma children in the lower grades (from the first to the fourth grade) varies from 33% to 36%. The total number of pupils in Podturen Primary School in 2001 was 463, 47 of whom were Roma. There was one Roma-only class, with 17 pupils, while the remaining 30 Roma pupils attended mixed classes.

12. In 2001 a pre-school programme called "Little School" (*Mala škola*) was introduced in the Lončarevo settlement in Podturen. It included about twenty Roma children and was designed as a preparatory programme for primary school. Three educators were involved, who had previously received special training. The programme ran from 11 June to 15 August 2001. This programme has been provided on a permanent basis since 1 December 2003. It usually includes about twenty Roma children aged from 3 to 7. The programme is carried out by an educator and a Roma assistant in cooperation with Podturen Primary School. An evaluation test is carried out at the end of the programme.

13. In December 2002 the Ministry of Education and Sports adopted a decision introducing Roma assistants in schools with Roma pupils from the

first to fourth grades. In Podturen Primary School, there was already a Roma assistant who had worked there since September 2002. A statement made by one such assistant, Mr K.B., on 13 January 2009 reads:

> "I started work at Podturen Primary School in September 2002. At that time there were two classes in the fourth grade. Class four (b) had Roma pupils only and it was very difficult to work with that class because the pupils were agitated and disrupted the teaching. I contemplated leaving after only two months. At the request of teachers, I would give written invitations to the parents or I would invite them orally to come to talk with the teachers at the school. Some parents would come, but often not, and I had to go and ask them again. A lot of time was needed to explain Croatian words to the pupils because some of them continued to speak Romani and the teachers could not understand them. I told the pupils that they should attend school regularly. Some pupils would just leave classes or miss a whole day. I helped pupils with homework after school. I helped the school authorities to compile the exact list of pupils in the first grade. I no longer work at the school."

14. Since the school year 2003/04 there have been no Roma-only classes in Podturen Primary School.

2. Macinec Primary School

15. The proportion of Roma children in the lower grades varies from 57% to 75%. Roma-only classes are formed in the lower grades and only exceptionally in the higher grades. All classes in the two final grades (seventh and eighth) are mixed. The total number of pupils in Macinec Primary School in 2001 was 445, 194 of whom were Roma. There were 6 Roma-only classes, with 142 pupils in all, while the remaining 52 Roma pupils attended mixed classes.

16. Since 2003 the participation of Roma assistants has been implemented.

17. A "Little School" pre-school programme was introduced in 2006.

B. Individual circumstances of each applicant

18. The applicants submitted that they had been told that they had to leave school at the age of 15. Furthermore, the applicants submitted statistics showing that in the school year 2006/07 16% of Roma children aged 15 completed their primary education, compared with 91% of the general primary school population in Međimurje County. The drop-out rate of Roma pupils without completing primary school was 84%, which was 9.3 times higher than for the general population. In the school year 2005/06, 73 Roma children were enrolled in the first grade and 5 in the eighth.

19. The following information concerning each individual applicant is taken from official school records.

1. Podturen Primary School

(a) The first applicant

20. By a letter of 22 February 2007, the first applicant expressed the wish to withdraw his application. Thus in the Chamber judgment of 17 July 2008 the Court decided to discontinue the examination of the application in so far as it concerned the first applicant.

(b) The second applicant

21. The second applicant, Mirjana Oršuš, was enrolled in the first grade of primary school in the school year 1997/98. She attended a mixed class that year and the following year, but in those two years she failed to go up a grade. In the school years 1999/2000 to 2002/03 she attended a Roma-only class. In 2003/04 to 2005/06 she attended a mixed class. In 2005/06 she took the sixth grade for the second time and failed. She failed the first and the sixth grades twice. Out of seventeen regular parent-teacher meetings organised during her primary schooling, her parents attended three.

22. She was provided with additional classes in Croatian in the fourth grade. From the first to the fourth grade she participated in extracurricular activities in a mixed group (that is to say a number of different activities organised for the same group of children), organised by the school. After reaching the age of 15, she left school in August 2006. Her school report shows that during her schooling she missed 100 classes without justification.

(c) The third applicant

23. The third applicant, Gordan Oršuš, was enrolled in the first grade of primary school in the school year 1996/97 and passed the first grade. That year and the following year he attended a Roma-only class. In 1998/99 and 1999/2000 he attended a mixed class and after that a Roma-only class for the remainder of his schooling. In 2002/03 he passed the fourth grade. He failed the second grade three times. Out of fifteen regular parent-teacher meetings organised during his primary schooling, his parents attended two.

24. He was not provided with additional classes in Croatian. From the first to the fourth grade he participated in extracurricular activities in a mixed group organised by the school. After reaching the age of 15 he left school in September 2003. His school report shows that during his schooling he missed 154 classes without justification.

25. Later, he enrolled in evening classes in the People's Open College in Čakovec, where he completed his primary education.

(d) The fourth applicant

26. The fourth applicant, Dejan Balog, was enrolled in the first grade of primary school in the school year 1996/97. During the first and second years he attended a Roma-only class and the following two years a mixed class. In 2000/01 to 2002/03 he attended a Roma-only class. In 2003/04 to 2005/06 he attended a mixed class. In 2005/06 he took the fifth grade for the second time and failed. He failed the second grade three times, the fourth grade once and the fifth grade twice. Out of eleven regular parent-teacher meetings organised during his primary schooling, his parents attended two.

27. He was not provided with additional classes in Croatian. From the first to the fourth grade he participated in extracurricular activities in a mixed group organised by the school. After reaching the age of 15, he left school in August 2006. His school report shows that during his schooling he missed 881 classes without justification.

28. Later, he enrolled in fifth-grade evening classes, but did not attend.

(e) The fifth applicant

29. The fifth applicant, Siniša Balog, was enrolled in the first grade of primary school in 1999/2000 and passed the first grade. In 1999/2000 to 2002/03 he attended a Roma-only class, after which he attended a mixed class. In 2006/07 he took the fifth grade for the third time and failed. He failed the fourth grade once and the fifth grade three times. Out of eleven regular parent-teacher meetings organised during his primary schooling, his parents attended one.

30. He was not provided with additional classes in Croatian. From the first to the fourth grade he participated in extracurricular activities in a mixed group organised by the school. After reaching the age of 15, he left school in 2008. His school report shows that during his schooling he missed 1,304 classes without justification. In October 2006 the school authorities wrote to the competent social welfare centre informing them of the applicant's poor school attendance.

(f) The sixth applicant

31. The sixth applicant, Manuela Kalanjoš, was enrolled in the first grade of primary school in the school year 1996/97 and attended a Roma-only class. The following two years she attended a mixed class. In 1999/2000 to 2002/03 she attended a Roma-only class and passed the fourth grade, after which she attended a mixed class. From February 2003 she followed an adapted curriculum for the rest of her schooling on the ground that a competent expert committee – the Children's Psycho-physical Aptitude Assessment Board (*Povjerenstvo za utvrđivanje psihofizičkog stanja djeteta*) had established that she suffered from developmental difficulties. In 2004/05 she took the fifth grade for the second time and

failed. She failed the first grade three times and the fifth grade twice. Out of eleven regular parent-teacher meetings organised during her primary schooling, her parents attended three.

32. She was provided with additional classes in Croatian in her third grade. From the first to the fourth grade she participated in extracurricular activities in a mixed group organised by the school. After reaching the age of 15, she left school in August 2005. Her school report shows that during her schooling she missed 297 classes without justification.

33. Later, she enrolled in fifth-grade evening classes, but did not attend.

(g) The seventh applicant

34. The seventh applicant, Josip Oršuš, was enrolled in the first grade of primary school in 1999/2000 and attended a Roma-only class up to and including the school year 2002/03, after which he attended a mixed class. From May 2002 he followed an adapted curriculum in his further schooling on the ground that a competent expert committee – the Children's Psycho-physical Aptitude Assessment Board (*Komisija za utvrđivanje psihofizičke sposobnosti djece*) had established that he suffered from developmental difficulties. In 2007/08 he took the sixth grade for the second time and failed. He failed the fifth and sixth grades twice. Out of fifteen regular parent-teacher meetings organised during his primary schooling, his parents attended two.

35. He was provided with additional classes in Croatian in the third grade in 2001/02. From the first to the fourth grade he participated in extracurricular activities in a mixed group organised by the school. After reaching the age of 15, he left school in February 2008. His school report shows that during his schooling he missed 574 classes without justification.

(h) The eighth applicant

36. The eighth applicant, Biljana Oršuš, was enrolled in the first grade of primary school in the school year 1996/97 and in her first three school years attended a Roma-only class, after which she attended a mixed class for two years. On 28 December 2000 the Međimurje County State Administration Office for Schooling, Culture, Information, Sport and Technical Culture (*Ured za prosvjetu, kulturu, informiranje, šport i tehničku kulturu Međimurske Županije*) ordered that she follow an adapted curriculum during the rest of her schooling on the ground that a competent expert committee – the Children's Psycho-physical Aptitude Assessment Board – had established that she suffered from poor intellectual capacity, concentration difficulties and socio-pedagogical neglect. It was also established that she was in need of treatment from the competent social welfare centre. In 2001/02 and 2002/03 she attended a Roma-only class and passed the fourth grade. In the following two school years she attended a mixed class, took the fifth grade for the second time and failed. She failed the third grade

three times and the fifth grade twice. Out of seven regular parent-teacher meetings organised during her primary schooling, her parents attended three.

37. She was provided with additional classes in Croatian in the third grade in 2001/02. She participated in extracurricular activities in a mixed group organised by the school. After reaching the age of 15, she left school in August 2005. Her school report shows that during her schooling she missed 1,533 classes without justification.

(i) The ninth applicant

38. The ninth applicant, Smiljana Oršuš, was enrolled in the first grade of primary school in the school year 1999/2000 and attended a Roma-only class up to and including 2002/03, after which she attended a mixed class. In 2006/07 she took the fifth grade for the third time and failed. She failed the fourth grade once and the fifth grade three times. Out of eleven regular parent-teacher meetings organised during her primary schooling, her parents attended three.

39. She was provided with additional classes in Croatian in the third grade in 2001/02. From the first to the fourth grade she participated in extracurricular activities in a mixed group organised by the school. After reaching the age of 15, she left school in August 2007. Her school report shows that during her schooling she missed 107 classes without justification.

(j) The tenth applicant

40. The tenth applicant, Branko Oršuš, was enrolled in the first grade of primary school in the school year 1997/1998 and attended a mixed class for the first two years. From 1999/00 to 2002/03 he attended a Roma-only class, after which he attended a mixed class. On 23 February 2005 the Međimurje County State Welfare Department ordered that he follow an adapted curriculum during the rest of his schooling on the ground that a competent expert committee – the Children's Psycho-physical Assessment Board – had established that he suffered from developmental difficulties. In 2005/06 he failed the sixth grade. He failed the first grade twice and the fourth and sixth grades once. Out of eleven regular parent-teacher meetings organised during his primary schooling, his parents attended one.

41. He was provided with additional classes in Croatian in the third grade in the school year 2001/02. He participated in extracurricular activities in a mixed group organised by the school. After reaching the age of 15, he left school in August 2006. His school report shows that during his schooling he missed 664 classes without justification.

2. Macinec Primary School

(a) The eleventh applicant

42. The eleventh applicant, Jasmin Bogdan, was enrolled in the first grade of primary school in 1997/98. The preliminary tests carried out before his assignment to a particular class showed that he did not understand the Croatian language. He scored 15 out of 97 points (15.5%). He was therefore assigned to a Roma-only class, where he spent his entire schooling. In 2004/05 he took the fifth grade for the second time and failed. He failed the first and the fourth grades once and the fifth grade twice. Out of twenty-four parent-teacher meetings organised during his entire primary schooling, his parents attended none.

43. He was provided with additional classes in Croatian in the third grade in the school year 2001/02. After reaching the age of 15, he left school in August 2005. His school report shows that during his schooling he missed 1,057 classes without justification.

(b) The twelfth applicant

44. The twelfth applicant, Josip Bogdan, was enrolled in the first grade of primary school in 1999/2000. The preliminary tests carried out before his assignment to a particular class showed that he did not understand the Croatian language. He scored 8 out of 97 points (8.25%). He was therefore assigned to a Roma-only class, where he spent his entire schooling. In 2006/07 he took the third grade for the second time and failed. He failed the first grade once, the second grade three times and the third grade twice. Out of thirty-seven regular parent-teacher meetings organised during his primary schooling, his parents attended none.

45. He was provided with additional classes in Croatian in the first, second and third grades. In the second grade he participated in a dancing group and in the third grade in a choir. After reaching the age of 15, he left school in August 2007. His school report shows that during his schooling he missed 1,621 classes without justification.

(c) The thirteenth applicant

46. The thirteenth applicant, Dijana Oršuš, was enrolled in the first grade of primary school in the school year 2000/01. The preliminary tests carried out before her assignment to a particular class showed that she had inadequate knowledge of the Croatian language. She scored 26 out of 97 points (26.8%). She was therefore assigned to a Roma-only class, where she spent her entire schooling. In 2007/08 she passed the fifth grade. She failed the first grade twice and the second grade once. Out of thirty-two regular parent-teacher meetings organised during her primary schooling, her parents attended six.

47. She was provided with additional classes in Croatian in the first grade. In the first grade she participated in extracurricular activities in a mixed group and in the fifth grade in a choir. After reaching the age of 15, she left school in August 2008. Her school report shows that during her schooling she missed 522 classes without justification.

(d) The fourteenth applicant

48. The fourteenth applicant, Dejan Oršuš, was enrolled in the first grade of primary school in 1999/2000. The preliminary tests carried out before his assignment to a particular class showed that he did not understand the Croatian language. He scored 15 out of 97 points (15.5%). He was therefore assigned to a Roma-only class, where he spent his entire schooling. In 2005/06 he passed the third grade. He failed the first grade three times and the third grade once. Out of twenty-eight regular parent-teacher meetings organised during his primary schooling, his parents attended five.

49. He was provided with additional classes in Croatian in the first grade. After reaching the age of 15, he left school in August 2006. His school report shows that during his schooling he missed 1,033 classes without justification.

(e) The fifteenth applicant

50. The fifteenth applicant, Danijela Kalanjoš, was enrolled in the first grade of primary school in the school year 2000/01. The preliminary tests carried out before her assignment to a particular class showed that her understanding of the Croatian language was poor. She scored 37 out of 97 points (38.14%). She was therefore assigned to a Roma-only class, where she spent her entire schooling. In 2007/08 she passed the fifth grade. She failed the first grade twice and the second grade once. Out of twenty-one regular parent-teacher meetings organised during her entire primary schooling, her parents attended two.

51. She was provided with additional classes in Croatian in the first grade. In the first grade she participated in extracurricular activities in a mixed group, in the second grade in dancing, in the third grade in handicraft classes, and in the fifth grade in a choir. After reaching the age of 15, she left school in August 2008. Her school report shows that during her schooling she missed 238 classes without justification.

C. Proceedings before the national courts

52. On 19 April 2002 the applicants brought an action under section 67 of the Administrative Disputes Act in the Čakovec Municipal Court (*Općinski sud u Čakovcu*) against the above-mentioned primary schools and Kuršanec Primary School, the State and Međimurje County ("the defendants"). They submitted that the teaching organised in the Roma-only

classes in the schools in question was significantly reduced in volume and in scope compared to the officially prescribed curriculum. The applicants claimed that the situation described was racially discriminating and violated their right to education as well as their right to freedom from inhuman and degrading treatment. They requested the court to order the defendants to refrain from such conduct in the future.

53. The applicants also produced the results of a psychological study of Roma children attending Roma-only classes in Međimurje, carried out immediately before their action was lodged, showing the following:

– most children had never had a non-Roma child as a friend;
– 86.9% expressed a wish to have a non-Roma child as a friend;
– 84.5% expressed a wish to attend a mixed class;
– 89% said they felt unaccepted in the school environment;
– 92% stated that Roma and non-Roma children did not play together.

Furthermore, the report asserted that segregated education produced emotional and psychological harm in Roma children, in terms of lower self-esteem and self-respect and problems in the development of their identity. Separate classes were seen as an obstacle to creating a social network of Roma and non-Roma children.

54. The defendants each submitted replies to the arguments put forward by the applicants, claiming that there was no discrimination of Roma children and that pupils enrolled in school were all treated equally. They submitted that all pupils were enrolled in school after a committee (composed of a physician, a psychologist, a school counsellor (*pedagog*), a defectologist and a teacher) had found that the candidates were physically and mentally ready to attend school. The classes within a school were formed depending on the needs of the class, the number of pupils, etc. In particular, it was important that classes were formed in such a way that they enabled all pupils to study in a stimulating environment.

55. Furthermore, the defendants submitted that pupils of Roma origin were grouped together not because of their ethnic origin, but rather because they were often not proficient in Croatian and it took more exercises and repetitions for them to master the subjects taught. Finally, they claimed that Roma pupils received the same quality of education as other pupils as the scope of their curriculum did not differ from that prescribed by law.

56. On 26 September 2002 the Čakovec Municipal Court dismissed the applicants' action, accepting the defendants' argument that the reason why most Roma pupils were placed in separate classes was that they were not fluent in Croatian. Consequently, the court held that this was not unlawful and that the applicants had failed to substantiate their allegations concerning racial discrimination. Lastly, the court concluded that the applicants had failed to prove the alleged difference in the curriculum of the Roma-only classes.

57. On 17 October 2002 the applicants appealed against the first-instance judgment, claiming that it was arbitrary and contradictory.

58. On 14 November 2002 the Čakovec County Court (*Županijski sud u Čakovcu*) dismissed the applicants' appeal, upholding the reasoning of the first-instance judgment.

59. Subsequently, on 19 December 2002, the applicants lodged a complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) under section 62 of the Constitutional Act on the Constitutional Court. In their constitutional complaint the applicants reiterated their earlier arguments, relying on the relevant provisions of the Constitution and of the Convention.

60. On 3 November 2003 the applicants' lawyer lodged an application with the Constitutional Court to expedite the proceedings. On 7 February 2007 the Constitutional Court dismissed the applicants' complaint in its decision no. U-III-3138/2002, published in Official Gazette no. 22 of 26 February 2007. The relevant parts of the decision read as follows.

> "The first-instance court established in the impugned judgment that the criteria for formation of classes in the defendant primary schools had been knowledge of the Croatian language and not the pupils' ethnic origin. The [first-instance] court considered that the complainants had failed to prove their assertion that they had been placed in their classes on the basis of their racial and ethnic origin. The [first-instance] court stressed that the complainants relied exclusively on the activity report of the Ombudsman for the year 2000. However, the Ombudsman said in his evidence that the part of the report referring to the education of Roma had been injudicious because all the relevant facts had not been established.
>
> The first-instance court relied on section 27 paragraph 1 of the Primary Education Act ... which provides that teaching in primary schools is in the Croatian language and Latin script, and considered a lack of knowledge of the Croatian language as an objective impediment in complying with the requirements of the school curriculum, which also transpires from the conclusion of a study carried out for the needs of the Croatian Helsinki Committee. The [first-instance] court found:
>
> > 'pupils enrolling in the first year of primary schools have to know the Croatian language, so that they are able to follow the teaching, if the purpose of primary education is to be fulfilled. It is therefore logical that classes with children who do not know the Croatian language require additional efforts and commitment of teachers, in particular to teach them the Croatian language.'
>
> The first-instance court found that the defendants had not acted against the law in that they had not changed the composition of classes once established, as only in exceptional situations was the transfer of pupils from one class to another allowed. The [first-instance] court considered that this practice respected the integrity of a class and its unity in the upper grades.
>
> The [first-instance] court considered that classes should be formed so as to create favourable conditions for an equal approach to all pupils according to the prescribed curriculum and programme, which could be achieved only where a class consisted of a permanent group of pupils of approximately the same age and knowledge.

Furthermore, the [first-instance] court found that the complainants had failed to prove their assertion that ... they had a curriculum of significantly smaller volume than the one prescribed for primary schools by the Ministry of Education and Sports on 16 June 1999. The [first-instance] court found that the above assertion of the complainants relied on the Ombudsman's report. However, the Ombudsman said in his testimony that he did not know how the fact that in Roma-only classes the teaching followed a so-called special programme had been established.

The [first-instance] court established that teaching in the complainants' respective classes and the parallel ones followed the same curriculum. Only in the Kuršanec Primary School were there some deviations from the school curriculum, but the [first-instance] court found those deviations permissible since they had occurred ... at the beginning of the school year owing to low attendance.

After having established that the complainants had not been placed in their classes according to their racial and ethnic origin and that the curriculum had been the same in all parallel classes, the first-instance court dismissed the complainants' action.

...

The reasoning of the first-instance judgment ... shows that the defendant primary schools replied to the complainants' allegations as follows:

> 'The [defendant schools] enrolled in the first year those children found psycho-physically fit to attend primary school by a committee composed of a physician, a psychologist, a school counsellor [*pedagog*], a defectologist and a teacher. They did not enrol Croatian children or Roma children as such, but children found by the said committee to be psychologically and physically fit to be enrolled in primary school. ... The defendant primary schools maintain that the first obstacle for Roma children in psychological tests is their lack of knowledge of the Croatian language in terms of both expression and comprehension. As to the emotional aspect of maturity, most of these children have difficulty channelling their emotions. In terms of social maturity, children of Roma origin do not have the basic hygienic skills of washing, dressing, tying or buttoning, and a lot of time is needed before they achieve these skills. ... It is therefore difficult to plan lessons with sufficient motivation for all children, which is one of the obligations of primary schools. There are classes composed of pupils not requiring additional schooling to follow the teaching programme and classes composed of pupils who require supplementary work and assistance from teachers in order to acquire the necessary [skills] they lack owing to social deprivation. ...'

The reasoning of the same judgment cites the testimony of M.P.-P., a school counsellor and psychologist at Macinec Primary School, given on 12 December 2001 ...;

> 'Before enrolment the committee questions the children in order to establish whether they possess the skills necessary for attending school. Classes are usually formed according to the Gauss curve, so that the majority in a given class are average pupils and a minority below or above average. ... However, in a situation where 70% of the population does not speak Croatian, a different approach is adopted so as to form classes with only pupils who do not speak Croatian, because in those classes a teacher's first task is to teach the children the language.'

The above shows that the allocation of pupils to classes is based on the skills and needs of each individual child. The approach is individualised and carried out in keeping with professional and pedagogical standards. Thus, the Constitutional Court finds the approach applied correct since only qualified experts, in particular in the fields of pedagogy, school psychology and defectology, are responsible for assigning individual children to the appropriate classes.

The Constitutional Court has no reason to question the findings and expert opinions of the competent committees, composed of physicians, psychologists, school counsellors [*pedagog*], defectologists and teachers, which in the instant case found that the complainants should be placed in separate classes.

None of the facts submitted to the Constitutional Court leads to the conclusion that the placement of the complainants in separate classes was motivated by or based on their racial or ethnic origin.

The Constitutional Court finds that their placement pursued the legitimate aim of necessary adjustment of the primary educational system to the skills and needs of the complainants, where the decisive factor was their lack of knowledge or inadequate knowledge of Croatian, the language used to teach in schools.

The separate classes were not established for the purpose of racial segregation in enrolment in the first year of primary school but as a means of providing children with supplementary tuition in the Croatian language and eliminating the consequences of prior social deprivation.

It is of particular importance to stress that the statistical data on the number of Roma children in separate classes in the school year 2001/02 ... are not in themselves sufficient to indicate that the defendants' practice was discriminatory (see also the European Court of Human Rights judgments *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001, and *D.H. and Others v. the Czech Republic*, no. 57325/00, § 46, 7 February 2006).

Moreover, the complainants themselves maintain in their constitutional complaint that in the school year 2001/02 40.93% of Roma children in Međimurje County were placed in regular classes, which tends to support the Constitutional Court's conclusion that there is no reason to challenge the correct practice of the defendant primary schools and expert committees.

...

In their constitutional complaint the complainants further point out that, '[e]ven if lack of knowledge of the Croatian language on enrolment in the first year was a problem, the same could not be said of the complainants' enrolment in upper grades'. They therefore consider that their rights were violated by the courts' findings that it had been justified to maintain separate [Roma-only] classes in the upper grades in order to preserve the stability of the wholeness of a given class. The complainants submit that the stability of a class should not have been placed above their constitutional rights, multiculturalism and national equality.

In that regard the Constitutional Court accepts the complainants' arguments.

While the Constitutional Court considers correct and acceptable the courts' findings that lack of knowledge of the Croatian language represents an objective obstacle justifying the formation of separate classes for children who do not speak Croatian at all or speak it badly when they start school ... bearing in mind the particular circumstance of the present case, it cannot accept the following conclusion of the first-instance court:

> 'Furthermore, the integrity and unity of a class is respected in the upper grades. Therefore, transfer of children from one class to another occurs only exceptionally and in justified cases ... because a class is a homogeneous whole and transferring children from one class to another would produce stress. ... The continuity of a group is a precondition for the development of a class collective ...'

Accordingly, the Constitutional Court cannot accept the following view of the appellate court:

> 'The classes are formed when the children enter the first year of their schooling, not every year, and their composition changes only exceptionally. They become a settled whole which makes for work of a higher quality and it is not pedagogically justified to change them. Therefore this court, like the first-instance court, concludes that maintaining established classes did not amount to an unlawful act.'

The above views of the courts would have been acceptable had they referred to the usual situations concerning the assignment of pupils to upper grade classes in primary schools where no objective need for special measures existed, such as forming separate classes for children with inadequate command of Croatian.

Considering the circumstances of the present case, the Constitutional Court finds that it is in principle objectively and reasonably justified to maintain separate classes in the upper grades of primary school only for pupils who have not attained the level of Croatian necessary for them to follow the school curriculum of regular classes properly. ...

However, there is no objective or reasonable justification for not transferring to a regular class a pupil who has attained proficiency in Croatian in the lower grades of primary school and successfully mastered the prescribed school curriculum.

...

Keeping such a pupil in a separate class against his or her will ... for reasons unrelated to his or her needs and skills would be unacceptable from the constitutional point of view with regard to the right of equality before the law, guaranteed under Article 14 § 2 of the Constitution.

...

... [A] constitutional complaint is a particular constitutional instrument for the protection of a legal subject whose human right or fundamental freedom guaranteed under the Constitution has been infringed in an individual act of a State or public body which determined his or her rights and obligations.

The present constitutional complaint concerns impugned judgments referring to the school year 2001/02. However, not a single complainant alleges that in that school year he or she was a pupil in a separate [Roma-only] upper-grade class or was personally affected or concerned by the contested practice ...

Although it does not concern the individual legal position of any of the complainants ..., in respect of the complainants' general complaint about the maintaining of Roma-only classes in the upper grades of primary school the Constitutional Court has addressed the following question:

– was the continued existence of Roma-only classes in the upper grades of primary school ... caused by the defendants' intent to discriminate those pupils on the basis of their racial or ethnic origin?

... [N]one of the facts submitted to the Constitutional Court lead to the conclusion that the defendants' ... practice was aimed at discrimination of the Roma pupils on the basis of their racial or ethnic origin.

...

The complainants further complain of a violation of their right to education on the ground that the teaching organised in those classes was more reduced in volume and in scope than the curriculum for primary schools adopted by the Ministry of Education and Sports on 16 June 1999. They consider that 'their placement in Roma-only classes with an inferior curriculum stigmatises them as being different, stupid, intellectually inferior and children who need to be separated from normal children in order not to be a bad influence on them. Owing to their significantly reduced and simplified school curriculum, their prospects of higher education or enrolment in high schools as well as their employment options or chances of advancement are slimmer ...'

After considering the entire case file, the Constitutional Court has found that the above allegations are unfounded. The case file, which includes the first-instance judgment ..., shows that the allegations of an inferior curriculum in Roma-only classes are not accurate. The Constitutional Court has no reason to question the facts as established by the competent court.

The possible difference in curricula between parallel classes for objective reasons (for example the low attendance at Kuršanec Primary School, where in the first term of the school year 2001/02 the pupils in classes 1c, 1d, 2b and 2c missed 4,702 lessons in total, 4,170 of which were missed for no justified reason) does not contravene the requirement that the curriculum be the same in all parallel classes.

The Constitutional Court is obliged to point out that neither the Constitution nor the Convention guarantees any specific requirements concerning school curricula or their implementation. First and foremost the Constitution and the Convention guarantee a right of access to educational institutions existing in a given State, as well as an effective right to education, in other words that every person has an equal right to obtain official recognition of the studies which he or she has completed (a similar view was expressed by the European Court of Human Rights in a case relating to certain aspects of the laws on the use of languages in education in [*Case "relating to certain aspects of the laws on the use of languages in education in*] *Belgium*[*"*] (merits), 23 July 1968, Series A no. 6). ...

... [T]he Constitutional Court finds the evidence submitted in the present proceedings insufficient to show beyond doubt that the complainants had to follow a school curriculum of lesser scope. ...

Thus, the Constitutional Court considers the complainants' assertion about being stigmatised as a subjective value judgment, without reasonable justification. The Constitutional Court finds no factual support for the complainants' assertion that the source of their stigmatisation was an allegedly reduced curriculum owing to which their prospects for further education were lower, and dismisses that assertion as arbitrary. The competent bodies of the Republic of Croatia recognise the level of education a person has completed irrespective of his or her racial or ethnic origin. In that respect everyone is equal before the law, with equal chances of advancement according to their abilities."

II. RELEVANT DOMESTIC LAW

A. The Constitution

61. Article 14 of the Constitution reads:

"Everyone in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics.

All shall be equal before the law."

B. The Constitutional Act on the Constitutional Court

62. The relevant parts of section 62 of the Constitutional Act on the Constitutional Court (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 49/2002 of 3 May 2002 read:

"1. Everyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his or her rights and obligations, or about suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms, or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right) ...

2. If another legal remedy exists against the violation of the constitutional right [complained of], the constitutional complaint may be lodged only after that remedy has been exhausted.

3. In matters in which an administrative action or, in civil and non-contentious proceedings, an appeal on points of law is allowed, remedies are exhausted only after the decision on these legal remedies has been given."

C. The Administrative Disputes Act

63. Section 67 of the Administrative Disputes Act (*Zakon o upravnim sporovima*, Official Gazette nos. 53/1991, 9/1992 and 77/1992) provides for special proceedings for the protection of constitutional rights and freedoms from unlawful acts of public officials, specifically that an action can be brought if the following conditions are met: (a) an unlawful action has already taken place; (b) such action is the work of a government official/body/agency or another legal entity; (c) the action resulted in a violation of one or more of the plaintiff's constitutional rights; and (d) the Croatian legal system does not provide for any other avenue of redress.

D. The Primary Education Act

64. The relevant provisions of the Primary Education Act (*Zakon o osnovnom školstvu*, Official Gazette nos. 59/1990, 26/1993, 27/1993, 29/1994, 7/1996, 59/2001, 114/2001 and 76/2005) read:

Section 2

"The purpose of primary education is to enable a pupil to acquire knowledge, skills, views and habits necessary for life and work or further education.

A school is obliged to ensure continuous development of each pupil as a spiritual, physical, moral, intellectual and social being in accordance with her or his abilities and preferences.

The aims of primary education are:

– to arouse and cultivate in pupils an interest and independence in learning and problem solving as well as creativity, moral consciousness, aesthetic tastes and criteria, self-esteem and responsibility towards the self and nature, social, economic and political awareness, tolerance and ability to cooperate, respect for human rights, achievements and aspirations;

– to teach literacy, communication, calculation, scientific and technological principles, critical observation, rational argumentation, understanding of the life we live and understanding of the interdependence of people and nature, individuals and nations.

The aims and tasks of primary education shall be realised according to the established teaching plans and programmes."

Section 3

"Primary education lasts at least eight years.

Primary education is in principle mandatory for all children from six to fifteen years of age."

III. COUNCIL OF EUROPE REPORTS CONCERNING CROATIA

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

1. The first report on Croatia, published on 9 November 1999

65. The relevant part of the report concerning the situation of Roma reads:

> "32. Overall, Roma/Gypsy are reported to continue to face societal discrimination and official inaction when complaints are filed. Progress has been made in the fields of education and public awareness, through the publication of studies on the subject of Romani education, initiatives related to the organisation and financing of education of Roma children, training of Roma teachers, and public forums on the difficulties faced by Roma/Gypsy society. The authorities are encouraged to give further support to such initiatives, taking into account ECRI's General Policy Recommendation No. 3 on combating racism and intolerance against Roma/Gypsies. ..."

2. The second report on Croatia, published on 3 July 2001

66. The relevant parts of this report read:

> "Access to education
>
> 41. Education of Roma/Gypsy children is a serious problem in Croatia. Many Roma/Gypsy children do not go to school, having either dropped out or having never attended. According to Roma/Gypsy representatives, there are regions where not a single Roma/Gypsy child attends school. ECRI understands that the reasons for this situation are complex, and there is no easy solution, however emphasises the need to increase the participation of Roma/Gypsy children at all levels of education. The Croatian authorities are encouraged to make special efforts in this regard.
>
> 42. ECRI wishes to draw attention to its General Policy Recommendation No. 3 on combating racism and intolerance against Roma/Gypsies, where the existence of discrimination in explaining the process of social exclusion is highlighted. An investigation should be carried out into the role of stereotypes and prejudices of teachers, which may lead to low expectations for Roma/Gypsy children. ECRI recommends, in this respect, that training be offered to teachers, including information about the particular needs and expectations of Roma/Gypsies and the ability to use this knowledge effectively. As insufficient knowledge of the Croatian language upon entry to classes may also present an obstacle, ECRI emphasises the importance of preparatory classes, additional training in the Croatian language and increased opportunities to study the Roma language in the early years of schooling, which might assist Roma/Gypsy children in integrating into the educational system. ECRI notes with interest initiatives such as the "Programme for Including Roma children in the Education System of the Republic of Croatia", launched in 1998, and encourages the authorities in their efforts to continue to develop and implement appropriate measures in cooperation with Roma associations. Roma/Gypsy organisations have highlighted the connection between poverty, poor living conditions and school attendance. The

Croatian authorities might consider creating special assistance programmes for Roma/Gypsy and other children from extremely poor families who may find the costs of textbooks, other school materials and proper school dress prohibitive."

3. The third report on Croatia, published on 14 June 2005

67. The relevant parts of this report read:

"*Education and awareness raising*

83. ECRI is concerned to learn that schoolbooks sometimes convey negative images of certain minority groups, particularly ... Roma.

...

Situation of the Roma community in Croatia

...

137. ECRI is pleased to learn that in October 2003 the government adopted a national programme for the Roma which aims to resolve many of the difficulties encountered by Roma in their day-to-day lives. The programme is based on the observation that Roma are largely marginalised in social and public activities and experience worse living conditions than the average majority population and other minorities. The programme aims to abolish all forms of discrimination, violence, stereotyping and prejudice against Roma, while ensuring that they do not lose their own identity, culture or traditions. In order to achieve this aim, the programme sets out a series of measures in areas such as access to citizenship, education, housing, access to public services and relations with the police. In 2004, a commission made up of government representatives, Roma and NGO [non-governmental organisation] representatives was set up to monitor the programme and develop a joint action plan for the different ministries. A number of measures have already been taken, such as the training of Roma as assistants in schools or as police officers and the training of young Roma at seminars on participation in public life. ... However, implementation of the programme has not really got off the ground yet and NGOs are critical of the lack of budgetary resources provided, though these are essential to the success of such a programme. The programme must be regarded as positive, although in ECRI's view it does not sufficiently emphasise the part played by stereotyping and prejudice against Roma, both among the population and among representatives of the public authorities, in the difficulties encountered by this community. ECRI also notes with interest that the government is in the process of adopting a national action plan for Roma integration, which proposes a wide range of measures to improve the situation of Roma.

...

Access to education for Roma children

141. In its second report on Croatia, ECRI recommended that the Croatian authorities make special efforts to increase the participation of Roma children at all levels of education.

142. The authorities have taken measures to facilitate Roma children's access to education, such as setting up nursery school classes enabling them to learn Croatian, training teachers in Roma culture and training young Roma as assistants in schools. Some Roma now receive State grants to enrol in university. However, as they are very recent and applied on a small scale these measures are not enough to offset the fact that Roma children are very much behind in terms of equal opportunities in education. Many Roma children leave school at a very early age. They do not always have access to education in their mother tongue and their own culture in schools, in spite of the legislation on the rights of national minorities which provides for this possibility. The authorities have explained to ECRI that this is because the Roma have not asked for it themselves and because the Romani language is not standardised, with several Romani dialects in Croatia. However, some Roma representatives have expressed the wish that the school curriculum for Roma children should include teaching of their mother tongue and Roma culture, though they also emphasise the importance of learning Croatian.

143. ECRI is particularly concerned by allegations that separate classes solely for Roma children exist alongside classes for non-Roma children in some schools in the Međimurje region. According to several NGOs, including the European Roma Rights Centre, education in the classes set aside for Roma children is of poorer quality than in the other classes. According to the authorities, however, the sole reason why there are still classes comprising only Roma children is the *de facto* segregation which they face where housing is concerned, since Roma are sometimes in the majority in some areas. Nevertheless, this explanation does not provide a response to allegations that when the authorities tried to introduce mixed classes instead of separate classes in some schools, they came up against opposition from the non-Roma parents, who apparently signed petitions against this measure, with the result that the separate classes were maintained. ECRI notes that proceedings for racial segregation are pending before the national courts in this connection.

Recommendations

144. ECRI urges the Croatian authorities to take measures without delay to improve equal opportunities for Roma children in education. It stresses the paramount importance of elaborating a short-, medium- and long-term policy in the matter and providing sufficient funds and other resources to implement this policy. In particular, it should be made easier for Roma children to learn Croatian while also allowing those who so wish to be taught their Romani dialect and Roma culture.

145. ECRI encourages the Croatian authorities to conduct an in-depth investigation into the allegations that segregation is practised between Roma and non-Roma children in some schools and to rapidly take all the necessary measures, where appropriate, to put an end to such situations.

146. ECRI reiterates its recommendations that a study be carried out on the influence of stereotyping and prejudices among teachers, which may lead to low expectations of Roma children. It encourages all measures designed to educate teachers about Roma culture."

B. Advisory Committee on the Framework Convention for the Protection of National Minorities

1. Opinion on Croatia adopted on 6 April 2001

68. The relevant parts of the opinion read:

Article 4

"...

28. The Advisory Committee finds that Croatia has not been able to secure full and effective equality between the majority population and Roma and that the situation of Roma remains difficult in such fields as employment, housing and education. It appears, however, that Roma issues have recently received increasing attention from the central authorities. The Advisory Committee finds it important that this commitment increases the vigour with which sectoral projects for Roma, such as the ones in the field of education (see also comments under Article 12), are pursued and leads to the development, in consultations with Roma, of more comprehensive programmes and strategies to address the concerns of this national minority.

..."

Article 12

"...

49. While recognising that there appears to be no large-scale separation of Roma children within the educational system of Croatia, the Advisory Committee is highly concerned about reports that in certain schools, Roma children are placed in separate classes and school facilities are organised and operated in a manner that appears to stigmatise Roma pupils. The Advisory Committee stresses that placing children in separate classes should take place only when it is absolutely necessary and always on the basis of consistent, objective and comprehensive tests. The Advisory Committee supports the efforts of the office of the Ombudsman to review this situation with a view to ensuring that Roma children have equal access to, and opportunities to continue to attend, regular classes. The Advisory Committee is aware of the reservations expressed by some Roma with respect to the integration of Roma pupils into regular classes and supports efforts to involve Roma parents and Roma organisations in the process aimed at remedying the current situation. The Advisory Committee considers that a key to reaching this aim is to secure that the educational system reflects and takes fully into account the language and culture of the minority concerned, as stipulated in the principles contained in the Committee of Ministers;' Recommendation No. R (2000) 4 on the education of Roma/Gypsy children in Europe. The Advisory Committee notes that the government of Croatia adopted in July 1998 a "Programme of Integration of Roma Children in the Educational and School System" which contains a number of useful ideas in this respect. The text of the programme appears however rather cursory in nature, and the Advisory Committee considers that Croatia needs to develop, implement and evaluate further its measures aimed at improving the status of Roma in the educational system.

...”

V. Proposal for conclusions and recommendations by the Committee of Ministers

“...

In respect of Article 12

...

The Committee of Ministers *concludes* that in certain schools in Croatia, Roma children are reportedly placed in separate classes, and school facilities are organised and operated in a manner that appears to stigmatise Roma pupils. The Committee of Ministers *recommends* that this question be reviewed, and necessary measures taken, with a view to ensuring that Roma children have equal access to, and opportunities to continue to attend, regular classes, bearing in mind the principles contained in the Committee of Ministers' Recommendation No. R (2000) 4 on the education of Roma/Gypsy children in Europe.”

2. Comments submitted by the Croatian Government on 26 September 2001

69. The relevant parts of the comments read:

Articles 12 and 14

“...

The education of Roma is a serious problem caused by their way of life and their attitude towards the system, laws, rights and obligations of citizens and requires particular efforts and solutions. The Croatian Ministry of Education and Sports, in cooperation with the other ministries and state institutions, local administration and self-government, as well as non-governmental organisations, has initiated programmes to resolve this issue at two levels:

(a) Programme of integration of the Roma population into the educational system of the Republic of Croatia.

(b) Exercise of minority rights aimed at preserving their mother tongue and culture.

Regarding pre-school education, the Ministry of Education and Sports, in cooperation with non-governmental organisations, initiated a programme for the inclusion of Roma children and their families, notably mothers, into the system, but only on a voluntary basis, while at the moment there are no effective mechanisms of obligatory inclusion.

At the level of primary and secondary education, Roma children attend classes together with other children. Those children who do not speak the Croatian language may well be enrolled in special classes where they receive special attention with a view to learning the Croatian language. This practice is implemented only in the first

and second grade of primary school, after which children attend classes together with children of other nationalities. Although this practice has yielded some positive results, priority is given to the organisation of pre-school preparation to help Roma children to overcome the language barrier, learn the basic rules of school conduct, hygienic habits and needs, and strengthen the feeling of affiliation and security in the school environment. The Ministry of Education and Sports, in cooperation with the local administration, has taken a number of measures for this purpose – additional assistance to overcome problems concerning the following and comprehension of school lessons, adaptation of curricula to the needs of Roma children, granting of accommodation for Roma pupils (attending secondary schools), follow up to the process of inclusion, assisting in the preparation of young Roma for the profession of teachers and trainers, providing free school meals and bus transport to and from school and so forth."

3. Second opinion on Croatia adopted on 1 October 2004

70. The relevant parts of the opinion read:

"Article 12 of the Framework Convention [for the Protection of National Minorities]

...

Education of Roma children and contacts amongst pupils from different communities

...

Present situation

(a) Positive developments

128. The authorities seem to be increasingly sensitive to the problems of Roma children in education and have launched new initiatives, including at the pre-school level, which are aimed at improving the situation and attendance of Roma children in schools. The National Programme for Roma Integration details a number of laudable measures that could help to further the protection of the Roma in the educational system, such as the employment of Roma assistant teachers in regular classes and the provision of free meals for children.

(b) Outstanding issues

129. The placing of Roma children in separate classes appears to be increasingly rare in Croatia, but this practice, which has been challenged in pending legal cases, continues in some schools in Međimurje County. The National Programme for Roma Integration also endorses the idea of separate first-grade Roma-only classes for those who have not attended pre-school and are not proficient in the Croatian language. Such classes do not appear to be set up to foster teaching in or of Roma language or other elements of Roma culture, but rather to assist the children to obtain basic Croatian language and other skills so that they can meet the demands of the educational system. While recognising that these are valuable aims, the Advisory Committee considers that pupils should not be placed in such separate remedial classes on the basis of their affiliation with a national minority but rather on the basis

of the skills and needs of the individuals concerned, and where such placing is found necessary, it should be for a limited period only.

...

Recommendations

131. Croatia should fully implement the valuable educational initiatives contained in the National Programme for Roma Integration, including those promoting increased attendance of Roma children in pre-schools. The envisaged remedial first-grade classes should, however, not be conceived *a priori* as Roma classes, but as classes in which individuals are placed on the basis of their skills and needs, regardless of their ethnicity.

..."

4. Comments submitted by the Croatian Government on 13 April 2005

71. The relevant parts of the comments read:

Education of Roma children and contacts amongst pupils from different communities

"The programme of pre-school education is intended to encompass as large a number of Roma children as possible and thus create the precondition for their successful entrance into the primary education system. The Ministry of Science, Education and Sports has also supported the establishment of kindergartens for Roma children in cooperation with Roma NGOs, international organisations and local authorities. The responsible bodies are also helping with the enrolment of Roma pupils in institutions of secondary and higher education and are providing student grants.

By increasing the number of Roma children in pre-school education, conditions are created for their enrolment in regular primary schools."

C. Commissioner for Human Rights

1. Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the Republic of Croatia, 14 to 16 June 2004

72. The relevant parts of the report read:

"III. Situation of the Roma community

...

27. In spite of non-discrimination on a legal plane, the treatment meted out to the Roma minority still raises anxieties since this population continues to undergo social and economic discrimination. It should nevertheless be observed that efforts have been undertaken in institutional matters especially, the government having set up a National Council of Roma chaired by the Deputy Prime Minister. Locally, and around

Međimurje in particular, most districts have had water and electricity connected and are served by school transport.

...

A. Segregation in schools

30. The year 2002 saw the worsening of problems around the town of Čakovec which applied a practice of separating Roma and non-Roma pupils in schools. An atmosphere of intolerance took hold; non-Roma parents went so far as to stage a demonstration in front of a school at the start of the 2002/03 school year, denying entry to the Roma children. Under strong national and international pressure, the authorities recognised that these practices existed and undertook to review this question.

31. When I visited Čakovec, I had the opportunity to visit a primary school with a mixed enrolment. I hasten to thank the head and the staff of this school for their reception. My discussions with them satisfied me that the situation had substantially improved thanks to the commitment of all concerned. Certain difficulties still lingered, however. The Međimurje region has a high proportion of Roma and schools have a large enrolment of Roma pupils who make up as much as 80% of certain age bands. But these figures cannot justify any segregation whatsoever between children, who must be equally treated. I sincerely hope there will be no recurrence of the events which took place in the past, and it is imperative to guarantee that the social and ethnic mix is maintained for the sake of having Roma and non-Roma children educated together in the same classes.

32. Difficulties over Roma pupils' Croatian language proficiency were also reported to me. I would stress the importance of putting all pupils through the same syllabus and the same teaching process in one class. Nonetheless, the knowledge gap problem is not to be evaded. As a remedy to it, it could be useful to set up at national level pre-school classes for children whose mother tongue is not Croatian. That way, they will acquire a sufficient grounding in the Croatian language to be able to keep up with the primary school courses later, while at the same time familiarising themselves with the school institution. In the second place, it rests with the parents to ensure the sound learning of the language and their children's regular attendance for the entire school course."

2. *Final report by Mr Alvaro Gil-Robles on the Human Rights Situation of the Roma, Sinti and Travellers in Europe (dated 15 February 2006)*

73. In the third section of the report, which concerns discrimination in education, the Commissioner for Human Rights noted that the fact that a significant number of Roma children did not have access to education of a similar standard to that enjoyed by other children was in part a result of discriminatory practices and prejudices. In that connection, he noted that segregation in education was a common feature in many Council of Europe member States. In some countries there were segregated schools in segregated settlements, in others special classes for Roma children in

ordinary schools. Being subjected to special schools or classes often meant that these children followed a curriculum inferior to those of mainstream classes, which diminished their opportunities of further education and finding employment in the future. At the same time, segregated education denied both Roma and non-Roma children the chance to know each other and to learn to live as equal citizens. It excluded 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.

74. It was also noted that special classes or special curricula for Roma had been introduced with good intentions, for the purposes of overcoming language barriers or remedying the lack of pre-school attendance of Roma children. Evidently, it was necessary to respond to such challenges, but segregation or systematic placement of Roma children in classes which followed a simplified or a special Romani-language curriculum while isolating them from other pupils was clearly a distorted response. Instead of segregation, significant emphasis had to be placed on measures such as pre-school and in-school educational and linguistic support as well as the provision of school assistants to work alongside teachers. In certain communities, it was crucial to raise the awareness of Roma parents – who themselves might not have had the possibility to attend school – of the necessity and benefits of adequate education for their children.

75. In conclusion, the Commissioner made a number of recommendations related to education. Where segregated education still existed in one form or another, it had to be replaced by ordinary integrated education and, where appropriate, banned through legislation. Adequate resources had to be made available for the provision of pre-school education, language training and school assistant training in order to ensure the success of desegregation efforts. Adequate assessment had to be made before children were placed in special classes, in order to ensure that the sole criterion in the placement was the objective needs of the child, not his or her ethnicity.

76. The excerpt of the report concerning Croatia reads:

> "52. While visiting Croatia in 2004, I learned of a two-year programme, initiated in 2002, to prepare all Roma children for schools, under which children were taught various skills in the Croatian language. Under the Croatian Action Plan for the Decade for Roma Inclusion, special efforts to improve pre-school education for Roma children have been continued with a view to full integration in[to] the regular school system. ..."

IV. OTHER COUNCIL OF EUROPE DOCUMENTS

A. The Committee of Ministers

1. *Recommendation No. R (2000) 4 of the Committee of Ministers to member States on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting of the Ministers' Deputies)*

77. The Recommendation provides as follows:

"The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members and that this aim may be pursued, in particular, through common action in the field of education;

Recognising that there is an urgent need to build new foundations for future educational strategies toward the Roma/Gypsy people in Europe, particularly in view of the high rates of illiteracy or semi-literacy among them, their high drop-out rate, the low percentage of students completing primary education and the persistence of features such as low school attendance;

Noting that the problems faced by Roma/Gypsies in the field of schooling are largely the result of long-standing educational policies of the past, which led either to assimilation or to segregation of Roma/Gypsy children at school on the grounds that they were 'socially and culturally handicapped';

Considering that the disadvantaged position of Roma/Gypsies in European societies cannot be overcome unless equality of opportunity in the field of education is guaranteed for Roma/Gypsy children;

Considering that the education of Roma/Gypsy children should be a priority in national policies in favour of Roma/Gypsies;

Bearing in mind that policies aimed at addressing the problems faced by Roma/Gypsies in the field of education should be comprehensive, based on an acknowledgement that the issue of schooling for Roma/Gypsy children is linked with a wide range of other factors and pre-conditions, namely the economic, social and cultural aspects, and the fight against racism and discrimination;

Bearing in mind that educational policies in favour of Roma/Gypsy children should be backed up by an active adult education and vocational education policy;

...

Recommends that in implementing their education policies the governments of the member States:

– be guided by the principles set out in the appendix to this Recommendation;

– bring this Recommendation to the attention of the relevant public bodies in their respective countries through the appropriate national channels."

78. The relevant sections of the Appendix to Recommendation No. R (2000) 4 read as follows:

"*Guiding principles of an education policy for Roma/Gypsy children in Europe*

I. Structures

1. Educational policies for Roma/Gypsy children should be accompanied by adequate resources and the flexible structures necessary to meet the diversity of the Roma/Gypsy population in Europe and which take into account the existence of Roma/Gypsy groups which lead an itinerant or semi-itinerant lifestyle. In this respect, it might be envisaged having recourse to distance education, based on new communication technologies.

2. Emphasis should be put on the need to better coordinate the international, national, regional and local levels in order to avoid dispersion of efforts and to promote synergies.

3. To this end member States should make the ministries of education sensitive to the question of education of Roma/Gypsy children.

4. In order to secure access to school for Roma/Gypsy children, pre-school education schemes should be widely developed and made accessible to them.

5. Particular attention should also be paid to the need to ensure better communication with parents, where necessary using mediators from the Roma/Gypsy community which could then lead to specific career possibilities. Special information and advice should be given to parents about the necessity of education and about the support mechanisms that municipalities can offer families. There has to be mutual understanding between parents and schools. The parents' exclusion and lack of knowledge and education (even illiteracy) also prevent children from benefiting from the education system.

6. Appropriate support structures should be set up in order to enable Roma/Gypsy children to benefit, in particular through positive action, from equal opportunities at school.

7. The member States are invited to provide the necessary means to implement the above-mentioned policies and arrangements in order to close the gap between Roma/Gypsy pupils and majority pupils.

II. Curriculum and teaching material

8. Educational policies in favour of Roma/Gypsy children should be implemented in the framework of broader intercultural policies, taking into account the particular features of the Romani culture and the disadvantaged position of many Roma/Gypsies in the member States.

9. The curriculum, on the whole, and the teaching material should therefore be designed so as to take into account the cultural identity of Roma/Gypsy children. Romani history and culture should be introduced in the teaching material in order to reflect the cultural identity of Roma/Gypsy children. The participation of representatives of the Roma/Gypsy community should be encouraged in the development of teaching material on the history, culture or language of the Roma/Gypsies.

10. However, the member States should ensure that this does not lead to the establishment of separate curricula, which might lead to the setting up of separate classes.

11. The member States should also encourage the development of teaching material based on good practices in order to assist teachers in their daily work with Roma/Gypsy pupils.

12. In the countries where the Romani language is spoken, opportunities to learn in the mother tongue should be offered at school to Roma/Gypsy children.

III. Recruitment and training of teachers

13. It is important that future teachers should be provided with specific knowledge and training to help them understand better their Roma/Gypsy pupils. The education of Roma/Gypsy pupils should however remain an integral part of the general educational system.

14. The Roma/Gypsy community should be involved in the designing of such curricula and should be directly involved in the delivery of information to future teachers.

15. Support should also be given to the training and recruitment of teachers from within the Roma/Gypsy community.

...”

2. Recommendation CM/Rec(2009)4 of the Committee of Ministers to member States on the education of Roma and Travellers in Europe (adopted by the Committee of Ministers on 17 June 2009 at the 1061st meeting of the Ministers' Deputies)

79. The relevant parts of the Recommendation read:

“The Committee of Ministers ...

1. Recommends that the governments of member States, with due regard for their constitutional structures, national or local situations and educational systems:

...

b. elaborate, disseminate and implement education policies focusing on ensuring non-discriminatory access to quality education for Roma and Traveller children, based on the orientations set out in the appendix to this recommendation;

...

d. ensure, through local and regional authorities, that Roma and Traveller children are effectively accepted in school;

..."

80. The relevant sections of the Appendix to Recommendation CM/Rec(2009)4 read as follows.

"I. Principles of policies

...

5. Member States should ensure that legal measures are in place to prohibit segregation on racial or ethnic grounds in education, with effective, proportionate and dissuasive sanctions, and that the law is effectively implemented. Where *de facto* segregation of Roma and Traveller children based on their racial or ethnic origin exists, authorities should implement desegregation measures. Policies and measures taken to fight segregation should be accompanied by appropriate training of educational staff and information for parents.

6. Educational authorities should set up assessment procedures that do not result in risks of enrolling children in special education institutions based on linguistic, ethnic, cultural or social differences but facilitate access to schooling. Roma and Traveller representatives should be involved in defining and monitoring these procedures.

...

II. Structures and provision for access to education

9. Roma and Travellers should be provided with unhindered access to mainstream education at all levels subject to the same criteria as the majority population. To accomplish this goal, imaginative and flexible initiatives should be taken as required in terms of educational policy and practice. Appropriate measures should also be taken to ensure equal access to educational, cultural, linguistic and vocational opportunities offered to all learners, with particular attention to Roma and Traveller girls and women.

10. Attendance of pre-school education for Roma and Traveller children should be encouraged, under equal conditions as for other children, and enrolment in pre-school education should be promoted if necessary by providing specific support measures.

...

III. Curriculum, teaching material and teacher training

...

19. Educational authorities should ensure that all teachers, and particularly those working in ethnically mixed classes, receive specialised training on intercultural education, with a special regard to Roma and Travellers. Such training should be

included in officially recognised programmes and should be made available in various forms, including distance and online learning, summer schools, etc.

20. Teachers working directly with Roma and Traveller children should be adequately supported by Roma or Traveller mediators or assistants and should be made aware that they need to engage Roma and Traveller children more in all educational activities and not de-motivate them by placing lower demands upon them and encourage them to develop their full potential.

..."

B. The Parliamentary Assembly of the Council of Europe

1. Recommendation No. 1203 (1993) on Gypsies in Europe

81. The Parliamentary Assembly made, *inter alia*, the following general observations:

"1. One of the aims of the Council of Europe is to promote the emergence of a genuine European cultural identity. Europe harbours many different cultures, all of them, including the many minority cultures, enriching and contributing to the cultural diversity of Europe.

2. A special place among the minorities is reserved for Gypsies. Living scattered all over Europe, not having a country to call their own, they are a true European minority, but one that does not fit into the definitions of national or linguistic minorities.

3. As a non-territorial minority, Gypsies greatly contribute to the cultural diversity of Europe. In different parts of Europe they contribute in different ways, be it by language and music or by their trades and crafts.

4. With central and east European countries now member States, the number of Gypsies living in the area of the Council of Europe has increased drastically.

5. Intolerance of Gypsies by others has existed throughout the ages. Outbursts of racial or social hatred, however, occur more and more regularly, and the strained relations between communities have contributed to the deplorable situation in which the majority of Gypsies lives today.

6. Respect for the rights of Gypsies, individual, fundamental and human rights and their rights as a minority, is essential to improve their situation.

7. Guarantees for equal rights, equal chances, equal treatment, and measures to improve their situation will make a revival of Gypsy language and culture possible, thus enriching the European cultural diversity.

8. The guarantee of the enjoyment of the rights and freedoms set forth in Article 14 of the European Convention on Human Rights is important for Gypsies as it enables them to maintain their individual rights.

...”

82. As far as education is concerned, the Recommendation states:

“vi. the existing European programmes for training teachers of Gypsies should be extended;

...

viii. talented young Gypsies should be encouraged to study and to act as intermediaries for Gypsies;

...”

2. Recommendation No. 1557 (2002) on the legal situation of Roma in Europe

83. This Recommendation states, *inter alia*:

“...

3. Today Roma are still subjected to discrimination, marginalisation and segregation. Discrimination is widespread in every field of public and personal life, including access to public places, education, employment, health services and housing, as well as crossing borders and access to asylum procedures. Marginalisation and the economic and social segregation of Roma are turning into ethnic discrimination, which usually affects the weakest social groups.

4. Roma form a special minority group, in so far as they have a double minority status. They are an ethnic community and most of them belong to the socially disadvantaged groups of society.

...

15. The Council of Europe can and must play an important role in improving the legal status, the level of equality and the living conditions of Roma. The Assembly calls upon the member States to complete the six general conditions, which are necessary for the improvement of the situation of Roma in Europe:

...

c. to guarantee equal treatment for the Romany minority as an ethnic or national minority group in the field of education, employment, housing, health and public services. Member States should give special attention to:

i. promoting equal opportunities for Roma on the labour market;

ii. providing the possibility for Romany students to participate in all levels of education from kindergarten to university;

iii. developing positive measures to recruit Roma in public services of direct relevance to Roma communities, such as primary and secondary schools, social welfare centres, local primary health care centres and local administration;

...

d. to develop and implement positive action and preferential treatment for the socially deprived strata, including Roma as a socially disadvantaged community, in the field of education, employment and housing ...

e. to take specific measures and create special institutions for the protection of the Romany language, culture, traditions and identity:

...

ii. to encourage Romany parents to send their children to primary school, secondary school and higher education, including college or university, and give them adequate information about the necessity of education;

...

v. to recruit Roma teaching staff, particularly in areas with a large Romany population;

f. to combat racism, xenophobia and intolerance and to ensure non-discriminatory treatment of Roma at local, regional, national and international levels:

...

vi. to pay particular attention to the phenomenon of discrimination against Roma, especially in the fields of education and employment;

..."

C. ECRI

1. *ECRI General Policy Recommendation No. 3 on combating racism and intolerance against Roma/Gypsies (adopted by ECRI on 6 March 1998)*

84. The relevant sections of this Recommendation state:

"The European Commission against Racism and Intolerance:

...

Recalling that combating racism, xenophobia, anti-Semitism and intolerance forms an integral part of the protection and promotion of human rights, that these rights are universal and indivisible, and that all human beings, without any distinction whatsoever, are entitled to these rights;

...

Noting that Roma/Gypsies suffer throughout Europe from persisting prejudices, are victims of a racism which is deeply rooted in society, are the target of sometimes violent demonstrations of racism and intolerance and that their fundamental rights are regularly violated or threatened;

Noting also that the persisting prejudices against Roma/Gypsies lead to discrimination against them in many fields of social and economic life, and that such discrimination is a major factor in the process of social exclusion affecting many Roma/Gypsies;

...

recommends the following to governments of member States:

...

– to ensure that discrimination as such, as well as discriminatory practices, are combated through adequate legislation and to introduce into civil law specific provisions to this end, particularly in the fields of employment, housing and education;

...

– to vigorously combat all forms of school segregation towards Roma/Gypsy children and to ensure the effective enjoyment of equal access to education;

..."

2. ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (adopted by ECRI on 13 December 2002)

85. The following definitions are used for the purposes of this Recommendation:

"(a) 'racism' shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

(b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(c) 'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues

a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

86. In the explanatory memorandum to this Recommendation, it is noted (point 8) that the definitions of "direct" and "indirect" racial discrimination contained in paragraph 1 (b) and (c) of the Recommendation draw inspiration from those contained in Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and in Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and on the case-law of the European Court of Human Rights.

V. RELEVANT UNITED NATIONS MATERIALS

A. International Covenant on Civil and Political Rights

87. 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

88. In points 7 and 12 of its General Comment No. 18 of 10 November 1989 on non-discrimination, the Committee expressed the following opinion:

"7. ... 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.

...

12. ... when legislation is adopted by a State Party, it must comply with the requirement of Article 26 that its content should not be discriminatory. ..."

89. 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

90. The relevant part of Article 1 of this Convention provides:

"... the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

..."

D. Committee on the Elimination of Racial Discrimination

91. In its General Recommendation No. 14 of 22 March 1993 on the definition of discrimination, the Committee noted, *inter alia*:

"1. ... A distinction is contrary to the [International Convention on the Elimination of All Forms of Racial Discrimination] if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States parties by Article 2 § 1 (c) to nullify any law or practice which has the effect of creating or perpetuating racial discrimination. ...

2. ... In seeking to determine whether an action has an effect contrary to the [International Convention on the Elimination of All Forms of Racial Discrimination], [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."

92. In its General Recommendation No. 19 of 18 August 1995 on racial segregation and apartheid, the Committee observed:

"3. ... while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds.

4. The Committee therefore affirms that a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities. ..."

93. In its General Recommendation No. 27 of 16 August 2000 on discrimination against Roma, the Committee made, *inter alia*, the following recommendation in the education sphere:

"17. To support the inclusion in the school system of all children of Roma origin and to act to reduce drop-out rates, in particular among Roma girls, and, for these purposes, to cooperate actively with Roma parents, associations and local communities.

18. To prevent and avoid as much as possible the segregation of Roma students, while keeping open the possibility for bilingual or mother-tongue tuition; to this end, to endeavour to raise the quality of education in all schools and the level of achievement in schools by the minority community, to recruit school personnel from among members of Roma communities and to promote intercultural education.

19. To consider adopting measures in favour of Roma children, in cooperation with their parents, in the field of education."

94. In its concluding observations of 30 March 1998 following its examination of the report submitted by the Czech Republic, the Committee noted, *inter alia*:

"13. The marginalisation of the Roma community in the field of education is noted with concern. Evidence that a disproportionately large number of Roma children are placed in special schools, leading to *de facto* racial segregation, and that they also have a considerably lower level of participation in secondary and higher education, raises doubts about whether Article 5 of the [International Convention on the Elimination of All Forms of Racial Discrimination] is being fully implemented."

E. Convention on the Rights of the Child

95. The relevant parts of Articles 28 and 30 of this Convention provide as follows.

Article 28

"1. States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

...

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

..."

Article 30

"In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to

enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

F. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

96. The relevant part of Article 4 provides:

"1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

..."

G. United Nations Education, Scientific and Cultural Organization (Unesco)

97. Articles 1 and 3 of the Convention against Discrimination in Education of 14 December 1960 provide in their relevant parts as follows.

Article 1

"1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

..."

Article 3

"In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

(a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;

(b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

98. The applicants complained about the length of the proceedings before the national courts. They relied on Article 6 § 1 of the Convention, which reads in its relevant parts as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

A. The Chamber judgment

99. In its judgment of 17 July 2008, the Chamber found that Article 6 was applicable to the present case under its civil head and that the length of the proceedings had been excessive.

B. The parties' submissions to the Grand Chamber

1. Applicability of Article 6 § 1

100. The Government, relying on the Court's judgment in *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (10 July 1998, *Reports of Judgments and Decisions* 1998-IV), disputed the applicability of Article 6 to the proceedings conducted before the national courts upon the applicants' civil action.

101. The applicants argued in favour of the applicability of Article 6.

2. Merits

102. The applicants complained that the length of the proceedings, and in particular those before the Constitutional Court, had exceeded the reasonable time requirement.

103. The Government contested that argument, stressing the special role of the Constitutional Court and the fact that it had to address complex constitutional issues in the applicants' case.

C. The Court's assessment

1. As to the Government's preliminary objection

104. In its judgment in *Emine Araç v. Turkey* (no. 9907/02, ECHR 2008), the Court explicitly recognised, for the first time, that the right of access to higher education is a right of a civil nature and, in so doing, it abandoned the case-law of the Commission (see *André Simpson v. the United Kingdom*, no. 14688/89, Commission decision of 4 December 1989, Decisions and Reports 64, p. 188), which had concluded that Article 6 was inapplicable to proceedings concerning the laws on education (on the ground that the right not to be denied primary education fell within the domain of public law). The Court considers that the same reasoning applies *a fortiori* in the context of primary education (*argumentum a maiore ad minus*).

105. In addition, in the *Kök v. Turkey* judgment (no. 1855/02, § 36, 19 October 2006), the Court found that, where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of Article 6 § 1 (see, along the same lines, *Tinnelly & Sons Ltd and Others and McElduff and Others*, cited above, § 61).

106. As to the present case, it seems clear that a "dispute" arose in respect of the applicants' initial and then continuing placement in Roma-only classes during their schooling in primary schools. The proceedings before the domestic courts concerned the applicants' allegations of infringement of their right not to be discriminated against in the sphere of education, their right to education and their right not to be subjected to inhuman and degrading treatment. The applicants raised their complaints before the regular civil courts and the Constitutional Court and their complaints were examined on the merits.

107. Furthermore, the applicants' right not to be discriminated against on the basis of race was clearly guaranteed under Article 14 § 1 of the Constitution and, as such, enforceable before the regular civil courts in the national legal system (see, *mutatis mutandis*, *Tserkva Sela Sosulivka v. Ukraine*, no. 37878/02, § 42, 28 February 2008, and *Gülmez v. Turkey*, no. 16330/02, § 29, 20 May 2008).

In view of the above, the Court concludes that Article 6 § 1 is applicable in the instant case.

2. Merits

108. The Court reiterates that the reasonableness of the length of these proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicants' conduct and that of the competent authorities, and the importance of what was at stake for the applicants in the litigation (see *Süßmann v. Germany*, 16 September 1996, § 48, *Reports* 1996-IV, and *Gast and Popp v. Germany*, no. 29357/95, § 70, ECHR 2000-II). In this connection, the Court notes that the proceedings commenced on 19 April 2002 and ended with the Constitutional Court's decision of 7 February 2007. While the case was speedily decided by the trial and appellate court, where the proceedings lasted for some seven months, the same cannot be said of the length of the proceedings before the Constitutional Court, which lasted for four years, one month and eighteen days.

109. Although the Court accepts that the Constitutional Court's role of guardian of the Constitution sometimes makes it particularly necessary for it to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms, the Court finds that a period exceeding four years to decide on the applicants' case and in particular in view of what was at stake, namely the right to education, appears excessive.

110. Accordingly, the Court considers that in the present case there has been a violation of Article 6 § 1 of the Convention on account of the length of the proceedings before the Constitutional Court.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 2 OF PROTOCOL No. 1

111. The applicants complained that they had been denied their right to education and discriminated against in this respect. They relied on Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1, which read as follows:

Article 14 – Prohibition of discrimination

> "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 – Right to education

"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

112. The Chamber found no violation of Article 2 of Protocol No. 1 taken alone or in conjunction with Article 14 of the Convention. It held that the applicants had been assigned to Roma-only classes because they lacked sufficient command of the Croatian language and that this measure had been justified.

B. The parties' submissions to the Grand Chamber

1. The applicants

113. As regards the nine applicants (the second to tenth applicants) who had attended Podturen Primary School, the applicants submitted that in the school year 2000/01, when they had all attended the second grade, a majority of them had been assigned to a Roma-only class. The following year, all nine of the applicants attending Podturen Primary School had been assigned to a Roma-only class with nineteen Roma pupils. At the same time there was only one other class in the third grade, consisting of nineteen non-Roma pupils. In the school year 2002/03 all nine applicants had been assigned together to a Roma-only class in the fourth grade. In the school year 2003/04 they had all been assigned to a mixed class only because there had not been enough Roma pupils to form a Roma-only class.

114. As regards the five applicants (the eleventh to fifteenth applicants) who attended Macinec Primary School, the applicants submitted that they had been assigned to a Roma-only class during their entire schooling. Most of the other Roma pupils had been assigned to Roma-only classes. In total, out of 153 Roma pupils in the first four grades, 137 had been assigned to Roma-only classes. In the fourth grade, out of 44 pupils, 21 were Roma, all assigned to a Roma-only class. The applicants argued that the Government had failed to present any consistent and rational explanation for forming a Roma-only class in the fourth year of schooling in Macinec Primary School since, in the applicants' view, by then all their language problems should have already been adequately remedied. The number of Roma-only classes in Croatia had increased from 27 in 2004 to 68 in 2008, 62 of which were in Međimurje County.

115. The applicants stressed, in particular, that the method used by the school authorities, allegedly to improve their language skills, had been inadequate. In their opinion the best method of integrating children with insufficient language proficiency would have been to place them in classes together with children who spoke the language of instruction because that, coupled with additional lessons in Croatian, would have been the easiest and fastest way for the applicants to learn Croatian. The applicants argued that it was critical to ensure that children who spoke a different language at home were included in groups that could provide good role models in terms of the majority language and created the best conditions for their language needs. They maintained that various research reports and expert bodies within the Council of Europe, the European Union and the United Nations recommended an integrative approach in the field of education of Roma children.

116. The applicants argued that there had been no specific programme in the above respect. They admitted, however, that the sixth, seventh, tenth and twelfth to fifteenth applicants had been provided with additional lessons in Croatian. They also argued that they had been provided with a substandard curriculum taught in Roma-only classes.

117. The applicants claimed that there had been no legal basis for assigning them to a Roma-only class. They argued that there had been no clear, accessible and foreseeable procedures regarding the assignment of pupils to special classes, either upon their enrolment or at subsequent stages in their education. In their view the tests employed as a part of the enrolment procedure were not designed to assess a child's knowledge of the Croatian language but as an orientation point in determining the child's psycho-physical status.

118. The applicants submitted that, apart from a general grading system, there had been no other specialised periodic assessment of their progress in acquiring an adequate command of the Croatian language. The grading scale was from one to five, and the lowest pass mark was two. They further argued that even when they had achieved a pass mark in the Croatian language they had not been transferred to a mixed class.

119. As a rule, their transfer to a mixed class had not been considered. On the contrary, the school authorities had refused to transfer them, claiming that the principle of homogeneity of a class was paramount.

120. The applicants claimed that there had been no specific measures in place for improving their poor school attendance and high drop-out rate, other than sanctions against pupils and parents.

121. The applicants submitted that there had been Roma assistants in the 1990s and that recently they had been reintroduced, but that both times this had been without a legal basis and without clear and objective criteria for hiring them that would have ensured their competence and positive results.

122. They further argued that they had not taken part in any extracurricular activities in an ethnically/racially mixed group organised by the school. They pointed to the lack of systematic and structured approach to the integration of Roma children into mainstream classes. Even if ethnically mixed extracurricular activities existed, they would be no substitute for complete classroom integration.

2. The Government

123. The Government firstly pointed out that the applicants had not been deprived of the right to attend school and receive education since they had all enrolled in primary school at the age of seven, like all children in Croatia, and had attended school until they reached the age of fifteen, after which schooling was no longer mandatory. The Government admitted that it was possible that the curriculum in Roma-only classes was reduced by up to 30% in relation to the regular, full curriculum. They argued that this was admissible under relevant domestic laws, and that such a possibility had not been reserved for Roma-only classes but was applied in respect of all primary school classes in Croatia, depending on the particular situation in a given class. Furthermore, the Roma-only classes were by no means "special" classes of any kind. They were ordinary classes in ordinary schools and were created only in schools where the proportion of Roma pupils was significant or where they represented a majority of pupils in a given generation, and then only in respect of those Roma pupils who also lacked adequate command of the Croatian language. In Podturen Primary School the number of Roma children in the lower grades varied from 33% to 36%. In 2001 the total number of pupils had been 463, of whom 47 were Roma. There had been only one Roma-only class, with 17 pupils, while the remaining 33 Roma pupils had attended mixed classes. Since 2003 there had been no Roma-only classes in that school. In Macinec Primary School the number of Roma children in the lower grades varied from 57% to 75%. Roma-only classes were formed in the lower grades and only exceptionally in the upper grades. All classes in the two final grades were mixed. In 2001 the total number of pupils had been 445, of whom 194 were Roma. There had been six Roma-only classes, with 142 pupils, while the remaining 52 Roma pupils had attended mixed classes.

124. The Government submitted that the applicants had been assigned to Roma-only classes on the basis of section 2 of the Primary Education Act and the Rules on the number of pupils in regular and multi-grade classes. Under section 2 of the Primary Education Act the purpose of primary education was to ensure the continuing development of each pupil as a spiritual, physical, moral, intellectual and social being, according to his or her capabilities and affinities. In the Government's view this could only be achieved in a permanent group of pupils of approximately the same age and knowledge. The same legal basis and the same criteria had been applied in

respect of all other pupils. The applicants had been submitted to the same tests as all other children enrolling primary school. The applicants had been assigned to Roma-only classes on the basis of their insufficient knowledge of the Croatian language in order to address their special needs and to ensure an equal approach, which was possible only where the majority of them had the same initial knowledge of the Croatian language and psycho-physical readiness to attend primary school.

125. All but the second and tenth applicants had been assigned to a Roma-only class upon their enrolment in primary school. The second and tenth applicants were initially enrolled in a mixed class. They failed the first grade with negative marks in, *inter alia*, the Croatian language. After that, they were assigned to a Roma-only class.

126. In respect of the applicants enrolled in Macinec Primary School, the Government submitted that the enrolment procedure included the psycho-physical appraisal of the children by a panel composed of a physician, a psychologist, a school counsellor (*pedagog*), a defectologist and a teacher, in the presence of at least one of the child's parents.

127. In respect of the applicants enrolled in Podturen Primary School, the Government submitted that the records concerning the enrolment of the applicants who had attended that school could not be found owing to the passage of time. They did, however, submit a testimony of a teacher who had led a three-month pre-school programme for Roma children and who said that at the end of that programme a teacher would assess each child's language level, after which the child would be placed in a mixed or Roma-only class accordingly.

128. The Government submitted school records showing that all the applicants, both in Podturen and Macinec Primary Schools, had been provided with additional lessons in the Croatian language. They had been able to participate in various extracurricular activities carried out in the Croatian language, some of which were particularly focused on the improvement of language skills (such as recitals and reading). Furthermore, in 2002 in Podturen Primary School and in 2003 in Macinec Primary School, Roma assistants were recruited to help children in Roma-only classes to improve their knowledge.

129. The Government submitted that the assessment of the applicants' progress had been a part of the regular procedure for the evaluation of pupils, as in all other schools in Croatia. In the lower grades, evaluation in all subjects was done by the class teacher. A final mark was given at the end of each school year on the basis of all marks given during the school year. The basic elements for determining a mark were: knowledge and understanding of the subject matter, oral and written expression, applying acquired knowledge in practice and creative use of it, development of skills, participation in classes and development of a pupil's psycho-physical abilities and capacities. In particular, elements for assessing knowledge of

the Croatian language included reading and writing skills, oral and written expression, vocabulary and grammar, reading of books, and homework. A mark combined a number of factors, among which the most important for pupils in the lower grades were motivation and personal development in respect of each subject. The marks were given according to the individual capacity of each child. Therefore, the good marks given to some of the applicants after they had failed a grade or repeatedly failed a grade did not necessarily mean that they had a good command of the Croatian language, but that they had made progress.

130. As to the individual circumstances of the applicants in the present case, the Government submitted that their progress had in fact been very slow. All of the applicants had failed several grades in succession. Sometimes it had taken them two or three years to complete one grade. As an example they explained that the twelfth applicant had had to repeat the first grade twice, after which he scored a three (good) in Croatian. However, in the first grade, pupils were taught basic reading and writing skills and a majority of them received high marks. Therefore a three in Croatian after twice repeating the first grade could not be seen as proof of an adequate knowledge of the Croatian language. It had then taken him another three years to complete the second grade.

131. Furthermore, there were several procedural safeguards. Each parent had the right to challenge a teacher's assessment. A school headmaster was obliged to examine every complaint. Where the majority of parents at a school meeting agreed that a particular teacher was not objective in his or her assessment, the class teacher had to examine the complaint at a meeting of the school board. Where the school board found the complaint founded, the headmaster was obliged to take the necessary measures, as prescribed by law. Furthermore, each pupil had the right to complain about the marks awarded, and the right to ask for a special panel to assess his or her knowledge. As to the applicants in the present case, there had never been any complaints about the assessment of their knowledge or their placement in a Roma-only class. Likewise, their parents had never asked for the transfer of their children to a mixed class.

132. The Government submitted school records showing that a number of measures had been adopted. Firstly, the class teachers encouraged pupils to attend school. The schools held regular meetings of class teachers with parents, as well as individual parent-teacher meetings for pupils who had problems with school attendance, but the parents of the pupils concerned mostly ignored invitations to both types of meeting. The schools also employed Roma assistants who served, *inter alia*, as mediators between the schools and parents and would visit parents and explain the necessity and importance of education for their children.

133. The school authorities also regularly informed the applicants and their parents that the applicants could continue their education at the same

school even after the age of 15. In addition, the applicants also had a possibility of attending evening classes, free of charge, in a nearby town in order to complete their primary education. Three applicants enrolled in the evening programme, but only one actually completed it. In respect of the fifth applicant, the school authorities had informed the competent social welfare centre of the attendance problem, so that appropriate steps could be taken. The teachers had been involved in resolving various problems encountered in respect of the applicants. When a class teacher of the tenth applicant had noticed that he had problems with his sight, the teacher had taken him to an ophthalmologist and made sure he obtained adequate glasses.

134. The Government submitted that all Roma children, regardless of their placement in a particular class, were integrated with other children during their schooling in numerous ways, for example by their active involvement in all extracurricular activities organised at schools (such as singing, dancing, handicraft and mixed activities), as well as their participation in all outdoor activities organised by schools (such as swimming lessons, excursions to towns, visits to various sites, monuments and institutions, collection of litter, ecological activities and various competitions), and participation with other pupils in the social activities organised at schools (such as Christmas and New Year's celebrations, School Day celebrations, Sports Day and Bread Day), plus the fact that they shared the same common school facilities, such as the canteen and playgrounds.

135. The schools in question also organised special activities for all pupils to improve non-Roma children's understanding of Roma traditions and culture. These activities included celebrating Roma Day, organising visits to Roma settlements, informing pupils about the Romani language and customs and the problems Roma faced in everyday life, and encouraging Roma pupils to publish texts and poems in school magazines.

3. The third-party interveners

(a) The Government of the Slovak Republic

136. The Government of the Slovak Republic recognised the need to address the learning difficulties of certain pupils, such as lack of proficiency in the language of instruction at schools. They found different compensatory measures adopted in that respect constructive. They referred to the margin of appreciation afforded to the States in the sphere of education and stressed that the States should not be prohibited from setting up separate classes at different types of school for children with difficulties, or from implementing special educational programmes to respond to special needs.

137. Although the special needs of children with learning difficulties had to be addressed, that could not take precedence over the effective

functioning of an education system, which had to remain compact and not fragmented according to the needs of each individual pupil. Thus, the placing of a child in a different class on objective and legitimate grounds, such as lack of proficiency in the language of instruction, could not be considered discriminatory. The other relevant factors in respect of the present case were the attitudes of parents and the possibility of transferring pupils to mixed classes, as well as the content of the school curriculum.

(b) Interights

138. Interights stressed the necessity for the Court to develop a comprehensive body of case-law on the substantive aspects of the right to education. The obligation to respect the right to education required States Parties to avoid measures that hindered or prevented the enjoyment of this right. The obligation to ensure that education was both adequate and appropriate required States to take positive measures that would enable and help individuals and communities to fully enjoy the right to education. The principal aims of education could only be achieved where children from different cultural backgrounds were educated together in integrated schools.

139. Access to education without discrimination implied that children should have the opportunity to participate in, and benefit from, a mainstream educational system that ensured their integration into society. All international standards on education were buttressed by the principle of non-discrimination. Because of the paramount importance of the right to education, the failure to secure that right to children of ethnic or linguistic minorities would undermine the ability of those minorities to break the cycle of poverty and marginalisation which many of them suffered from.

140. There were effective and practical alternatives to segregation in schools on the basis of linguistic and cultural differences. Segregation could effectively deny a minority their right to learn the majority language with consequential negative impact on their ability to benefit from education and to effectively participate in, and integrate into, general society. State-enforced segregation on the basis of culture or ethnicity was not permissible. While States should not segregate or exclude pupils on the basis of language in a discriminatory manner, they needed to adopt certain measures which would temporarily affect the segregation of pupils based on insufficient command of the language of instruction. However, a very narrow margin of appreciation was to be applied in that sphere in order to ensure that the segregation occurred only on the basis of valid linguistic needs and did so in a manner that ensured that pupils should be fully integrated on an appropriate and timely basis.

(c) Greek Helsinki Monitor

141. Referring to the Court's case-law concerning the right to education and in particular to the judgments in *D.H. and Others v. the Czech Republic*

([GC], no. 57325/00, ECHR 2007-IV) and *Sampanis and Others v. Greece* (no. 32526/05, 5 June 2008), the Greek Helsinki Monitor stressed the importance of tests aimed at assessing the educational level of children upon their enrolment in schools, as well as the need to ultimately assign all Roma children to ordinary, mainstream classes. He also highlighted that the principle of integrated education could be diverged from only in certain exceptional circumstances and that only the integrative educational policy was compatible with the role of the member States' educational systems.

142. The interveners further relied on the Action Plan on Improving the Situation of Roma and Sinti within the OSCE (Organization for Security and Co-operation in Europe) area, which urged the member States to "develop and implement comprehensive school desegregation programmes aimed at: (1) discontinuing the practice of systemically routing Roma children to special schools or classes; and (2) transferring Roma children from special schools to mainstream schools". The interveners also relied on the relevant Council of Europe sources, cited above.

C. The Court's assessment

143. The applicants in the present case made complaints under Article 2 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention, claiming that the fact that they had been allocated to Roma-only classes during their primary education violated their right to receive an education and their right not to be discriminated against. However, the Grand Chamber sees this case as raising primarily a discrimination issue.

144. In this connection, the Court reiterates that Article 14 has no independent existence, but plays an important role by complementing the other provisions of the Convention and its Protocols, since it protects individuals placed in similar situations from any discrimination in the enjoyment of the rights set forth in those other provisions. Where a substantive Article of the Convention or its Protocols has been relied on both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 as well, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 67, Series A no. 45; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 89, ECHR 1999-III; and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 53, ECHR 2005-XII).

145. The complaint in the present case concerns alleged discrimination in respect of the applicants' right to education on account of their having been assigned, for part of their schooling, to separate classes constituted, according to them, on the basis of ethnic criteria. The Government, for their

part, claimed that the applicants had been placed in separate classes on account of their inadequate command of the Croatian language. It follows that the central question to be addressed in the present case is whether adequate steps were taken by the school authorities to ensure the applicants' speedy progress in acquiring an adequate command of Croatian and, once this was achieved, their immediate integration into mixed classes. In this connection, the curriculum followed by the applicants and the procedures concerning their transfer to mixed classes appear of high importance. Thus, the alleged inequality of treatment in the enjoyment of the right to education is a fundamental aspect of the present case and the issues pertinent to this case are to be analysed from the standpoint of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1.

146. The right to education, as set out in the first sentence of Article 2 of Protocol No. 1, guarantees everyone within the jurisdiction of the Contracting States "a right of access to educational institutions existing at a given time", but such access constitutes only a part of the right to education. For that right "to be effective, it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed" (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, pp. 30-32, §§ 3-5, Series A no. 6 – "the '*Belgian linguistic*' case"; *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 52, Series A no. 23; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 152, ECHR 2005-XI).

147. While the case at issue concerns the individual situation of the fourteen applicants, the Court nevertheless cannot ignore that the applicants are members of the Roma minority. Therefore, in its further analysis the Court shall take into account the specific position of the Roma population. The Court has noted in previous cases that as a result of their history, 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 81 above, and point 4 of its Recommendation No. 1557 (2002) on the legal situation of Roma in Europe, cited in paragraph 83 above). They therefore require special protection. As is attested by the activities of numerous European and international organisations and the recommendations of the Council of Europe bodies, 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 (see *D.H. and Others*, cited above, § 182).

148. 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 (see *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*, the Court also observed that there could be said to be an emerging international consensus among the member 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 (see *D.H. and Others*, cited above, § 181).

1. Whether there was a difference in treatment

149. According to the Court's well-established case-law, discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *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 Article 14 (see the '*Belgian linguistic*' case, cited above, p. 34, § 10; *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; and *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2006-VI). Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of ethnic origin as compatible with the Convention (see *Timishev*, cited above, § 56).

150. The Court has also accepted that a general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance in the present case, are identifiable only on the basis of an ethnic criterion, may be considered discriminatory notwithstanding that it is not specifically aimed at that group (see, *mutatis mutandis*, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001; *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 6 January 2005; and *Sampanis and Others*, cited above, § 68), unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate. Furthermore, discrimination potentially contrary to the Convention may result from a *de facto* situation (see *Zarb Adami v. Malta*, no. 17209/02,

§ 76, ECHR 2006-VIII). Where an applicant produces prima facie evidence that the effect of a measure or practice is discriminatory, the burden of proof will shift on to the respondent State, to whom it falls to show that the difference in treatment is not discriminatory (see *D.H. and Others*, cited above, §§ 180 and 189).

151. The Court points out at the outset that it has recently adopted two judgments in the sphere of education of Roma children finding that the applicants were discriminated against on the basis of their ethnic origin, namely *D.H. and Others* and *Sampanis and Others* (both cited above). The *D.H. and Others* judgment concerned a situation where a nationwide practice of placing a disproportionate number of Roma children in schools for pupils with learning difficulties amounted to discrimination based on the applicants' ethnic origin. In *Sampanis and Others* the Court found that the practice of first denying Roma children enrolment in school and their subsequent placement in special classes located in an annex to the main building of a primary school, coupled with a number of racist incidents in the school instigated by the parents of non-Roma children, also amounted to discrimination based on the applicants' Roma origin.

152. The present case is to be distinguished from the above two cases, in particular regarding the relevance of the statistics in the three cases, which could have a bearing on whether there is prima facie evidence of discrimination and consequently on the burden of proof. In *D.H. and Others* (cited above, § 18) the Court established that between 50% and 70% of Roma children in the Czech Republic attended special schools for pupils with learning difficulties, while in *Sampanis and Others* (cited above, § 81) all Roma children attending the school at issue were allocated to a separate establishment. As to the present case, the Court firstly notes that the applicants, unlike in the *Sampanis and Others* case, attended regular primary schools and that the Roma-only classes were situated in the same premises as other classes. The proportion of Roma children in the lower grades in Macinec Primary School varies from 57% to 75%, while in Podturen Primary School it varies from 33% to 36%. The data submitted for the year 2001 show that in Macinec Primary School 44% of pupils were Roma and 73% of those attended a Roma-only class. In Podturen Primary School 10% of pupils were Roma and 36% of Roma pupils attended a Roma-only class. These statistics demonstrate that only in Macinec Primary School did a majority of Roma pupils attend a Roma-only class, while in Podturen Primary School the percentage was below 50%. This confirms that it was not a general policy to automatically place Roma pupils in separate classes in both schools at issue. Therefore, the statistics submitted do not suffice to establish that there is prima facie evidence that the effect of a measure or practice was discriminatory.

153. However, indirect discrimination may be proved without statistical evidence (see *D.H. and Others*, cited above, § 188). In this connection, the

Court notes that the measure of placing children in separate classes on the basis of their insufficient command of the Croatian language was applied only in respect of Roma children in several schools in Međimurje County, including the two primary schools attended by the applicants in the present case. Thus, the measure in question clearly represents a difference in treatment.

154. As regards the grounds for the applicants' placement in separate classes, the Court is also mindful of the general comments made in the third ECRI report on Croatia, published on 14 June 2005 (see paragraph 67 above), which refers to "allegations that when the authorities tried to introduce mixed classes instead of separate classes in some schools, they came up against opposition from the non-Roma parents, who apparently signed petitions against this measure, with the result that the separate classes were maintained". The Commissioner for Human Rights, in the report on his visit to Croatia (see paragraph 72 above), referred to a similar situation in the following passage:

> "The year 2002 saw the worsening of problems around the town of Čakovec, which applied a practice of separating Roma and non-Roma pupils in schools. An atmosphere of intolerance took hold; non-Roma parents went so far as to stage a demonstration in front of a school at the start of the 2002/03 school year, denying entry to the Roma children."

155. In the circumstances of the present case, and even without any discriminatory intent on the part of the relevant State authorities, the fact that the measure in question was applied exclusively to the members of a singular ethnic group, coupled with the alleged opposition of other children's parents to the assignment of Roma children to mixed classes, calls for an answer from the State to show that the practice in question was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate, necessary and proportionate.

2. Whether the difference in treatment had an objective and reasonable justification

156. According to the Court's case-law, 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; *Stec and Others*, cited above, § 51; and *D.H. and Others*, cited above, § 196). 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 (see *Sampanis and Others*, cited above, § 69).

157. The Court considers that temporary placement of children in a separate class on the ground that they lack an adequate command of the

language is not, as such, automatically contrary to Article 14 of the Convention. It might be said that in certain circumstances such placement would pursue the legitimate aim of adapting the education system to the specific needs of the children. However, when such a measure disproportionately or even, as in the present case, exclusively, affects members of a specific ethnic group, then appropriate safeguards have to be put in place (see *Buckley v. the United Kingdom*, 25 September 1996, § 76, *Reports* 1996-IV; *Connors*, cited above, § 83; and *Timishev*, cited above, § 56). Thus, the Court must now examine whether there existed such safeguards at each stage of the implementation of the measures complained of and whether they were effective.

(a) Initial placement of the applicants in separate classes

158. The Court first notes that there existed no clear and specific legal basis for placing children lacking an adequate command of the Croatian language in separate classes. The laws relied on by the Government, namely, the Primary Education Act and the Rules on the number of pupils in regular and multi-grade classes, did not provide for separate classes for children lacking proficiency in the Croatian language. The Government have not shown that this practice has been applied in respect of any other pupils lacking an adequate command of the Croatian language in any other part of Croatia, and not only in respect of Roma children in several schools in Međimurje County, including the two schools in question. Consequently, the impugned measures can hardly be seen as part of a common and general practice designed to address the problems of children who lack an adequate command of the Croatian language.

159. Moreover, the tests applied for deciding whether to assign pupils to Roma-only classes are not specifically designed to test the children's command of the Croatian language. Where the State authorities opt to place children in a separate class on the ground that the children lack an adequate command of the Croatian language, the testing of such children should be specifically designed to assess their knowledge of the language. In its Opinion on Croatia, adopted on 6 April 2001, the Advisory Committee on the Framework Convention for the Protection of National Minorities stressed that "placing children in separate classes should take place only when it is absolutely necessary and always on the basis of consistent, objective and comprehensive tests" (see paragraph 68 above).

160. In the present case no specific testing of the applicants' command of the Croatian language took place. The testing of the applicants who attended Macinec Primary School (the eleventh to fifteenth applicants) was designed to test the children's general psycho-physical condition, not their knowledge of the Croatian language in particular. As regards the applicants who attended Podturen Primary School (the second to tenth applicants), the

Government have not shown that they were ever effectively tested in this respect (see paragraph 127 above).

161. Furthermore, certain inconsistencies in respect of some individual applicants cannot be ignored. For example, both the second and the tenth applicants were initially placed in a mixed class in Podturen Primary School upon enrolling in the first grade in the school year 1997/98. Only after two years were they transferred to a Roma-only class. Assuming that, as the Government contend, insufficient knowledge of the Croatian language was the reason for placing Roma children in Roma-only classes, it is difficult to understand why the second and the tenth applicants would have had sufficient knowledge of the Croatian language at the age of seven, when they started primary school, but not two years later, when they were transferred to a Roma-only class. It is equally improbable that it should have taken two years for their respective class teachers to note the applicants' insufficient command of the language. Even if these two applicants might have had some learning difficulties, as suggested by the fact that they failed to go up a grade for the initial two years of their schooling, these difficulties would not appear to have been adequately addressed simply by placing the applicants concerned in a Roma-only class. The tenth applicant, for his part, was offered an adapted curriculum by reason of his developmental difficulties only in the school year 2005/06, that is to say not until eight years after he enrolled in primary school and when he had already reached the age of 15 and thus soon to leave school.

162. The Court does not consider satisfactory the explanation given by the Government that, although these two applicants' command of the Croatian language had been inadequate when they enrolled in school, in those years there were no Roma-only classes in their school. For the fact remains that the applicants' insufficient command of the Croatian language was not adequately addressed for the first two years of their schooling.

(b) Curriculum

163. As regards the curriculum provided in Roma-only classes, the Government first argued that it was the same as in any other classes of the same grade and that all subjects were taught in Croatian. Yet, at the same time they contended that the applicants' command of the Croatian language had been insufficient to follow the regular school curriculum with the other pupils. The Government also admitted that the curriculum in Roma-only classes might have been reduced by up to 30% compared with the full standard curriculum, such a reduction being permissible under national laws and not reserved for Roma-only classes but accepted and allowed in respect of any primary school class in Croatia, depending on the abilities of the pupils in a given class.

164. The Court notes that if the applicants were taught the same curriculum as all other pupils, there appears to be no reason to have placed

them in separate classes. However, if they were placed in separate classes because they lacked an adequate command of the Croatian language, the regular curriculum, taught in Croatian, could not possibly address their needs. Furthermore, the Government's contention that the applicants followed a regular curriculum is difficult to reconcile with the comments submitted on 26 September 2001 by the Croatian Government in response to the Opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities, according to which "[t]he Ministry of Education and Sports, in cooperation with the local administration, has taken a number of measures for this purpose [namely, to overcome the language barrier] – additional assistance to overcome problems concerning the following and comprehension of school lessons, adaptation of curricula to the needs of Roma children ..." (see paragraph 69 above). Thus, it would appear that the Roma children followed an "adapted curriculum", though it is not clear what exactly that included.

165. As regards the fact that the curriculum taught in Roma-only classes might have been reduced by 30%, the Court first notes that the Government have not indicated the exact legal basis for such a reduction. Secondly, and more importantly, they have not shown how the mere fact of a possible reduction of the curriculum could be considered an appropriate way to address the applicants' alleged lack of proficiency in Croatian. Since, as indicated by the Government, teaching in the schools in question was in Croatian only, the State in addition had the obligation to take appropriate positive measures to assist the applicants in acquiring the necessary language skills in the shortest time possible, notably by means of special language lessons, so that they could be quickly integrated into mixed classes.

166. In this connection, the Court refers to the above-mentioned comments submitted by the Croatian Government in response to the Opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities, according to which "those children who do not speak the Croatian language may well be enrolled in special classes where they receive special attention with a view to learning the Croatian language" (see paragraph 69 above). The applicants, however, once assigned to Roma-only classes, were not provided with any specific programme in order to address their alleged linguistic deficiencies. Nor have the Government shown the existence of any written instructions or guidelines concerning the programme to be followed by pupils assigned to Roma-only classes.

167. As to the existence of additional Croatian classes, which, according to the Government's submission, was one of the means by which the applicants' language deficiencies had been addressed, it would appear that the third, fourth and fifth applicants were never provided with such classes,

although all three of them attended a Roma-only class for at least the first two years of their primary education.

168. As regards the sixth to eleventh applicants, it was not until their third grade that they were offered additional Croatian language lessons, although they were all placed in a Roma-only class from their first grade.

169. The thirteenth to fifteenth applicants were offered additional language classes only in the first year of their schooling. Yet they all stayed in a Roma-only class for the rest of their primary schooling.

170. Only the twelfth applicant was systematically offered additional Croatian language classes in the first, second and third grade. However, he spent his entire primary schooling in a Roma-only class.

171. In any event, even such additional classes in Croatian could at best only compensate in part the lack of a curriculum specifically designed to address the needs of pupils placed in separate classes on the ground that they lacked an adequate command of Croatian.

(c) Transfer and monitoring procedure

172. As to the transfer from Roma-only to mixed classes, the Government, both in the proceedings before the national courts and before this Court, argued that the homogeneity of each class had been an important factor in not transferring the applicants to a mixed class. However, as indicated above, the placement of the applicants in Roma-only classes could be seen as pursuing a legitimate aim only if it served the purpose of bringing their command of the Croatian language up to an adequate level and then securing their immediate transfer to a mixed class.

173. In this respect, it is to be noted that no programme was established for addressing the special needs of Roma children lacking language skills that included a time frame for the various phases of acquisition of the necessary language skills. As a result, the Court is of the opinion that the time the applicants spent in Roma-only classes appears to fall short of the requirement that their immediate and automatic transfer be ensured as soon as adequate language proficiency was attained.

174. In the above-mentioned comments in response to the Opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Government stated that "[t]his practice [of placing of Roma-children in separate classes] is implemented only in the first and second grade of primary school, after which children attend classes together with children of other nationalities" (see paragraph 69 above). The Court also refers to the Opinion on Croatia of the Advisory Committee on the Framework Convention for the Protection of National Minorities, adopted on 1 October 2004, according to which "pupils should not be placed in such separate remedial classes on the basis of their affiliation with a national minority but rather on the basis of the skills and needs of the individuals

concerned, and where such placing is found necessary, it should be for a limited period only" (see paragraph 70 above).

175. Yet the applicants in the present case each spent a substantial period of their education in Roma-only classes. The eleventh to fifteenth applicants spent all eight years of their schooling in a Roma-only class, while the second to tenth applicants attended at times both Roma-only and mixed classes. However, no particular monitoring procedure was in place. Although some of the applicants at times attended mixed classes, the Government failed to show that any individual reports were drawn up in respect of each applicant and his or her progress in learning Croatian. Such reports appear necessary in order to ensure objectivity as well as to identify problem areas which could then be addressed, if needed, with additional measures. The lack of a prescribed and transparent monitoring procedure left a lot of room for arbitrariness.

(d) Poor school attendance and high drop-out rate

176. One of the problems highlighted in the reports of the Council of Europe bodies concerning Croatia was the poor school attendance of Roma children and their high drop-out rate. In the second ECRI report on Croatia, published on 3 July 2001, it is stated that "many Roma/Gypsy children do not go to school, having either dropped out or having never attended" (see paragraph 66 above). This observation was confirmed in the third ECRI report on Croatia, published on 14 June 2005, according to which "[m]any Roma children leave school at a very early age" (see paragraph 67 above). The statistics submitted by the applicants for Međimurje County and not refuted by the Government show a drop-out rate of 84% for Roma pupils before completing primary education. The applicants in the present case, without exception, left school at the age of 15 without completing primary education. Their school reports show poor attendance.

177. While the Croatian authorities cannot be held to be the only ones responsible for the fact that so many pupils failed to complete primary education or to attain an adequate level of language proficiency, such a high drop-out rate of Roma pupils in Međimurje County called for the implementation of positive measures in order, *inter alia*, to raise awareness of the importance of education among the Roma population and to assist the applicants with any difficulties they encountered in following the school curriculum. Therefore, some additional steps were needed in order to address these problems, such as active and structured involvement on the part of the relevant social services. However, according to the Government, the social services had been informed of the pupil's poor attendance only in the case of the fifth applicant. No precise information was provided on any follow-up.

(e) The involvement of the applicants' parents

178. The Government emphasised the parents' passivity and lack of objections in respect of the placement of their children in separate classes, as well as on the fact that they had not requested their transfer to mixed classes. In this connection, the following conclusions reached in the *D.H. and Others* case appear to be of relevance:

> "202. 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 (see *Pfeifer and Plankl v. Austria*, 25 February 1992, §§ 37-38, Series A no. 227) and without constraint (see *Deweer v. Belgium*, 27 February 1980, § 51, Series A no. 35).
>
> 203. 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. ...
>
> 204. 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 202 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-XII)."

179. The same applies to the failure of the applicants' parents in the present case to raise objections to the placement of their children in Roma-only classes and their failure to seek their transfer to mixed classes.

(f) Conclusion

180. As appears from the Court's judgment in *D.H. and Others* (cited above), the documentation produced by ECRI and the report of the Commissioner for Human Rights of the Council of Europe on the Human Rights Situation of the Roma, Sinti and Travellers in Europe (dated 15 February 2006; see paragraphs 73 to 76 above), a number of European States encounter serious difficulties in providing adequate schooling for Roma children. The Croatian authorities have sought to tackle the problem. However, in their attempts to achieve the social and educational integration of the disadvantaged group which the Roma form, they have had to contend with numerous difficulties as a result of, *inter alia*, the cultural specificities of that minority and an alleged degree of hostility on the part of the parents of non-Roma children. As the Grand Chamber noted in the above-

mentioned *D.H. and Others* judgment, the choice of the best means to address learning difficulties of children lacking proficiency of the language of instruction 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 (see *D.H. and Others*, cited above, § 205, and *Valsamis v. Greece*, 18 December 1996, § 28, *Reports* 1996-VI).

181. Nevertheless, whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the 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*, cited above, § 76, and *Connors*, cited above, § 83).

182. The facts of the instant case indicate that the schooling arrangements for Roma children were not sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group (see, *mutatis mutandis, Buckley*, cited above, § 84, and *Connors*, cited above, § 84). Furthermore, as a result of the arrangements the applicants were placed in separate classes where an adapted curriculum was followed, though its exact content remains unclear. Owing to the lack of transparency and clear criteria as regards transfer to mixed classes, the applicants stayed in Roma-only classes for substantial periods of time, sometimes even during their entire primary schooling.

183. A very positive aspect is the possibility of further education for Roma children who failed to complete primary education by the age of 15. After leaving primary school, the applicants had the possibility of enrolling in the government-funded evening school in Čakovec (a nearby town) in order to complete their education. Although all expenses were covered by the Government, only three of the applicants availed themselves of this opportunity, and only one actually completed the evening school. However, most of these developments took place after the period that is to be examined in respect of the applicants in the present case. They cannot repair the above-described deficiencies in the applicants' education.

184. In sum, in the circumstances of the present case and while recognising the efforts made by the Croatian authorities to ensure that Roma children receive schooling, the Court considers that there were at the relevant time no adequate safeguards in place capable of ensuring that a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued was achieved and maintained. It follows that the placement of the applicants in Roma-only classes at times during their primary education had no objective and reasonable justification.

185. The Court therefore finds that in the present case there has been a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1.

186. In view of that conclusion, it is not necessary to examine the complaint under Article 2 of Protocol No. 1 taken alone.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

187. 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. The Chamber judgment

188. The Chamber, in view of the violation found, considered that the applicants had sustained non-pecuniary damage because the length of the proceedings before the national courts had exceeded a "reasonable time", and that it was therefore appropriate to award them compensation. Ruling on an equitable basis, it awarded each applicant 1,300 euros (EUR) under this head, plus any tax that might be chargeable. It also awarded the applicants jointly EUR 2,000 for costs and expenses, plus any tax that might be chargeable.

B. The parties' submissions

189. The applicants claimed EUR 22,000 each in respect of non-pecuniary damage and EUR 20,316.50 jointly for costs and expenses incurred at domestic level and before the Court.

190. The Government argued that the applicants' claim in respect of non-pecuniary damage should be rejected. As regards the claim for costs and expenses in respect of the proceedings before the Court, the Government deemed it excessive.

C. The Court's assessment

1. Non-pecuniary damage

191. The Court considers that the applicants must have sustained non-pecuniary damage – in particular as a result of the frustration caused by the indirect discrimination of which they were victims – for which the finding of a violation of the Convention does not afford sufficient redress. However,

the Court considers the amounts claimed by the applicants to be excessive. Ruling on an equitable basis, it assesses the non-pecuniary damage sustained by each of the applicants at EUR 4,500.

2. Costs and expenses

192. The Court reiterates that legal costs are only recoverable to the extent that they relate to the violation that has been found (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002). The Court notes that Mrs Kušan, Mr Dobrushi and Mr Alexandridis have each submitted details of their professional fees, as well as the costs of translation of the relevant documents. Having regard to all the relevant factors and to Rule 60 § 2 of the Rules of Court, the Court makes a joint award to all the applicants of EUR 10,000 for costs and expenses.

3. Default interest

193. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection as to the applicability of Article 6 § 1 of the Convention to the present case;

2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by nine votes to eight that there has been a violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1;

4. *Holds* unanimously that it is not necessary to examine the complaint under Article 2 of Protocol No. 1 taken alone;

5. *Holds* by twelve votes to five
   (a) that the respondent State is to pay, within three months, the following amounts, to be converted into Croatian kuna at the rate applicable at the date of settlement:
      (i) to each applicant EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) to the applicants jointly EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(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;

6. *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 16 March 2010.

Vincent Berger
Jurisconsult

Jean-Paul Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić is annexed to this judgment.

J.-P.C.
V.B.

JOINT PARTLY DISSENTING OPINION OF JUDGES JUNGWIERT, VAJIĆ, KOVLER, GYULUMYAN, JAEGER, MYJER, BERRO-LEFÈVRE AND VUČINIĆ

1. We are unable to find a violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 in the present case.

I

2. We agree with the majority on the principles laid down in paragraphs 146, 149, 150 and 156 of the judgment. Particularly, we accept that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of an ethnic origin at a particular disadvantage compared with other persons, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate.

II

3. We do not agree with the majority as to the application of the above principles to the case at issue and the conclusion that there has been no objective and reasonable justification for the measures applied to the applicants.

4. First of all, the applicants do not argue that their command of the Croatian language upon their enrolment in primary school was adequate – they have never objected to the Government's assertion that they lacked the required level of language proficiency. (In respect of the applicants enrolled in Macinec Primary School, the enrolment procedure included the psycho-physical appraisal of the children by a panel composed of a physician, a psychologist, a school counsellor (*pedagog*), a defectologist and a teacher, in the presence of at least one of the child's parents.) Thus we accept that the applicants did not have a sufficient command of the Croatian language to follow lessons in that language.

5. Secondly, it is accepted that decisions pertaining to the methods used to address the special needs of certain pupils belong to the sphere of social policy, in which States enjoy quite a wide margin of appreciation. Therefore, placing the applicants in separate classes as a means of addressing their special needs is not as such contrary to the Convention, either from the standpoint of Article 2 of Protocol No. 1 or from that of Article 14 of the Convention.

6. As stated in the judgment, the proportion of Roma children in the lower grades in Macinec Primary School varies from 57% to 75%, while in Podturen Primary School it varies from 33% to 36%. We accept that the large number of Roma pupils in the two primary schools concerned, and in

particular in Macinec Primary School, was an obstacle to creating mixed classes in certain grades with a view to achieving integration among the pupils concerned. Notwithstanding these difficulties, the Roma-only classes were not established as a rule but only in cases where the percentage of Roma pupils was sufficient to form such classes.

Thus in Podturen Primary School, out of 47 Roma pupils only 17 were placed in a Roma-only class, while 30 were in mixed classes (paragraph 11 of the judgment). In Macinec Primary School, there were 194 Roma pupils in 2001, 142 of whom were placed in six Roma-only classes, while 52 attended mixed classes (paragraph 15 of the judgment).

7. The language deficits and other difficulties in the case at issue, according to school records (paragraphs 21 to 51 of the judgment), went hand in hand with obvious lack of parental support. It cannot be denied that the slow linguistic development and progress in the applicants' case was to a large degree due to their very poor school attendance (paragraphs 176 to 177 of the judgment), which would equally have upset the majority's progress in mixed classes in respect of all school subjects.

In this connection, it is to be noted that the authorities attempted to address these problems by organising regular parent-teacher meetings at class level, as well as individual parent-teacher meetings with the applicants' parents. They also organised visits of Roma assistants to the pupils' homes in order to stress the importance of regular school attendance. However, the applicants' parents rarely responded to such efforts. The role of the parents in these matters cannot be underestimated. Regular school attendance depends on cooperation between school authorities and the children's parents, who are primarily responsible for their children. The report of the Commissioner for Human Rights also stressed that "it rests with the parents to ensure the sound learning of the language and their children's regular attendance for the entire school course" (see paragraph 72 *in fine* of the judgment).

8. To assess the proportionality of the measures taken, it is important to point out that the setting and planning of the curriculum fall in principle within the competence of the Contracting States. The regulation of educational institutions may vary in time and in place, *inter alia*, according to the needs and resources of the community and the distinctive features of different levels of education. Consequently, the Contracting States enjoy a certain margin of appreciation in this sphere (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 154, ECHR 2005-XI).

9. The authorities were faced with a situation where in a small community a large number of children belonging to the Roma minority at the time of their enrolment in primary school did not have sufficient command of the language of instruction. They had to contend with numerous difficulties as a result of, *inter alia*, the cultural specificities of that minority. The choice between various possibilities to tackle the

situation at hand entailed a difficult balancing exercise between the competing interests. On the one hand the interest of the applicants and other Roma children who did not speak the Croatian language was to acquire, as soon as possible, proficiency in the language of teaching and thus become able to follow the teaching. On the other hand the pupils, both Croatian and Roma, who did speak Croatian, had an interest in not being held back too much in their education owing to the insufficient linguistic proficiency of a very large number of other pupils.

Moreover, we stress that it may indeed be difficult to organise teaching in mixed classes where a high percentage or even a majority of pupils do not have sufficient knowledge of the language of teaching. In such a situation where a high percentage or a majority of pupils have special needs, it is obvious that the teaching has to be adapted to their needs, particularly when they share a common language among themselves. However, this may affect the interests of other pupils who do not have such needs and whose progress may thus be impeded. In such a situation the State authorities are confronted with the duty to ensure a fair distribution of available resources among both groups of pupils. We accept that for this reason as well their placement in the same class could be justified from a pedagogical point of view, as it is known that children are considered to learn best in stable surroundings, and this is also why parents are often reluctant to make their children change classes. That argument should not have been set aside without balancing also the interests of the Croatian-speaking children: the importance for Croatian-speaking pupils of being able to progress properly at school is not mentioned at all in the judgment.

10. By keeping Roma children in ordinary schools, the Croatian authorities made the change from a separate class to a mixed class quite flexible and allowed the change to be made without formalities. Thus the majority of the applicants in the present case attended both Roma-only and mixed classes and shared with other pupils the same common school facilities, such as canteen and playgrounds, as well as various extracurricular and social activities (see also paragraphs 134 and 135 of the judgment).

11. The schools attended by the applicants are regular educational establishments, forming part of the system of public primary schools in Croatia. All pupils who complete any of these schools are considered as having succeeded in acquiring full primary education and they all receive a final certificate in standard form. Those pupils who at times or during their entire primary education attend Roma-only classes and successfully complete the final grade also receive the same standard final certificate which in no way indicates that they attended some special, separate classes. All certificates on the completion of primary education have equal standing as regards the possibility of enrolling in secondary schools or finding employment. Thus, the fact that the applicants attended Roma-only classes

could not, as such, in any way have impeded or undermined their prospects of further education. All those who complete primary school have the same possibilities of reaping the benefits of their education.

12. It is thus important to stress that the applicants were at no time deprived of the right to attend school and receive an education. They were all enrolled in the primary schools concerned at the age of seven, the normal age to start mandatory primary education in Croatia. They all stayed in primary school until they reached the age of 15 and then left on their own initiative since there was no further obligation for them to attend school.

Furthermore, there was a possibility of continued education in evening classes for pupils who had not completed primary education by the age of 15. Although the full cost of this education was borne by the State, only the third, fourth and sixth applicants made use of this opportunity and only the third applicant actually completed the evening school, while the fourth and sixth applicants, although enrolled, failed to attend classes.

13. Therefore, it is not shown in this case that the applicants were put at a particular disadvantage compared with other pupils by their placement in Roma-only classes at times during their primary education.

III

14. The present case is thus not about the situation of a minority in general but about a concrete question of education practice (in two schools) in respect of a minority insufficiently conversant with the language of instruction, and the measures taken by the domestic authorities to deal with such a situation. The case can clearly be distinguished from *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, ECHR 2007-IV) and *Sampanis and Others v. Greece* (no. 32526/05, 5 June 2008), as the majority is well aware. The majority also accepted the fact that the statistical data in the present case did not suffice to establish that there was prima facie evidence that the effect of a measure or practice was discriminatory (paragraphs 151 to 152 of the judgment). We agree that indirect discrimination may be proved without statistical evidence (paragraph 153 of the judgment). Yet then the facts would have to show that the effect of the practice had an adverse impact on the applicants and could not be justified on other grounds.

15. It would seem that the majority viewed the case in the first place as a means of further developing the notion of indirect discrimination in the Court's jurisprudence. To be able to do so it was, however, obliged to lean on arguments outside the concrete facts, referring to the situation of the Roma population in general (see, for example, paragraphs 147, 148, 176 and 177 of the judgment). As a result, this became in some respects more a judgment on the special position of the Roma population in general than one based on the facts of the case, as the focus and scope of the case were

altered and interpreted beyond the claims as lodged by the applicants before the Court. In adopting this approach, however, the majority neglected the criteria previously elaborated by the Court itself in respect of the right to education under Article 2 of Protocol No. 1 to the Convention (paragraph 146 of the judgment).

16. Although it is accepted that education by integration is definitely a very important concept, it is, however, to be noted that there are no general recommendations of best practices in such a situation and that States have to use their margin of appreciation to resolve such very important and concrete problems on the spot as they are the best placed for that task.

17. In addition the majority has not taken into consideration at all that one of the rights of a minority consists in "preserving diversity" (see paragraph 148 of the judgment) and that separation is therefore not always considered to be harmful, especially when accompanied – as in the given situation – by various social activities and measures organised in the common school.

IV

18. We are satisfied that in the present case, as pointed out by the Constitutional Court, it was not shown that the allegedly different treatment of the applicants was based on their ethnic origin or any other "suspect" grounds, but rather exclusively on their insufficient command of the language, which means on pedagogical grounds. In such circumstances a wider margin of appreciation is allowed to the State authorities in employing methods of addressing the applicants' learning difficulties. Once it has been established that the applicants lacked sufficient command of the Croatian language, the choice of means to address that problem lay with the State authorities. Therefore, and regard being had to the margin of appreciation afforded to the national authorities in the field of education (see, *mutatis mutandis*, *Sampanis and Others*, cited above, § 92 *in fine*), we consider that the placement of the applicants in Roma-only classes at times during their primary education in the circumstances of the present case had a legitimate aim pursued by acceptable means for a limited period without discernable alternatives at hand. In other words, there existed an objective and reasonable justification.

V

19. We would also like to stress that in a situation like the present one in which the Court is overruling a well-reasoned judgment by a Constitutional Court, as well as a unanimous judgment of one of its Chambers, by adopting a Grand Chamber judgment by a nine to eight vote, it should have presented more convincing arguments to justify its decision. In addition, it would have

been useful if the Court had been willing to offer more practical guidance on how to develop and apply the notion of indirect discrimination. As it stands, without any clear indications on the matter, it could appear that the majority simply used its own discretion to replace a decision of the highest national court with its own. In so doing, the Court runs the risk of being told that it took upon itself the task of the national courts. Particularly so in a situation where the Constitutional Court's reasoning was based on the principles of the Convention and where its indications to the domestic authorities were clear. Thus, the present example well illustrates that when it comes to cases where the Court declares that a certain margin of appreciation is to be left to the States, it should be particularly careful not to overstep its role, especially when a large number of judges in the Court have expressed their support for the Constitutional Court's approach.

Be that as it may, it will certainly not be easy for the respondent State or any other State party to the Convention faced with schooling problems in relation to minority groups to follow the present judgment.

APPENDIX

LIST OF APPLICANTS

	Name	**Date of birth**	**Residence**
1.	Stjepan Oršuš	22 December 1991	Orehovica
2.	Mirjana Oršuš	30 September 1990	Podturen
3.	Gordan Oršuš	16 June 1988	Podturen
4.	Dejan Balog	10 November 1990	Podturen
5.	Siniša Balog	25 January 1993	Podturen
6.	Manuela Kalanjoš	12 February 1990	Podturen
7.	Josip Oršuš	25 February 1993	Podturen
8.	Biljana Oršuš	20 April 1990	Podturen
9.	Smiljana Oršuš	6 April 1992	Podturen
10.	Branko Oršuš	10 March 1990	Podturen
11.	Jasmin Bogdan	11 May 1990	Trnovec
12.	Josip Bogdan	13 September 1991	Trnovec
13.	Dijana Oršuš	20 January 1994	Trnovec
14.	Dejan Oršuš	2 August 1991	Trnovec
15.	Danijela Kalanjoš	7 October 1993	Trnovec