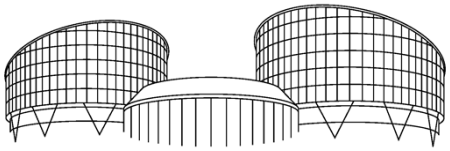

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF SALAY v. SLOVAKIA

(Application no. 29359/22)

JUDGMENT

Art 14 (+ Art 2 P1) • Discrimination • Right to education • Discriminatory treatment of Roma pupil on account of placement in special class for children with mild intellectual disabilities • Danger that diagnostic tests, used to determine the applicant's intellectual capacity, were culturally biased • Enrolment in special classes *de facto* permanent with no systematic retesting to monitor any developments which might justify a pupil's transfer back into mainstream education • In case-circumstances, permanent nature of the applicant's enrolment in a special class confirmed in practice • Applicant's schooling in special class not attended by adequate safeguards to ensure consideration of special needs of Roma pupils as members of a disadvantaged class • Placement in such a class, with a more basic curriculum than mainstream classes, resulted in an education not offering guarantees stemming from the State's positive obligation to undo a history of racial segregation in special education • Domestic legislation as applied at material time had a disproportionately prejudicial effect on the Roma community • State's failure to prove, in a prima face case of discrimination, necessary guarantees provided to avoid misdiagnosis and inappropriate placement of Roma pupils

Prepared by the Registry. Does not bind the Court.

STRASBOURG

27 February 2025

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

In the case of Salay v. Slovakia,

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

Ivana Jelić*, President*,
Alena Poláčková,
Raffaele Sabato,
Frédéric Krenc,
Alain Chablais,
Artūrs Kučs,
Anna Adamska-Gallant*, judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the application (no. 29359/22) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovak national, Mr Adrián Salay ("the applicant"), on 4 June 2022;

the decision to give notice to the Government of the Slovak Republic ("the Government") of the complaint characterised under Article 14 of the Convention, in conjunction with Article 2 of Protocol No. 1, concerning the applicant's enrolment and schooling in a preparatory class and in special classes, and to declare the remainder of the application inadmissible;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by (i) the Public Defender of Rights of the Slovak Republic, (ii) the European Network of Equality Bodies and the Slovak National Centre for Human Rights, jointly and (iii) Validity Foundation, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 4 February 2025,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns the allegedly discriminatory enrolment and schooling of the applicant, who was born in 1998 and is of Roma origin, first in a preparatory class of a primary school for children who were not expected to be able to complete the mainstream curriculum, and then in special classes at that school which were for children with an intellectual disability. It raises an issue under Article 14 of the Convention, in conjunction with Article 2 of Protocol No. 1.

THE FACTS

2. The applicant was born in 1998 and lives in Plavecký Štvrtok. He was represented by the European Roma Rights Centre (ERRC), a non-governmental organisation based in Brussels.

3. The Government were represented by their Agent, Ms M. Bálintová.

4. The facts of the case may be summarised as follows.

I. APPLICANT'S SCHOOLING

5. The applicant grew up in a Roma community in Plavecký Štvrtok, consisting of several hundreds (see *Salay and Zemanová v. Slovakia* [Committee], no. 43225/19, § 5, 28 September 2021).

6. Prior to his enrolment in the first year of primary school (*základná škola*), in August 2004 the applicant's school maturity was tested (*vyšetrenie školskej zrelosti*) at the Educational and Psychological Advice and Prevention Centre in Malacky ("the Centre").

7. In view of his results, the applicant was not enrolled in mainstream Year One for the academic year 2004/2005, but in what is called Year Zero (*nultý ročník*). Under section 6(2) of the School Act (Law no. 29/1984 Coll., as applicable at the material time), Year Zero was a form of upbringing and education and constituted an integral part of primary school. It was intended for children who were aged six on 1 September of a given year but who did not have the requisite level of academic maturity, who were from a disadvantaged background and who, in view of the social or language-related aspects of that background, could not be expected to master the curriculum of the mainstream Year One in one academic year.

8. From Year Zero onwards the applicant attended Plavecký Štvrtok Primary School ("PSPS"), which had mainstream classes as well as special classes (*špeciálna trieda* under section 32a(3) of the 1984 School Act, and subsequently section 94(1)(b) of the 2008 School Act (Law no. 245/2008 Coll., as amended)). Special classes were for pupils with special educational needs, the same type of disability or the same type of intellectual gift, and had a curriculum adapted to such needs.

9. As would also be established in the ensuing judicial proceedings, in principle, only Roma pupils attended PSPS. Nevertheless, there were also some non-Roma children in the applicant's class in Year Zero.

10. Thereafter, in the academic year 2005/2006 the applicant started Year One in a mainstream class. According to him, this was a mixed class of Roma and non-Roma pupils.

11. In response to learning difficulties which the applicant experienced in the course of the year, the school requested that he be retested at the Centre. He was retested on 16 January 2006 and the report which was produced found that his intellectual capacity was similar to that of a person with a mild

intellectual disability (*mentálna retardácia ľahkého stupňa*) and recommended that he be transferred to a special class. Among other things, the report noted that "[the applicant] ha[d] not always understood verbal instructions in performance subtests".

As would later be established in the judicial proceedings, two tools were used in that testing. The first tool was an "RR screening test", which was an instrument developed in 2004 as part of PHARE project SR0103.01 to support the Roma minority in education, with the aim of distinguishing between intellectual disability and socio-economic disadvantage. The aim of the test is to rule out an intellectual disability, and the result of the test in the applicant's case was that such a disability could not be ruled out. The second tool used was a "WISC III test", which was a general test used across the population with no particular regard for any specificities of Roma people. In the applicant's case, the result of the test indicated a mild intellectual disability.

12. The recommendation in that report was subsequently confirmed when the applicant was retested in April 2006 at the special education advisory service at the special primary school in Malacky. It was also noted that the applicant had learning difficulties in Slovak and mathematics, as well as behavioural issues. Among other things, the report noted that the applicant's "speech [was] ... influenced by dialect".

13. On 27 June 2006, by means of a pre-printed form, the applicant's mother requested his transfer to a special class at PSPS.

14. From Year Two (academic year 2006/2007) until the end of his schooling at PSPS, the applicant attended special classes, and at that time all the pupils in those classes at PSPS were Roma.

15. In 2009 the applicant was examined at the Centre. In the ensuing court proceedings, the psychologist who had tested the applicant explained that she had examined him twice. The first examination took place on 10 June 2009 and involved a non-verbal test for children aged five to eleven. It resulted in a finding that the applicant's development was delayed and his skills were similar to those of a person with a mild disability, below the population norm.

16. The second of those examinations took place on 12 November 2009, in the presence of the applicant's mother. The report produced specifies that the examination followed a request made by PSPS owing to what was described as the applicant's inadequate reactions at school. The testing established that the development of the applicant's personality was delayed, that he was extremely energetic and lively, and that his actions were hasty and inconsiderate. In view of the school's concerns about the applicant's behaviour, a further examination by a psychiatrist was recommended. As the psychologist who carried out the testing later explained, the test used was a standard test focusing on non-verbal elements.

17. On 20 January 2011 the applicant (accompanied by his father) was examined at the Centre again, following a request made by PSPS owing to

learning difficulties which had been observed in relation to the applicant's reading and writing. Among other findings, the applicant was found to have a general intellectual capacity similar to that of a person with a mild intellectual disability, and displayed restlessness, impatience and a lively nature. The psychologist who examined him would later specify that the testing had followed a methodology for children from socially disadvantaged backgrounds which had been recommended in 2005 by the Research Institute of Child Psychology and Pathopsychology ("the Institute"), an entity operating under the auspices of the Ministry of Education.

18. On 23 June 2011, at the request of his mother, the applicant was tested at the Institute. The report produced concluded that his development was within the normal range (below average or borderline), and he had an uneven performance profile. There was a suspicion that he had a learning disorder relating to his development, but a more in-depth special education examination would be necessary to establish this with certainty. In terms of recommendations, the report noted that in three years' time the applicant's attendance at school would no longer be mandatory (at the time of the testing, he was in Year Six) and that it was right that he should be given the opportunity to complete lower secondary education by then. The report said that he should not be transferred to a lower year of a mainstream class at primary school which corresponded to his level of acquired knowledge if this would result in his dropping out of primary school before completing Year Nine. The applicant could be enrolled in Year Seven of a mainstream class, with an individual study programme to make up for any deficits in the knowledge he had so far acquired. However, from a psychological perspective, it was most appropriate for the applicant to continue his education in a special class with an extended curriculum, and this would enable him to complete lower secondary education.

19. On 14 September 2011, relying on the results of the above test, the applicant's parents requested that he be transferred to a mainstream class at PSPS, with an individual study plan.

20. On 18 October 2011 the applicant (accompanied by his father) underwent two tests at the Centre.

The first test was a special education test in which the applicant's learning development in grammar was assessed as being mediocre, and his learning development in mathematics was found to be adequate in relation to the curriculum. According to the Government, this test was recommended by the Institute and adapted to children from disadvantaged social backgrounds.

The second test was a psychological test, which concluded that the applicant's intellectual capacity was similar to that of a person with an intellectual disability. Indications of aggressive behaviour on his part were to be examined further by a child psychiatrist. The psychologist who carried out the test later specified that the test used was "standardised, culturally

neutral and commonly used in psychological practice", adding that it was non-verbal and pictographic.

Both tests found that the applicant's enrolment in Year Seven of a special class, where he followed a "type-A" curriculum, was correct.

21. The applicant completed his studies at PSPS in the academic year 2012/13, and from the academic year 2013/14 he proceeded to study at a three-year training college. Following issues with discipline and numerous unexcused absences that year, he did not start the academic year 2014/15, and consequently his studies at that college were terminated.

II. ANTI-DISCRIMINATION ACTION

22. On 14 April 2014 the applicant lodged an anti-discrimination action with the Malacky District Court. The action was against PSPS and the State (through the Ministry of Education), and essentially sought judicial recognition of a violation of his rights.

In his action, the applicant emphasised the general situation of Roma in Slovakia and beyond. In the area of education, an ever-growing number of Roma pupils were in special schools and special classes designed for children with intellectual or social disabilities. In his submission, at the relevant time, some 86% of all pupils in special classes were Roma and more than 20% of Roma children in Slovakia received special education, in circumstances where the overall national average was 4.1% of children in special schools and 2.2% in special classes. This had to be seen in the context of the fact that Roma made up some 6-8% of the country's overall population.

In that regard, the applicant relied, *inter alia*, on the concluding observations in respect of Slovakia of various United Nations (UN) bodies such as the Committee on the Elimination of Racial Discrimination (2004, 2010 and 2013), the Committee on the Rights of the Child (2000 and 2007), the Committee on Economic, Social and Cultural Rights (2002 and 2012) and the Human Rights Committee (2003 and 2011), as well as on communications by the European Commission.

As to his individual case, the applicant contended that his enrolment in Year Zero and in special classes had been arbitrary and had, in practice, prejudiced his entire academic trajectory, as demonstrated by the fact that it had not been possible to transfer him to a mainstream class in the academic year 2011/12, even though he had been retested in June 2011 and the relevant results had indicated that this was a valid option.

The results of his tests had been incoherent and had relied on learning difficulties that had not been individually specified. Moreover, the tests had been culturally, socially and linguistically biased. As regards linguistic bias, the applicant specified that the tests had been carried out in Slovak, whereas at home he spoke Romani and a dialect of Western Slovakia.

His parents had not given informed consent for his enrolment in special classes, and he had not been retested regularly. The physical equipment used in such classes and the curriculum followed was inferior to that used in mainstream classes.

In support of his claims, the applicant also relied on section 11(2) of the Anti-Discrimination Act (Law no. 365/2004 Coll., as amended), which provided that the defendant had to show that the principle of equal treatment had not been violated in all instances where the claimant had established facts giving rise to a justified assumption that such a violation had taken place.

In sum, the applicant alleged both direct and indirect discrimination on the grounds of his Roma origin with regard to, *inter alia*, his right to education.

23. The District Court took evidence from the parties and heard the experts involved in the tests carried out on the applicant. It also considered submissions from the ERRC, who had been admitted to the proceedings as a third party appearing in support of the applicant under Article 95 of the Code of Civil Contentious Procedure.

24. On 17 May 2018 the District Court dismissed the action. Noting that "the problems with education of the Roma minority in Slovakia were enormous", the court recognised that the State "could and should do much more [in that regard]".

Nevertheless, the case at hand concerned the applicant's individual situation, which had been properly and repeatedly examined by the competent authorities; his parents had been involved and his enrolment had corresponded to the results of that examination. From that perspective, he was no victim of the existing educational system, but had instead failed to make use of the opportunities provided by it.

In his argument, the applicant had placed significant weight on the linguistic aspect of his understanding of the testing. Nevertheless, his claim that he spoke Romani at home did not correspond to the established reality. In so far as the language spoken at his home was a dialect of Western Slovakia, this had not significantly limited his ability to participate effectively in the tests.

As only Roma pupils attended PSPS, the fact that only Roma children attended the special classes there was not indicative of any segregation. The testing for enrolment in such classes was the same, irrespective of the origin of the children being tested. Moreover, the applicant's personality was complicated and he had behavioural problems.

In sum, the applicant had failed to show that he had been treated differently on the grounds of his origin.

25. The applicant and the ERRC appealed, arguing that the reasoning behind the first-instance judgment was inadequate and lacked any position on essential aspects of the case. The first-instance court had failed to take into account the situation of the Roma minority in the area of education, to consider the distribution of the burden of proof, and to inquire into matters

such as the nature of the consent given by the applicant's parents and the cultural and social neutrality of the tools used in the testing carried out on him.

26. On 25 November 2020 the Bratislava Regional Court dismissed the appeals, concurring with the District Court's conclusions, endorsing its reasoning and adding the following observations. The applicant had attended PSPS with the consent of his parents. It was the school in his catchment area and the population in this area was largely Roma. His behavioural problems alone would have prevented his enrolment in mainstream classes. The applicant had dropped out of secondary school when he had passed the mandatory school attendance age, as he had not been interested in pursuing further education. Even if the results of the testing carried out when he had been thirteen (see paragraph 18 above) could be accepted as authoritative, they had pertained only to the situation at that time and had not been directly relevant to the situation when he had been enrolled previously. The applicant had failed to show that he had been treated differently from non-Roma pupils in a similar situation or, in other words, that he had been enrolled in Year Zero or special classes on account of his Roma origin. There was accordingly no question of any shift in the burden of proof in relation to whether any difference in treatment had been justified.

III. CONSTITUTIONAL COMPLAINT

27. On 12 April 2021 the applicant lodged a complaint under Article 127 of the Constitution, further developing his above arguments and specifying, *inter alia*, that the scope of the curriculum prescribed for the special classes which he had attended was such that it had prevented him from being eligible for secondary education concluding with a baccalaureate (*maturita*).

28. On 12 November 2021 the Constitutional Court declared the complaint inadmissible, essentially for being manifestly ill-founded. The ordinary courts had properly established the facts and had drawn adequate legal conclusions. The testing and enrolment had been in full compliance with the applicable law, the relevant criterion being the applicant's capacity; his origin had been of no consequence. The decision was served on the applicant on 28 January 2022 and no appeal lay against it.

IV. OTHER RELEVANT FACTS

29. On 22 December 2023 the European Commission brought an action against Slovakia before the Court of Justice of the European Union ("CJEU"), alleging an infringement of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("the Anti-Racism Directive").

30. In support of its action, the Commission alleged systematic and persistent improper administrative practice on the part of the authorities of the Slovak Republic in relation to indirect discrimination against the Roma community in the field of education. In particular, by placing too many Roma children in special schools or special classes for children with intellectual or other disabilities, the Slovak Republic had systematically and persistently infringed paragraph 1 of Article 2 of that Directive, read in conjunction with paragraph 2(b) (for these provisions, see paragraph 61 below). It also maintained that the Slovak Republic had systematically and persistently infringed these provisions by segregating Roma children in separate classes in mainstream schools or in separate schools.

31. The action has been registered under file no. C-799/23 and is ongoing.

V. FURTHER FACTS REFERRED TO BY THE GOVERNMENT

32. The Government referred to a series of records from the year 2010/11 indicating that the applicant had been involved in several discipline-related incidents at school, such as damaging school property, verbally abusing teachers and assaulting classmates. According to the available records, such incidents continued in 2012 and were repeatedly raised with the applicant's parents.

33. As pointed out by the Government, the applicant's sister completed her mandatory school education in mainstream classes.

34. The Government also referred to a position statement issued by the Institute on 4 May 2015 in response to a series of questions concerning the testing and schooling of pupils with mild intellectual disabilities. Among other things, the Institute had noted that in general, there were no tests designed for pupils from socially disadvantaged environments. There were only tests which were more suitable for testing such pupils and tests which were less suitable. None of the existing tests could determine whether a pupil suffered from a mild intellectual disability. A good test result could rule out such a disability, and a poor test result could have various causes which tests could not establish. A diagnosis had to be determined by a psychologist by way of an expert assessment, which had to take into account not only the test results, but also other information about the child.

The only existing test focusing on pupils from socially disadvantaged environments was the RR screening test, which had been developed at the Institute in 2004. However, not even this test could establish a mild intellectual disability, and it could only serve to rule out such a disability if the test results were sufficient.

By definition, a mild intellectual disability was permanent and could not be treated. Establishing such a disability was difficult and never sufficiently reliable when the person in question was a child. If a child appeared to suffer from a mild intellectual disability, it might later be established that his or her

insufficient cognitive performance had been due to a different disorder (for example, a learning disorder that could fade away with age) or living in a socially disadvantaged environment lacking stimulation.

A child's performance might evolve over time and differ in different tests. If one institution diagnosed a mild intellectual disability and another ruled it out, the latter assessment was probably correct. In the event of doubts about differing results, a third opinion could be obtained from the Institute, which was the body responsible for providing the testing establishments with guidance in terms of methodology.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. The Constitution

35. In accordance with Article 12 of the Constitution, all human beings are equal in dignity and in rights (paragraph 1). Fundamental rights are guaranteed to everyone in Slovakia regardless of, *inter alia*, race, colour, language, national or social origin, nationality or ethnic origin, and no one is to be harmed, favoured or discriminated against on any of those grounds (paragraph 2).

36. Article 42 guarantees everyone the right to education, with school attendance being compulsory under conditions set by law.

B. The Anti-Discrimination Act

37. The Anti-Discrimination Act (Law no. 365/2004 Coll., as amended) regulates the implementation of the principle of equal treatment and determines legal remedies in the event of a violation of this principle (section 1).

38. Respect for the principle of equal treatment lies in the prohibition of discrimination on grounds of, *inter alia*, race, affiliation to a nationality or ethnic group and disability (section 2(1)). While respecting the principle of equal treatment, good morals should also be taken into account for the purpose of extending protection against discrimination (section 2(2)). Respect for the principle of equal treatment is also based on the adoption of measures to protect against discrimination (section 2(3)).

39. Discrimination encompasses direct and indirect discrimination (section 2a(1)). Direct discrimination means any action or omission where one person is treated less favourably than another person is, has been or would be treated in a comparable situation (section 2a(2)), while indirect discrimination includes, *inter alia*, an apparently neutral provision or practice which puts a person at a disadvantage compared with another person, unless

it is objectively justified by a legitimate aim, appropriate and necessary for achieving such an aim (section 2a(3)).

40. Everyone must respect the principle of equal treatment, including in the field of education (section 3(1)), and discrimination in this field on the grounds referred to above is forbidden (section 5(1)).

41. Under section 5(2)(c), the principle of equal treatment in the field of education applies only with regard to the rights of persons provided for under separate legislation regulating access to and the provision of education.

42. Everyone has the right to bring an action in a court of law asserting his or her right to equal treatment and protection from discrimination (section 9(1) and (2)). The action may seek an order requiring the defendant to refrain from unlawful behaviour, to rectify any unlawful state of affairs and to provide just satisfaction (section 9(2) and (3)).

43. Proceedings commence when an action is lodged by a person who feels wronged by a violation of the principle of equal treatment. In the action, the claimant must identify the person who is alleged to have violated that principle (section 11(1)).

44. Under section 11(2), if the claimant establishes facts giving rise to a justified assumption that there was a violation of the principle of equal treatment, it is the defendant who must show that no such violation occurred. In a judgment of 15 December 2022 on an appeal on points of law in an anti-discrimination action in an unrelated case (no. 5Cdo 102/2020), the Supreme Court took the view that the notion of a "justified assumption" under that provision corresponded to a *prima facie* indication within the meaning of the Convention (paragraph 16 of that judgment).

C. Judicial practice

45. On 28 February 2023 the Prešov Regional Court ruled on an appeal in an anti-discrimination action in an unrelated but similar case (no. 20Co 21/22). It noted that the high proportion of children diagnosed with an intellectual disability was not an omnipresent phenomenon. More than 70% of such children lived in the regions of Prešov, Košice and Banská Bystrica. In Prešov and Košice, children with a diagnosed intellectual disability accounted for 8% of all pupils, whereas in Banská Bystrica, the figure was 6%, compared with a national average of 1.3%. An explanation for this disparity could be the fact that most of the Roma population lived in these three regions (almost 80%). The overrepresentation of Roma children among those diagnosed with an intellectual disability was well known. According to the most recent data, every fifth Roma child was diagnosed with a mild intellectual disability, and Roma children accounted for 71.2% of pupils in special classes for children with a mild intellectual disability, and for 41.7% of pupils in special schools. However, Roma children made up only 12.3% of pupils in primary school.

The Regional Court further noted that the Ministry of Education was the guarantor of the State's educational policy. As such, in cooperation with the legislature, it had proactively to set up mechanisms to prevent violations of the right to education and to compensate the victims of such violations if they had already occurred. The court recognised that the schools involved had no choice but to place their trust in the expert assessments carried out by psychologists. In ordinary tort law, they would bear no liability for enrolling pupils on the basis of the recommendations made by such experts. However, in view of the particular distribution of the burden of proof in anti-discrimination actions, a school was also liable for a violation of a claimant's right to education, although it would bear the smallest share of liability.

II. COUNCIL OF EUROPE SOURCES

46. A summary of general sources may be found in the Court's judgment in *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, §§ 54-61 and 77-80, ECHR 2007-IV), for example.

A. European Commission against Racism and Intolerance (ECRI)

47. In so far as relevant, in its third report on Slovakia (adopted on 27 June 2003), ECRI made the following observations and recommendations:

Education of Roma/Gypsy children

"99. In its second report, ECRI recommended that the area of education of Roma/Gypsy children should be given immediate attention. It recommended that the practice of channelling Roma/Gypsy children into 'special schools' be closely examined, and that it be ensured that the testing procedures used for entry into such schools are fair and fully evaluate the true capacities of each individual child. ECRI recommended that the Slovak authorities should vigorously combat all forms of school segregation towards Roma/Gypsy children. ...

101. ECRI recommended that steps be taken to ensure that Roma/Gypsy children enjoy the same opportunities in practice as majority children to succeed in secondary and further education.

...

103. ... ECRI is extremely concerned to learn that high proportions of Roma children are still being channelled into special schools and that in fact in some settlements, there is no other school available. In some areas, up to 80% of Roma children attend special schools. Moreover, Roma parents are not always fully-informed concerning the different educational possibilities open to their children and may therefore concur with decisions to send their children to special schools believing that it is in the best interests of their child. The authorities have acknowledged that the tests and criteria used to determine which children should attend special schools are not satisfactory and that individual inspectors may be taking decisions which are not justified, and work is currently underway to devise new assessment techniques which are culturally-sensitive. ...

Recommendations:

106. ECRI recommends that immediate steps should be taken to end the overrepresentation of Roma children in special schools, including the preparation and implementation of culturally-fair assessment measures, training for teachers and other persons involved in assessment to ensure that they are making correct decisions, the integration of Roma children currently in special schools into the mainstream school system, and the provision of other schools in settlements where only special schools exist."

48. With regard to the last recommendation mentioned above, in its fourth report on Slovakia (adopted on 19 December 2008 and published on 26 May 2009), ECRI noted and recommended as follows:

"41. The authorities have informed ECRI that in April 2008, a Concept of Education and Training of Roma Children and Pupils, including the Development of High Schools and University Education was adopted. One of the stated objectives of this concept is to lower the percentage of Roma children attending Special Elementary Schools by, among others, maintaining and developing the 'zero year' for children who are deemed not to have the requisite abilities for entering the first grade of elementary school. The authorities have indicated that the concept includes the preparation of socially and culturally independent tests on the educational abilities of six and seven year-old children. The concept also provides that these tests are to be performed solely by pedagogical and psychological advisors. On 6 August 2008, a decree from the Ministry of Education outlining the procedure for placing children in Special Elementary Schools was issued and came into effect on 1 September 2008. Another measure taken with regard to the issue of the over-representation of Roma children in Special Elementary Schools is the adoption in May 2008, of a new School Act which prohibits discrimination and segregation in education.

...

43. As the above measures have only been recently adopted and/or extended, it is difficult at the present stage to assess their impact. Any such assessment is rendered all the more difficult by the fact that no official mechanisms to collect data on the situation of Roma children placed in these types of schools have been established. ECRI notes with interest that some initial positive results have been observed by civil society actors as concerns, for example the 'zero year'. However, the fact that most children placed in these classes are Roma has been noted as having a potentially negative impact on their integration. The authorities should also take more initiatives in addressing the problem of the overrepresentation of Roma children in Special Elementary Schools as it appears that many measures have been implemented at the initiative of/or by NGOs.

44. ECRI thus notes with concern that research demonstrates that Roma pupils continue to be over-represented in Special Elementary Schools. Reports indicate that they are 28 times more likely to be placed in such schools than their non-Roma counterparts, that up to 50% of Roma children are erroneously placed in Special Elementary Schools or classes and that approximately 10% could be immediately reassigned to mainstream education. Three main factors play a role in this phenomenon: 1) the fact that the testing procedures for placing children in these types of schools do not take into account the situation of Roma children, including language barriers; 2) the fact that Special Elementary Schools are provided with three times more funding than mainstream schools in direct proportion to the number of registered children, thus providing an incentive for schools to place Roma children therein, and 3) the fact that for many Roma parents, Special Elementary Schools are an attractive alternative to

mainstream education, among others, because their children will obtain higher scores in those institutions. ...

45. ECRI urges the Slovak authorities to take measures to remove from Special Elementary Schools Roma children who have no disabilities and to integrate them into mainstream education. It also strongly recommends that the measures provided for in the Concept of Education and Training of Roma Children and Pupils, including the Development of High Schools and University Education, in order to address the problem of the disproportionately high number of Roma children placed in Special Elementary Schools, be implemented as soon as possible with adequate human and financial resources.

46. ECRI recommends that the authorities assess the impact of the 'zero year' to ensure that it does not have the effect of continuing the segregation of Roma children."

49. ECRI's report on Slovakia (fifth monitoring cycle), adopted and published on 19 June and 16 September 2014 respectively, contains the following observations and recommendations:

Segregation of Roma children in education

"125. In its third recommendation, ECRI invited the authorities to fight the *de facto* segregation of Roma children in education through the provision of financial and non-financial incentives to desegregate schools. As noted in ECRI's conclusions in 2012, such incentives were not adopted and school segregation seemed to be an ongoing reality in Slovakia.

126. Despite the ban on ethnic segregation guaranteed by the Anti-Discrimination Act and the School Act, *de facto* segregation continues to be practiced. ... Moreover the authorities have admitted that 30% of Roma pupils attend special schools for children with mental disabilities. ... This is often due to an incorrect diagnosis as well as state subsidies which create incentives for school managers and Roma parents to enrol children in special schools. To counter this situation, Roma pupils are often placed in 'zero-year classes' in primary schools to support their educational needs before being enrolled in regular classes. However, in most cases the class composition remains the same until the end of the education cycle, resulting in segregation.

127. ECRI considers that given the differences in quality between mainstream education and education provided in special schools or classrooms, unjustified placement in such schools seriously affects Roma children's future education and employment opportunities. ...

129. The authorities have informed ECRI that they are aware of this persisting problem despite all the legal and practical steps taken so far. The issue has now been discussed in the context of the next phase of the [national Roma Integration Strategy] with a view to allocating adequate funds to programmes countering Roma segregation in school. In particular, the authorities consider that 'it is necessary to increase the quality of the diagnosis prior to assignment to special schools'.

130. ECRI recommends that authorities monitor even more closely the system for assigning Roma pupils to special schools; ensure that the assessment of special needs is used to design an individual curriculum within the mainstream education rather than placing pupils in special schools; adequately inform Roma parents of what special schooling entails; introduce a clear duty for schools to desegregate education and at the same time provide effective support to schools and teachers to achieve this goal."

50. ECRI's report on Slovakia (sixth monitoring cycle), adopted and published on 1 October and 8 December 2020 respectively, contains the following observations and recommendations:

> "86. A second serious problem, yet to be resolved, is currently the subject of European Union infringement proceedings [for more details, see paragraphs 29 et seq. of this judgment above]. By comparison with the European average, Slovakia has far too many Roma children placed in special education programmes which were originally intended for children with mild intellectual disabilities. Many actors in civil society and the education sector underline that the tests that are set before children start attending primary school do not make it possible to establish whether a child is actually suffering from mild intellectual disabilities or merely difficulties due to the highly precarious circumstances in which he or she is growing up. Since most of the children affected by this practice are Roma children, this system appears to constitute indirect discrimination against Roma children which would be contrary to Article 14 [of the Convention] and Article 2 of Protocol No. 1 thereto.
>
> 87. According to the schoolteachers whom the ECRI delegation met, placing Roma children in special classes and schools is often the only way of teaching them in smaller classes and obtaining the essential extra teaching staff. Without these additional resources, it is indeed not possible to do more for these children, who are often left to their own devices, and try to compensate for all the developmental problems that they have accumulated before being enrolled in a school. At the same time, it would seem that there are financial incentives, for both schools and families, which encourage the enrolment of Roma children in special education, and this education is also perceived by Roma parents as a means of protection against the considerable discrimination to which their children are exposed in mainstream education.
>
> 88. ECRI concludes from this that the authorities are allocating far too many resources to an oversized special education system. This system is not suitable for remedying the difficulties experienced by Roma children who have grown up in a world of exclusion, and many of whom have not been prepared linguistically for education in Slovak. ECRI considers that the authorities should firstly – drawing inspiration from the statistics from other countries – make a realistic estimate of special education needs. They should then reduce the capacities of special education to the level necessary to meet these needs and use the financial and human resources that are freed up by investing them in inclusive pre-school and school education. ...
>
> 89. The unjustified placement of a large number of Roma children in special education contributes in addition to their strong segregation. This results in a disproportionately high number of children having to repeat a year and poor school results; only half of Roma children who attend Year 5 reach Year 9 and obtain a certificate.
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> ...
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> 93. ECRI recommends that the Slovak authorities (i) put in place the conditions necessary to ensure that all Roma children from disadvantaged neighbourhoods attend pre-school education from the age of three years, (ii) arrange for Slovak to be taught as a second language to all Roma children who generally only speak Romani with their family, (iii) significantly reduce the number of Roma children enrolled in special education, (iv) abolish school segregation, (v) make the positive measures designed to support Roma children in primary education a permanent fixture, and (vi) increase the number of Roma children who attend secondary education and obtain a certificate."

B. The European Committee of Social Rights

51. In its Conclusions of 5 December 2019 (published on 28 February 2020), concerning a reference period from 1 January 2014 until 31 December 2017, the European Committee of Social Rights noted its conclusions of 2015 that the situation in Slovakia was not in conformity with the European Social Charter because Roma children were disproportionately represented in special classes.

The Committee noted that there had been positive developments consisting of various measures taken by Slovakia in response to those conclusions. Nevertheless, it also noted that following his visit to the Slovak Republic in 2018 (outside the reference period), the Commissioner for Human Rights of the Council of Europe had called on the Slovakian authorities to start addressing the continuing segregation of Roma children in education in a more comprehensive manner. He had noted that little meaningful progress had been achieved in this field since his visit in June 2015.

Furthermore, the Committee noted that in 2016 the UN Committee on the Rights of the Child had found (see paragraph 63 below), *inter alia*, that the number of Roma children placed in schools for children with mild disabilities remained disproportionately high.

There was a lack of concrete information on the measures taken to include Roma children in mainstream education, a lack of data on the number of Roma children in special schools, and a lack of data on the number of Roma-only classes and schools, as well as on trends in that area. In the light of the above, the Committee concluded that the situation in the Slovak Republic was not in conformity with Article 17 § 2 of the European Social Charter (the provision of free primary and secondary education, and the encouragement of regular attendance) because it had not been established that adequate measures had been taken to include Roma children in mainstream education, which resulted in the perpetuation of segregation in education.

52. In its Conclusions of 27 January 2023 (published on 5 February 2024), concerning a reference period from 1 January 2018 until 31 December 2021, the Committee noted the above conclusion and a subsequent report by Slovakia recognising that one of the most significant problems in (addressing) the education of pupils from marginalised Roma communities was their inappropriate placement in special schools. Care was taken to ensure that the vocational activities offered to all children were precisely tailored to their individual needs. The system as a whole provided five levels of support depending on the help which a pupil needed.

The Committee also noted comments by the Slovak National Centre for Human Rights to the effect that despite the measures taken by the Slovak Republic to introduce inclusive approaches in education, persistent,

widespread and systematic discrimination against Roma children and their segregation in education continued. Most pupils in "special classes" and "special schools" for children with intellectual disabilities were Roma, and they were segregated from mainstream education. In 2019 the European Commission had concluded that all the steps taken by the Slovak Republic to prohibit discrimination in education had been inadequate.

Accordingly, the Committee considered that the situation in the Slovak Republic was not in conformity with Article 17 § 2 of the Charter because adequate measures had not been taken to include Roma children in mainstream education.

C. Framework Convention for the Protection of National Minorities

1. Opinions on Slovakia of the Advisory Committee on the Framework Convention for the Protection of National Minorities

53. Already in its first Opinion, adopted on 22 September 2000, the Advisory Committee expressed deep concern about reports according to which a high proportion of Roma children were placed in so-called special schools. While these schools were designed for mentally handicapped children, it appeared that many Roma children who were not mentally handicapped were placed in them due to real or perceived language and cultural differences between Roma and the majority. The Advisory Committee considered that such practice was not compatible with the Framework Convention. The Advisory Committee stressed that placing children in such special schools should take place only when it was absolutely necessary and always on the basis of consistent, objective and comprehensive tests (paragraph 39 of the Opinion). The Advisory Committee noted with satisfaction that the above-mentioned problem was recognised by the Government and that it was designing new measures aimed at ensuring that Roma children had equal access to, and opportunities to continue to attend, regular schools (paragraph 39 of the Opinion). While some progress was noted, similar findings were made in the subsequent Opinions such as, for example, that adopted on 26 May 2005 (paragraphs 94 - 96), 28 May 2010 (paragraphs 144-145) and 3 December 2014 (paragraphs 60-61).

2. Resolutions by the Committee of Ministers on the implementation of the Framework Convention for the Protection of National Minorities by Slovakia

54. Having examined the Advisory Committee's Opinions, the Committee of Ministers noted positive developments. Nevertheless, it observed that there remained problems in the implementation of the Framework Convention as concerned Roma (Resolution ResCMN(2001)5, adopted on 21 November 2001) and that there persisted various forms of

exclusion and segregation which mainly affected Roma children and were a source of concern (Resolution ResCMN(2006)8, adopted on 21 June 2006). In the Resolution adopted on 6 July 2011 (CM/ResCMN(2011)15), it was noted specifically that persisting segregation of Roma children in education was a matter of deep concern, considering that this practice was not compatible with the principles of the Framework Convention. A considerable number of Roma children continued to be placed in "special" schools for pupils with learning difficulties. In that regard, the Committee of Ministers recommended that measures be taken to put an end, without further delay, to unjustified assignment of Roma children to "special" schools and that efforts be pursued and strengthened to ensure adequate inclusion of Roma children into mainstream education. Similar recommendations were also made in the Resolution adopted on 13 April 2016 (CM/ResCMN(2016)6).

D. The Commissioner for Human Rights

55. In his report on his visit to Slovakia from 14 to 16 May 2001 (published on 19 September 2001), Commissioner Gil-Robles noted, *inter alia*, that the Roma/Gypsy community was the least educated: in some regions, 80% of the children were placed in specialised institutions; only 3% got as far as secondary school and only 8% as far as secondary-level technical school.

In both Bratislava and Košice (in Eastern Slovakia), talks with the authorities and the Roma/Gypsy population showed that there was very long-standing distrust between the Roma/Gypsy community and the authorities, and between that community and the rest of civil society. There were prejudices on all sides, making it impossible to pursue a policy of integration and participation. While the authorities claimed that the Roma/Gypsies were very nonchalant about working, taking care of their homes and sending their children to school, to give but a few examples, the Roma/Gypsy community protested at the policy of discrimination from which it suffered at all levels of society. There was only one alternative to these two opposing positions: working together to improve the socio-economic situation of this national minority.

56. A follow-up report on the Slovak Republic (2001-2005), published on 29 March 2006, concerning the assessment of the progress made in implementing the recommendations of Commissioner Gil-Robles, noted that ensuring access to education was still a serious challenge; the segregation of Roma children in special schools continued, whilst the number of Roma continuing their education to secondary school level remained low (paragraph 20).

Efforts were being made to tackle the segregation of Roma children in special schools. A "Policy Concept of Integrated Education of Roma Pupils and Youth, Including the Development of Secondary and Higher Education"

had been approved by the Slovak Government in 2004, and a number of PHARE-sponsored projects had been developed in this area. Particular importance had been attached to the "Reintegration of Socially Disadvantaged Children from Special Schools to Standard Elementary Schools" project, which would be finalised by 2006. This project covered the creation of objective, compulsory diagnostic tests for all children to determine whether they should attend regular or special schools. The tests were designed to identify only children with disabilities or special intellectual needs and to prevent the separation of children whose development had been affected by their socially marginalised environment. Further efforts had concentrated on increasing pre-school education, the creation of a Year Zero in primary school, the introduction of teaching assistants, all-day teaching and reintegration modules in the education process, and establishing and operating community centres (paragraph 28).

In his conclusions, the Commissioner remained concerned about the unjustified placement of Roma children in special schools and their transfer to such establishments, and urged the authorities to carefully monitor positive recent legislative and administrative reforms intended to ensure equal access to quality education, which was central to the integration of all Roma (paragraph 31).

57. In his report following his visit to Slovakia from 26 to 27 September 2011 (published 20 December 2011), Commissioner Hammarberg made the following observations and conclusions:

> "5. Segregation in the education system
>
> 42. The Commissioner is concerned that many Roma children in Slovakia continue to receive education of lower quality than their non-Roma peers due to policies and practices resulting in segregation. There are two main ways in which segregation manifests itself: the disproportionate placement of Roma children in special schools or classes for children with mild mental disabilities; and the assignment of Roma children to Roma-only mainstream schools or classes.
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> 43. As regards the disproportionate placement in special schools or classes for children with mild mental disabilities, the Commissioner notes that according to a 2009 survey by the Roma Education Fund, across Slovakia Roma children represent 85% of all pupils attending such schools. In 2009, ECRI noted reports indicating that these children are erroneously placed there in up to 50% of cases and that 'approximately 10% could be immediately reassigned to mainstream education'.
>
> 44. The factors that contribute to this situation are numerous and interconnected. One aspect appears to be that in Slovakia social disadvantage, which is prevalent among many Roma children, is lumped together with mental disability in determining a child's special education needs. Therefore, the approach that currently tends to deal with mental disability through special education instead of integration in mainstream classes (see below, Section II. 3.) is somewhat echoed in the manner in which the education system deals with social disadvantage. Another aspect is connected with the child assessment procedures, which reportedly do not fully take into account certain specificities (such as that Slovak may not be the language the children speak at home) and leave room for conscious and unconscious prejudice on the part of the assessors.

There are then economic factors which play a role. For instance, the fact that special schools are provided with three times more funding than mainstream schools in direct proportion to the number of registered children is reported to be an incentive for these schools to enrol Roma children.

45. Although a child can be placed in a special school only with the prior consent of the parents, in practice the consent is apparently often given on the basis of insufficient information about the consequences of this decision. A lack of long-standing tradition of formal education among some Roma families may also play a role as does the fear that children may be mistreated by their non-Roma peers in mainstream schools. The Commissioner was informed that some Roma parents view special education as a viable alternative because their children obtain higher marks in these institutions. Clearly, however, more could be done to thoroughly inform them about the real implications of this choice for the future of their children and more generally, to assist them in securing better long-term educational opportunities.

46. Once a child is placed in a special school or class, reintegration in mainstream schools is very rare. Reassessment of pupils is not required by law and generally only happens if a parent requests it. Reintegration is also all the more difficult as special education has already considerably reduced the child's ability to follow the curriculum in mainstream schools. The Commissioner had a clear illustration of these difficulties when he visited the school in Plavecký Štvrtok (a Roma-majority mainstream school with a special education section), whose Headmaster confirmed that no child there had ever been able to make the transition from special education back to mainstream education.

47. [On the subject of segregation, the school in Plavecký Štvrtok] has 139 pupils, 90% of whom are Roma ...

49. In segregated mainstream schools or classes, Roma children also frequently end up receiving a lower standard of education. Teachers in Roma-only classes are reported to often have lower expectations of their students and fewer resources and poorer quality infrastructures at their disposal.

...

Conclusions and recommendations

...

53. The Strasbourg Court has ruled on several cases concerning practices resulting in the segregation of Roma children into separate, substandard educational arrangements. In particular in 2007, ruling in the case of *D.H. and Others v. Czech Republic*, the Court's Grand Chamber found, also on the basis of statistical evidence showing dramatic disparities in the placement of Roma children in special schools for children with mild mental disabilities, that the applicants had been discriminated against in the enjoyment of their right to education.

54. In order to ensure that Roma children's right to education is respected, the Commissioner calls on the Slovak authorities to make clear advances in the establishment of inclusive, de-segregated education, notably by setting clear and measurable targets for transfers of children from special to ordinary education and for overall desegregation of the school system. The focus should be on special measures to support Roma children and their parents during the transition process.

..."

58. The report by Commissioner Muižnieks, following his visit to the Slovak Republic from 15 to 19 June 2015 (published 13 October 2015), contains the following passages:

> "2.2.3 DISCRIMINATION OF ROMA CHILDREN IN THE EDUCATION SYSTEM
>
> 81. The serious, persistent deficiencies in Roma children's access to education are an issue of major concern to the Commissioner. According to the 2010 UNDP household survey, almost one in five Roma persons (18.4%) did not finish primary education, 59.7% finished primary school and only 17% continued into further secondary studies. ... While compulsory school attendance was high, with practically all Roma children enrolled in school, completion rates of secondary education were very low, with 39% of Roma women and 28% of Roma men aged 16-24 having stopped school before the age of 16.
>
> 82. The Commissioner remains deeply concerned by the long-standing, widespread practice consisting in placing Roma children either in special schools or classes, or in separate classes or schools within the mainstream education system. According to the UNDP 2010 household survey, 43% of Roma children enrolled in mainstream schools were in practice attending ethnically segregated classes. In 2008-2009 the Roma Education Fund estimated the share of Roma pupils at 60% in special schools and at 86% in special classes functioning in mainstream schools. In 2013, based on research carried out in 21 inspected schools, the Ombudsperson found that Roma children represented 88% of children enrolled in special primary schools and classes.
>
> 83. In this context, the Commissioner notes the view expressed by the National Lifelong Learning Institute of Slovakia that the Slovak education system is 'one of the most unfair systems in Europe', the most discriminated children being those who are affected by social marginalisation, poverty, or a language barrier.
>
> 84. ... Concerning enrolment in special classes and schools, the Commissioner's interlocutors have stressed that while this is based on parental consent, in many cases parents are not adequately informed about the serious consequences of their choice for the future of their children.
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> ...
>
> 86. ... [With regard to the situation in a specific school visited by the Commissioner (the elementary school in Kecerovce, near Košice)] the Commissioner's interlocutors considered kindergarten as an essential step before school, helping children start at the same level of basic knowledge. In fact, some 60% of the children coming to the school were enrolled first in pre-school 'zero' classes designed to help children who did not attend kindergarten. ...
>
> 87. However, the Commissioner notes that not all children who had attended 'zero' classes were then included in mainstream courses in elementary school. Although the specialist staff of the school expressed their view that it was 'definitely possible' to bring children to the adequate level for starting mainstream education, the Commissioner found with surprise that 44 of the school's pupils were enrolled in five special classes. Moreover, the specialist staff admitted that once a child was included in a special class, this decision was not going to be changed later to integrate the child into mainstream education.
>
> ...

> 92. The Commissioner is also pleased that the annex to the [National Human Rights Strategy] on the 'Rights of persons belonging to national minorities and ethnic groups' includes as a priority the adoption of measures 'to prevent the unjustified placement of Roma children in separate schools and classes'.
>
> ...
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> 94. While [various positive] developments are [noted and] welcome[d], the Commissioner notes the views expressed by some NGOs that they do not remove the system of special education and do not tackle issues which are crucial for combating the segregation of Roma children, such as ethnically and culturally biased diagnostics; the existence of *de facto* segregation in Roma-only schools or classes; or the insufficient methodological guidance and financial support for schools enabling them to educate children inclusively. ..."

59. In his statement after his follow-up visit to the Slovak Republic between 12 and 16 March 2018 (published 16 March 2018), with regard to inclusive education, Commissioner Muižnieks called on the Slovakian authorities to start addressing the continuing segregation of Roma children and children with disabilities in education in a more comprehensive manner. Noting that little meaningful progress had been achieved in this field since his visit in June 2015, the Commissioner stressed that "measures to tackle school segregation [could] not be *ad hoc*, piecemeal and temporary. They [had to] be bold and sustainable and reflect a long-term vision of inclusion shared by all stakeholders and supported across all levels and areas of the administration."

The Commissioner welcomed the acknowledgment from the government that there was a need to tackle school segregation, as well as some of the legislative and policy measures that had been put in place since his last visit. Overall, however, the efforts which had been made so far did not appear to be commensurate with the inclusion challenges which the country faced. Although he had found examples of successful desegregation and inclusion, these often depended on the goodwill and efforts of individual schools, parents or other actors, but were not the result of a systemic approach.

Moreover, the Commissioner noted with interest the Slovakian authorities' intention to reform the diagnostic methods used in relation to primary school enrolment. In line with his position paper on inclusive education, he expressed hope that this would provide an opportunity to shift the focus from measuring children's abilities – for the purpose of deciding whether they should be enrolled in special education – to assessing how their needs could be best met in mainstream education.

III. EUROPEAN UNION LAW

60. The European Union Charter of Fundamental Rights, in so far as relevant, provides as follows:

Article 14

Right to education

"(1) Everyone has the right to education and to have access to vocational and continuing training."

Article 21

Non-discrimination

"(1) Any discrimination based on any ground such as ... race, colour, ethnic ... origin, ... disability ... shall be prohibited."

61. The European Union Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in so far as relevant, provides:

Recital 9

"Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty ... It may also undermine the objective of developing the European Union as an area of freedom, security and justice."

Recital 19

"Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection ..."

Recital 21

"The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought."

Article 1

Purpose

"The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment."

Article 2

Concept of discrimination

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

(2) For the purposes of paragraph 1:

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

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

Article 3

Scope

"(1) Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

...

(g) education;

..."

Article 8

Burden of proof

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

..."

IV. UNITED NATIONS SOURCES

62. A summary of general sources may be found in the Court's judgment in *D.H. and Others v. the Czech Republic* (cited above, §§ 92, 93, 95-98 and 100-102), for example.

63. In its Concluding observations on the combined third to fifth periodic reports of Slovakia (CRC/C/SVK/CO/3-5, 20 July 2016, paragraphs 44 and 45), the UN Committee on the Rights of the Child expressed concern, *inter alia*, that Roma children continued to be victims of *de facto* segregation in the school system. Over 50% were taught in Roma-only classes or attended classes in separate school premises, which often provided inferior education. Despite the recent legislative amendments, the number of Roma children placed in schools for children with mild disabilities remained disproportionately high, and the psychological assessment process which took place while children attended school continued to fail to take into account the different socio-economic backgrounds of Roma children. In addition, Slovakia's legislation did not provide that an initial diagnosis of a disability should be regularly re-evaluated. Accordingly, the Committee recommended, *inter alia*, that Slovakia include in its legislation the requirement that an initial diagnosis of a disability affecting a child with special educational needs had to be periodically re-evaluated; such re-evaluation could not be conditional upon the child's parents making a request in that regard.

64. Similar concerns and recommendations were expressed in the Concluding observations on the fourth report of Slovakia by the UN Human

Rights Committee (CCPR/C/SVK/CO/4, 22 November 2016, paragraph 18) and the Concluding observations on the combined eleventh and twelfth periodic reports of Slovakia by the UN Committee on the Elimination of Racial Discrimination (CERD/C/SVK/CO/11-12, 12, January 2018, paragraphs 25 and 26).

THE LAW

I. PRELIMINARY REMARKS

65. There are two forms of education for children with intellectual disabilities in Slovakia: education in special classes of mainstream schools, and education in special schools. The present application primarily concerns education in special classes of mainstream schools. With regard to the issues at stake in this case, the two forms of special education have similar features and the available data often concern both. In so far as appropriate, the Court will take into account the general context of special education in Slovakia. However, education in special schools is not the focus of its assessment.

66. While the Court is aware that there have been efforts and developments in this area (see, for example, paragraphs 48, 51, 53, 54, 56 and 58 above), the situation which is decisive for the assessment of the present application is the one which existed at the time the applicant was actually at school.

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

67. The applicant complained that he had been discriminated against in the exercise of his right to education, in violation of his rights protected under Article 14 of the Convention, in conjunction with Article 2 of Protocol No. 1 to the Convention.

Article 14 of the Convention reads as follows:

> "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 provides that:

> "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. Admissibility

68. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

69. The applicant complained that he had been discriminated against in his right to education through his enrolment and schooling in Year Zero and in special classes.

Such classes followed and provided an inferior curriculum and facilities compared with mainstream classes, and Roma pupils were overrepresented in them. In general, the tests used for selecting pupils for such classes took no account of the specificities of Roma children and were thus biased.

The test carried out on him on 16 January 2006 had been performed as early as four months after he had started in the first year of a mainstream class, and there was no indication that it had considered any particular aspect of his social and cultural profile. That test and subsequent ones (except for the test of 23 June 2011) had completely failed to consider whether it was possible for him to be integrated or reintegrated into mainstream classes, subject to any individual measures, and, if so, which measures were appropriate. Even though the RR screening test took into account some but not all specificities of Roma children, it was not suitable for diagnosing a mild intellectual disability, but only for ruling it out. The WISC III test made no allowance for such considerations at all, and its results were to be interpreted with caution.

At any rate, determining whether a young child had an intellectual disability required a complex diagnostic process, not just a one-off examination.

There was no rule or systematic practice in relation to retesting pupils who were in the special education system on account of a mild intellectual disability, and there had been excessively long intervals between the tests carried out on him.

As his parents had not been advised about the implications of his enrolment in the special education system, their consent could not be considered informed.

The results of the test on 23 June 2011 had acknowledged that his development was within the normal range and that he could be transferred to a mainstream class, and his parents had made a request to that effect. However, instead of being transferred, he had been subjected to further testing. It was significant that, as established by the Public Defender of Rights

of Slovakia in relation to the academic year 2012/13, no pupils had been transferred from the special education system to the mainstream system (see paragraph 81 below).

70. The applicant acknowledged that he did not speak Romani at home and explained that a misunderstanding with his lawyer had meant that it had been stated before the domestic courts that he did. Nevertheless, as noted in the reports on his tests of January and April 2006, he did speak a dialect of Western Slovakia and his understanding of Slovak was limited. It was true that at school he had had problems with discipline, but these had been exaggerated by PSPS and at any rate had not been the reason for his transfer to the special education system.

71. In the applicant's submission, the Government had failed to refute the statistics on the overrepresentation of Roma pupils in the special education system and to demonstrate that the available tests and the use of such tests had fairly and objectively determined his academic ability and intellectual capacity at the material time.

72. The applicant referred to the ongoing infringement proceedings before the CJEU following an action brought by the European Commission, and considered that Slovakia had failed in its duty to ensure inclusive education in line with its international obligations. In that regard, he pointed to domestic decisions such as that of the Prešov Regional Court of 28 February 2023 in an unrelated but similar case (see paragraph 45 above).

73. The applicant also contended that he had been denied procedural safeguards in his anti-discrimination action, since the courts had arbitrarily refused to acknowledge that the burden of proof had shifted to the defendants.

74. In response to an argument raised by the Government in relation to his sister's situation (see paragraph 78 below), the applicant expressed that her situation had not been the subject of the domestic proceedings, nor was it relevant to the assessment of his application to the Court.

(b) The Government

75. The Government referred to the applicant's academic history and the underlying testing, arguing that everything had been in full compliance with the applicable rules. Relying on the findings of the experts at national level and on the conclusions of the domestic authorities, the Government vigorously opposed the allegation that the applicant's origin had played a role in his schooling.

76. No relevant limits on his linguistic understanding of the tests had been identified. The RR screening test used in relation to his initial enrolment in Year Zero was adapted to the specificities of Roma pupils. The tests used in 2009 and October 2011 were also suitable for that specific situation.

77. The tests had established the applicant's academic ability and needs at the material time, which by their nature could evolve. Accordingly, the test of 23 June 2011 had had no direct bearing on the results of the earlier and

later tests. Nevertheless, even that test had resulted in a recommendation that the applicant remain in special classes, and that had been confirmed by the results of two subsequent tests. In addition to learning difficulties, the applicant had also had serious problems with discipline.

78. Accordingly, like any other pupil, the applicant's schooling had been provided solely on the basis of his individual learning ability and needs. This was demonstrated by the example of his own sister, who had completed her mandatory schooling in mainstream classes (see paragraph 33 above).

79. Furthermore, there was no indication that the applicant's enrolment in Year Zero and in special classes had had any negative impact on his prospects as regards further education. Such prospects had materialised in him being admitted to secondary education, which he had abandoned of his own accord.

The statistical data relied on by the applicant were general in nature and did not give rise to any uncertainty as regards the treatment he had received in the specific circumstances of his individual case. Moreover, in so far as the applicant relied on other cases, such as that decided by the Prešov Regional Court on 28 February 2023 (see paragraph 45 above), the facts of that case had been significantly different from those of the present case. Unlike in the present case, the claimants in that case had initially been subjected to tests that had not been suitable for their specific situations; it had even been recommended that one claimant be enrolled in a mainstream class, and tests performed later had resulted in a recommendation that all the claimants be transferred to mainstream classes.

2. The third parties' comments

80. In their joint observations, the European Network of Equality Bodies and the Slovak National Centre for Human Rights referred to reports and findings of various European and international bodies concerning the situation of Roma in education in Slovakia, as well as to the findings of Slovakian courts made in unrelated cases as specified above.

States had a positive obligation to rectify the persistent segregation of Roma children in schools, including their disproportionate placement in special schools. Such placement was directly linked to their low educational attainment, limited opportunities to continue their education and higher unemployment rates in Slovakia.

The country needed to prevent and address segregation, promote inclusive education systems (including ones for children of Roma origin and children with disabilities) and refrain from using biased tests to place children in special schools.

The best interests of the child had to play a central role in any decision made on a child's behalf. Therefore, even when there was parental consent, it was invalid in cases where it violated a child's right to equality in education. States were also bound to provide for effective safeguards and remedies to challenge decisions.

81. The Public Defender of Rights referred to a 2013 report issued by his office, according to which some 88% of pupils enrolled in Year One in the special schools and special classes in mainstream schools which had been reviewed in the academic year 2012/13 had been of Roma origin. None of the pupils enrolled in these establishments in that academic year had been reintegrated into mainstream classes after being retested. Such enrolment thus appeared to be of a practically permanent nature. At the same time, it predetermined the scope of the education a student was able to receive, and therefore the student's future. Another report issued in 2014 had revealed a general failure in primary schools subject to review which provided special education to consider the unique circumstances of Roma children in relation to the diagnostic methods used in the enrolment process. This constituted indirect discrimination in access to education. The Public Defender of Rights cited official data from 2019 from the Ministry of Finance of Slovakia which indicated that 63% of pupils enrolled in special classes in Slovakia were of Roma origin, and that 16.1% of pupils from Roma communities received special education on account of what had been diagnosed as a mild intellectual disability (the overall national average being 3.2%). According to the same source, the number of pupils in special education in Slovakia was almost four times higher than the European Union average, and 71% of the pupils who received special education in Slovakia did so on account of what had been diagnosed as a mild intellectual disability.

82. Validity Foundation pointed to the factors of vulnerability and reasonable accommodation which were applicable in situations involving an intellectual disability where the right to education was at stake. Inclusive education was not compatible with maintaining a separate mainstream education system and a special education system for students with disabilities. Segregation occurred when students with disabilities were educated in separate environments that were designed or used to respond to a particular impairment, in isolation from students without disabilities. Where there was a history of direct discrimination with continuing effects and structural deficiencies, there was a particularly stringent duty on the part of the State to take positive measures to assist pupils with any difficulties they encountered in following the school curriculum. Positive obligations were also a major theme in the accessibility of inclusive education for children with disabilities.

3. The Court's assessment

83. The relevant Convention principles regarding alleged discrimination against Roma pupils in the enjoyment of their right to education were set out in *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, §§ 175-81, ECHR 2007, with further references) and *Oršuš and Others v. Croatia* ([GC], no. 15766/03, §§ 144 and 146-48, ECHR 2010, with further references), and further summarised in *Horváth and Kiss v. Hungary* (no. 11146/11,

§§ 101-108, 29 January 2013, with further references) and *Lavida and Others v. Greece* (no. 7973/10, §§ 61-64, 30 May 2013, with further references), and include the following:

- Discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed, in certain circumstances, a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.

- Discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment. The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.

- As a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority. They therefore require special protection. Their vulnerable position 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.

- The word "respect" in Article 2 of Protocol No. 1 means more than "acknowledge" or "take into account"; in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. Nevertheless, the requirements of the notion of "respect", which appears also in Article 8 of the Convention, vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States. As a result, the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

- In the context of the right to education of members of groups which have suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures in order to, *inter alia*, assist applicants with any difficulties they have encountered in following the school curriculum. These obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems, such as active and structured involvement on the part of the relevant social services.

- A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. Such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent.

- A general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who are identifiable on the basis of an ethnic criterion may be considered discriminatory notwithstanding that it is not specifically aimed at that group, unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate.

- Discrimination potentially contrary to the Convention may result from a *de facto* situation.

- Where it has been shown that legislation produces such an indirect discriminatory effect, in cases in the educational sphere, it is not necessary to prove any discriminatory intent on the part of the relevant authorities.

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

- Where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden of proof shifts to the respondent State. The latter must show that the difference in treatment is not discriminatory. Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case, it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.

(a) Whether there was a difference in treatment

84. The core of the applicant's argument in the present case is his contention that as a person of Roma origin, he was the victim of a situation whereby a disproportionately high number of Roma pupils were enrolled in special classes during his schooling at PSPS, and that such schooling provided him with a lower standard of education than mainstream education.

On that account, the Court notes that, in contrast to the ordinary, where primary school education starts by Year One and takes place in mainstream classes, the applicant's schooling started by Year Zero (academic year 2004/05), followed by Year One in in a mainstream class (academic year 2005/06), and then continued in special classes of the PSPS (from academic year 2006/07 onwards) (see paragraphs 7, 10 and 14 above).

85. The applicant's argument is supported by findings made by Council of Europe and UN bodies as well as the Public Defender of Rights of

Slovakia, which noted, with regard to the relevant time and the period up to the present day, that special education in Slovakia constituted an inferior standard of education and that there was persistent, widespread and systematic overrepresentation of Roma pupils in special education (see paragraphs 47-55, 53-54, 57-58, 63-64 and 81 above). The fact that it is well known that Roma children are overrepresented among those diagnosed with an intellectual disability has also recently been recognised by a Slovak court (see paragraph 45 above).

86. For example, a 2015 report by the Council of Europe Commissioner of Human Rights cited data from 2008-09 indicating that 86% of pupils in special classes in mainstream schools were Roma (see paragraph 82 of the report cited at paragraph 58 above), which is consistent with the existing indication as to the overall proportion of Roma pupils in the special education system (in both special classes and special schools) compared with non-Roma pupils in that system, as well as the proportion of Roma pupils in the special education system compared with Roma pupils in the mainstream education system.

In that regard, in its reports produced in 2008 and 2014, ECRI observed that Roma pupils were 28 times more likely to be placed in special schools and that 30% of Roma pupils attended such schools (see paragraphs 44 and 126 of the reports cited at paragraphs 48 and 49 above).

In addition to the findings already noted, the office of the Council of Europe Commissioner for Human Rights, in its report of 2001, identified that the proportion of Roma pupils in specialised institutions in some regions was 80% (see paragraph 55 above), and in its report of 2015, referred to the findings of the Public Defender of Rights (see paragraph 82 of the report cited paragraph 58 above) establishing that 88% of pupils in Year One in the special education system in the academic year 2012/2013 were Roma (see paragraph 81 above).

Moreover, on the basis of data from 2019, the Public Defender of Rights noted that 63% of pupils in special classes were Roma, and 16.1% of Roma children received special education on account of a diagnosed mild intellectual disability (see paragraph 81 above). In the Court's view, these indicators should be viewed in connection with the fact that it has been established that the national average for the proportion of children in special education is 3.2%, and it has recently been established that Roma children make up 12.3% of all primary school pupils (see paragraphs 45 and 81 above).

87. The Court is aware that the above-mentioned reports also noted that there was a lack of official data on the situation of Roma children placed in such establishments. Nevertheless, the figures provided in those reports are coherent and have not been disputed, and no alternative statistical evidence has been produced.

88. The decisive criterion for enrolment in special classes is the assessment that the pupil concerned suffers from a mild intellectual disability,

and it has not been disputed that, but for some exceptions such as the RR screening test, the tests used for that assessment at the time the applicant was at school were the same for the entire population (see, in particular, the position taken by the Institute, as cited at paragraph 34 above).

89. In the circumstances, the Court accepts that the available figures reveal a dominant trend of a general policy or measure exerting a disproportionately prejudicial effect on the Roma, a particularly vulnerable group (see *Horváth and Kiss*, cited above, § 110). In the Court's view, the existence of this situation is confirmed by the position of the domestic authorities, which have been taking or providing for corrective measures in that regard (see, for example, paragraphs 48, 53-54, 49 56 and 59 above).

90. Accordingly, there exists a *prima facie* case of indirect discrimination. It thus falls on the Government to prove that in the case of applicant, the difference in treatment had no disproportionately prejudicial effects due to a general policy or measure couched in neutral terms, and that therefore the difference in treatment was not discriminatory.

(b) Whether the difference in treatment had an objective and reasonable justification

91. 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. Moreover, 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 *Horváth and Kiss*, cited above, § 112).

(i) Legitimate aim

92. The Court notes that a multitude of interrelated factors play a role in the practice whereby Roma children are enrolled in the special education system in Slovakia, including aspects of intellectual capacity and socio-economic disadvantage in particular (see paragraphs 7, 11, 17, 20, 34, 50, 56 and 57).

93. The Court found in the past that the existence of a system of special education for children with special educational needs which was linked to their intellectual capacity might, in principle, be justified as serving a legitimate aim (ibid., § 113). It considers unnecessary to make a definitive ruling on this question on the facts of the present case since, even assuming that the applicant's enrolment in the special education system served such a legitimate aim, it was not proportional as established below.

94. In so far as the applicant's behavioural issues were referred to in the present case, there is no indication at a systemic or individual level that those issues actually led to his enrolment in special classes.

95. Similarly, it has not been confirmed that language issues played any significant role in his enrolment in such classes (see paragraphs 24 and 70 above).

(ii) Proportionality

96. As to the method used to determine the level of the applicant's intellectual capacity, which was the criterion for his enrolment in special classes, and the associated question of the proportionality of that enrolment, the Court has already noted above that the applicant's capacity was established on the basis of tests. The relevant tests took place in January 2006, April 2006, June 2009, November 2009, January 2011, June 2011 and October 2011 (see paragraphs 11, 12, 15, 16, 17, 18 and 20 above).

97. As reflected in the response of the domestic authorities referred to in the various reports cited above, it appears to be generally accepted that the diagnostic methods used to determine a child's intellectual capacity at the relevant time were imperfect (see paragraphs 49, 56, 58, 59 and 81 above). In that regard, the Court noted in *Horváth and Kiss* (cited above, § 115) that the inappropriate placement of Roma children in special schools had a long history across Europe, and held that in circumstances involving recognised bias in previous placement procedures, the State had a positive obligation to avoid the perpetuation of past discrimination or discriminative practices disguised as allegedly neutral practices (ibid., § 116). It was accordingly incumbent on the State to demonstrate that the tests in question and the application of those tests were capable of fairly and objectively determining a person's academic ability and intellectual capacity (ibid., § 117).

98. As to the present case, there appears to be a consensus that diagnosing a mild intellectual disability in young children is a challenging process (see paragraphs 18 and 34 above). From that perspective the Court finds it appropriate to point out that, unlike in *Horváth and Kiss* (cited above, § 118), the diagnostic process used in the present case appears to have included no exact parameters such as IQ.

99. The Government's argument concerning the applicant's testing was based on the contention that the test used prior to his initial enrolment in a special class and the tests used when he was retested in 2009 were adapted to the specificities of Roma pupils and suitable for that particular situation (see paragraph 76, together with paragraphs 11, 15 and 16 above).

100. In that regard, while being aware that it is not its role to judge the validity of the tests used or to identify the state-of-the-art, least culturally biased test of academic ability, the Court is called upon to ascertain whether efforts were made in good faith to implement non-discriminatory testing (ibid., § 119).

101. As specified in the position statement issued by the Institute on 4 May 2015, a copy of which was submitted to the Court by the Government themselves, there were no specific tests designed for pupils from socially

disadvantaged environments, and there were only tests which were more suitable for testing them and tests which were less suitable. While none of the tests could actually diagnose a mild intellectual disability, good results in those tests could rule out such a disability. In the event of poor results, the diagnosis was to be determined by a psychologist, taking into account the test results and other information about the child (see paragraph 34 above).

102. The applicant's examinations on the basis of the tests at issue in the present case were a combination of psychological and special education examinations. In January 2006 they comprised the RR screening test, which had been developed to distinguish between intellectual disability and socio-economic disadvantage. Nevertheless, the Court accepts that the aim of the test was not to determine a mild intellectual disability, but only to rule it out. As the test did not rule out a mild intellectual disability in the applicant's case, the relevant diagnosis was in fact based on the results of the WISC III test, which was carried out alongside the RR screening test. The WISC III test was a general test used across the population with no particular regard for any specificities of Roma people (see paragraphs 11 and 34 above).

103. It has not been established that the other tests referred to by the Government were in any way specifically designed to prevent the misdiagnosis of pupils from socio-economically disadvantaged backgrounds.

104. Except for the examination in June 2011, which concluded that the applicant's development was within the normal range (see paragraph 18 above), all the other examinations concluded that he suffered from a mild intellectual disability. In so far as the Government sought to contest the results of the examination in June 2011 by claiming that academic ability could evolve (see paragraph 77 above), this argument appears to be undermined by the position statement issued by the Institute on 4 May 2015, which said that a mild intellectual disability was by definition permanent. In that position statement, the Institute also said that if one establishment diagnosed a mild intellectual disability and another ruled it out, the latter assessment was probably correct, and that if there were doubts about differing results, a decisive third opinion could be obtained from the Institute (see paragraph 34 above).

105. In the present case, the applicant's examination in June 2011 took place at the Institute. However, rather than accepting the result of that examination as decisive, the authorities proceeded to retest the applicant in October 2011, ultimately maintaining his enrolment in a special class on the basis of the results of that subsequent testing (see paragraph 20 above).

106. In that context, the Court also takes into account that according to the findings of ECRI in its report published in 2009, up to 50% of Roma children in the special education system had been enrolled in it erroneously, and approximately 10% of them could be transferred into mainstream education immediately (see paragraph 44 of the report cited at paragraph 48 above).

107. In these circumstances, the Court considers that, at the very least, there is a danger that the tests used in the applicant's case were culturally biased. It must therefore be considered to what extent any special safeguards were applied that would have allowed the authorities, in the placement and periodic review process, to take into account the particularities and special characteristics of the Roma applicants who took those tests, in view of the high risk of discriminatory misdiagnosis and inappropriate placements (see *Horváth and Kiss*, cited above, § 121).

108. As has already been noted above, the only test used in the applicant's case that took into consideration any particularities and special characteristics of Roma pupils was the RR screening test, which had only limited impact on his diagnosis of a mild intellectual disability.

109. As established by the above-mentioned reports and by the Public Defender of Rights (see paragraphs 49 (paragraph 126 of the cited report), 57 (paragraph 46 of the cited report), 58 (paragraph 87 of the cited report) and 81 above), the enrolment of a pupil in special classes was *de facto* permanent. Moreover, the observations made by Commissioner Hammarberg (cited in paragraph 57 above) related specifically to PSPS, whose headmaster was referred to in his report as having confirmed to him that no child at that school had ever been able to make the transition from special education back to mainstream education.

110. In the Court's view, the problem posed by the *de facto* permanent nature of enrolment in the special education system in Slovakia at the relevant time was directly linked to another feature of that education system, in particular the fact that there appears to have been no systematic retesting with a view to monitoring any developments which might justify a pupil's transfer back into mainstream education. In the applicant's case, following his initial testing at the Centre in 2006, the subsequent tests there in 2009 and January 2011 appear to have been *ad hoc* (see paragraphs 15, 16 and 17 above), and they were carried out following a request by the applicant's parents (see paragraphs 18 and 20 above). Even though the results of the test at the Institute on 23 June 2011 concluded that the applicant could be enrolled in a mainstream class, with an individual study programme, ultimately it was recommended that he continue his education in a special class with an extended curriculum.

111. The said recommendation essentially had to do with enabling the applicant to complete lower secondary education withing the mandatory school attendance age (see paragraph 18 above). Nevertheless, his parents requested his transfer in a mainstream class and, in circumstances already noted at paragraph 105 above, such request was not accommodated. The permanent nature of the applicant's enrolment in a special class was thereby confirmed in practice. This has however remained short of any initiative to provide him with an extended curriculum as recommended by the Institute.

112. Furthermore, the Court observes that when the applicant asserted his right not to be discriminated against in the exercise of his right to education, although the domestic courts recognised in general terms the existence of problems in ensuring the right to education of the Roma minority in Slovakia, they failed to draw any conclusions from that for the assessment of the applicant's case with regard to the distribution of the respective burden of proof (see paragraphs 24, 26 and 28 above). By a similar token, no answer was given to his argument that the consent of his parents to his enrolment in the special classes had not been endowed with features making it an informed one (see paragraphs 22, 24, 25, 26, 27 and 28 above).

113. The above considerations support a conclusion that the applicant's schooling in the special class was not attended by adequate safeguards to ensure that the State, within its margin of appreciation in the sphere of education, took into account the special needs of Roma pupils as members of a disadvantaged class (see *Horváth and Kiss*, cited above, §§ 126 and 127, with further references).

114. In short, the applicant was placed in a special class for children with mild intellectual disabilities, where a more basic curriculum was followed than in mainstream schools. As a consequence, he received an education which did not offer the necessary guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special education.

115. It has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, and that the State, in a situation where there was a *prima facie* case of discrimination, has failed to prove that it provided the guarantees needed to avoid the misdiagnosis and inappropriate placement of Roma pupils. The Court therefore considers that the applicant must have suffered discriminatory treatment.

116. Consequently, in the instant case, there has been a violation of Article 14 of the Convention, taken in conjunction with Article 2 of Protocol No. 1.

117. In view of the above conclusion, the Court finds it unnecessary to examine other components of the applicant's complaint, in particular those concerning his enrolment in Year Zero.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. Article 41 of the Convention provides:

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

A. Damage

119. The applicant claimed 12,000 euros (EUR) in respect of non-pecuniary damage.

120. The Government contended that the amount of the claim was overstated.

121. The Court awards the applicant EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

122. The applicant also claimed EUR 9,960 for legal fees incurred at domestic level and before the Court. In support of this claim, he submitted a copy of an unsigned contract between the lawyer representing him at domestic level and his representative before the Court, pursuant to which the latter was to pay the former EUR 2,200 for aiding in the "conduct [of] litigation concerning the situation of Romani children in [PSPS] on behalf of individual applicants". In addition, he submitted a calculation of the fees of his representative before the Court.

123. The Government requested that the matter be determined according to the Court's case-law.

124. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI)).

125. In the instant case, the claim has not been substantiated, as nothing has been submitted to show that the applicant was under an obligation to pay the cost of the legal services in question or that he has actually paid for them (see *Ištván and Ištvánová v. Slovakia*, no. 30189/07, § 122, 12 June 2012).

126. The claim in respect of costs and expenses is accordingly dismissed.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 14 of the Convention, taken in conjunction with Article 2 of Protocol No. 1;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros),

plus any tax that may be chargeable, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 February 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Registrar	Ivana Jelić President