

## Supplementary Arguments

### Factual context

1. Historically, education in the Czech Republic has been provided through two parallel systems – “mainstream” and “special” education systems. A special education stream was created in order to provide education to children who were believed to be unable to attend mainstream schools because of their physical, sensory or mental disabilities. Students at these schools follow an inferior curriculum as compared to mainstream schools and, after completing the period of compulsory education, may continue education in vocational training centres. Since 18 February 2000 they also have the option of continuing education in other forms of secondary school but only if they can satisfy the entrance requirements for the relevant course.
2. Up to this day, the majority of children with mental disabilities or multiple disabilities are educated in the segregated system of schools. Long-term segregation in such schools has serious detrimental effects on the future lives and careers of the students, with very few students continuing to take part in further education.<sup>1</sup> The inferior curricula seriously impact on future employability, contributing to the disproportionately higher rates of unemployment amongst people with disabilities<sup>2</sup> and thus ensuring their continued isolation from society in adulthood.
3. The Czech Republic has made some efforts towards a more inclusive approach to education provision and provides for ‘integration’ of children with disabilities into mainstream schooling in its legislation. The new Education Act enacted in 2004 acknowledges the inappropriate nature of segregated schooling by formally removing the system of ‘special’ schools as a type of educational institution. However, these efforts are far from adequate as, in practice, special schools are often simply renamed as “remedial schools” or “practical schools” without any significant change in teaching or curriculum.<sup>3</sup>
4. Children with disabilities still do not have equal access to education because of the lack of reasonable accommodations which would enable them to attend mainstream education in fact. This failure to provide reasonable accommodations results from number of factors: separate and unequal budgeting for special and mainstream education; non-existent criteria governing the allocation of funding for pedagogical assistance; and the lack of a clear obligation in law to provide inclusive education.
5. A number of international bodies have highlighted the barriers that children with disabilities face in the Czech Republic when attempting to access mainstream education. For example, the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights on the second periodic report of the Czech Republic in 23 June 2014 stated that:

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<sup>1</sup> According to last comprehensive study regarding people with disabilities in the Czech Republic, "Disabled Persons Survey of 2007" by the Czech Statistical Office, around one third of men and two fifths of women with disabilities in the Czech Republic only achieved primary education.

<sup>2</sup> See OHCHR Thematic Study on the Work and Employment of Persons with Disabilities, A/HRC/22/25.

<sup>3</sup> European Roman Rights Centre, “The Impact of Legislation and Policies on School Segregation of Romani Children: A study of anti-discrimination law and government measures to eliminate segregation in education in Bulgaria, Czech Republic, Hungary, Romania and Slovakia”, February 2007

*“The Committee is concerned that children with disabilities in the State party are still primarily schooled in specialized institutions, despite the implementation of the 2010–2014 Action Plan for Creating Equal Opportunities for Persons with Disabilities. The Committee is also concerned at reports that reasonable accommodation is not always provided to children with disabilities in mainstream education (arts. 13 and 2, para. 2).*

*The Committee recommends that the State party ensure that the new concept for better accessibility of schools at all levels of education for all children, including children with disabilities, fully promotes inclusive education for children with disabilities, including by allocating resources for the provision of reasonable accommodation and any additional professional support needed, and training teachers. It also recommends that inclusive education, the preferred model of education, as well as the obligation to provide reasonable accommodation be incorporated in the Education Act.”*

6. In a report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to the Czech Republic, from 12 to 15 November 2012, the Commissioner stated:

*“110. The Commissioner is deeply concerned at the continuing segregation in the education system of children with disabilities. A significant number of these children, particularly children with intellectual disabilities, are educated according to special programmes in mainstream schools, “practical schools” or “special schools”, segregated from their peers. (..)*

*112. The Commissioner notes that Czech legislation does not yet contain the concept of “inclusive education”. The law recognises the right of all persons to equal access to education and the consideration of the individual needs of every person. However, civil society organisations have pointed out that the concept of “individual integration” laid down in Czech legislation includes not only the integration of children with disabilities or disadvantaged children in mainstream settings, but also in special schools. Therefore, individual integration is considered as one of the possible methods of special education. Another concern expressed by civil society organisations is related to the lack of funding for the support measures needed by children with certain disabilities that are not mentioned or defined in the Education Act.*

*113. The Commissioner further notes that the Consolidated Action Plan submitted by the Czech Republic to the Committee of Ministers, which concerns the execution of the D.H. judgment as well as broader measures meant to ensure equal opportunities in education, envisages the revision and possible re-evaluation of the framework education programme for children with “mild mental disabilities”. However, the Consolidated Action Plan does not include a clear commitment to abolish special schools for children with disabilities and to transfer them to mainstream education where appropriate support should be available.*

*(...)*

*116. The Commissioner underlines that the lifetime exclusion of persons with disabilities from society often begins with their exclusion from mainstream education, which further reinforces and validates their marginalisation in the later stages of their lives.*

117. The Commissioner urges the Czech authorities to adopt inclusive education as a fundamental principle of the "Strategy for the Development of the Education System to 2020" currently under preparation and to ensure that children with special educational needs effectively benefit from individual support and reasonable accommodation in mainstream settings, in line with article 24 of the CRPD. The authorities are encouraged to adopt legislative and other necessary measures in order to make possible the transition to inclusive education, including provisions establishing an enforceable obligation on mainstream schools to reasonably accommodate children with special educational needs.

118. Such measures should be accompanied by a clear and ambitious timetable and an adequate budget. The concrete plans for the transfer of all children to mainstream education should be based on comprehensive, up-to-date statistical data concerning children with disabilities enrolled in special education."

7. The Concluding Observations of 4 August 2011 of the Committee on the Rights of the Child regarding the Czech Republic state:

"51. While welcoming the State party's Education Act (Act No. 73/2005 Coll.) which provides for the integration of children with disabilities into mainstream schools, the Committee is seriously concerned that:

(a) The Executive Ordinance of the Education Act (Act No. 73/2005 Coll.) allows schools to refuse to provide integrated education on the basis of insufficient material resources, which results in de facto exclusion of children with disabilities from mainstream schools remaining the norm; furthermore, parents of children with special educational needs are required to contribute to the extra cost of providing their child with education in a mainstream environment, inappropriately transferring the onus from the State to parents to fund their children's education in a free public school;

(...)

(d) A medical model approach is applied in addressing the needs of children with disabilities;

(e) The availability of data concerning children with disabilities is quantitatively as well as qualitatively limited.

52. The Committee recommends that the State party:

(a) Ensure the provision of adequate financial, technical and human resources for schools to effectively provide mainstream education for children with disabilities; and amend its legislation to prohibit schools from refusing children on the grounds of insufficient material resources;

(...)

(d) Adopt a social model approach which is in accordance with the Convention on the Rights of Persons with Disabilities, addressing attitudinal and environmental barriers that hinder the full and effective participation of children with disabilities in society on an equal basis, and train all professionals working with or for children with disabilities accordingly;

(e) Establish mechanisms for the collection of comprehensive and disaggregated data on children with disabilities and provide the human, technical and financial resources

necessary for using such data to guide State party policy and programming for inclusive education.”

## **Statement of Violations**

### **A. The right to education: Article 2 of Protocol No. 1**

8. The applicant maintains that his right to equal access to education was violated by the decisions of the administrative bodies and courts.

9. Article 2 of Protocol No. 1 reads:

*“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.”*

10. Several UN instruments have considered the content of the right to education. The UN Convention on the Rights of the Child in Articles 28 and 30 sets out comprehensive norms which must be met to secure the right to education for every child on the basis of equal opportunity. These include requirements to make different forms of secondary education available and accessible to every child and making higher education accessible to all on the basis of capacity by every appropriate means.<sup>4</sup>

11. General Comment No. 13 of the UN Committee on Economic, Social and Cultural Rights stipulates that, in order to fulfil the right to education, States must ensure that education is available, accessible, acceptable and adaptable.<sup>5</sup> Availability requires functioning institutions and programmes in sufficient quantity. Accessibility requires that they be accessible to everyone, especially the most vulnerable groups, in law and fact and without discrimination. Acceptability requires that the form and substance of the education is acceptable e.g. relevant, culturally appropriate and of good quality. Adaptability requires education to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

### **B. The right not to be discriminated against: Article 14 of the ECHR in conjunction with Article 2 of Protocol No. 1**

12. Article 14 of the Convention reads:

*“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.”*

13. It is well established in international law that the burden of proof in cases relating to discrimination shifts to the respondent to prove that there has been no breach of the principle of equal treatment once the applicant has established facts from which it can be presumed that there has been direct or indirect discrimination.<sup>6</sup> Such facts may be established from

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<sup>4</sup> Article 28(b) and (c).

<sup>5</sup> At para 6.

<sup>6</sup> See, for example, Article 4(1) of Council Directive 97/80/EC of 15 December 1997 and Article 8 of Council Directive 2000/43/EC of 29 June 2000. On direct and indirect discrimination, see Article 2(2) of Council Directive 97/80/EC and Article 2 of Council Directives 2000/43/EC.

evidence which shows that an apparently neutral measure or system has a disproportionate impact on a particular protected group or creates differences in treatment which are not attributable to objective factors unrelated to discrimination. This has been clearly addressed by the Court of Justice of the European Communities in several cases and is also contained, for instance, in Article 2(2) of Council Directive 97/80/EC of 15 December 1997.<sup>7</sup>

14. In the Court's own jurisprudence, this has been established in numerous cases: *Chassagnou and Others v France* [GC], Application Nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III; *Timishev v Russia* Application Nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII; *Thlimmenos v. Greece* [GC], Application No. 34369/97, para 44, ECHR 2000-IV; *Hoogendijk v. the Netherlands* (dec.), Application No. 58641/00, 6 January 2005; and *Nachova and Others v. Bulgaria* [GC], Application Nos. 43577/98 and 43579/98, para 157, ECHR 2005-VII). The Court reiterated this principle in the context of discrimination in education in *D.H. v Czech Republic*, Application No. 57325/00, para 189.
15. In *Aktas v Turkey*, (Application No. 24351/94, § 272, ECHR 2003-V), the Court has also recognised that the requirement that the party alleging something must prove it is not always to be rigorously applied and, in certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], Application No. 21986/93, para 100, ECHR 2000-VII, and *Anguelova v. Bulgaria*, Application No. 38361/97, para 111, ECHR 2002-IV). A respondent may indeed be required to disprove an arguable allegation of discrimination in certain cases and in the legal systems of many countries proof of the discriminatory effect of a policy, decision or practice may dispense with the need to prove intent in respect of alleged discrimination in employment or in the provision of services (*Nachova and Others*, para 157). In *D.H. v Czech Republic*, the Court stated at paragraph 194 that:

*„Where it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases concerning employment or the provision of services (see, mutatis mutandis, Nachova and Others, cited above, § 157), it is not necessary in cases in the educational sphere to prove any discriminatory intent on the part of the relevant authorities (see paragraph 184 above).“*
16. In its case-law, the Court has established that discrimination occurs when people in relevantly similar situations are treated differently without an objective and reasonable justification (*Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v Belgium (Belgian Linguistics case)* (merits), 23 July 1968, p.34, para 10, Series A No. 6; *Willis v UK*, Application No. 36042/97, para 48, ECHR 2002-IV; and *Okpiz v Germany*, Application No. 59140/00, para 33, 25 October 2005 among many others).
17. However, this does not prohibit treating certain groups differently in order to correct “factual inequalities” between them. If the State fails to treat differently people in significantly different situations (*Thlimmenos v. Greece*, [GC], Application

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<sup>7</sup> For example, *Giovanni Maria Sotgiu v Deutsche Bundespost*, judgment of 12 February 1974 (Case 152073, point 11); *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, judgment of 13 May 1986 (Case 170/84, point 31); *Hilde Schonheit v Stadt Frankfurt am Main*, judgment of 23 October 2003 (Case C-4/02) and *Silvia Becker v Land Hessen* (Case C-5/02) at points 67 – 69; and *Commission of the European Communities v Republic of Austria*, judgment of 7 July 2005 (Case C-147/03, points 41 and 46 – 48).

No. 34369/97, ECHR 2000-IV, para 44) or fails to attempt to correct inequality through different treatment, this may in itself give rise to a breach of Article 14 (Belgian Linguistics case; Thlimmenos v. Greece; Stec and Others v. the United Kingdom [GC], Application No. 65731/01, para 51, ECHR 2006-VI; and Horváth and Kiss v Hungary, Application No. 11146/11, para 101).

18. The Court has also established that a measure may be discriminatory even if it is not specifically aimed at a particular group if it has disproportionately prejudicial effects on that group (Hugh Jordan v UK, Application No. 24746/94, 4 May 2001; and Hoogendijk v Netherlands (dec.), Application No. 58641/00, 6 January 2005). In Zarb Adami v. Malta, Application No. 17209/02, §§ 75-76, ECHR 2006-VIII, the Court ruled that a difference in treatment did not need to be set forth in legislative text in order to breach Article 14 and that a “well-established practice” or “de facto situation” could also give rise to discrimination.
19. The EU definition of discrimination and its application in the context of education is mirrored in the UN system’s treatment of the same, the definition of discrimination is similar across the UN Conventions on human rights and refers to measures which have ‘the purpose or effect of nullifying or impairing’ the exercise of a right (and not necessarily the intent to do so).<sup>8</sup> The CRPD defines discrimination in Article 2 as:

*“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”*

20. This is very similar to the definition contained in Article 1 of the UNESCO Convention against Discrimination in Education of 14 December 1960. The UNESCO definition goes on to cite as discriminatory, in particular, measures which have the effect of depriving any person or group of access to education „of any type or at any level“, „limiting any person or group of persons to education of an inferior standard“, or „establishing or maintaining separate educational systems or institutions for persons or groups of persons“.<sup>9</sup>

### C. Article 14 includes the right to reasonable accommodation and inclusive education

21. Article 14 includes a right to reasonable accommodation requiring positive action by the State to ensure that provision is made to ensure that those who experience disabilities are able to access both educational facilities and the curriculum; such accommodation enables inclusive education. Reasonable accommodation has been a feature of the Court’s own jurisprudence to the extent that it upholds the right of individuals to non-discrimination and

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<sup>8</sup> See General Comment No. 18 of 10 November 1989 of the UN Human Rights Committee at para 7 and its Views of 31 July 1995 on Communication No. 516/1992 concerning the Czech Republic at point 11.7. A similar definition can be found in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of the International Convention on the Elimination of All Forms of Discrimination against Women.

<sup>9</sup> This latter is subject to certain exceptions in Article 2 in relation to gender, religion, language and the establishment of private education systems.

other rights by treating individuals in different circumstances differently.<sup>10</sup> The result has been the finding of violations of the rights of people with disabilities for the failure by the State to take steps to provide alternatives or to adapt to the individual's circumstances and needs.<sup>11</sup>

22. The right to inclusive education is comprehensively articulated in the CRPD, in particular in Article 24. Article 24(1) provides explicitly that States "shall ensure an inclusive education system at all levels."<sup>12</sup> It defines objectives for inclusive education that include the "full development of human potential and sense of dignity and self-worth;" the development of the "personality, talents and creativity" of people with disabilities; and effective participation of people with disabilities in a free society. Article 24(2) requires that States ensure:

*„(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability...;*

*(b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;*

*(c) Reasonable accommodation of the individual's requirements is provided;*

*(d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;*

*(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.“*

23. Education in mainstream, inclusive environments aims to overcome long practices of segregation, negligence and lower educational standards which have devastating impacts affecting the children subjected to them throughout their childhood and the effects of which

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<sup>10</sup> Thlimmenos v Greece Application no 34369/97, judgment of 6 April 2000, para 44.

<sup>11</sup> See Price v UK, Application no 33394/96, judgment of 10 July 2001, Vincent v France, Application no 6253/03, judgment of 24 October 2006, Mouisel v France, Application no 67263/01, judgment of 14 November 2002, Khudobin v Russia, Application no 59696/00, judgment of 26 October 2006, Xiros v Greece, Application no 1033/07, judgment of 9 September 2010, Kupczak v Poland, Application no 2627/09, judgment of 25 January 2009, Grori v Albania, Application no 25336/04, 7 July 2009, Logvinenko v Ukraine, Application no 13448/07, 14 October 2010, Raffray Taddei v France, 36435/07, judgment of 21 December 2010, Vasyukov v Russia, Application no 2974/05, judgment of 5 April 2011, Vladimir Vasilyev v Russia, Application no 28370/05, judgment of 10 January 2012, Artyunyan v Russia, Application no 48977/09, judgment of 10 January 2012, Grzywaczewski v Poland, Application no 18364/06, judgment of 31 May 2012, DG v Poland, Application no 45705/07, judgment of 12 February 2013. In each of these instances, the Court conducted a review of the measures taken by the authorities with respect to the specific circumstances and needs of the individual prisoners, persons with disabilities and/or persons with chronic illnesses. The Court concluded that the authorities failed to take measures to ensure they were accommodated in terms of accessible or adapted facilities nor did they have access to adequate medical care during their detention (in police custody or prison, or secure and adapted measures during prison transport) thereby leading the Court to find that the treatment surpassed the minimum severity necessary for a finding of Article 3 violations. These cases point to the fact that disabled prisoners were disadvantaged in comparison to their non-disabled inmates and the appropriate steps were not taken to remove that disadvantage which caused them suffering and distress beyond that associated with detention. In other words, the failure to provide reasonable accommodation to prisoners with disabilities resulted in them being subjected to inhuman and degrading treatment.

<sup>12</sup> Article 24(1).

continue long into adulthood. The UN Handbook for Parliamentarians on Implementation of the CRPD notes that:

*“...inclusive education not only provides the best educational environment, including for children with intellectual disabilities, but also helps to break down barriers and challenge stereotypes. This approach helps to create a society that readily accepts and embraces disability, instead of fearing it. When children with and without disabilities grow up together and learn, side by side, in the same school, they develop a greater understanding and respect for each other.”<sup>13</sup>*

24. Inclusive education is based on the principles of equality, participation, non-discrimination, and celebrating diversity. It includes obligations to eliminate barriers to participation and the full exercise of the right to education as well as to modify culture, policy and practice in mainstream schools to accommodate the needs of all students.
25. The OHCHR thematic Study on the Right of Persons with Disabilities to Education notes the international acknowledgement that inclusive education is „the most appropriate modality for States to guarantee universality and non-discrimination in the right to education.“<sup>14</sup> Referring to the CRPD, it goes on to state that „...consequently, the right to education is a right to inclusive education.“
26. The right to inclusive education has also been addressed by a number of Council of Europe instruments: The Committee of Ministers’ Recommendation (1992) 6 on a coherent policy for people with disabilities aims to enable “all people who are disabled or are in danger of becoming so, regardless of their... degree and severity of disablement” to “exercise their rights to full citizenship and have access to all institutions and services of the community including education.”<sup>15</sup>
27. Furthermore, the Council of Europe Disability Action Plan 2006 – 2015<sup>16</sup> establishes a Europe-wide strategy to combat disability discrimination and emphasises access to education for children with disabilities in mainstream settings. It aims to ensure that “all persons, irrespective of the nature and degree of their impairment, have equal access to education” and “that disabled people have the opportunity to seek a place in mainstream education by encouraging relevant authorities to develop educational provision to meet the needs of their disabled population.”<sup>17</sup>
28. In 2010, the Parliamentary Assembly of the Council of Europe adopted Resolution No. 1761 (2010) Guaranteeing the right to education for children with illnesses or disabilities and reaffirmed that:

*“Wherever possible, children with disabilities should receive education and vocational training – in all phases of their schooling – within the schools attended by other children and they should receive the support required to facilitate their adaptation to*

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<sup>13</sup> <http://www.un.org/disabilities/default.asp?id=240> (last accessed 5 September 2014).

<sup>14</sup> A/HRC/25/29 of 18 December 2013

<sup>15</sup> See Recommendation (1992)6 of the Committee of Ministers to Member States on a Coherent Policy for People with Disabilities, adopted by the Committee of Ministers from 9 April 1992, part I.2., available at <https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=602412&SecMode=1&Admin=0&Usage=4&InstranetImage=43361> (last accessed on 13 February 2007).

<sup>16</sup> Recommendation (2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015.

<sup>17</sup> *Ibid.*, Article 3.4.2 ii.



*regular education or vocational training within the mainstream systems. Where special schools or units are deemed necessary or appropriate, these special schools or units should be linked to regular schools and should be operated as resource centres for their local communities.*"<sup>18</sup>

29. The Committee of Ministers emphasised the importance of inclusive education for ensuring full inclusion in society of children and young people with disabilities in its recent Recommendation CM/Rec(2013)2.<sup>19</sup>
30. The Charter of Fundamental Rights of The European Union provides for the right to education under Article 14. The right to education is framed positively: "everyone has the right to education". Under Article 26, the Charter explicitly recognises the right of persons with disabilities to integration, stipulating that "the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community." A State's system of inclusive education should be considered as such a measure.
31. This conclusion is in full conformity with other EU documents which emphasise especially the relation between inclusive education and employment. In its 2007 Opinion, the European Economic and Social Committee on Equal Opportunities for People with Disabilities noted that:
- "...without inclusive education provided for disabled children and youth, integration into the labour market would be difficult to achieve. Improving access to education for people with disabilities should become a priority for forthcoming action plans and strategies for people with disabilities."*<sup>20</sup>
32. Finally, the European Committee on Social Rights has already observed that failure to include children with disabilities into mainstream education and the fact that such a failure is directly related to disabilities may constitute discrimination contrary to the guarantees of Article E of the Revised European Social Charter.<sup>21</sup>
33. States have an obligation therefore to take whatever measures are necessary to ensure reasonable accommodations within inclusive settings to allow children with disabilities to fully realise their right to education and failure to do so amounts to discrimination<sup>22</sup>.

## Submissions

- A. *The applicant was treated less favourably than other children in a comparable situation because of his disability*

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<sup>18</sup> Resolution of the Parliamentary Assembly of the Council of Europe no. 1761 (2010) Guaranteeing the right to education for children with illnesses or disabilities, para. 5.

<sup>19</sup> Recommendation CM/Rec(2013)2 of the Committee of Ministers to member states on ensuring full inclusion of children and young persons with disabilities into society. See paras. 13-15 in particular.

<sup>20</sup> Opinion of the European Economic and Social Committee on Equal opportunities for people with disabilities, (2007/C93/08), para 3.1.2.

<sup>21</sup> Autism Europe v. France, §50-54; MDAC v. Bulgaria, §51-54, AEH v. France, §132-145

<sup>22</sup> Denial of reasonable accommodations is explicitly acknowledged in Article 2 of the CRPD as coming within the definition of 'discrimination'.

34. Under Article 178(1) of the Education Act, the Municipality is responsible for “establishing conditions for education”. While the Municipality has established a primary school in the region, the access of the applicant to this school was denied. Unlike his peers without mental disabilities who are automatically enrolled in the local school, the enrolment of the applicant was subject to the discretion of the Director. The less favourable treatment is thus clear, the applicant was not enrolled in a school.
35. The national legal framework for admissions is clear: under Article 36(6) of the Education Act, a child is primarily to be educated in their local school. Under Article 36(7), the director of the local school can refuse enrolment of a child only if it would cause the school to exceed the allowed number of pupils in the school registry. However, the allowed number of pupils may be extended by means of a request by the director (Article 140(1)) and this request can be made even after the child has already been enrolled (Article 149(5)). Alternatively, the school's founder (the Municipality) can grant an exception to the allowed number of pupils up to a maximum of four additional pupils (Article 23(5)). No evidence exists that the Director sought either the extension of the allowed number of pupils in the school or an exception by the Municipality. On the contrary, in both of the decisions refusing enrolment of the applicant, the Director also listed other reasons for the decision, such as the lack of staff or insufficient room, such reasons were *ultra vires* and cannot justify non-enrolment.
36. The fact that the applicant was denied enrolment in his local school for reasons which were contrary to the law strongly indicates that the reference to the school’s capacity served merely as a justification for the unwillingness of the school to “put up” with the applicant and his disability. That he was then unable to find accessible, acceptable education in thirteen other schools in his region, points to a systemic problem – the complete unpreparedness of the schools in the region to enrol a child with a mental disability. This systemic *de facto* exclusion from mainstream schooling represents a form of structural discrimination violating the right of the applicant and many other children with disabilities to equal access to education.
37. A key milestone in the process of overcoming deeply-rooted discriminatory practices against people with mental disabilities was the adoption of UN CRPD (CRPD) which was ratified by the Czech Republic in 2009. The CRPD contains in Article 24(2)(a) an express ‘no-rejection clause’, prohibiting the rejection of any student from general education on the basis of disability. However, the facts of this case, show that the domestic legal requirements are not being followed by the education system within the Czech Republic and is a clear breach of the international standards that the Czech Republic has adopted.

*B. There is no reasonable and objective justification*

38. It is submitted that once the applicant has shown that he was treated less favourably than children in a comparable situation the burden therefore falls to the respondent to provide a reasonable and objective justification for this difference in treatment (*Timishev v. Russia* (Application Nos. 55762/00 and 55974/00, para 56, ECHR 2005-XII) and *Moldovan and Others v. Romania* (no. 2) (Application Nos. 41138/98 and 64320/01, para 140, 12 July 2005). This requires that the difference in treatment pursue a legitimate aim and that there is a reasonable relationship of proportionality between the means and the aim sought to be achieved (among many other authorities, *Larkos v. Cyprus* [GC], Application No. 29515/95, para 29, ECHR 1999-I; *Orsus and Others v Croatia*, Application No. 15766/03, para 196; and *Stec and Others*, cited above, para 51).

39. In the Belgian Linguistics case, the Court held:

*„The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.“<sup>23</sup>*

#### Article 36(7): exceeding the allowed number of pupils in the school

40. The explanation provided contemporaneously by the Municipality was not a reasonable and objective justification, as already submitted it was not permitted within the domestic law. Furthermore, it is submitted that it was on the basis of the applicant's disabilities and not the fact that his admission would constitute a circumstance exceeding the allowed number of pupils in the school registry, that meant he was refused admission.

#### Availability of special schools

41. Nor can the availability of 'special schools', constitute a reasonable and objective justification.

42. It is submitted that the system of 'special' education or segregated schooling in the Czech Republic is premised on an out-dated understanding of disability as defined from a medical rather than a social perspective. A medical model or understanding of disability locates the barriers and obstacles to learning within the individual concerned and promotes segregation of such children so that they can learn in a 'special' environment where their education is adapted and lowered to the level their disability can supposedly achieve.

43. A recognition of human rights, as entrenched in the ECHR, provides a greater understanding of disabilities, and requires a recognition that the barriers and obstacles those with disabilities face are created by societal structures and the education system itself. This social model recognises that children with disabilities have the same right to be educated in inclusive settings with their peers without disabilities:

*“all children and young people of the world, with their individual strengths and weaknesses, with their hopes and expectations, have the right to education. It is not our education systems that have a right to certain types of children. Therefore, it is the school system of a country that must be adjusted to meet the needs of all children.“<sup>24</sup>*

44. Education for children with disabilities must be provided in a manner that ensures they are included in the social and community aspects of schooling and that they are provided with the skills and opportunities necessary to enable them to continue to be full members of the broader community as adults. That process of inclusion can only be effective when children

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<sup>23</sup> Paragraph 10.

<sup>24</sup> Former Special Rapporteur of the Commission for Social Development for monitoring the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Bengt Lindqvist, 1994.

with disabilities are included in mainstream classrooms and given adequate support to meet their individualised needs.

45. Providing an inclusive education for children with disabilities requires that children with and without disabilities are educated side by side whilst teachers and assistants in mainstream schools must be required to ensure reasonable accommodation of the unique needs of students with disabilities. When inclusive education is implemented from an early age, it creates an environment where people without disabilities are socialized to accept and respect the unique contributions of people with disabilities. This process of mixing and socialization facilitates people with disabilities in interacting as full members of society.

46. Indeed, the Court itself has previously stated in relation to „special schools“ that, „...it shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system causes.“<sup>25</sup> In *D.H. v Czech Republic*, the Court went on to find that students placed in such schools in the Czech Republic:

*„...received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.“*<sup>26</sup>

47. Given the detrimental impact that such segregation has on children who experience disabilities and the lack of resources and educational opportunities such an education would provide to the applicant, the existence of such schools cannot and does not provide a reasonable and objective justification of the decision not to admit the applicant.

### C. The need for reasonable accommodation and the special position of applicant as a member of a vulnerable group

48. Czech legislation provides for “integration” of children with disabilities within mainstream schools and often, assessment centres, as in the case of the applicant, actively recommend integration. However, the law does not provide sufficient procedural safeguards to allow individuals to effectively exercise this right. Although under domestic legislation the applicant has a right to choose a primary school, because none of the schools within the district was able (or willing) to accommodate his needs, this choice is merely illusory. According to the interpretation of domestic law by the Brno Regional Court, Supreme Administrative Court and Constitutional Court, the obligation of the Municipality to provide education is fulfilled simply by guaranteeing education for its residents without disabilities, leaving a large group of children (like the applicant) completely excluded.

49. The applicant submits that this unequal treatment as compared to his peers without disabilities cannot be justified on the basis of his disability. On the contrary, as a member of an especially vulnerable group which has been historically discriminated against, the State must guarantee special protection of his right to equal access to education. This principle is recognised at the international level, article 24 of the CRPD guarantees equal access to inclusive education for all people with disabilities, thus under the standards recognised by the

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<sup>25</sup> *D.H. v Czech Republic*, para 198 and *Horvath and Kiss v Hungary*, para 113.

<sup>26</sup> *Ibid*, para 207.

CRPD, there is no justification for sustaining a system of education that excludes a significant portion of the population.

50. In order to facilitate such inclusive education, the State may need to make reasonable accommodations. This is necessary both at the structural level and at the individual level in the case of the applicant. Structurally, the system must be changed to ensure that the child's choice of a mainstream school is respected and implemented. The Court has stated in previous jurisprudence that, when considering equal access to education, historical context must be considered:

*"In the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures in order, inter alia, to assist the applicants with any difficulties they 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 service"* (Oršuš and Others v Croatia, para 177).

51. The Court has noted the special consideration required to be given to the needs and different lifestyle of groups in vulnerable positions in many cases.<sup>27</sup> It has also interpreted the word "respect" in Article 2 of Protocol No. 1 as "implying some positive obligation on the part of the State" in addition to the negative undertaking (Horvath and Kiss v Hungary, para 103 and Campbell and Cosans v. the United Kingdom, 25 February 1982, Application no. 7511/76; 7743/76 para 37, Series A no. 48).

52. On an individual level, in addition to a teaching assistant, specific reasonable accommodations to facilitate access to inclusive education for the applicant must be determined on the basis of the individual, focused on identifying, not his capacities but his needs. It may include, for example, suitable teaching materials for someone with his particular mental disability, adoption of teaching methods and curricula tailored to his requirements, and training for his teachers on how to teach in an inclusive classroom. It is inherent in the concept of reasonable accommodation that considerations for effective participation and exercise of rights must be made in response to the circumstances of a particular individual with a disability.

53. The OHCHR Thematic Study discusses the concept of 'reasonableness' in the context of reasonable accommodations in education:

*"Reasonable accommodation is a common concept in certain legal systems. "Reasonableness" is understood as the result of an objective test that involves an analysis of the availability of resources, as well as the relevance of the accommodation, and the expected goal of countering discrimination."*<sup>28</sup>

54. It is submitted that where the failure to provide such accommodations results in complete denial of the right to education, the accommodations in question must be considered to be reasonable and their denial a disproportionate interference with the applicant's rights under Article 2 of Protocol No. 1 and discrimination under Article 14 of the Convention.

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<sup>27</sup> In relation to Roma/Gypsies, for example, see *Chapman v. the United Kingdom* [GC], Application No. 27238/95, para 96, ECHR 2001-I, and *Connors v. the United Kingdom*, Application No. 66746/01, para 84, 27 May 2004.

<sup>28</sup> *Op cit.*, para 43

55. The Court has previously emphasised that the Member States enjoy a wide margin of appreciation in the area of protection of the right to education. However, when assessing the proportionality of the interference with the applicant's rights, the fact that the applicant is a member of especially vulnerable group must be considered:

*“In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question (...). The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs (...).”* (Alajos Kiss v Hungary, Application no. 38832/06, para 43).

56. The United Nations Special Rapporteur on Disability has stated in her report on the Question of Monitoring in 2006:

*“People with developmental disabilities are particularly vulnerable to human rights violations. Also, people with disabilities are rarely taken into account, they have no political voice and are often a sub group of already marginalized social groups, and therefore, have no power to influence governments. They encounter significant problems in accessing the judicial system to protect their rights or to seek remedies for violations; and their access to organizations that may protect their rights is generally limited.”<sup>29</sup>*

57. The applicant submits that the violation of his right to education was aggravated when considered in the social context of education of children with disabilities in the Czech Republic. Although the government may determine the general framework for education and may place limitations on the exercise of the right, this must never injure the substance of the right nor conflict with other rights protected by the Convention<sup>30</sup>, including the right to non-discrimination. Limitations on the right to education cannot result in complete denial of access to education or be based on the fact that the applicant is a person with a mental disability.

#### The right to an effective remedy: Article 13 of the ECHR

58. The applicant has no available remedies for the breach of his right to equal access to education under domestic law after the Municipality failed to fulfil its obligation to provide him with equal access to education.

59. Article 13 reads:

*“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”*

60. The Court has stated before that the remedy required by Article 13 must be “effective” in practice and in law. Further, there is no need to show that another Convention right has been

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<sup>29</sup> Introduction, para 2. Available at <http://www.un.org/esa/socdev/enable/rapporteur.htm> (last accessed 7 September 2014).

<sup>30</sup> Belgian Linguistics Case, p.28, para 5; Campbell and Cosans v UK, 25 February 1982, para 41, Series A no. 48; and Groza v Romania, Application No. 31017/05, para. 22.

violated in order to establish a breach of Article 13 (Klass and Others, Application no. 5029/71, para 64). Article 13 can be properly invoked in relation to any arguable claim, which arguability must be determined in the light of the particular facts and the nature of the legal issue or issues raised (Boyle and Rice v United Kingdom, Application No. 9659/82; 9658/82, para 55).

61. The applicant requested that the Municipality fulfil its legal obligation to provide him with access to primary education. Neither the Municipality nor the courts accepted the applicant's arguments that the law is to be applied without discrimination based on a disability. Further, the South Moravian Regional Authority stated that it was not the appropriate body to supervise decisions of the Miletovice Municipality and that, in its opinion, no such body exists. The applicant's rights under Article 13 were further violated by the dismissal of the administrative action challenging the findings of the South Moravian Regional Authority as inadmissible by the Brno Regional Court, the Supreme Administrative Court and the Constitutional Court. All of the bodies referred the applicant to the possibility of initiating an administrative proceeding against each of the schools that refused to enrol him.
62. Firstly, the applicant's complaint related to the fact that the Municipality had failed to provide him with access to primary education. The fact that neither his local school, nor any other school in the region were able or willing to enrol him resulted from the failure of the Municipalities to provide proper financial and supervisory support to the schools. The legal route that the applicant took proved to be completely ineffective. All of the courts held the Municipality had fulfilled its obligation by setting up a school despite the fact that the school it set up was not inclusive and thus would have marginalised the applicant and provided an inferior standard of education.
63. Secondly, the applicant submits that filing separate actions against all of the schools cannot be considered to be an effective remedy for his situation. It is highly probable that the Regional Authority would uphold the decisions of the schools on non-enrolment of the applicant and thus this avenue held no reasonable prospect of success. The applicant would then have had to submit a separate administrative action against each school, most likely barring the costs of legal representation. This course of action would also cause delay, which means that the applicant would likely have no education whatsoever during the school year. The applicant needed to ensure his education for the next school year and therefore time was crucial.

### **Exhaustion of Domestic Remedies**

64. Article 35(1) is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach and it is for the government to satisfy the Court that such a remedy was available both in theory and in practice at the relevant time i.e. that it was accessible, capable of providing redress and offered reasonable prospects of success (V v the United Kingdom [GC], Application no. 24888/94, para 57, ECHR 1999-IX).
65. The requirement to exhaust domestic remedies is not an absolute one and cannot be applied automatically: it must not be applied with excessive formalism. Its application must contain some degree of flexibility and have regard to the circumstances of the individual case, including the general context in which formal remedies operate and the personal circumstances of the applicant. The Court must consider whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to

exhaust domestic remedies (see İlhan v. Turkey [GC], Application No. 22277/93, para 59, ECHR 2000-VII).

66. In the case of the applicant, while there was a possibility of lodging an appeal against the individual decisions of each of the schools which rejected his enrolment, it is submitted that filing separate appeals for each of the breaches of his rights cannot be reasonably expected of the applicant. Further, this avenue would not offer an effective remedy as the issues involved go beyond the personal interests of the applicant and such an avenue is incapable of offering a remedy to the structural discrimination and denial of his right to education. In the alternative, it is submitted that, even if an individual remedy provided against one of the schools is effective, there is no obligation on the applicant to exhaust this where an administrative practice makes discrimination possible.
67. It is submitted in the circumstances, the applicant has taken all reasonable steps to exhaust all remedies necessary for this Court to have jurisdiction over this matter.