III. ÚS 1136/13 of 12 August 2015

On Establishing Indirect Discrimination of Roma Children when Being Placed in Special Schools

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

HEADNOTES

Unlike direct discrimination, in the case of indirect discrimination, a neutral criterion is applied, i.e. a criterion not consisting in any of the "suspicious" reasons pursuant to Art. 3, para. 1 of the Charter, yet its application, in certain particular circumstances, affects the members of the protected group in a manner as if there was actually a "suspicious" suspicion. Thus, indirect discrimination may always be regarded solely as a factual consequence of a certain relevant practice, which must be understood as a sum of individual cases in which a certain neutral criterion was (or is supposed to be) applied in an identical or comparable manner. Defining the essential elements of such a practice represents a necessary prerequisite of assessing whether the members of a certain protected group are, within the scope of the practice, exposed to indirect discrimination.

If the neutral criterion is applied in relation to one group of cases in a certain manner, while being applied in a different manner in relation to another group, whereas each of these manners will provide different safeguards of varying efficiency against their potential discriminatory effect, then the assumption of indirect discrimination may only be assessed separately in relation to every partial practice. In fact, each of them will have the nature of a relevant practice just in relation to those individual cases of which it consists. In addition, it may not be ruled out, however, that with respect to a completely specific approach to applying a neutral criterion, a certain specific case may not be regarded as part of any relevant practice in relation to which a consideration on indirect discrimination could be reasonably made (with respect to the number of relevant cases). However, such a case would always have to be assessed separately.

The conclusion that a certain practice resulted in indirect discrimination does not mean that within its scope, the disadvantage would necessarily affect every member of the protected group in whose case the relevant neutral criterion has been applied. However, it implies that such disadvantage actually occurred to a substantial degree, while in individual instances of which this practice consists, it is impossible to distinguish in a conclusive manner whether it was the case or not. For this very reason, the assumption of indirect discrimination may only be rebutted in relation to a certain relevant practice as a whole (cf. the Judgment of D. H. and others v. the Czech Republic, paragraph 209). If the above distinction could also be reasonably made in individual cases, it would mean that these discrimination cases might be examined independently of the overall assessment of such a practice, i.e. in terms of direct discrimination. Under such circumstances, assessing indirect discrimination would lack any sense.
The application of § 133a, letter b) of the Civil Procedure Code, which would fail to respect the above defined sharing of the burden of production and proof in the cases when indirect discrimination is alleged, would not satisfy the requirements related to the right to judicial protection under Art. 36, para. 1 and Art. 37, para. 3 of the Charter and Art. 6, para. 1 of the Convention.

VERDICT

The Constitutional Court, in its Chamber consisting of Presiding Judge Jan Musil, Judge Vladimír Kůrka, and Judge Rapporteur Pavel Rychetský, held, dispensing with an oral hearing and without the

presence of the parties to the proceedings, in the matter of the constitutional complaint of J. S., represented by Mgr. David Strupka, attorney with the head office in Prague 1, Jungmannova 31, directed against the Decision of the Supreme Court dated 13 December 2012, file reference 30 Cdo 4277/2010-180, and the Decision of the High Court in Prague dated 23 February 2010, file reference 1 Co 314/2009-128, with the participation of the Supreme Court and the High Court in Prague as parties to the proceedings and the Czech Republic – Ministry of Education, Youth and Sports, with the head office in Prague 1, Karmelitská 7, as the secondary party, as follows:

The constitutional complaint shall be dismissed.

REASONING

I.
Summary of the proceedings before ordinary courts
1. By means of a constitutional complaint, delivered to the Constitutional Court on 4 April 2013, the complainant sought the annulment of the afore-mentioned decisions, as he had been allegedly denied protection against discrimination, while also suffering a breach of Art. 6, para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter only as the "Convention") and Art. 1 in association with Art. 9, para. 2 of the Constitution of the Czech Republic (hereinafter only as the "Constitution").

2. In 1985, when the complainant was 7 years old, the District National Committee in Cheb decided on his placement in a special school. It was a kind of school which was, pursuant to the then legal regulations, established for children with mental disabilities. The complainant then completed all his compulsory ten-year education in special schools. At that time, he was placed in institutional education which had been ordered in July 1980 at the age of 2 years, and he remained placed in the facility until 1996, when he attained majority. In that period, his parents remained his legal guardians.

3. The complainant assigns his placement in a special school to his Roma origin, perceiving it as an expression of discrimination or disparate and above all less beneficial treatment which he received from the state, compared to persons placed in primary schools. The resulting education deficit has particularly limited him on the labour market until now. In order to be able to continue his studies at secondary school, he was forced to take a course of primary education completion. Only owing to that could he then, from 2000 to 2005, study part-time at the Roma Secondary Social School in Kolín, where he completed his studies upon passing the graduation examination.

4. The discrimination which the complainant allegedly suffered upon his placement in a special school allegedly interfered with his personality rights in an unacceptable manner. For this reason, by means of an action for the protection of the personality, filed on 11 June 2008, he sought an apology and damages in the amount of 500,000 CZK. After all, such treatment was allegedly not exceptional at the material time (nor even later). The complainant submitted evidence on indirect discrimination using the statistics published by the Institute of School Information at the Ministry of Education of the Czechoslovak Socialist Republic, which contains the data on the number of children of "gypsy origin" in schools for young people with special needs related to school years 1985/86 to 1990/91. The data show that in the school year 1985/86, when he started the first year of the special school, the share of Roma children placed in special schools amounted to 37.14 % in the territory of the then Czechoslovak Socialist Republic, 29.88% in the territory of the Czech Socialist Republic, and 40.2% in the then West Bohemian Region and that this trend remained unchanged even in the following years. In the whole examined period, the average share of Roma children placed in special schools amounted to 39.35% in the territory of the then Czechoslovak Socialist Republic, 30.13% in the territory of the Czech Socialist Republic, and 38.27% in the then West Bohemian Region. In 1996, however, the overall share of the Roma population in the Czech Republic was estimated to approximately 1.5 to 2% of its inhabitants. According to the complainant, these data constitute the assumption of discrimination as formulated by the European Court of Human Rights in the Judgment of the Grand Chamber dated 13 November 2007 in the matter

of Application No. 57325/00, D. H. and others v. the Czech Republic.

5. The action was dismissed by means of the Decision of the Municipal Court in Prague (hereinafter only as the "first instance court") dated 10 April 2009, file reference 37 C 89/2008-52, which was subsequently, upon the complainant's appeal, upheld by the Decision of the High Court in Prague (hereinafter only as the "court of appeal") dated 23 February 2010, file reference 1 Co 314/2009-128. Even though the statistics submitted by the complainant could, at least in the opinion of the court of appeal, constitute a rebuttable presumption of indirect discrimination of members of the Roma ethnic group when being placed in special schools, in his case, it was supposedly rebutted in a convincing manner. In this respect, the essential importance was placed on the documentary evidence submitted by the Ministry of Education, Youth and Sports (hereinafter only as the "Ministry"), which acts on behalf of the state as its organisational body in the instant case. As established by ordinary courts, the complainant was placed in a special school on the basis of a recommendation of the competent district educational and psychological counselling centre, under whose supervision he had been placed in an institutional education facility and on the basis of whose recommendation his mandatory education had been postponed in 1984. What was also taken into consideration was the unfavourable results of the examination of his intellectual capacities when he was not found fit to continue in the second year, as well as the information on the course of his school attendance, particularly in lower years, and other records from the period when it was being decided on exempting the plaintiff from mandatory education at all (for which no reasons were eventually found). If the complainant alleged that the applied tests failed to reflect cultural and language particularities of his ethnic group, it was not deemed as a well-founded allegation. In fact, since the age of two, he had been living in a children's home, rather than in a Roma family or a Roma community where such particularities could have been transferred. For all these reasons, he was thus not placed in a special school as a consequence of discriminatory treatment caused by his membership to the Roma ethnic group but owing to his then intellectual and rational capacities, which were obviously insufficient to complete common primary education. The conclusions of both decisions state that as for the complainant's claim for compensation for non-pecuniary damage, the state successfully applied the objection of the statute of limitations in the course of the proceedings before the first instance court.

6. The complainant filed a Supreme Court application directed against the decision of the court of appeal. In its opinion, if a certain practice justifies a conclusion on indirect discrimination of some members of the group, then it must be related to all its members, while it does not need to be examined whether the individual would succeed in the system even in the case that it would not be discriminatory. In this respect, it referred to paragraph 209 of the Judgment of D. H. versus the Czech Republic, which states that "since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, … the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly (for the purposes of establishing indirect discrimination – note of the Constitutional Court), the Court does not need to examine their individual cases".

7. The Supreme Court (hereinafter only as the "court of extraordinary appeal") considered the application admissible as in the instant case, it was necessary to find a solution to a legal issue not completely resolved until then concerning which party and in what extent, in the proceedings on the protection of personality, taking into account the provision of § 133a, letter b) of the Civil Procedure Code, in the wording taking effect on 1 September 2009, bears the procedural duty to claim and establish (and the related burdens of allegation and proof) the facts on indirect discrimination on the grounds of racial or ethnic origin concerning the access to education and professional training. Nevertheless, it did not find the application well-founded, thus dismissing it by means of the Judgment dated 13 December 2012, file reference 30 Cdo 4277/2010-180.

8. According to the court of extraordinary appeal, a violation of the Convention in the complainant's matter may have occurred solely in the period from 18 March 1992 to 30 June 1995 (as it was not binding on the Czech Republic or the Czech and Slovak Federal Republic at that time). At the same time, it was not essential that the decision on his placement in a special school be issued prior to the first

mentioned date, as this fact did not prevent any potential conclusion on the Convention's violation. As for the remaining period from 1985 to 18 March 1992, in relation to that, the complainant could substantiate his claim using the International Convention on the Elimination of All Forms of Racial Discrimination, published under No. 95/1974 Coll. Nevertheless, its direct application is prevented by the non-automatically enforceable nature of its provisions regarding the right to education.

9. In order to establish indirect discrimination, the complainant was requested, above all, to submit facts which would provide prima facie evidence in this respect. Only after that would the burden of proof shift automatically to the secondary party to the proceedings, which would have to establish that he was not discriminated against. The court of extraordinary appeal performed an analysis of certain Judgments of the European Court of Human Rights, including, apart from the afore-mentioned Judgment in the case of D. H. and others versus the Czech Republic, mainly the Judgment dated 5 June 2008 in the case of application No. 32526/05 Sampanis and others versus Greece and the Judgment of the Grand Chamber dated 16 March 2010 in the case of application No. 15766/03 Oršuš and others versus Croatia, which were concerned with the cases of placing Roma children in so-called Roma classes, whereas it concluded that the statistics might confirm the indirect discrimination in question only in the case of a relevant disproportion between the assessed statistical data. At the same time, the court also determined the limit of the statistical significance at 50%, taking into account the conclusions contained in the Judgment in the case of Oršuš and others versus Croatia. Pursuant to the court of extraordinary appeal, the statistics submitted by the complainant could not establish a discriminatory nature of the given practice or measures, as they did not imply such a high share of Roma children among the total number of children placed in special schools (see paragraph 4 of the Judgment).

10. Given the circumstances, the first instance court was obliged, pursuant to § 118a, para. 3 of the Civil Procedure Code, to invite the complainant to label other evidence establishing his claims. Only in the event that he did so would the secondary party become obliged to rebut the complainant's allegation (which is also presumed in § 133a, letter b) of the Civil Procedure Code) concerning the fact that his placement in a special school was motivated, on the side of the state, by a prohibited ground consisting in his membership in the Roma ethnic group. At the same time, it might only be rebutted by means of an objective and reasonable justification that the disparate treatment pursued a legitimate aim and that the means to attain it was reasonable.

11. Even though the first instance court failed to fulfil its afore-mentioned instruction duty, and the error was not remedied by the court of appeal either, the court of extraordinary appeal did not conclude that such an error amounted to a reason to annul the decision challenged by the Supreme Court application. In fact, the reason for dismissing the action did not consist in the fact that the complainant failed to bear the burden of proof concerning his claims on discrimination, but rather the fact that the disparate treatment pursued a legitimate goal (balancing the established handicap) and the means to attain that (i.e. the placement in a special school which was supposed to balance this handicap) was reasonable pursuant to the established circumstances of the case. In this respect, it emphasised that even though the impact of a certain seemingly neutral practice is assessed in relation to a certain (e.g. ethnic) group, it does not mean that this "structural inequality" would divert from the situation of the particular plaintiff. Assessing whether the burden of proof has been borne always takes place with respect to the particular case, defined by its specific factual circumstances. In addition, the defendant may not establish "structural equality" in general and then draw a conclusion in relation to the individual plaintiff but they shall substantiate the claim related to the particular plaintiff. For this reason, it is impossible to agree with the complainant that (exclusively) due to his ethnic origin he was a priori disadvantaged upon his entrance to the education system.

12. The court of extraordinary appeal found that the then legislation contained safeguards preventing the child from being unduly placed in a special school, including a complex examination of the pupil. The complainant had been under the care of the District Pedagogical and Psychological Counselling Centre in Cheb since 1984, when he was examined before attending the first year and when he was recommended to postpone the school attendance to the beginning of the 1985/1986 school year. He was thus not placed in a special school immediately but upon the expiry of this alternative means which was

supposed to provide him with more time to better handle the school attendance and to adapt to a new life regime. Approximately six months following the postponement of the school attendance, an interview with the nursery school teacher took place, in which she stated that the complainant seemed eligible for placement in a special school. Similar recommendations also arose from the subsequent intelligence tests and an examination of knowledge. After completing the first grade at special school, the complainant was not eligible to advance to the next grade, and therefore he repeated the grade, while psychological examinations were being conducted even in this period. In 1987, when he was attending the second grade of the special school, there was even an application file seeking his exemption from mandatory school attendance. However, the conducted tests, which included the Raven's Progressive Matrices (with the result "defective") and the Prague Children's Wechsler test (with a substantially below-average result, implying feeblemindedness in the verbal part and light feeblemindedness – debility in the non-verbal part), excluded the reasons for exempting him from school attendance. The complainant thus completed his mandatory education at a special school with average grades. The court of extraordinary appeal admitted that the test on the basis of which the complainant had been examined on a number of occasions failed to take into account the language and cultural differences of the Roma community, while assigning only limited importance to this fact in the instant case. As a matter of fact, the complainant had lived in a children's home since the age of two years, where he had been provided with language and cultural education corresponding to the education of the majority society. At the same time, he attended a pre-school facility (nursery school), which was supposed to eliminate the differences in question.

13. Other safeguards included the possibility of the complainant or his legal guardians filing an appeal with the Regional National Committee in Plzeň directed against the decision on his placement in a special school, which did not take place. The decision of the District National Committee in Cheb dated 16 May 1958, file reference 77/85-SR-to be served, implies that the legal guardians were duly instructed on this possibility. The last safeguard consisting in transferring the pupil to another school, while any such application could have been filed with the District National Committee by the head teacher.

II.
Complainant's arguments

14. The complainant does not agree with the conclusions drawn by ordinary courts. In his constitutional complaint, he mentions, above all, that the commencement of the direct enforceability of the International Convention on the Elimination of All Forms of Racial Discrimination was supposed to be considered on 9 January 1991, pursuant to § 2 of the Constitutional Act No. 23/1991 Coll., which introduces the Charter of Fundamental Rights and Freedoms as a constitutional act of the Federal Assembly of the Czech and Slovak Federal Republic. For the period of 1 September 1985 to 8 January 1991, the prohibition of discrimination on the grounds of ethnic group membership needs to be derived from Art. 20, para. 2 of the Constitutional Act No. 100/1960 Coll., Constitution of the Czechoslovak Socialist Republic, guaranteeing equality in rights regardless of race and nationality, in association with its Art. 24, para. 1, which guaranteed the right to education to everyone.

15. An extensive part of the arguments contained in the constitutional complaint deals with the conclusion of the Supreme Court, which conditioned the conclusion on the applicability of the statistics to establish indirect discrimination through a relevant disproportion between the examined statistical data expressed as the 50% limit. The complainant perceives in it an incorrect interpretation of the Judgment in the case of Oršuš and others versus Croatia. This Judgment did not deal with placing children in schools intended for children with mental disabilities (as was the case in the Judgment of D.H. and others versus the Czech Republic), but in segregated classes at regular primary schools, established for the purpose of balancing a handicap in the sphere of the language. For this reason, the information on the number of Roma children at schools where such segregation took place does not make any sense in terms of discrimination, and at best it attests to the composition of the local population. What is relevant is only the information on how many out of all Roma pupils were placed in these segregated classes (e.g. in a school in Podturen, it was 17 out of 47 pupils, i.e. approximately 36%). At the same time, the conclusion that it was not a result of a general policy was not drawn merely from the fact that this share did not exceed 50% but rather from assessing the overall context of the

matter, when the problem concerned merely several primary schools in Međimurje County. However, the situation was different in the complainant's case. The overall share of Roma pupils in the Czechoslovak Socialist Republic placed in special schools, which amounted to approximately 40%, implies, owing to the fact that the Roma community represents only approximately 2% of its population, an obvious disproportion. The given 50% limit, based on completely different information, is also questioned by the fact that in the case of D.H. and others versus the Czech Republic the share of Roma children in special schools amounted to 50.3%. In addition, in the Judgment dated 29 January 2013 in the Application No. 11146/11 Horváth and Kiss versus Hungary, the European Court of Human Rights concluded on the disproportion between the share of Roma children attending special schools, which amounted to 40-50% of pupils, and the share of Roma children attending other primary schools, which amounted to less than 9% of pupils. These statistical data were deemed sufficient to draw a conclusion on the existence of a general practice which has a prejudicial negative and disparate impact on the Roma community.

16. Even though it was not expressly mentioned by the court of extraordinary appeal, its judgment implies a conclusion that even though prima facie evidence had been submitted in the instant case, the secondary party would have prevailed anyway, as it would have rebutted the presumption of discrimination. Instead, it deemed the argument on the lack of reliability of psychological tests weakened by the fact that the complainant had not been exposed, in his preschool age, to cultural and social particularities which could cause the failure in tests taken by Roma children brought up in families in which they did not, among other things, attend nursery school. The complainant does not agree with such assessment. If the European Court of Human Rights admitted the possibility to rebut the assumption of indirect discrimination upon submitting sufficient safeguards that the state took into account the special needs of Roma children related to their disadvantaged status, then the assessment of these safeguards shall be made in relation to the whole ethnic group. This is implied by both the afore-mentioned paragraph 209 of the Judgment of D.H. and others versus the Czech Republic, and the Judgment of Horváth and Kiss versus Hungary, according to which it was impossible, in the case of the complainants, to claim with certainty whether they were mentally disabled or not (paragraph 122). With respect to the unfavourable prejudicial impact on the Roma community, the defects of the potential safeguard led the Court to conclude that the complainants must have been exposed to discrimination (paragraph 128).

17. According to the complainant, the contested decisions may not be subject to a review, either. In fact, they do not deal with his argument that the lack of capacity of psychological tests to reflect ethnical particularities was not the sole reason why Roma children ended up in special schools. The Judgment of D. H. and others versus the Czech Republic already emphasised that they were placed in these schools for substitute reasons (e.g. truancy or behavioural disorders) and that in this context it was racial prejudice that played a significant role. The whole matter thus needs to be considered in the context of the widespread negative sentiment of the majority population towards the Roma community. What is notoriously known is the reluctance of primary school teachers and the resistance of parents of non-Roma children to educating Roma children in primary schools. Indeed, a number of the complainants in the instant case were placed in a special school following a short primary school attendance upon the request of the class teacher stating general failure to cope with the curriculum, truancy or behavioural disorders as the reasons for doing so. This allegedly occurred in the case of the complainant, as well.

18. As for the other warranties mentioned by the court of extraordinary appeal, in the complainant's views, they do not allow the instant case to be distinguished from the situation which was dealt with in the Judgment of D. H. and others versus the Czech Republic. In 1985, when the decision on his placement in a special school was issued, he was 7 years old and thus could not file an appeal on his own. At that time, he had not been in the custody of his legal guardians for 5 years. In addition, one may not overlook the fact that the European Court of Human Rights, in the afore-mentioned Judgment, concluded on the violation of the complainants' rights despite the fact that the majority of their legal guardians had consented to their placement in a special school. Consequently, it did not represent a sufficient safeguard. What is also irrelevant is the fact that the complainant could have been transferred to primary school upon the application of the head teacher. In his view, it is apparent that the context in

which the special education system disadvantaged Roma children was substantially broader and more varied and it could not be definitely limited to the statement that these children were placed in special schools solely for the reason of failure in tests owing to the particularities of their upbringing in Roma families (which is not the case of the complainant who grew up in a children's home). Neither the court of appeal, nor the court of extraordinary appeal took into account other elements and components which contributed to the discriminatory impact of the system and whose effect could have played a role in the instant case.

19. In the last part of the constitutional complaint, the complainant challenged the conclusion on the statute of limitation of his claim, pointing to the fact that he had filed the action before consolidating the case law on the statute of limitations related to claims for non-pecuniary damages by means of the Judgment of the Civil and Commercial Division of the Supreme Court dated 12 November 2008, file reference 31 Cdo 3161/2008. Until then the specialised chamber 30 Cdo consistently ruled that this claim was not subject to the statute of limitations, which is the fact that should have been taken into consideration with respect to the principles of legal certainty and predictability of the law. In this context, he refers to the Judgment dated 22 December 2010, file reference III. ÚS 1275/10 (N 253/59 SbNU 581).

III.
Summary of the proceedings before the Constitutional Court
20. For the purposes of these proceedings, the Constitutional Court requested the file kept at the Municipal Court in Prague, file reference 37 C 89/2008, inviting the parties to the proceedings and the secondary party to submit their statements on the constitutional complaints.

21. The Supreme Court, on behalf of which the statement, in the form of an official letter dated 29 May 2013, was submitted by the Presiding Judge of the corresponding chamber, JUDr. Lubomír Ptáček, Ph.D., referred to the content of the contested decision. It emphasised that the focus of its argument did not consist in the interpretation or even a polemic with the Judgment in the case of D. H. and others versus the Czech Republic and its conclusion on the applicability or inapplicability of statistical tables as evidence, but rather on the assessment of the individual circumstances of the case, which implied the decision on dismissing the application.

22. In its statement dated 3 May 2013 and signed by the Presiding Judge of the corresponding chamber JUDr. Ludmila Říhová, the High Court in Prague also referred to its contested conclusion. In its view, the instant case did not establish any illegitimate interference with the personality rights of the complainant, and thus no responsibility of the state, either.

23. The Ministry of Education, Youth and Sports, on behalf of which the statement was submitted by JUDr. Miroslav Šimůnek, Chief Director of the Legislation and Law Department, by means of an official letter dated 26 April 2013, commented in detail on the issue of the limitation of the complainant's claim. It pointed out that in the course of the proceedings, the complainant had not challenged the issue of the statute of limitations of the claim for non-pecuniary damages, but rather only the timely manner of raising the relevant objection. In the instant case, raising this objection did not result in an excessive disadvantage to him, either, as at the time of filing the action, the issue of the statute of limitation of his claim was disputable. Subsequently, the ordinary courts could have only applied the conclusions contained in the consolidating Judgment of the Supreme Court.

24. In the Judgment of D. H. and others versus the Czech Republic, the European Court of Human Rights assessed, on the basis of the submitted statistics, the character of the system of placing children in special schools as discriminatory; however, according to the Ministry, this fact does not preclude that in every ethnic group, there might be a person who would belong in a special school owing to their intellectual capacities. Disregarding the individual circumstances of the complainant would actually create an irrebuttable presumption of violation of his rights, in which the role of the court would be limited to the automatic granting of the action and the state as the defendant would be denied any possibility of legal protection. In the instant case, there are given circumstances which justified the placement of the

complainant in a special school. It was up to him to supply facts suggesting that at the time of his placement he was not a mentally retarded person and, consequently, that the alleged discriminatory practice had been applied in his case.

25. In addition, it is impossible to disregard the conclusions of the Judgment of Horváth and Kiss versus Hungary, in which the European Court of Human Rights held that Roma had been overrepresented in remedial schools due to the systematic misdiagnosis of mental disability (paragraph 110). If the IQ limit between a healthy and mentally disabled individual was set, following the recommendation of the World Health Organisation, at the level of 70, then merely 49% of the pupils placed in special education were mentally disabled, while 50.7% fell within the normal limits, out of whom 12% had an average intellect and 38.7% were borderline cases (on the border of mental disability). In the course of examination of the complainant at the District Pedagogical and Psychological Counselling Centre in Cheb on 17 April 1985, his IQ level was determined at the value of 63. In addition, he was not placed in a special school on the basis of a single examination; his intellectual capacities for education in a common primary school were monitored and assessed in the following years as well. As the complainant had failed in the first grade of primary school, he could have hardly been found, at that time, eligible for education at primary school. For this reason, his case did not represent a systematic misdiagnosis.

26. The Ministry does not perceive as unfinished the conclusion of the court of extraordinary appeal according to which the complainant had apparently been instructed by the court pursuant to § 118a, para. 3 of the Civil Procedure Code. In fact, its judgment implies that in the course of the proceedings, the alleged (and anticipated in § 133a, letter b) of the Civil Procedure Code) fact that his placement in a special school had been, on the side of the secondary party, motivated by a prohibited ground consisting in his membership in the Roma ethnic group was rebutted, given the situation when the complainant had failed to furnish any other evidence establishing that he had been subject to discrimination. As a result, the decision of the court of appeal did not need to be set aside. Due to the fact that the complainant had not been discriminated against in relation to the access to education on the grounds of his membership in the ethnic group, the Ministry motioned that the Constitutional Court should dismiss his constitutional complaint.

27. The afore-mentioned statements were sent to the complainant, who exercised his rights and responded to them by means of a submission dated 24 June 2013. Above all, his submission emphasised some parts of his arguments summarised already above. In relation to the statement of the Ministry, he reiterated that if the system discriminated against the whole ethnic group, then every member of it entered the system a priori disadvantaged and it was irrelevant whether they would end up in an identical situation, taking into account the individual circumstances, if they were not subject to discrimination. In order to make an inference on discrimination, it is the treatment itself that is the most important, rather than the result. In other words, discrimination applies not only to a person who did not succeed in the system but also the one who succeeded despite the discriminatory treatment, or even the one who did not succeed and would not have succeeded even if they had not been subject to discrimination. As for the reference to the fact that unlike the case of the complainant, the Judgment of Horváth and Kiss versus Hungary concluded on systematic misdiagnosis of mental capacities and that the boundary IQ level was set at 70 pursuant to the recommendation of the World Health Organisation, while the complainant scored 63, the Ministry was supposed to disregard the fact that while the applicant Horváth had repeatedly scored below 70, the European Court of Human Rights concluded that he had to be subject to discrimination owing to a disproportionately prejudicial effect (paragraph 128). In conclusion of his reply, the complainant raised the question what else testifies of "systematic misdiagnosis of mental capacities" than the fact 40% of special school pupils labelled as mentally disabled were Roma, while merely 2-3% of the population were Roma. He remains to deem the constitutional complaint as justified and well-founded.

28. Pursuant to § 44 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, the Constitutional Court held in the matter dispensing with an oral hearing, as it was not expected to provide any further clarification of the matter.

IV.
Assessment of the Court

29. The constitutional complaint is admissible, it was filed in a timely manner and by an authorised person, and it also meets other statutory formalities. The Constitutional Court therefore proceeded to its assessment on the merits, subsequently finding that it was not well-founded.

IV./a
Constitutional dimension of the matter
30. Responding to the question whether the ordinary courts, when making a decision on the complainant's claim, did not commit a violation of his constitutionally guaranteed rights requires understanding certain broader circumstances of the present case, illustrating more closely its constitutional dimension.

31. By means of an action for the protection of personality rights, the complainant sought an apology of the state and just satisfaction owing to the fact that from 1985 to 1995, he had been forced to attend a special school intended for children with mental disabilities on the grounds of his membership in the Roma ethnic group. This allegedly deprived him of access to education under the same conditions as with other children who, on the contrary, could attend primary school. In addition, it was allegedly not an isolated case. As the complainant maintained, it was part of an established practice of the relevant bodies, which in effect resulted in segregating Roma pupils in special schools.

32. Above all, the Constitutional Court considers desirable to emphasise the importance of education for the life of every individual. Education creates conditions for the development of their individual capacities, for their self-realisation and social fulfilment. In this respect, it has a major impact on their decision-making about their own lives and in the broadest sense, on their efforts to pursue happiness as well. However, education is important not only from the perspective of a specific individual but also society as a whole. In addition, access to it may be deemed as an implicit assumption of a functioning democratic state, as in fact, it opens up a space for citizens to exercise their civil and political rights, and thus their active and widest possible participation in dealing with public interest matters. The outlined importance is expressed in the right to education and access to it, which is constitutionally guaranteed in Art. 33 of the Charter of Fundamental Rights and Freedoms (hereinafter only as the "Charter") and Art. 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. In order to satisfy the requirement of equality in rights, it is essential that everyone be provided with an equal education opportunity without any difference. To put it more precisely, everyone shall be guaranteed equal and open access to education.

33. The purpose of former special schools, which the complainant attended instead of primary school, did not consist in restricting access to education for a certain group of children. Pursuant to § 31 of Act No. 29/1984 Coll., on the System of Primary Schools, Secondary Schools and Higher Vocational Schools (Act on Schools), these were intended to serve for educating pupils with intellectual deficiencies which prevented them from successfully completing primary school or a special primary school intended for pupils with sensory or physical disabilities, pupils with speech defects, pupils with multiple disabilities, pupils with serious behavioural issues, and sick or weakened pupils placed in medical facilities. Basically, its pupils included children with mental disabilities, which was expressly stipulated in § 2, para. 1 of the Decree of the Ministry of Education of the Czech Socialist Republic No. 95/1978 Coll., on School for Youth Requiring Special Care, or § 2, para. 4 of the later Decree of the same Ministry No. 49/1986 Coll., on School for Youth Requiring Special Care. Special schools were intended to enable them to complete education corresponding to their intellectual maturity. Their curricula were adapted to this purpose, which may undoubtedly be labelled as legitimate even today.

34. The question which the Constitutional Court was asked to address in these proceedings and the answer to which was sought within its competence, consists in whether ordinary courts had dealt, in a constitutionally conforming manner, with the allegations of the complainant that he had been placed in a special school owing to his belonging to the Roma ethnic group and whether they had adequately

assessed the evidence furnished by him in this respect. It was this factual finding that was decisive for assessing his action by means of which he sought the protection of his personality rights. On the contrary, the role of the Constitutional Court in these proceedings does not consist in general retrospective assessment of the functioning of then special schools. Similarly, it is not competent to make reflections whether in the past it was possible to achieve the purpose of their established differently and better.

35. If the above-mentioned reason for placing the complainant in the special school had been established, it would have amounted (and still would amount) to inadmissible discrimination on the ground of the ethnic origin, which could not stand the test either in terms of the then or contemporary constitutional order (see, in particular, Art. 1, Art. 3, para. 1 and Art. 24, para. 1 of the Charter), or in terms of the relevant international law obligations (apart from Art. 14 of the Convention, it is possible to mention, for instance, Art. 26 of the International Covenant on Civil and Political Rights or the International Convention on the Elimination of All Forms of Racial Discrimination). In a democratic rule of law state, based on respect for the person and their rights, it is impossible that the criterion of race or ethnic origin should decide on the extent to and terms under which the individual is provided access to education. Any such distinction would become contradictory to the essential principal of the constitutional order, being the equality of all people in their dignity and rights (Art. 1 of the Charter), as consequently, it would deprive a certain group of persons of certain rights due to their existence. Accepting it would thus mean nothing but recognising that in relation to the state, these persons are in an inferior or second-rate position, which is the conclusion which may not be accepted under any circumstances. It is not only our history that offers a sufficient number of examples attesting how harmful consequences may arise upon admitting such a possibility.

36. The above-mentioned discrimination against children who would be exposed to it would have a negative impact in several directions. If they were placed in a special school solely on the grounds of their membership in the Roma ethnic group, it would mean that they would be deprived, without any relevant reason, of the education to the same extent and under the same terms as primary school pupils. This would disadvantage such children in their possibility to continue their studies, substantially hampering or limiting the possibility of developing their careers or social roles. Such placement would also impact the manner in which these children regard their social status, as well as how they are regarded by others. In relation to both these groups, it would result in upholding the unequal or second-rated position of the members of the Roma community. In addition, such convictions cannot be changed in either part of the society overnight, and to some extent, it remains part of how each of us perceives the world around us. Last but not least, it must be mentioned that the very fact that the child attended a special school shows, on the outside, their mental disability regardless of the actual reason for such placement. Given the circumstances when it is common knowledge that no such placement could occur "by the way", but must have been preceded with a decision of a public authority issued on the ground of an expert assessment of the child's health condition, the above mentioned assumption, even though it would be incorrect in the specific case, may hardly be rebutted by merely one's own statement. On the contrary, it is significantly more likely that such children would encounter it all throughout their lives to a varied extent.

37. The Constitutional Court is convinced that if the proceedings before the ordinary courts had established indirect discrimination against the complainant upon his placement in a special school, the above-mentioned consequences could have substantiated the conclusion on the violation of his personality rights. For this reason, within its assessment, it concluded that no such discrimination had been established, and in this respect, it considered as the essential constitutional law standpoint the complainant's right to judicial protection pursuant to Art. 36, para. 1 of the Charter and Art. 6, para. 1 of the Convention. It should be noted that pursuant to the established case law of the Constitutional Court, a violation of this right may also occur in the cases when ordinary courts, when dealing with a certain issue, will opt for a different than constitutionally conforming alternative to the interpretation of a sub-constitutional right [cf., for instance, the Judgment dated 16 February 1995, file reference III. ÚS 114/94 (N 9/3 SbNU 45)] or when in the course of its application, it is interpreted in an arbitrary or unreasonable manner or when it deviates from generally acceptable rules of interpreting legal norms [cf., for instance, the Judgment dated 10 October 2002, file reference III. ÚS 74/02 (N 126/28 SbNU

85), Judgment file reference IV. ÚS 1796/11, dated 18 October 2011 (N 178/63 SbNU 69) or Judgment dated 7 March 2012, file reference I. ÚS 3523/11 (N 48/64 SbNU 599)]. In the instant case, the relevant sub-constitutional right refers to, in particular, § 133a, letter b) of the Civil Procedure Code, which served as a basis for sharing the burden of proof between both parties to the proceedings, as outlined below.

IV./b
On sharing the burden of proof in cases of indirect discrimination
38. The provisions of § 133a, letter b) of the Civil Procedure Code, which were applied by the ordinary courts in the instant case, prescribe that if the plaintiff submits before the court facts which allow an inference that the defendant caused direct or indirect discrimination on the grounds of racial or ethnic origin in access to education and vocational training, the defendant shall prove that there was no violation of the equal treatment principle.

39. The legal regulation of producing evidence in proceedings under § 133a of the Civil Procedure Code, in which the plaintiff maintains that they were discriminated against, either directly or indirectly (while usually alleging the violation of rights stipulated in the Civil Code or Labour Code and applying the related liability), represents an exemption from the general principle of producing evidence, expressed in § 120 of the Civil Procedure Code, pursuant to which the burden of proof rests upon every party to the proceedings in relation to the alleged facts. Even though a person who alleges being a victim of discrimination is at first obliged to submit to the court the facts sufficiently justifying the conclusion on the existence of possible discrimination (i.e. they must establish a prima facie interference), if they do so, it establishes a rebuttable assumption in relation to which the burden of proving the opposite rests upon the defendant. The above mentioned sharing of the burden of proof ensures that the persons discriminated against were provided with effective means of legal protection with respect to the nature of the subject to the dispute, and in fact, it satisfies the constitutional requirement of the equality of the parties to the proceedings pursuant to Art. 37, para. 3 of the Charter (or the equality of weapons under Art. 6, para. 1 of the Convention) in the material sense. After all, in cases when the discrimination allegedly occurred on the ground of racial or ethnic origin, satisfying the requirement to establish such grounds of the defendant would not be possible [for more details, see the Judgment dated 26 April 2006, file reference Pl. ÚS 37/04 (N 92/41 SbNU 173; 419/2006 Coll.)].

40. The outlined sharing of the burden of proof shall be applied regardless of the fact whether direct or indirect discrimination has been alleged. Direct discrimination means any act or omission when a person is treated less favourably than another person is or has been treated in a comparable situation on the basis of any of the "suspicious" (discrimination) grounds under Art. 3, para. 1 of the Charter, such as the race, ethnic origin, nationality, sex, sexual orientation, or age. In the case of indirect discrimination, disparate treatment occurs on the grounds of a seemingly neutral criterion, whose consequences, however, specifically disadvantage a certain group of people defined by any of the above mentioned "suspicious" grounds in comparison to others.

41. Both direct and indirect discrimination lead to the same negative effect, and thus both establish an inconsistency with Art. 3, para. 1 of the Charter [e.g. the Judgment dated 30 April 2009, file reference II. ÚS 1609/08 (N 105/53 SbNU 313)]. The prohibition of indirect discrimination, as inferred by the European Court of Human Rights in its case law, also ensues together with the prohibition of direct discrimination from Art. 14 of the Convention [cf. the Judgment of D. H. and others v. the Czech Republic, paragraph 184 et seq., or the Judgment of Horváth and Kiss v. Hungary, paragraph 105; in addition, for instance, the Judgment of the European Court of Human Rights, dated 4 May 2001, in the application No. 24746/94, Hugh Jordan v. the United Kingdom, paragraph 154, or the Judgment dated 20 June 2006 in the application No. 17209/02, Zarb Adami v. Malta, paragraph 76].

42. Due to the fact that the complainant was allegedly subject to indirect discrimination, the Constitutional Court further dealt with the interpretation of the provision of § 133a, letter b) of the Civil Procedure Code with respect to its particularities. In this context, it holds that in the course of its application, one may proceed from the test of indirect discrimination as formulated by the European

Court of Human Rights in its case law (see the case law mentioned in the previous paragraph). At the beginning, the burden of proof rests upon the plaintiff who shall prove that (1) a facially neutral criterion has a significantly stronger impact on a protected group (defined according to the ethnic, racial, sex or other "suspicious" criteria listed in Art. 3, para. 1 of the Charter) and that (2) they are a member of such a protected group. Establishing these two conditions assumes indirect discrimination with respect to all members of the particular protected group. This shifts the burden of production and proof onto the adverse party who shall either (3) deny any of the two afore-mentioned allegations (e.g. through establishing that there has been no substantial effect on the protected group or that the actual reason differs from the discrimination ground or that the plaintiff is not a member of the particular group or (4) establish that there is an objective and reasonable justification for the excessive disadvantage of the protected group, i.e. that it has been a measure pursuing a legitimate aim which was appropriate, necessary and reasonable in order to achieve it (for the latter step, see the Judgment of D. H. and others v. the Czech Republic, paragraph 196; cf. also the Judgment of the European Court of Human Rights dated 18 February 1999 in the application No. 29515/95, Larkos v. Cyprus, paragraph 29). All the above steps must be preceded by the definition of the specific criterion and an assessment of its "neutrality".

43. Unlike direct discrimination, in the case of indirect discrimination, a neutral criterion is applied, i.e. a criterion not consisting in any of the "suspicious" reasons pursuant to Art. 3, para. 1 of the Charter, yet its application, in certain particular circumstances, affects the members of the protected group in a manner as if there was actually a "suspicious" suspicion. The fact that it cannot be a consequence which would be necessarily linked to the application of the criterion in question (or which could be inferred from this criterion in an abstract manner for every instance of application) is related to the essence of the matter. If it were the case, it would not at all represent a neutral criterion. Thus, indirect discrimination may always be regarded solely as a factual consequence of a certain relevant practice, which must be understood as a sum of individual cases in which a certain neutral criterion was (or is supposed to be) applied in an identical or comparable manner.

44. Defining the essential elements of such a practice represents a necessary prerequisite of assessing whether the members of a certain protected group are, within the scope of the practice, exposed to indirect discrimination. In addition, these elements do not include only the relevant neutral criterion applied in the practice, but also the particular manner (procedure) in which the application actually takes place, including all the related safeguards which should prevent applying the neutral criterion for another than the pursued (or possibly prohibited) purpose. Typically, the nature of these safeguards consists in the conditions under which the criterion may be applied (e.g. conditioning the placements of a child in a special school by their expert examination), as well as the means available to the individual concerned in order to protect their right or the review mechanisms of other bodies. To a substantial extent, the possibility of rebutting the assumption of indirect discrimination depends on the existence of the above-mentioned safeguards, as well as on the fact whether in the examined period, they actually served their function. If they were effective, then their existence opens space for rebutting the assumption of indirect discrimination in relation to the relevant practice as a whole. Otherwise, the situation would be different, though. If they were found inefficient, they could not then be relied on in individual cases, as their application would not have the required validity in terms of whether discrimination occurred.

45. The conclusion that a certain practice resulted in indirect discrimination does not mean that within its scope, the disadvantage would necessarily affect every member of the protected group in whose case the relevant neutral criterion has been applied. However, it implies that such disadvantage actually occurred to a substantial degree, while in individual instances of which this practice consists, it is impossible to distinguish in a conclusive manner whether it was the case or not. For this very reason, the assumption of indirect discrimination may only be rebutted in relation to a certain relevant practice as a whole (cf. the Judgment of D. H. and others v. the Czech Republic, paragraph 209). If the above distinction could also be reasonably made in individual cases, it would mean that these discrimination cases might be examined independently of the overall assessment of such a practice, i.e. in terms of direct discrimination. Under such circumstances, assessing indirect discrimination would lack any sense.

46. As noted above, the conclusion on indirect discrimination may stand only in the case if it is related

to the relevant practice consisting of cases mutually consistent in all material elements. What matters is not only the fact that a neutral criterion has been applied but also the manner (procedure) in which it took place. For instance, if this criterion is applied in relation to one group of cases in a certain manner, while being applied in a different manner in relation to another group, whereas each of these manners will provide different safeguards of varying efficiency against their potential discriminatory effect, then the assumption of indirect discrimination may only be assessed separately in relation to every partial practice. In fact, each of them will have the nature of a relevant practice just in relation to those individual cases of which it consists. In addition, it may not be ruled out, however, that with respect to a completely specific approach to applying a neutral criterion, a certain specific case may not be regarded as part of any relevant practice in relation to which a consideration on indirect discrimination could be reasonably made (with respect to the number of relevant cases). However, such a case would always have to be assessed separately.

47. The application of § 133a, letter b) of the Civil Procedure Code, which would fail to respect the above defined sharing of the burden of production and proof in the cases when indirect discrimination is alleged, would not satisfy the requirements related to the right to judicial protection under Art. 36, para. 1 and Art. 37, para. 3 of the Charter and Art. 6, para. 1 of the Convention.

IV./c
Assessment whether the complainant established the facts substantiating the assumption of indirect discrimination

48. In the instant case, the review of the contested decisions was based on the above constitutional law reflections. The complainant furnished evidence on indirect discrimination using statistical data processed by the Institute of School Information at the Ministry of Education of the Czechoslovak Socialist Republic, according to which between 1985 and 1991, the share of Roma children in the total number of children placed in special schools in the then Czechoslovak Socialist Republic amounted to approximately 40 %, in the territory of the Czech Socialist Republic to approximately 30 %, and in the territory of the West Bohemian Region to approximately 40 %. Owing to the fact that in 1996, the Roma community reportedly represented 1.5 to 2 % of the total population, it allegedly resulted in an obvious disproportion which should substantiate the assumption that Roma children had been placed in special schools due to their ethnic origin.

49. The contested decisions imply that the ordinary courts failed to consider the above facts as sufficient to establish the assumption of indirect discrimination. Whereas the court of appeal did not make any further considerations on their relevance, the court of extraordinary appeal inferred, from certain judgments of the European Court of Human Rights, the conclusion according to which statistical data might establish the above assumption only when they imply a relevant disproportion of at least 50 %. The defined threshold of statistical significance was then applied in the manner that it considered whether the percentage share of the number of Roma children in the overall number of special school pupils did not attain at least this value. At the same time, it found out that this limit had not been reached, and thus the assumption of indirect discrimination had not been established.

50. The Constitutional Court believes that the above conclusions will not stand the test in the constitutional law perspective. Statistical data may establish the assumption of indirect discrimination if they imply such a disproportion which will allow, on the basis of a reasonable consideration and taking into account the relevant context, making a prima facie conclusion on the existence of a discriminatory practice. It is in this sense that it is necessary to understand the conclusion according to which “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” (Judgment of D. H. and others v. the Czech Republic, paragraph 188).

51. The limit of statistical significance, as stated by the court of extraordinary appeal, will not stand for the very reason that its general determination lacks any adequate validity. In fact, achieving this limit shows, on its own, merely whether the percentage of the protected group in special schools represents a

majority or a minority. This information was justifiable in the application of Oršuš and others v. Croatia, in which, given the context of other facts, it showed the existence or non-existence of a practice of placing Roma children in separate classes, which however represents a practice, in terms of its potential assessment, significantly different from placing these children in special schools intended for mentally disabled children. On the contrary, the assumption of indirect discrimination in the complainant's case could be based on establishing an obvious disproportion between the share of the number of children belonging to the protected group and placed in special schools from the total number of children placed in such schools and the share of the total number of children belonging to the protected group from the total number of children in the territory where the discriminatory practice allegedly occurred (or possibly the share of the total number of inhabitants belonging to the protected group in the total population). Obviously, the relevant data would always have to be related to the area in whose case it is justifiable to consider a certain common, even uncoordinated practice. In this sense, importance may be assigned to, for instance, the administrative district (a region or district) where there was a sole special school authority or where their activity was subject to the supervision of a sole administrative body. Similarly, one might assess the practice in the territory of the whole country if the above conditions were met.

52. In the instant case, the ordinary courts, when assessing the statistical data submitted by the complainant, limited themselves to assessing the threshold of statistical significance as defined by them. However, such assessment is completely insufficient, and for the above reasons, it does not provide a reasonable basis for the conclusion that the complainant failed to establish the assumption of indirect discrimination. Consequently, the Constitutional Court considers the above conclusion as a deviation from the requirements concerning the decision-making of ordinary courts and derived from the right to judicial protection under Art. 36, para. 1 of the Charter and Art. 6, para. 1 of the Convention. However, this partial conclusion is not reflected in the overall constitutional law assessment of the contested decisions, as it does not question the legitimacy of dismissing the complainant's action. It did so for the reasons as follows.

IV./d
The assessment whether the state rebutted the assumption of indirect discrimination
53. Both the court of appeal and the court of extraordinary appeal did not consider as significant whether the complainant, in relation to his placement in a special school, had established the assumption of indirect discrimination on the ground of membership in the Roma ethnic group. Even if he had done so, in his case, this assumption would have been rebutted with respect to the performed examinations of his intellectual capacities. The Constitutional Court has identified with this conclusion, yet its considers its reasoning provided by the court of extraordinary appeal as rather simplifying and insufficiently reflecting the essence of indirect discrimination, and thus it is desirable to offer a more detailed reflection.

54. It has already been mentioned that individual circumstances on their own often fail to rebut the successfully established assumption of indirect discrimination in a specific case, as their relevance is questioned by means of this assumption (see paragraphs 44 and 45 of this Judgment). For instance, if placing Roma children in special schools were always decided solely on the grounds of a certain test of intellectual capacities, then the statistics which would establish a manifest disproportion between the number of Roma children in the population and their representation in special schools would raise doubts on the correctness and purposefulness of the application of this test. Naturally, a mere reference to its result would be insufficient in order to establish that the child has not been placed in a primary school on the grounds of ethnic origin. At first, it would be necessary to deal with the issue whether these tests (with respect to the manner in which they have been actually applied) are objective and actually measure the child's intellectual capacities.

55. Nevertheless, individual circumstances need to be admitted importance for assessing whether and in relation to what relevant practice an assumption of indirect discrimination would have to be established in order to relate it to the case at hand. The relevant practice may always be considered only in the event it consists of cases mutually identical in their essential elements. In fact, what is crucial for the purposes of identifying these elements is the case of the plaintiff alleging discrimination, as the matter requires it

to be part of the practice. This importance may also be described using the example of the application of the test of intellectual capacities. For instance, one may imagine that the child has been placed in a special school based on the results of this test, while, unlike the majority of other children in a similar situation, they were also subject to other tests or examinations based on another method and whose correctness is not, on the contrary, at all challenged. It is obvious that with respect to this specific approach, it would not be possible to consider the potential practice of the placement solely on the ground of the former test as relevant for assessing indirect discrimination in his case. Even though in all the cases it would consist in the child's placement owing to a neutral criterion of mental disability, these cases would not be comparable in terms of the procedure on the basis of which this disability was detected and which differed significantly in individual cases. It needs to be added that any such distinction of the relevant practice is necessary unless the conclusion on indirect discrimination is supposed to be merely declarative. After all, the purpose of its assessment in a particular case does not consist in answering the question whether in relation to placing Roma children in special schools, indirect discrimination occurred in general but whether it was the plaintiff who was subject to this discrimination. In this case, ordinary courts hold solely on the fact whether his subjective right has been violated or not. These grounds shall also be applied in the instant case.

56. The plaintiff stated in the action that in 1985, as a member of the Roma ethnic group, he had been placed in a special school which he subsequently attended until 1995. At the same time, he furnished statistical data which allegedly established indirect discrimination of Roma children when placed in special schools, while the relevant practice was considered, in general, the procedure of the competent bodies (or any other persons) when making decisions on placing children in special schools for the period of the academic year 1985/1986, as well as the following years, either in the territory of the then whole federation or solely in the territory of the then West Bohemian Region. In his view, the assumption of indirect discrimination founded in this manner allegedly affected his case as well.

57. The contested decisions may be reproached that the ordinary courts proceeded to rebutting the potential assumption of indirect discrimination without establishing, in a conclusive manner, what might be considered as a relevant practice in relation to the complainant's case. Given the situation when the decision-making procedure on placing the child in a special school included expert examinations of his intellectual capacities (cf. in particular § 8, para. 3 of Decree No. 95/1978 Coll. and § 8, para. 4 of Decree No. 49/1986 Coll.), it was impossible, in this particular case without further examination, to arrive at a rebuttal of the assumption of indirect discrimination just on the basis of their results. It was necessary to raise the question whether such examinations, which served as a basis for the decision of the District National Committee, were a key element of the then practice which in fact (for instance with respect to distorting their results) caused the alleged discrimination consequence to take effect (in this respect, cf. the Judgment of D. H. and others v. the Czech Republic, in particular, paragraph 199 et seq., where substantial attention was paid to this issue). In such as case, in the extent to which these examinations took place in a standard manner, their validity would be questioned. At the same time, a rebuttal of these doubts could only be made by means of establishing the objectivity of these examinations on a general level. Only then would it substantiate the conclusion that there is an objective and reasonable justification for placing children in special schools on the basis of their results (see paragraph 42).

58. However, individual circumstances could also have had a different meaning for assessing the matter. Even if the complainant had established that, in relation to placing Roma children in special schools, discrimination had occurred in general, the secondary party could have (and also argued in this direction) rebutted his allegation on the fact that he had been subject to a discriminatory practice by means of referring to the fact that significant differences of his case did not allow that his case should be considered part of this practice. This would mean that the practice as defined by the complainant would not be relevant for assessing this matter with respect to its extent and the varied nature. As a result, indirect discrimination would have to be established, if at all possible, in relation to a lower number of comparable cases. However, in relation to them, it would reduce the validity of the statistics concerning the total number of Roma children placed in special schools. In fact, the complainant would have to submit other prima facie evidence in support of his claim. It is worth mentioning that in the Judgment of D. H. and others v. the Czech Republic, the European Court of Human Rights assessed discrimination

in cases which undoubtedly formed part of the prevailing practice (cf. in particular, paragraphs 39 et seq. and paragraphs 199 et seq. of the above Judgment). For this reason, the essential conclusions concerning its discriminatory nature could have been drawn already on the basis of the submitted statistics.

59. The Constitutional Court states that the secondary party could have rebutted the complainant's allegation on indirect discrimination in two ways, either by establishing that the cause of this discrimination had not consisted in expert examinations on the basis of which a decision on his placement in a special school had been made (which would allow the results of such examinations in the specific case to be taken into consideration), or that the above assumption could not be related to a specific case with respect to its particularities which would not allow incorporating it reasonable under the relevant practice as defined by the complainant. In addition, the conclusions of the court of extraordinary appeal may be interpreted just in the sense that the secondary party met its burden of production and proof by means of one of the above manners.

60. The evidence submitted by the secondary party within the proceedings before ordinary courts implies that the intellectual capacities of the complainant, and thus the reasons for placing him in a special school, were assessed continuously in the course of his studies, using both psychological tests performed with the help of several methods and at multiple expert centres, and monitoring his study results or his grades (see paragraph 12 of this Judgment). His placement in a special school was thus not based on a single examination, nor was it obviously a result of a mere routine approach of the relevant bodies within which individual examinations or evaluations would have been conducted in a solely formal manner. After all, this is already shown in the fact that there was no inappropriate decision on releasing the complainant from mandatory education under 37, para. 2 of Act No. 29/1984 Coll., which would have meant, as a matter of fact, terminating his studies. In the view of the Constitutional Court, these very findings allow a relevant distinction of the complainant's case from the situation of the applicants in the matter of D. H. and others v. the Czech Republic, who were placed in special schools upon the decision of the head teachers of these schools with the parents' consent (or possibly upon their request) and with respect to the results of single psychological tests. In addition, this conclusion can be made despite the fact that psychological tests performed in pedagogical and psychological centres in the 1980s, to which the complainant had been subject, probably also insufficiently took into account the language and cultural differences of Roma children, which in the context of other facts, in particular the existence of racial prejudice, provided space for a segregation practice. When assessing the instant case, however, it is necessary to take into consideration the full scope of safeguards which were in fact applied in the complainant's case and which in principle effectively prevented the above deficiency from being adequately reflected in the overall assessment of the reasons for placing the complainant in a special school.

61. The latter conclusion has a broader overlap and cannot be related solely to the complainant's case. If a similar approach had been taken in other cases when reasons for placing a child in a special school were subject to a review, it would have effectively eliminated the possibility of this measure occurring on the system level owing to their membership in the Roma ethnic group. Consequently, there would have been a general objective and reasonable justification for placing children in special schools, as it would have pursued a legitimate goal (see paragraph 33 of this Judgment), and the relevant procedure would have guaranteed that it would be applied solely for a statutory purpose. This would have satisfied one of the assumptions that it would represent an appropriate, necessary and reasonable measure in order to achieve this goal.

62. If the court of extraordinary appeal concluded that in the complainant's case the possible assumption of indirect discrimination would have been rebutted in any case, it did it owing to the fact that the safeguards applied in relation to deciding on his placement in a special school were qualified to rebut this assumption in other comparable cases as well. To put it more precisely, they would have been qualified to rebut it against the whole relevant practice, in relation to which it would have been possible to reasonably assess whether the complainant was subject to indirect discrimination. And this exactly consists in the reason for dismissing the action. Under the given situation, in fact, it was not critical

whether the ordinary courts adequately defined the relevant practice in question. If an approach similar to the instant case had also been routinely adopted in other cases when Roma children were placed in special schools, then the complainant's case would have reflected substantial elements of the prevailing practice. For the above reasons, any possible assumption of indirect discrimination could have been conclusively rebutted. Yet, one may also admit another (much more probable) possibility that the complainant's case represented an exemption to the rule or an approach applied only in a small group of cases, while the prevailing practice of assessing the child's intellectual capacities was limited to a single examination or other insufficient safeguards. Under such circumstances, rebutting the assumption of indirect discrimination in relation to this practice would have been significantly more complex; yet what is critical for the instant case is the fact that the complainant's case would have differed from it to such an extent that it could not have been deemed as its part. Thus, his allegation that he had been subject to indirect discrimination would not have been established in this case either, as a result of which the action would also have had to be dismissed. The assumption of indirect discrimination would have been rebutted in any case.

IV./e
Other facts

63. For the sake of completeness, the Constitutional Court adds that it has not identified with the assessment of the importance of the remaining statutory safeguards as performed by the court of extraordinary appeal. Both the right to file an appeal against the decision of the District National Committee on the placement of the complainant in a special school and the possibility of being transferred to another school upon the request of the special school's head teacher (§ 10 of Decree No. 95/1978 Coll., and § 10 of Decree No. 49/1986 Coll.) do not show sufficiently whether in the context of the then practice, it consisted in effective means if, in particular, they were supposed to prevent children being placed in schools based on their ethnic origin. In this context, one must not omit that any possible consent to placing the child in a special school granted by their legal guardians, which may be equal to failing to file an appeal, may have legitimate reasons in the parents' perspective, e.g. concerns about the child being bullied or their separation from other Roma children. In the material perspective, however, these reasons cannot at all legitimize the discriminatory practice within which Roma children would be placed in schools intended for children with mental disabilities owing to their ethnic origin or related language and cultural differences (cf. the Judgment of D. H. and others v. the Czech Republic, paragraphs 46 to 48 and 202 to 204). Under no circumstances may the state tolerate or support any such practice.

64. The Constitutional Court did not deal with the issue of the statutory limitation of the complainant's claim, as it had been dealt with marginally by the ordinary courts, while not being critical for their decision making on the matter.

V.
Conclusion

65. For all these reasons, it is obvious that the ordinary courts, when interpreting and applying § 133a, letter b) of the Civil Procedure Code in the instant case, did not make such an error which would allow holding on arbitrariness or any other classified excess in their findings on the facts and legal conclusions, as a consequence of which the contested decisions could not stand as a whole. In spite of partial errors, they did not violate the complainant's fundamental right to judicial protection under Art. 36, para. 1 of the Charter and Art. 6, para. 1 of the Convention. Even if removed, the result of the proceedings before the ordinary courts could not have been at all different. For this reason, pursuant to § 82, para. 1 of the Act on the Constitutional Court, the Constitutional Court held on dismissing the constitutional complaint.

Instruction: The Judgment of the Constitutional Court cannot be appealed.