EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

20 November 2020

Case Document No. 3

European Roma Rights Centre (ERRC) v. Czech Republic
Complaint No. 190/2020

SUBMISSIONS BY THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 16 November 2020

THE CZECH REPUBLIC

OBSERVATIONS OF THE GOVERNMENT ON THE MERITS OF THE COLLECTIVE COMPLAINT

EUROPEAN ROMA RIGHTS CENTRE (ERRC) v. the Czech Republic

(No. 190/2020)

PRAGUE

16 NOVEMBER 2020

1. In its letter of 17 September 2020, the European Committee of Social Rights (“the Committee”) notified the Government of the Czech Republic (“the Government”) that on 9 September 2020, the collective complaint lodged by European Roma Rights Centre (“the complainant organisation”), a non-governmental organisation, against the Czech Republic had been declared admissible. In the letter, the Committee also invited the Government to submit their written observations on the merits of this collective complaint.

THE FACTS

I. SPECIFICATION OF THE SUBJECT MATTER AND SCOPE OF THE COLLECTIVE COMPLAINT

2. The Government find that the subject matter of the collective complaint at hand partly follows up on an earlier collective complaint lodged in the case of *European Roma Rights Centre (ERRC) & Mental Disability Advocacy Centre (MDAC) v. the Czech Republic* (No. 157/2017), in which the complainant organisations submitted that the Czech Republic has failed to comply with its obligations in violation of Article 17 of the 1961 European Social Charter (“the Charter“), read alone or in conjunction with the prohibition of discrimination laid down in the Preamble of the Charter, on the ground that the Czech Republic does not adopt sufficiently efficient measures to prevent the institutionalisation of children with disabilities and Roma children, placing them in children centres (i.e. children’s homes for children under the age of 3). In the latter case the Committee delivered a decision on the merits of the complaint on 17 June 2020 (“Committee’s decision in *ERRC & MDAC v. the Czech Republic*”).

3. The subject matter of the present collective complaint is narrower as it only relates to children of Romani origin. On the other hand, it is also wider because it is not limited to children centres. The present complaint refers to the lack of collecting statistical data on the numbers of these children in all institutions that provide childcare.

4. The term “institutional care”, used repeatedly in the collective complaint, is not defined in Czech law. Thus, the Government are not certain of the types of institutions at which the collective complaint is directed. Nevertheless, for the purposes of these observations the Government rely on the extensive interpretation, i.e. on the assumption that these institutions include not only children centres but also other children homes, children homes with schools, educational institutions, institutions for diagnostic assessment, separate facilities for protective therapy, security detention facilities and juvenile wards in prisons, as well as specialized prison wards for mothers with children.

II. GENERAL NOTES ON INSTITUTIONAL CARE PROVIDED BY THE STATE

5. First of all, the Government recall that under the applicable law and the decision-making practice of the domestic authorities, in the Czech Republic placing a child in any type of institutional facility is a measure of *ultima ratio* that can be envisaged only if all other options have failed and there is no other solution to the situation (cf. §§ 96, 98, 99 and 149 of the Committee's decision in *ERRC & MDAC v. the Czech Republic* and § 73 of the observations below).[1]

6. The Government also emphasise that alternatives to institutional care are available in the Czech Republic. There are several such alternatives, including placement in the care of another person, adoption, and foster care. In particular, temporary foster care has been rapidly rising in recent years (cf., in particular, §§ 41 and 97 of the Committee's decision in *ERRC & MDAC v. the Czech Republic*; see also § 73 of these observations).

7. As to the complainant organisation's argument that without statistics, it is impossible to prove whether there is indirect discrimination or unequal impacts of the government policies on minorities (see § 14 of the collective complaint), the Government note that it concurs with the complainant organisation's claim that Roma are among the most disadvantaged and vulnerable groups in Europe. In this connection, the Government has been combating racial discrimination on multiple fronts, which includes also addressing the specific needs of Roma children in institutional care.

THE LAW

8. The complainant organisation claims that the Czech Republic is in breach of its obligations under Articles 16 and 17 of the Charter, read alone or in conjunction with the principle of non-discrimination enshrined in its Preamble.

9. The relevant part of the Preamble to the Charter reads as follows:

> "The governments signatory hereto, being members of the Council of Europe, (…) Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin; (…)"

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[1] Family care and institutional care are primarily governed by Act No. 89/2012, the Civil Code, which provides clear preference for family care and substitute family care over institutional care. Article 971 of the Civil Code quite clearly lists the exceptional situations in which a child can be placed in an institutional facility. Act No. 292/2013 on Special Judicial Proceedings sets out the applicable procedural rules for the courts deciding on care for minor children. This law also emphasises that interim measures can only be used when a minor child is in a situation of lack of proper care, regardless of whether or not there is a person having the right to take care of the child, or if the child's life, normal development, or other vital interest is at serious risk or has been impaired.

10. Article 16 of the Charter, guaranteeing the right of the family to social, legal and economic protection reads:

> "With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means."

11. Article 17 of the Charter, providing for the right of mothers and children to social and economic protection, reads as follows:

> "With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services."

ALLEGED VIOLATION OF ARTICLES 16 AND 17 OF THE CHARTER READ ALONE OR IN CONJUNCTION WITH THE PRINCIPLE OF NON-DISCRIMINATION

12. The complainant organisation claims that the Czech Republic violates Articles 16 and 17 of the Charter, read alone and in conjunction with its Preamble, by failing to collect, systematically and on an ongoing basis, relevant statistical data on the numbers of Roma children in the institutional care of the State, which ultimately prevents it from implementing effective measures, policies, and strategies to remedy the overrepresentation of these children in institutional care.

13. Before expressing their views on the merits of the complaint under Articles 16 and 17 of the Charter, the Government consider it to be necessary to comment on the substantive scope of these provisions and the associated question of whether the grievances raised by the collective complaint are compatible *ratione materiae* with these provisions of the Charter. As it is the Committee's usual practice to only consider these aspects in the stage of the assessment of the merits, rather than admissibility, of the complaint [see, e.g., *Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden*, collective complaint No. 99/2013, decision on admissibility of 10 September 2013, §§ 2 and 10; *Quaker Council for European Affairs (QCEA) v. Greece*, collective complaint No. 8/2000, decision on admissibility of 28 June 2000, § 10; *European Roma Rights Center (ERRC) v. Bulgaria*, collective complaint No. 31/2005, decision on admissibility of 10 October 2005, §§ 8 and 9], the Government do so at this point.

A) ON THE SUBSTANTIVE SCOPE OF ARTICLES 16 AND 17 OF THE CHARTER

14. The Government take the view that the collective complaint is incompatible with Articles 16 and 17 of the Charter *ratione materiae* to the extent to which the complainant organisation suggests that under these provisions the State, and hence the domestic authorities, have the obligation to collect statistical data

on the numbers of Roma children in all institutional facilities. In the Government's view the complaint is inadmissible in the two aspects specified below.

15. However, at the outset the Government note that positive obligations arising from Articles 16 and 17 of the Charter cannot be interpreted in a manner that would impose an impossible or disproportionate burden on States. In this respect the Government refer to the settled case law of the European Court of Human Rights ("the Court") holding that *"[i]n determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities"* [e.g., *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland*, no. 32772/02, judgment [GC] of 30 June 2009, § 81; *Remuszko v. Poland*, no. 1562/10, judgment of 16 July 2013, § 63]. In the Government's opinion the same considerations should all the more apply to the social rights safeguarded by the Charter.

(i) Awareness of the existence of the problem as a precondition for the State's positive obligation to collect and analyse statistical data

16. States can hardly be expected to collect statistical data on all aspects of the social life. Such an obligation would certainly constitute an obviously disproportionate burden (see § 15 above). Thus the Government are convinced that for the State's positive obligation to collect statistical data to arise, the national authorities must first be aware, or should be aware, that rights safeguarded by the Charter are being or may be violated in a larger extent in relation to a particular group of persons in a particular area. Only then can the State's positive obligation to collect the relevant statistical data be derived from Articles 16 and 17 of the Charter. The lack of the national authorities' activity in the face of problems of which they were or could be aware can then give rise to the State's international responsibility for a violation of the respective provisions of the Charter.

17. The Government believe that this approach is supported by the earlier decisions of the Committee that has noted that States are obliged to collect relevant data to be able to assess the extent of the **existing problems** and any interferences with persons' rights. Only then can States develop appropriate policies and adopt necessary measures to address persons' social and economic problems [*European Roma Rights Centre (ERRC) v. Greece*, collective complaint No. 15/2003, decision on the merits of 8 December 2004, § 27]. In this respect, the Committee has also emphasised that **when it is generally acknowledged** that a particular group of children is or could be faced with disproportionate care risks in comparison with the majority of population, as is the case for Roma children, States have an obligation to collect data on the extent of the problem. The collection and analysis of such data is indispensable for the formulation of an adequate policy and the adoption of appropriate measures to ensure the social and economic protection

the children in question need [see, in particular, the Committee's decision in *ERRC & MDAC v. the Czech Republic*, § 172; *European Roma Rights Centre (ERRC) v. Italy*, collective complaint No. 27/2004, decision on the merits of 7 December 2005, § 23].

18. Moreover, the Government are of the opinion that awareness of the vulnerability of a particular group in the population cannot give rise to the general obligation of the State to gather statistical data on all areas of social life in which these persons could hypothetically face disadvantages or inequalities. Conversely, when it is generally acknowledged that in a very specific context, a particular group's rights guaranteed under the Charter are being violated, States can be justifiably required to monitor the situation on an ongoing basis by means of collecting relevant statistical data and assessing such data with a view to choosing the appropriate measures for addressing the problem in a systemic manner. Any other approach would necessarily result in States wasting resources and funds to map purely theoretical problems although might would soon become apparent that the problems are actually non-existent.

19. In the same logic, the Government are of the opinion that Articles 16 and 17 of the Charter do not imply an obligation to collect data on the numbers of Roma children in all types of facilities that can be subsumed under the wide term of institutional care (see § 4 above); rather, this obligation can be derived only with respect to those facilities where there have been justifiable concerns about indirect discrimination or other violations of Roma children's rights under the Charter. Awareness of such issues can stem, for example, from warnings provided by non-profit organisations, the ombudsman, a court, etc. However, the Government believe that it is an unwarranted proposition that a finding of higher numbers of Roma children in children's homes compared with the majority population should automatically establish the State's obligation to monitor the numbers of Roma children in facilities with completely different purposes (e.g., in educational institutions, security detention, etc.).

20. The Government admit that as regards children's centres, and also children's homes and children's homes with a school, the domestic authorities cannot claim that they are unaware of the existence of the overrepresentation of Roma children.[2] The Government therefore agree that under Articles 16 and 17 of the Charter, these authorities are obliged to seek to obtain relevant data that would enable them to adopt effective measures to address this problem.

21. However, in its complaint, the complainant organisation does not provide anything specific in relation to facilities such as educational institutions, institutions for diagnostic assessment, separate facilities for protective treatment or security detention facilities (cf. § 4 above), nor does it document in any other manner that there is a problem consisting in the excessive placement of Roma

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[2] See, for example, the complainant organisation's 2011 report on the placement of Roma children in children's homes: *European Roma Rights Centre. Life Sentence – Romani Children in State Care in the Czech Republic*. 2011, pp. 27–32. Available at: http://www.errc.org/uploads/upload_en/file/life-sentence-20-june-2011.pdf.

children in these institutions. The Government therefore consider that in respect of the above facilities, the Czech authorities' positive obligation to collect and analyse statistical data on the ethnicity of the children placed in such facilities cannot be deduced from Articles 16 and 17 of the Charter in the current situation. To this extent, therefore, the Government consider the complaint to be incompatible *ratione materiae* with those provisions.

(ii) Limits of the positive obligation to collect statistical data on ethnicity and alternative means of mapping the problem

22. The Government also believe that Articles 16 and 17 of the Charter cannot be interpreted as establishing the State's unexceptional positive obligation to collect hard statistical data in areas where the Charter rights are being or may be violated. If the premise that positive obligations cannot impose impossible burdens on States (see § 15 above) is to apply, the Charter should not be interpreted as requiring from States any actions whereby they would be compelled to violate other human right obligations that they have accepted.

23. The collection of the statistical data on people's ethnicity also faces, as elaborated on in more detail below, a number of practical problems, in particular in terms of the methodology for determining who can be regarded as a member of the Roma ethnic group (see § 47 below), but also with respect to the concerned persons' rights, in particular their right to respect for private life, an inseparable part of which is also protection of sensitive personal data (see § 41 below).

24. The Government consider it to be of essential importance that in connection with determining the number of Roma children in the State's institutional care, the extent of the problem can also be mapped employing other ways and means, which intervene with the concerned persons' rights significantly less than the collection and processing of disaggregated statistical data. One of these options is an anonymised survey, on the basis of which qualified estimates can be formulated.

25. The Government believe that this interpretation is supported by the existing decision-making practice of the Committee, which has held in the past that *"[w]hen it is generally acknowledged that a particular group is or could be discriminated against, the state authorities cannot stop their efforts at remedying the situation due to legal obstacles of collecting data on ethnicity. Under these circumstances the State has, conversely, the responsibility for finding alternative means of assessing the extent of the problem and progress towards resolving it"* [Conclusions XVIII-1, (2006) Czech Republic, Article 1 § 1]. The Committee also admitted that *"[w]here official sources of data are not sufficient enough to help to develop policies for the fulfilment of social rights, estimates should be taken into account when formulating such policies*" [*European Roma Rights Centre (ERRC) v. Greece,* collective complaint No. 15/2003, decision on the merits of 8 December 2004, § 28].

26. In the light of the above the Government are of the opinion that Articles 16 and 17 of the Charter do not strictly require the collection of disaggregated

statistical data on the ethnicity of people. In fact, in such sensitive matters States can also comply with their positive obligations by mapping the extent of the existing problem using alternative means, such as collecting aggregated data on the basis of which they can make qualified estimates. The Government therefore believe that to the extent that the complainant organisation claims that Czech authorities fail to collect statistical data on the numbers of Roma children in the State's institutional care, the collective complaint is incompatible *ratione materiae* with Articles 16 and 17 of the Charter.

(iii) Conclusion

27. As follows from the Government's comments on the substantive scope of Articles 16 and 17 of the Charter, the Government consider that the collective complaint at hand is compatible *ratione materiae* with those provisions only to the extent concerning the collection of data on the ethnicity of children (1) in facilities such as children's homes and children centres (but not other State child care institutions) and, simultaneously, (2) in the form of qualified estimates (but not in the form of hard statistical data).

B) ON THE MERITS

28. The following part of the Government's observations is divided into four chapters. The first chapter provides an overview of the relevant legislation from which certain restrictions arise as regards the collection of statistical data on membership of a nationality, race or ethnic group. The second chapter describes various methods for collecting qualified estimates or data on the number of the members of a certain ethnic group. In this connection the Government also offer examples of the Czech authorities' earlier efforts to gather relevant data employing various methods, their advantages and disadvantages, as well as the practical difficulties encountered. The third chapter summarises the current domestic practice in the collection of such data with respect to institutional childcare facilities. In the final chapter the Government consider it to be essential to highlight the general measures intended to contribute as much as possible to reductions in the total number of children placed in the State's institutional care, and also other measures in this area, which are targeted specifically at the Roma population.

(i) Relevant domestic law and the resulting restrictions on the collection of statistical data concerning adherence to a nationality, race or ethnic group

29. Czech law distinguishes between nationality, race, and ethnicity. All three categories are among the prohibited grounds for discrimination under Article 3 § 1 of the Charter of Fundamental Rights and Freedoms ("Czech Charter").[3] This provision guarantees the enjoyment of fundamental rights and basic free-

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[3] The English text of the Charter of Fundamental Rights and Freedoms is available, e.g., at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/prilohy/Listina_English_version.pdf

doms to everyone without regard to race, colour of skin, national or social origin, adherence to a national or ethnic minority, prohibiting both direct and indirect discrimination. Nevertheless, each of these categories is regulated to a different extent and is governed by different rules regarding the possibility of collecting data.

a) Possibilities of collecting data on nationality

30. The protection of national minorities' rights is governed primarily by Act No. 273/2001 on the rights of members of national minorities.[4] The law defines the terms "national minority" and "member of a national minority" in Section 2. Under paragraph 1, a national minority is a community of citizens of the Czech Republic who live on the territory of the present Czech Republic and as a rule differ from other citizens by their common ethnic origin, language, culture and traditions; they constitute a minority of citizens and at the same time they show their will to be considered a national minority for the purpose of common efforts to preserve and develop their own identity, language and culture and at the same time express and preserve interests of their community which has been formed during history. Under paragraph 2 a member of a national minority is a citizen of the Czech Republic who professes other than Czech ethnic origin and wishes to be considered a member of a national minority in common with the others who profess the same ethnic origin.

31. Nationality is a prohibited ground for differential treatment, whether direct or indirect. Article 24 of the Czech Charter provides that no one should face prejudice for belonging to a national minority. The principle of non-discrimination also applies to minorities who are defined not by nationality or language (such as members of national minorities), but by all other differences, including those outside an individual's control. Thus, both the members of national minorities and the majority nationality are entitled to protection.

32. The Czech Charter, in Article 3 § 2, also guarantees everyone that they are free to choose their nationality. No other subject is allowed to influence their choice in any way or to coerce them into denying the nationality they identify with. The individual's free choice of nationality is reflected, for example, in the Act on the Population and Housing Census[5] and also has a significant impact on how statistical data are collected (see § 51 below).

33. Section 4(2) of the Act on the rights of members of national minorities expressly provides that governmental authorities do not keep records of members of national minorities.

34. Historically, this ban is rooted in the negative experience of registering Roma in the Czech Lands, when Act No. 117/1927 on wandering Gypsies intro-

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[4] The law on the rights of members of national minorities summarises the fundamental rights of national minorities and serves as the general law (*lex generalis*) on national minorities' rights, while more detailed provisions are contained in the special laws (*lex specialis*) to which it refers.

[5] Article 6(b) of Act No. 296/2009 on the 2011 Population and Housing Census leaves it up to the individuals whether to voluntarily disclose their nationality.

duced the concept of “Gypsy identity cards”.[6] In the autumn of 1939, the Ministry of the Interior of the Protectorate of Bohemia and Moravia went further, declaring that nomadic persons must be permanently settled. In the summer of 1940, disciplinary labour camps were opened in Lety u Písku and Hodonín u Kunštátu (according to contemporary terminology, they were intended literally for “people avoiding work”) for those who defied the order to settle. In July 1942, the commander-in-chief of the Protectorate’s plain-clothes police issued a decree aimed, again literally, at “putting an end to the Gypsy evil”. That decree also introduced a register of the entire Roma population, including children from mixed marriages. Everyone of Roma origin was placed on this register, with no regard for their way of life, level of education, or how socially integrated they were. From then on, everyone over the age of 14 whose name was in the register were required to prove their identity by producing a Gypsy ID card. Even settled Roma had their ordinary identity cards confiscated and replaced with Gypsy cards. Subsequent to these administrative measures, the Czech Roma minority was largely annihilated during the Roma Holocaust in an act of undeniable genocide. The Roma had to wait until the first post-war Constitution (Act No. 150/1948) to see their equal status guaranteed *de jure* for the first time. However, a law on the permanent settlement of nomadic persons was passed in October 1958 and then enforced by the police in 1959. The specific ethnic and cultural attributes of the Roma were violently suppressed, and their identity was systematically stifled to make their assimilation easier. Under pressure from schools, parents stopped speaking Romani to their children, which was expected to ensure their educational success. Starting in the early 1970s, state-controlled assimilation was replaced with a softer concept of social integration. Even so, for all intents and purposes the Roma were not recognised as a distinctive ethnic group until 1989. They continued to be dismissed, out of hand, as nothing more than a socially retarded group that needed to be re-educated to fit the majority mould.[7]

35. Following the end of the Communist regime, the negative experience with the authorities’ abuse of data on adherence to a particular nationality was reflected in the Act on the rights of members of national minorities, which explicitly prohibits the collection of data of this kind (see § 33 above). The explanatory memorandum, in discussing this prohibition, states that only anonymous data may be collected in statistical surveys; details that could identity individual members of national minorities must be destroyed immediately thereafter. Similarly, if details on affiliation with a particular nationality are obtained during a census or under another specific law, which makes it possible to identify that a specific person belongs to a national minority, that information may be used for no purpose other than that for which it was collected and stored, and must be destroyed immediately after it has been statistically processed.[8]

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[6] Horváthová, J. *Kapitoly z dějin Romů (Chapters from the Roma History)*. Nakladatelství Lidové noviny, 2002, pp. 43 and 44.

[7] Ibid., pp. 50–53.

[8] Kryska, D., Větrovský, J. *Zákon o právech příslušníků národnostních menšin – Komentář (Act on the Rights of Members of National Minorities – Commentary)*. Wolters Kluwer, Prague, 2018.

b) Possibilities to collect data on race

36. Race is a term that seldom appears in Czech law. It can be found in the aforementioned Article 3 § 1 of the Czech Charter, which enshrines non-discrimination on the basis of race (among other things). The prohibition of racial discrimination also appears in Section 2(3) of Act No. 198/2009 on equal treatment and on legal means of protection against discrimination ("the Antidiscrimination Act"). Under Czech law, race is therefore completely inadmissible as a reason for treating people differently.[9]

37. In this context it should be noted that the line between the terms "race" and "ethnic origin" is blurred. Nor is their use based on settled or legal definitions. Generally speaking, while the term "race" refers to an individual's physiological features, "ethnic origin" or "ethnicity" goes further by also highlighting social and cultural features, such as a shared nationality, language, culture, history or religious tradition.[10]

38. Racial discrimination is prohibited in relation to both presumed and actual ethnic or racial origin. The terms "race" and "ethnic origin" also cannot be defined entirely biologically. Racial discrimination encompasses any differentiation, exclusion, restriction or advantage based on race, colour, ancestry, or national extraction or ethnic origin. It is hence also irrelevant whether someone is subject to racial discrimination on the basis of their actual or presumed racial or ethnic origin.[11]

39. The collection, processing and use of race-related personal data are also governed by Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ("the GDPR"). As the GDPR treats race and ethnicity in the same way – it classifies both types of personal data as particularly sensitive and meriting special enhanced protection – the requirements for their protection are discussed below (see §§ 42–46 below).

40. Similarly, Section 66(6) of Act No. 110/2019 on the processing of personal data classifies personal data indicative of racial or ethnic origin as 'sensitive personal data enjoying increased protection'.

c) Possibilities to collect data on ethnicity

41. Ethnicity is the third of the categories relevant to the subject matter of the complaint. Although, like race, ethnicity is not defined in Czech law, it too falls within the category of prohibited grounds of differential treatment, as listed

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[9] Boučková, P., Havelková, B., Koldinská, K., Kühnová, E., Kühn, Z., Whelanová, M. *Antidiskriminační zákon: komentář (The Antidiscrimination Act: Commentary).* 2nd edition. C. H. Beck, Prague, 2016, p. 43.

[10] *Ibid.,* p. 43 *et seq.*

[11] *Ibid.*

in Article 3 § 1 of the Czech Charter and Section 2(3) of the Antidiscrimination Act.

42. Under the GDPR, the collection of data on ethnicity (the same applies to data on race) is theoretically possible if certain conditions are met.

43. Firstly, personal data on ethnicity are among the more stringently protected “special categories of data”, which Article 9(1) of the GDPR generally prohibits from being processed. Yet this prohibition is not unconditional. Special categories of data may be processed if any of the exceptions listed in Article 9(2) of the GDPR is applicable. Four of the special categories are broadly conceivable in a situation where these personal data are collected to combat discrimination, namely: (a) the explicit consent of the data subject; (b) the need for processing in order to carry out the State’s obligations in the field of social protection; (c) the need for processing for reasons of substantial public interest (e.g. the elimination of discrimination); and (d) the need for processing for statistical purposes.

44. The basic principles of personal data processing under Article 5(1)(a) and (c) of the GDPR include the requirements of lawfulness, adequacy, relevance, and limitation to what is necessary in relation to purposes for which the data in question are processed. Therefore, whenever data on the ethnicity of persons is processed, it is necessary to ensure that the processing is as respectful as possible to the rights of the persons concerned. This can be achieved, for instance, by strictly limiting the scope of the data processed and the purposes and methods of use thereof, as well as by restricting the access that authorities and persons have to the data.

45. First of all, there evidently must be a legal basis for the collection of data on ethnicity, i.e. a special law needs to be adopted that, at the same time, sets clear boundaries and guarantees that the data will not be misused. A law of this kind has yet to be enacted in the Czech Republic. This means that there is no legal basis in Czech law for the processing of these special categories of data. Secondly, the requirement of necessity prevents data from being collected systematically and globally, as indicated by the present complaint. In every single case, the condition that the processing of the data be necessary to achieve the intended purpose would have to be met. The scope of the personal data processing, in terms of both content and time, would have to depend on that purpose. Finally, the requirement of necessity implies that, if the same objective can be achieved by other means that are less invasive to the fundamental rights of the persons concerned, those means should be given a preference.

46. This brings us to the second possibility of collecting data on ethnicity: processing and retention in the form of anonymous or anonymised data. This would mean that they are not then personal data within the meaning of the GDPR. This conclusion is premised on recital (26) of the GDPR: *“The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the pro-*

cessing of such anonymous information, including for statistical or research purposes." The processing of anonymous or anonymised data on ethnicity therefore appears to be a more appropriate method of collecting data on ethnicity, as it does not impinge so much on the rights and legitimate interests of the individuals concerned.

(ii) Methodology for collecting data on ethnicity

47. The collection of ethnic data necessarily faces not only legal, but also methodological hurdles.[12] First of all, as already explained (see § 37 above), the concepts of ethnicity, ethnic origin and race are not clearly defined and may be interpreted differently by different groups. Although race and ethnicity are often presented as natural categories, they do not have fixed boundaries, so the "adherence" to them may be disputable. They are abstract communities, in that people are socially defined as belonging to particular ethnic or racial groups according to a definition used by others or a definition that members of these ethnic groups use for themselves.[13]

48. A key question hanging over all data collection is therefore who should be considered a member of the Roma ethnic group for research purposes. This issue has previously been addressed by the Ombudsperson,[14] who identified three different approaches to the collection of data on ethnicity. Individuals may be considered a member of a certain ethnic group if: (a) they perceive themselves to be such; (b) they are perceived to be such by other members of that group; or (c) they are perceived to be such by their surroundings. In circumstances where it is necessary to define who is to be considered a member of the Roma ethnic group for research purposes, a specific method needs to be selected. Each method has practical, ethical, and legal limitations. The Ombudsperson has outlined four possible methods: (a) self-identification; (b) third-party observational identification; (c) identification by community members; and (d) third-party identification based on objective or indirect criteria.

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[12] Ombudsperson. *Popis metody a výsledky výzkumu etnického složení žáků bývalých zvláštních škol v ČR v roce 2011/2012* (*Description of the Method and the Results of a Survey of the Ethnic Structure of Pupils of Former Special Schools in the Czech Republic in 2011/2012*0). Available at: https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Vyzkum_skoly-metoda.pdf.

[13] Bulmer, M., Solomos, J. 1998. *Introduction: Re-thinking Ethnic and Racial Studies. Ethnic and Racial Studies*: 21 (5) in Ministry of Education, Youth and Sports. *2006 Analýza individuálního přístupu pedagogů k žákům se speciálními vzdělávacími potřebami. Závěrečná zpráva* (*2006 Analysis of Teacher's Individualised Approach to Pupils with Special Educational Needs. Final Report*). Prague: Ministry of Education, Youth and Sports. Available at: http://www.mpsv.cz/files/clanky/3043/Analyza_romskych_lokalit.pdf.

[14] Ombudsperson. *Popis metody a výsledky výzkumu etnického složení žáků bývalých zvláštních škol v ČR v roce 2011/2012* (*Description of the Method and the Results of a Survey of the Ethnic Structure of Pupils of Former Special Schools in the Czech Republic in 2011/2012*0) Available at: https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Vyzkum_skoly-metoda.pdf.

a) Self-identification

49. Self-identification is based on one simple rule: individuals are members of a particular ethnic group if they themselves claim to be so. Under this method, individuals are asked to declare which group they feel they belong to. Self-identification is regarded as the most ethical way of collecting data on ethnicity. This methodology is supported, for example, by the UN Committee on the Elimination of All Forms of Racial Discrimination,[15] and has also been manifested in the Council of Europe Framework Convention for the Protection of National Minorities, which declares that everyone has the right to choose their nationality.[16]

50. At the same time, the Court has noted, in its case law, that where the recognition of ethnicity has certain legal effects, the State has the right to require the existence of "objective evidence of a claimed ethnicity", and public authorities may refuse to officially recognise claimed ethnicity on "purely subjective and unsubstantiated grounds" (*Ciubotaru v. Moldova*, no. 27138/04, judgment of 27 April 2010, § 57).

51. In the Czech Republic, this method is used, for example, in the census held every ten years. In both the 2001[17] and 2011[18] Population and Housing Census, the data on the nationality of natural persons could only be obtained if they volunteered this information. In the latter of these censuses, the Czech Statistical Office took steps to help to ensure that the data obtained in this way were reliable. It therefore cooperated with 143 Roma advisers and assistants who either had the job of assisting census enumerators or were enumerators themselves. Their work included explaining the importance of the census to their Roma fellow citizens and helping them to fill in forms; where necessary, they translated these forms into Romani for them. Nevertheless, only 12,953 citizens out of a population of more than 10 million identified themselves as Roma in the Czech Republic in 2011. However, at a qualified estimate, based on the estimates of coordinators for Roma minority affairs, the true number of Roma is put at approximately 240,300.[19] Thus, despite the authorities' active efforts, the self-identification method does not result in the collection of data that can be described as reliable.

52. Furthermore, this method appears to be unsuitable for surveying the numbers of Roma children in the State's institutional care simply because minors will frequently be incapable of choosing a nationality. Their parents, who in many

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[15] CERD General Recommendation VIII Concerning the Interpretation and Application of Article 1, Paragraphs 1 and 4 of the Convention Identification with a Particular Racial or Ethnic Group.

[16] Article 3 § 1 of the Framework Convention.

[17] See Article 5 § 1 (a), point 13, of Act No. 158/1999 on the 2001 Population and Housing Census.

[18] See Article 6 § 1 (b), point 1, of Act No. 296/2009 on the 2011 Population and Housing Census.

[19] Government of the Czech Republic. *Zpráva o stavu romské menšiny pro rok 2017* (*Report on the Status of the Roma Minority for 2017*), p. 4. Available at: https://www.vlada.cz/assets/ppov/zalezitosti-romske-komunity/dokumenty/Zprava-o-stavu-romske-mensiny-2017.pdf

cases are unknown or refuse to cooperate with the authorities, will often be unable to do so either.

b) Third-party observational identification

53. The second possible approach is third-party observational identification. This method works on the assumption that individuals are considered to be a member of a particular group if, because of their physical appearance, they are perceived to be a member of that group by an external observer carrying out the classification. This method is therefore only suitable for identifying categories by reference to externally visible features. As for skin colour as a potential marker of Roma ethnicity, the Government view this method as inappropriate and unethical in the extreme because it could encourage stereotyping. Furthermore, from the perspective of the Roma ethnic group this method is difficult to apply because there are no clear boundaries for defining physical differences and – in the case of children – because the persons assessed are very young. Also, bearing in mind the requirement of necessity (see § 45 above) in relation to sensitive personal data such as ethnicity, we need to consider whether and under what circumstances there would be any legitimacy to prioritising this method over self-identification.

c) Identification by community members

54. The third method is identification by community members. In other words, individuals are taken to be Roma if they are viewed as such by other members of the Roma ethnic group.

55. This method is used to make qualified estimates of the total number of Roma in the Czech Republic. It relies on Roma advisers working in cooperation with coordinators for Roma minority affairs and draws on their specific knowledge of the environment and circumstances. The guideline for the collection of qualified data stresses principles according to which data should be collected at the lowest possible level and ideally by someone who is in day-to-day contact with Roma.[20] In this light, this method is not particularly suited to institutionalised children as they are not immersed in their original social group (community), making it impossible to determine with any clarity whether or not they are accepted as Roma by this community. As there is a high risk of inaccuracy with this method, the question is whether it is legitimate to prioritise the method of identification by community members over the primary method of self-identification, even though, in other respects, it can paint a much more accurate picture of the total number of Roma in the population.

d) Third-party identification based on objective and indirect criteria

56. The last method is third-party identification based on objective or indirect criteria. Using this method, individuals are identified as Roma on the basis of indirect indicators, such as the nationality of their parents and their mother tongue. These criteria are considered objective in the sense that, rather than being based

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[20] *Ibid.*

on the assumptions of other persons, they are predicated on factual information that can be objectively assessed.

57. The Czech Republic has a long tradition of collecting ethnic data using this method. This is linked to the execution of the Court's judgment in the case of *D. H. and Others v. the Czech Republic*.[21] Since the 2015/2016 school year, the Ministry of Education, Youth and Sports ("the Ministry of Education") has made annual qualified estimates of the number of Roma pupils in all primary schools entered in the register of schools and school facilities.[22] It publishes the results on its website.[23]

58. School directors (after consultation with teachers working in the various classes), when providing their qualified estimates of the numbers of Roma children, pupils and students using the method of third-party identification on the basis of objective and indirect criteria, should draw on the generally used definition formulated by the Government Office.[24] According to that definition, *"a Roma pupil is defined as an individual who considers themselves as a Roma without necessarily professing such ethnicity under all circumstances (e.g. in a census) and/or who is regarded as a Roma by a significant part their surroundings on the basis of actual or supposed (anthropological, cultural or social) indicators."*[25] In view of how the definition is framed and what concept underpins this recognition process, it is essential to know as much contextual information as possible about individual pupils, and it is the school itself that is in possession of such information.

59. Despite the efforts of the Ministry of Education to obtain data on the number of Roma pupils in schools, data collection is not without its challenges. These problems are related to the method that is used, i.e. not self-identification, but third-party observational identification. This raises ethical issues, which are reflected in the restrained approach taken by school directors and the platforms in which they associate. A general aversion to qualified estimates, as well as a critical stance on how the Ministry of Education perceives the need to make those estimates, can be detected in the schools' approach. Although the qualified estimates are anonymous, school directors are concerned about labelling a pupil as

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[21] *D. H. and Others v. the Czech Republic*, no. 57325/00, judgment [GC] of 13 November 2007.

[22] The data are collected further to Article 28 § 5 of Act No. 561/2004 on preschool, primary, secondary, tertiary professional and other education.

[23] https://www.msmt.cz/ministerstvo/novinar/vysledky-kvalifikovanych-odhadu-poctu-romskych-zaku-v-zs.

[24] Metodika pro sledování a vyhodnocování naplňování Strategie romské integrace do roku 2020 (Methodology for Monitoring and Evaluating the Implementation of the Roma Integration Strategy until 2020), p. 12. Available at: https://www.vlada.cz/assets/ppov/zalezitosti-romske-komunity/dokumenty/Metodika-pro-sledovani-a-vyhodnocovani-naplnovani-Strategie-romske-integrace-do-roku-2020_1.pdf.

[25] Ministry of Education, Youth and Sports. *2006 Analýza individuálního přístupu pedagogů k žákům se speciálními vzdělávacími potřebami. Závěrečná zpráva* (*2006 Analysis of Teacher's Individualised Approach to Pupils with Special Educational Needs. Final Report*). Prague: Ministry of Education, Youth and Sports. Available at: http://www.mpsv.cz/files/clanky/3043/Analyza_romskych_lokalit.pdf.

Roma on the basis of a subjective assessment (albeit underpinned by objectified criteria) without the pupil actually being, or considering themselves to be, a Roma.[26]

(iii) The practice of making qualified estimates of the number of children in institutional care

60. The complainant organisation claims that the Czech Republic is not fulfilling its obligation to collect relevant data and, consequently, its obligation to address the overrepresentation of Roma children in institutional care. The complainant organisation also claims that there are no unified procedures in the Czech Republic for monitoring the ethnicity of children in institutional care (see § 21 of the collective complaint).

61. The overview of methods available to collect ethnic data shows that there is currently no method that is optimal from both an ethical and legal perspective while yielding reliable results. Nevertheless, the Government are systematically working towards the development of an effective method that factors ethnic data into the reform of institutional care and that balances everyone's right to self-identification with the need to eliminate the risks of indirect discrimination. As outlined above (see § 49), the generally preferred method of self-identification is hindered by the practical difficulties posed by the young age of the individuals who are meant to decide for themselves what their ethnicity is. Thus, in relation to children, the Czech Republic collects ethnic data employing the method of third-party identification based on objective and indirect criteria. This approach is constantly being reassessed in the light of observations made in the field and with a view to protecting the best interests of the child.

62. In response to the complainant organisation's claim that Roma children are overrepresented in institutional care, the choice of the method used to collect ethnic data on these children should be taken into consideration. Insofar as the complaint presents, for comparison, data on the share of individuals of Roma origin in the Czech population, as estimated using the methods of third-party observational identification in combination with identification by community members, these data could be compared with the number of institutionalised children only if a similar method were used to identify individuals in this group. However, as explained above, this is not possible (see § 49).

a) Data collection by the Institute of Health Information and Statistics

63. Until 2016, the Institute of Health Information and Statistics of the Czech Republic collected data on the ethnicity of children placed in children's homes for children up to three years of age. The data were collected annually by children's homes for children up to three years of age in the form of 'annual reports on the activities of health service providers', approved by the Czech Statistical Office for the Ministry of Health under the Statistical Survey Programme un-

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[26] https://www.pedagogicka-komora.cz/2018/10/aktualni-tema-vykazovani-romskych-zaku.html.

der Section 10 of Act No. 89/1995 on the State's statistical service and the Czech Statistical Office Regulation No. 302/2015 on the 2016 Statistical Survey Programme.[27]

64. As the complainant organisation itself notes, the Institute of Health Information and Statistics of the Czech Republic stopped this data collection in 2016. At that time, the Government concluded that, in the absence of a specific legal basis for data collection and without uniform methodology, the collection of ethnic data may intensify, rather than prevent, the risk of discrimination. Besides, the collection of data on the ethnicity of institutionalised children care had been criticised by professional societies (e.g. the Society of Social Paediatrics of the Czech Medical Association of J. E. Purkyně, and the Czech Paediatric Society of J. E. Purkyně).

b) Pilot project for the collection of qualified data by the Ministry of Labour and Social Affairs in cooperation with the Research Institute for Labour and Social Affairs

65. The Ministry of Labour and Social Affairs ("the Ministry of Labour"), in cooperation with the Research Institute for Labour and Social Affairs, are currently running an ethnic data collection pilot project as part of the reform of the existing institutional care system. This project aims to analyse the situation of Roma children whom the regional authorities keep in a children's register in order to mediate adoption or foster care,[28] and to identify barriers complicating their access to substitute family care.

66. The research follows up on a task assigned to the Ministry of Labour under the Roma Integration Strategy until 2020 as part of the Strategy's specific objective 8.4, i.e. Support for Roma Families in the Field of Social and Legal Protection. As part of implementing this measure, the Czech Republic has made the following commitment to the European Commission, which monitors the progress being made in Roma integration by each EU Member State: *"By 2020, the share of Roma children who will be provided with substitute family care will rise by two percentage points."* The European Commission itself is calling for data collection to be used to monitor progress in individual measures.

67. The research focuses on the numbers of children placed in substitute family care. In accordance with Act No. 359/1999 on social and legal protection of children, all children for whom institutional care has been ordered are also entered in the register of substitute family care. It will therefore be possible to use the data from the current research to obtain summary information on the number of Roma children in institutional care.

68. The research methodology used consists of the aggregated collection of ethnic data on the total number of the Roma children who are kept in the register

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[27] https://uzis.cz/sites/default/files/knihovna/nzis_rep_2018_K33_A410_detske_domovy_pro_deti_do_3_let_veku_a_detska_centra_2017.pdf.

[28] See Section 22 of Act No. 359/1999 on social and legal protection of children.

of substitute family care by regional authorities. This questionnaire survey, drawing on the method of third-party identification based on objective and indirect criteria, is not considered to constitute the keeping of a register of members of national minorities within the meaning of Section 4(2) of the Act on the rights of members of national minorities (see §§ 33 *et seq.* above). This method was chosen because of previous positive experience of the collection of ethnic data in the education sector and in studies on the situation of socially excluded Roma. The questionnaire survey does not apply the disaggregated collection of data on the ethnicity of specific individuals who could be identified on the basis of the data obtained, so the consent of the individual about whom data are collected is not required.

69. The questionnaire survey is conducted under the guidance of specialists who, drawing on their own knowledge and experience, have insight into the situation of Roma children in the process of the mediation of substitute family care. These are the staff of municipal authorities' child protection departments (known as OSPOD) who specialise in substitute family care and identify children who need to have substitute family care arranged for them. To this end, they seek to obtain the information needed for such facilitation and keep files on the children. Other specialists are the staff of regional authorities' child protection departments, who manage registers of children for the mediation of substitute family care. They actively work with the children's files, participate in the expert assessment of children for the mediation of adoption or foster care, select individuals suitable to become adoptive or foster parents of a particular child, and arrange for the child and these individuals to get to know each other in person. In the research, the role of these specialists is to draw on their own experience of the mediation of substitute family care in order to describe the situation faced by Roma children in this area. The data obtained in this way will then help to assess whether the measures that have been set to streamline and improve the process for the mediation of substitute family care are increasing the share of Roma children for whom care in a substitute family has been arranged.

70. Under the project, this data collection should be repeated once a year. The final project outputs are not currently available, but the methodology for further data collection is being discussed. Comprehensive outputs are expected by the end of this year, or at the beginning of next year at the latest.

c) Conclusion

71. In the light of the above, the Government are of the opinion that it cannot be inferred that the competent authorities are inactive. On the contrary, there are continued efforts to find a reliable and effective way to make relevant qualified estimates while minimising interference with the rights of the individuals concerned.

(iv) General measures recently adopted to reduce the number of children in the State’s institutional care

72. The complainant organisation claims that in order for the Czech Republic to be able to adopt effective measures, policies and strategies to address the overrepresentation of Roma children in institutional care, it must have statistical data on their numbers. The Government do not agree with this claim. In other words, the Government do not believe that, without collecting statistics on the number of institutionalised Roma children it is impossible to take effective steps that – whether of general nature or targeted at the Roma population – will also, or mainly, result in a reduction of the share of Roma children in the State’s institutional care. The Government are aware of the problems linked to institutional care and have long been working to improve the level of institutional care and minimise the number of children who are institutionalised. These are two-pronged efforts: they seek to prevent the institutionalisation of children in general, while also trying to reduce the unequal impacts that institutionalisation has on children of Roma ethnicity. The Government add that the Committee, in its decision in the case of *ERRC & MDAC v. the Czech Republic*, did not infer that there had been discrimination against children of Roma origin with respect to their placement in children centres (see § 175 of the decision), nor did it reach a conclusive conclusion on the representation of this group of children in children centres. It merely noted that “there are significant indications that these numbers remain high” (see § 173 of the decision).

a) General measures to reduce the number of children in institutional care

73. Czech law views placing children in institutions as an *ultima ratio* means. The Civil Code, as a general source of legislation governing the raising of children, is framed around a clear preference for children to be raised in a family environment.[29] The Government are also supportive of alternatives to raising children in institutions, i.e. temporary foster care, long-term foster care, care by another individual, and adoption, including international adoption.

74. As the Government noted in their observations on the merits of the *ERRC & MDAC v. the Czech Republic* complaint, the number of children centres in the Czech Republic is steadily declining and, in parallel, the number of children being admitted to them is falling (see the Committee’s decision in the *ERRC & MDAC v. the Czech Republic* decision, §§ 104-130). The situation in the Czech Republic is developing rapidly. This development must be assessed comprehensively, not only on the basis of the (un)availability of data on children of Roma ethnicity in institutional care, as claimed by the complainant organisation.

75. Between 2016 and 2019, “Systemic development and support of child protection instruments”, a systemic project by the Ministry of Labour and Social Affairs, was carried out. This was a comprehensive project aimed at establishing

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[29] Act No. 89/2012, the Civil Code.

criteria for the quality of the processes in the mediation of substitute family care and the provision of long-term or temporary foster care. One of the tasks in this project was to design and verify in practice procedures leading to the successful finding of families or individuals ready to accept children with special needs into their substitute family care.

76. The project resulted in a Manual of Procedures for the Professional Assessment of Persons Interested in Substitute Family Care. A part of the manual is dedicated to instruments to assist substitute family care workers. These are intended to facilitate professional assessments of children in order to mediate substitute family care. This document helps to focus attention on the children themselves, on their personal and family situation viewed from the perspective of their needs, and, subsequently, on consideration of the risk situations that emerge when children arrive at their substitute family. The aspect of preparing children for their new family, as a prerequisite for their successful adaptation to their new environment, is also monitored. The need to prepare children for the transition to their new family is justified, among other things, by the findings of the Analysis of the Needs of Foster Families Caring for Children with Special Needs.

77. Another of the project's core activities was aimed at promoting and supporting substitute family care. This included activities to identify children in need of substitute family care, identifying substitute parents for children with special needs, unifying the methodology used to assess individuals interested in substitute family care, raising awareness, etc. These were activities intended to contribute to an increase in the number of children (of all ethnicities) in substitute family care, thereby shifting some of the balance away from institutional care.

78. Another systemic project, "Support of systemic changes in care for vulnerable children, young people and families in the Czech Republic", is currently being implemented. The project re-evaluates the situation of children (their individual plans) placed in residential care (there should be about 5,000 such children) and pays systematic visits to children in facilities (visits to about 250 institutions). Although the survey is not focused directly on the ethnicity of children, this is also taken into account in the re-evaluation of the children's situation in connection with their identity.[30]

79. There are currently two legislative initiatives aimed at abolishing or transforming children centres. In July 2020, a members' bill was laid before the parliamentary Chamber of Deputies to amend Act No. 372/2011 on health services and conditions for the provision thereof. The aim is to abolish children centres and create a new type of healthcare facility that will deliver comprehensive care for severely disabled children in order to support the possibility of long-term family care for these children. According to the explanatory memorandum on the bill, these facilities – termed "comprehensive care centres for children with disabilities" in the bill – are not institutional care facilities and children cannot be

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[30] Comprehensive information on both projects, as well as other activities of the Ministry of Labour, can be found on the website at www.pravonadetstvi.cz

placed there by a court decision.[31] In August 2020, the Ministry of Health submitted an amendment to the above Act in the external commenting procedure. This amendment was aimed at transforming children centres into "comprehensive health care centres for children". As in the previous case, according to the explanatory memorandum these are not facilities intended for the institutional care of children and children cannot be placed there by a court decision.[32]

80. In October 2020, the Lumos NGO published a new research report entitled *Former baby institutions in 2020*. The resulting analysis is based on the responses of the various facilities to a request from Lumos for information, which was sent to all 26 children centres in the Czech Republic in February 2020; the return rate was 100%. This analysis yielded several key findings:

- Whereas in 2018, there were 441 children under three years of age in all children centres, by 2020 this number had fallen to 265 children; therefore, there has been a 40% reduction in the last two years.
- Children over three years old now predominate in children centres – in the spring of 2020 there were 294 of these children there.
- In the last four years, six children centres (two children centres in the Zlín Region, one facility in the Pardubice Region, two in the Moravian-Silesian Region, and one in the South Moravian Region) terminated providing the institutional care. The children from these regions were not subsequently placed in children centres in other regions.
- Some children centres allow the child to stay with a parent – usually the mother – in the facility. The mother's parental skills are usually improved during these stays. In the spring of 2020, 100 children were staying with their mothers in these facilities.
- Only in the last two of the 26 abovementioned children centres does residential childcare predominate over other services, and the majority of children placed there are under three years of age; at the other facilities, there is a large proportion of older children, or other services predominate over institutional care.
- In this connection, the report states: *"Many regions have already managed to minimise the number of residential care capacities required for the youngest children by strengthening prevention and building a sufficient network of temporary foster carers. In a few years, it will be possible to end the institutional care provided to young children by baby institutions even in regions where this has not yet happened."* One of the report's conclusions is therefore: *"A large part of the Czech Republic has evidently already managed*

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[31] https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=944&CT1=0

[32] https://apps.odok.cz/veklep-detail?pid=KORNBSGJHXZU

> *to build a sufficiently strong network of alternatives, so the need to admit new children to baby institutions is minimal."*[33]

81. Available data published by the Institute of Health Information and Statistics show that the total number of persons residing in children centres (including children over three years old) decreased by approximately 32% in 2007-2018.[34]

82. As for other institutional care facilities, Lumos's research report published in November 2018, entitled *Investing in Children: Why Redirect Institutional Care Funds to Support Families and Communities*, includes the following information:

- In 2009-2017, the number of children with disabilities living in nursing homes decreased from 1,063 to 497, i.e. by 53%.
- In the same period, the number of children placed in correctional institutions (this term includes educational institutions for young people aged 15-18, children homes with a school for children aged 12-15, and institutions for diagnostic assessment) fell from 1,534 to 1,007, i.e. by 35%.[35]

83. Finally, according to the *Report on the Transition From Institutional Care to Community-Based Services, Focusing on 27 EU Member States*, a report published by a European group of experts in 2020, the total number of children in the State's residential institutional care in the Czech Republic declined by almost 29% in 2008–2018.[36]

84. In the context of the measures, projects and development trends outlined above, even without the systematic collection of data on the ethnicity of children in the State's institutional care, the Czech Republic is still taking steps to improve the situation in this area, including steps to reduce the number of institutionalised children. As the sources cited above indicate, this reduction has been real and significant in recent years, with children from particularly vulnerable social groups, such as the Roma population, generally benefiting the most. In the Government's opinion, the issue of placing children in institutional care needs to be addressed in a complex manner, with consideration for the best interests of the children, and not only with regard to their ethnicity. It is these comprehensive or global measures and their results (also in relation to marginalised groups) that should be taken into account when determining whether the Czech Republic is complying with its obligations under Articles 16 and 17 of the Charter.

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[33] https://lumos.contentfiles.net/media/assets/file/kojeneckeustavy2020lumos_JWFrL4h.pdf.

[34] https://uzis.cz/res/f/008303/nzis-rep-2019-k33-a410-detske-domovy-pro-deti-do-3-let-veku-a-detska-centra-2018.pdf.

[35] https://lumos.contentfiles.net/media/assets/file/Investice_do_deti_CELA_ZPRAVA_web_ilwLbI5.pdf.

[36] https://www.eurochild.org/fileadmin/public/05_Library/Thematic_priorities/06_Children_in_Alternative_Care/Other/EEG_transition_in_27_countries.pdf.

b) Measures to reduce the number of children in institutional care that are targeted at the Roma population

85. The complainant organisation claims that one of the reasons for the alleged overrepresentation of Roma children in institutional care is the lack of preventive services that would eliminate the risk of Roma poverty and related factors (see § 22 of the collective complaint).

86. In this regard, the Government note that, in addition to their activities aimed at reducing institutional care *per se*, they are making a special effort to improve the Roma community's position. As far back as 1997, the Government Council for Roma Minority Affairs ("the Council for Roma Minority Affairs") was established as the Government's advisory body. This is a permanent advisory and initiating body of the Government in the field of Roma integration. The prime minister chairs the Council for Roma Minority Affairs. The Council holds sessions as and when needed, but at least four times a year. The Council submits an annual *Report on the Status of the Roma Minority in the Czech Republic* to the Government.[37]

87. In furtherance of the State's conceptual approach to addressing the position of members of the Roma minority, the Government periodically adopt a *Roma Integration Strategy*.[38] The 2021-2030 Strategy is currently being prepared. This year, a public consultation on the draft was organised by the Office of the Council for Roma Minority Affairs and the Secretariat of the Government Office's Government Council for National Minorities. In addition to the Roma Integration Strategy up to 2020, the new strategy builds on key documents of the European Union and international organisations, such as the Report on the evaluation of the EU Framework for National Roma Integration Strategies up to 2020, or the recommendations of Council of Europe bodies concerning the implementation of the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. Relevant stake-holders were involved in the drafting of the strategy's text, in particular members of the Council for Roma Minority Affairs (civic members, as well as representatives of public administration and other represented institutions), and representatives of the expert circles and general public. The strategy addresses, among other things, ethnic data collection. For the reasons explained above, it considers this to be problematic and difficult to implement in practice.

88. The Agency for Social Inclusion ("the Agency"), established in 2008, operates within the Ministry for Regional Development.[39] It focuses on addressing social exclusion, which has a profound effect also on members of the Roma ethnic group. The Agency advocates systemic changes in the drafting of legislation and

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[37] Government of the Czech Republic. Documents concerning the Roma minority. Available at: https://www.vlada.cz/scripts/detail.php?pgid=490.

[38] Government of the Czech Republic. Strategie Romské integrace do roku 2020 (Roma Integration Strategy up to 2020). Available at: https://www.vlada.cz/assets/ppov/zalezitosti-romske-komunity/Strategie-romske-integrace-do-roku-2020.pdf.

[39] Agency for Social Inclusion. Available at: https://www.socialni-zaclenovani.cz/o-nas/.

methodologies with the aim of creating an effective system of care for vulnerable children and families in socially excluded localities (care for children and families at risk of social exclusion), emphasising prevention. In particular, it promotes close liaisons and cooperation between the responsible bodies, including non-profit organisations, coordinated by a child protection agency, and supports regional networks of sufficient numbers of support services. At the level of local partnerships, the Agency promotes and helps to introduce measures and services to ensure that conditions are in place for the all-round development of the child. These include quality health and parental care, nutrition, material security, ensuring a sense of security, access to quality education and active extracurricular activities, and the prevention of sociopathic phenomena. To this end, the Agency works with existing support services to propose the extension or establishment of new services and provides advice to responsible bodies on new methods of social work with families.

89. In 2015, the Ministry of Labour published an *Analysis of Socially Excluded Localities in the Czech Republic*.[40] This publication contains a large amount of high-quality and generally valid information and methodologically based analyses. It sheds light on the context of the various phenomena that influence the process of social exclusion, and thus the risk that children from those areas will be placed in institutions, and also addresses findings in key areas such as education, housing, and the labour market (the economic situation of the population of socially excluded localities).

(v) Conclusion

90. In the light of the above, the Government are convinced that compliance with the obligations that follow from Articles 16 and 17 of the Charter cannot be assessed in isolation, only in terms of data collection. The Government consider that it is necessary to take into account all the activities of the State in this respect, i.e. all the measures aimed at replacing institutional care with substitute family care as well as the results thereof, both generally and (in the context of the complaint at hand) specifically in relation to the Roma population. In the light of all information provided in this respect in this part of their observations, the Government are convinced that Articles 16 and 17 of the Charter, read alone or in conjunction with the prohibition of discrimination, have not been violated in the instant case.

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[40] Agency for Social Inclusion. 2015 Analýza sociálně vyloučených lokalit v ČR (2015 Analysis of Socially Excluded Localities in the Czech Republic). Available at: https://www.esfcr.cz/documents/21802/791224/Anal%C3%BDza+soci%C3%A1ln%C4%9B+vylou%C4%8Den%C3%BDch+lokalit+v+%C4%8CR/65125f3c-3cd9-4591-882b-fd3935458464.

OVERALL CONCLUSION

91. In the light of the above, the Government of the Czech Republic in their observations on the collective complaint at hand propose that the Committee holds that the complaint is partially incompatible with Articles 16 and 17 of the Charter *ratione materiae*, and, to the remaining extent, holds that these provisions, read alone or in conjunction with the prohibition of discrimination enshrined in the Preamble to the Charter, have not been violated.

Vít A. Schorm
Agent of the Government
signed electronically

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