EUROPEAN COMMITTEE OF SOCIAL RIGHTS
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European Roma Rights Centre (ERRC) v. Czechia
Complaint No. 220/2022

ERRC RESPONSE TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

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EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COLLECTIVE COMPLAINT NUMBER 220/2023

EUROPEAN ROMA RIGHTS CENTRE (ERRC)

V

THE CZECH REPUBLIC

Response to the Government Observations on the Merits

Number of pages: 13

1. Introduction

1. By its email of 5 February 2024, the European Committee of Social Rights (*hereinafter* "the European Committee") provided the Complainant organisation (*hereinafter* also "the ERRC"), which is supported in this collective complaint by the Czech non-governmental organisation Forum for Human Rights (*hereinafter* "FORUM"), with the Written Observations of the Czech Government (*hereinafter* also "Government's Observations") on the merits of Complaint no. 220/2023 (*hereinafter* also "the collective complaint"), and invited the Complainant organisation to submit a written response in reply by 5 April 2024. The ERRC and FORUM have reviewed the Government's Observations and hereby respectfully submit their comments.

2. In the present observations, the ERRC addresses the merits only to the extent that they need to be clarified, refined, or expanded upon in light of the Government's Observations. They have otherwise been outlined in the collective complaint, and this response should be read in conjunction with the complaint. The ERRC reiterates all arguments raised in its initial complaint. The present submission addresses the specific issues raised by the Government in their Observations to ensure that the Committee is provided with a clear and accurate understanding of the current situation in the field of availability, accessibility. and affordability of a right-based and quality preschool education for Romani children and children facing destabilising poverty and/or social exclusion. Hence, the ERRC asks the European Committee not to interpret their silence on any of the questions as an agreement with the Government's position.

2. The inappropriateness of the government's argument by progressive realisation of the right to preschool education

3. In the collective complaint, the ERRC and FORUM describe the existing barriers to quality preschool education for Roma children and children facing destabilising poverty and social exclusion. They also point out that mechanisms to overcome these barriers very often exist, 'but their application is not as much in the hands of the child and their family as the hands of the representatives of the educational system' (para. 119 of the collective complaint). Thus, they consider the major and umbrella deficiency of the current system of preschool education to consist of the support for children in vulnerable situations, not taking the form of their enforceable legal claims. The ERRC and FORUM argue in their collective complaint that the form of clear and enforceable legal claims of the child and their family is crucial for challenging the widespread discriminatory attitudes among the general population as well as the representatives of the school system and public offices.

4. The government bases its key counterargument on the fact that the right of the family to social, legal, and economic protection embedded in Article 16 of the European Social Charter (1961; *hereinafter* "the 1961 ESC"), which is the basis of the collective complaint, does not impose on States an obligation of "results" (para. 10 of the Government's Observations). The right enshrined in Article 16 of the 1961 ESC is thus one of progressive realisation. The Government accepts that it does not dispose of non-limited discretion when implementing the right and that it must comply with the requirements of the maximum possible use of the availability of resources, reasonable time, and measurable progress (para. 10). In the Observations and the Enclosures to them, the Government then tries to give a very detailed list of their activities and programmes aiming to increase the participation of Roma children and children facing poverty and/or social exclusion in preschool education and demonstrate thus that it fulfils the requirement of progressive realisation of their right to preschool education.

5. Although we appreciate all the government's efforts described in the Observations and consider them as a signal that the government is motivated to change the situation of Roma children and children facing poverty and/or social exclusion, we still find the government's argumentation to be flawed. The reasons are twofold. First, the government fails to consider the discriminatory nature of the situation, which is the subject matter of the collective complaint. Second, the measures the government tends to rely on do not break the dependency of the child and their family at the discretion of public authorities and school representatives, with only one exception: the extension of the right to be exempted from the attendance fees. They do not, therefore, eliminate the major problem of the already existing supportive measures and schemes described in the collective

complaint. Neither do they provide the child and their family with a sufficient and effective guarantee that the support will not result in their social disciplining and coercive cultural assimilation. We will describe both objections to the Government's Observations in more detail below.

2.1 The right not to be discriminated against as a right of immediate realisation

6. As mentioned above, the government's crucial argument is that the right to preschool education, as enshrined in the 1961 ESC, is of progressive realisation. We do not want to contradict this argument in any way but point out that it is incomplete. The nature of human rights, including economic, social and cultural rights, is never unambiguous and one-sided in that the right in all its aspects imposes only and exclusively either the obligations of 'result" or the obligations of 'progress'. Indeed, it is always a combination of both.

7. The UN Committee on Economic, Social and Cultural Rights (*hereinafter* the "CESCR Committee") confirmed in its General Comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para 1, of the Covenant) that the economic, social and cultural rights contain obligations of immediate effect. The right to non-discrimination in the exercise of those rights was one of them (paras.1, 3 and 5).[1] In its observations, the government completely overlooks that it is the issue of discrimination against Roma children and children facing destabilising poverty and/or social exclusion that is the very essence of the collective complaint. For instance, the collective complaint does not argue for a general right to a free-of-charge preschool education how the government is trying to give the impression (see especially para. 12). It thematises the right to be exempted from fees connected with attendance to kindergartens as an anti–discriminatory measure for children and families in dire financial situation. And the same conclusion may be drawn for the whole subject matter of the collective complaint.

8. Although the right to preschool education is generally one of progressive realisation, the obligation to avoid discrimination in implementing this right is obviously of immediate effect. Unfortunately, the Czech Republic is failing to meet this obligation for Roma children and children facing destabilising poverty and/or social exclusion as described in the collective complaint. **Any measure aiming to rectify the discriminatory situation of those children in their access to quality and rights-based preschool education is thus a remedy[2] of an already unlawful situation rather than a 'mere' step forward in implementing the right to preschool education.** The aim is to provide Roma children and children facing destabilising poverty and social exclusion with the same level of protection and opportunities that already exist for children who are not in such a vulnerable situation.

9. Although covering a different target group, the UN Convention on the Rights of Persons with Disabilities (hereinafter "the CRPD") may give us, thanks to its well-elaborated anti-discrimination concepts, an essential insight into what the immediate effect of the right not to be discriminated means, in what concrete obligations it can crystallise into. The key anti-discrimination concepts under the CRPD are accessibility, reasonable accommodation, procedural accommodations, and specific measures,[3] while accessibility and reasonable accommodation are crucial here. The CRPD Committee defines accessibility as a duty relating to groups that 'must be implemented gradually but

[1] CESCR Committee, General Comment No. 3, para. 1.
[2] CESCR Committee, General Comment No. 3, para. 5
[3] CRPDCRPD/C/GC/6.

unconditionally'.[4] In other words, it admits that ensuring a non-discriminating environment may take time and happen gradually.[5] However, the duty to ensure accessibility of the environment is accompanied by the duty to adopt reasonable accommodations which, 'on the other hand, are individualised, apply immediately to all rights and may be limited by disproportionality.'[6] The CRPD Committee further emphasises that until accessibility is ensured, reasonable accommodation as an immediate duty 'may be used as a means to provide access to an individual'.[7]

10. Expressed in more abstract terms, the CRPD framework shows that even though some measures to combat discrimination may require time and resources, there must always be an impermeable network, which will be ensured by the combination of gradually implemented measures by an immediate duty to provide reasonable accommodation, i.e., to ensure non-discrimination in an individual case. The only legitimate situation when such a network is not obliged to bring equality is that of disproportionality. The situation of disproportionality must always be an individual and not a structural one.

11. Therefore, the CRPD enables us to argue that whenever discrimination is the issue, the decisive criterion to consider whether the government is meeting its obligations is not that of an obligation of 'result' or 'means' but that of proportionality or disproportionality. Furthermore, the State should be able to demonstrate that disproportionality as a liberating reason from the obligation of non-discrimination is always considered individually. In other words, the State should be able to prove that it has established effective mechanisms providing the concerned individuals with reasonable accommodation on the general level.

12. The perspective drawn based on the CRPD shows the government's argumentation in a different light. It demonstrates that the information on different subsidy programmes may not be as important for assessing whether the government meets its obligations deriving from the 1961 ESC when such information is not accompanied by the information on mechanisms that ensure that individuals are provided with the effective and practical right to reasonable accommodation, i.e., in the context of the collective complaint to support measures that would effectively help them to gain access to quality and rights-based preschool education. Such information is, unfortunately, missing in the Government's Observations because the government satisfies itself with the conclusion that the right to preschool education is of progressive realisation and thus does not conceive as a problem if, in the current situation, the right is not ensured in such a level as also to cover Roma children and children facing destabilising poverty and/or social exclusion on an equal basis with others.

2.2 The need for a rights-based instead of welfare approach to children and their families

13. The government's failure to consider the discriminatory dimension of the subject matter of the collective complaint is closely linked to its failure to overcome a model of support that makes children and their families dependent on the discretion of public authorities and school representatives. Practically all the measures presented by the government take the form of subsidy schemes and strategies. Thus, they do not remove children and

[4] CRPD/C/GC/6, para. 41 (a).
[5] CRPD/C/GC/6, para. 42.
[6] CRPD/C/GC/6, para. 41 (b).
[7] CRPD/C/GC/6, para. 42.

their families from their passive role of charity beneficiaries and do not grant them the position of rights holders with clear legal entitlements.

14. The only exception is the extension of the exemption from attendance fees to families who are granted child benefits, which should come into effect on 1 September 2024.[8] This legislative change was submitted to the inter-ministerial comment procedure on 26 July 2023 and adopted on 19 December 2023, i.e., after submitting the collective complaint. It was justified as follows: 'Concerning families with a lower social status, it is also desirable to expand the circle of persons entitled to exemption from payment in preschool and after-school education – this is being extended to include families receiving child benefit.'[9] Even this legislative development confirms the correctness of the collective complaint's arguments. It is at the same time precisely that type of measure that constitutes a clear legal entitlement for concerned children and their families which enhances thus their legal position vis-à-vis the representatives of kindergartens. It thus reduces their situations of vulnerability to widespread discriminatory attitudes.

15. Nevertheless, not even this measure should be overestimated because the government is currently preparing a comprehensive reform of the social benefits system, which should be more disciplining[10] and, therefore, may not fully correspond to the situation of social groups facing systemic discrimination and structural barriers either on the labour market or at school environments. We cannot know how the extension of the exemption from attendance fee which is currently interlinked with child benefit will look like in the new system where two material distress benefits (subsistence allowance and housing supplement) and two social support benefits (child benefit and housing benefit) should be merged in one.

16. Other measures presented by the government consist of subsidy schemes and strategies, which again aim to implement a subsidy scheme or programme. Those may undeniably constitute an important support for many children and families in vulnerable situations. Nevertheless, they are not eligible to enhance their protection against arbitrariness, discriminatory attitudes, and disciplining tendencies. The existence of subsidy schemes, as well as the amount allocated through them, are dependent on the year-by-year decision of the public authorities. The Government's Observations directly demonstrate this fragility when stating that the amount allocated through the subsidy scheme *Support for the Participation of Children in Preschool Education* has been reduced in 2024 to a half compared to 2023 (CZK 10 million compared to CZK 20 million – para. 87 of the government's observations).

17. Furthermore, we should not lose sight of the fact that one of the most important effects of the subsidy schemes, as described by the government in its observations, is that the material support for those in need is distributed to them indirectly, i.e., through intermediaries. This may be completely inappropriate in a situation where the vulnerability of the situation of concerned persons consists merely or predominantly of material distress and is even easy to abuse in a context of systemic discrimination. For instance, even though the government stresses in its observations that all 14 regions take part in Call 26 under Operational Programme Employment+ (OPZ+) *Food aid for children in social need*, this does not still ensure that all children who need such support will benefit from it. As described in the collective complaint (paras. 95–98) the participation of children

[8] Introduced into the Czech legislation by an amendment to the ministerial decree No. 14/2005 Coll. (amendment No. 423/2023 Coll.).
[9] Cited according to the explanatory note which is available in Czech at: https://odok.cz/portal/veklep/material/KORNCU4GHS3T/KORNCU4GLDPX [viewed 18 March 2024].
[10] See, for instance, in Czech: https://www.seznamzpravy.cz/clanek/domaci-zivot-v-cesku-na-jednu-zadost-hned-ctyri-davky-podminky-se-ale-zprisni-245109 [viewed 20 March 2024].

in this type of subsidy scheme is dependent on an intermediary – representatives of the kindergarten or non-governmental organisations that dispose of a certain margin of appreciation in this regard. This opens space for creating at least informal pressure for children and their families to receive some other services alongside their participation in the programme (especially if the intermediary is a non-governmental organisation) or to accept additional requirements on their behaviour.

18. It is also important that even other subsidy schemes allocate funds for the support of Roma children and children facing destabilising poverty and/or social exclusion to the hands of the representatives of schools [like Operational Programme Johannes Amos Comenius (OP JAC) – para. 88 of the government's observations) and not directly to the hands of children and their families. Indeed, these mechanisms may not be adequate in a situation where the underlying problem is systemic discrimination and material poverty, as they do not address the actual cause but only its consequences, thus pathologising the victims of these systemic failures. The words of the former UN Special Rapporteur on the right to health, Dainius Pūras, about the "psychologization" and "psychiatrisation" of poverty resonate very strongly here.[11] Nor can it effectively ensure that the funds distributed are actually used in a way that the concerned persons consider beneficial and compliant with their needs. It establishes a hierarchy in deciding what those needs are because it gives more say in that regard to the representatives of schools (or kindergartens) and public authorities than to the persons whose needs are at stake.

19. Here, it is important to stress that participation of the concerned persons is an inherent part of the prohibition of discrimination. Again, the legal framework embedded in the CRPD is the most explicit on this issue. The UN CRPD Committee determined participation as one of four dimensions of inclusive equality, which is a concept that aims to elaborate further on the concept of material equality by capturing the different dimensions of material equality.[12] Furthermore, the requirement of participation is incorporated directly into the anti-discrimination concept of reasonable accommodation, which must always be determined in dialogue with the concerned persons.[13] Referring to the above-mentioned argumentation, it is obvious that this requirement is of immediate effect. Similarly, the UN Convention on the Rights of the Child (hereinafter "the CRC") determines participation as one of its four fundamental principles[14] and when the CRC Committee stresses that in a rights-based approach the process is as important as the end result, we can feel that participation is an inherent part of that process.[15] Nevertheless, the mechanisms of subsidy schemes through which intermediaries allocate the funds do not necessarily meet the requirements of participation and dialogue, and they do not provide the concerned persons – children and their families – with a legal claim to such a dialogue.

20. The presented government approach can be thus characterised, using the typology of the UN CRC Committee, as a welfare and not rights-based one. And as such, it carries with it all the negative consequences of welfarism,[16] including hierarchy in power, cultural dominance and disempowerment of those who belong to minorities.

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[11] A/HRC/44/48, para. 23.

[12] The concept of inclusive equality unfolds four dimensions of material equality, namely: a) a fair redistributive dimension; b) a recognition dimension; c) a participative dimension; d) an accommodating dimension. See CRPD/C/GC/6, para. 11.

[13] CRPD/C/GC/6, paras. 24 (b) and 26 (a).

[14] CRC/GC/2003/5, para. 12.

[15] CRC/C/GC/21, para. 10.

[16] See, for instance, ROSE, N. Expertise and the Government of Conduct. *Studies in Law, Politics and Society,* 1994, Vol. 14, pp. 359–397.

21. It is worth noting that neither the state policies nor plans are free from tendencies to social disciplining based on the family's difficult financial situation. In its most recent submission to the Council of Europe Committee of Ministers on the implementation of the judgment of the European Court of Human Rights (Grand Chamber) in the case of *D.H. and Others v. the Czech Republic*[17] concerning the segregation of Roma children in education, the Czech government mentioned that one of the currently discussed measures to increase the kindergarten attendance among Roma children is linking the welfare system to kindergarten attendance with the exemption of hardship benefits.[18] We argue that although preschool education is important, this turns the logic of rights on its head because it transforms the right into an obligation. This does not break the cycle of systemic discrimination; it just changes its form. The end result should not be to force Roma families and other families in vulnerable situations to place their children in kindergartens under the threat of worsening their economic situation (by losing the right to social welfare benefits) and thus abuse their difficult financial situation. It should be to create a system of quality and rights-based preschool education that would meet the requirements of availability, accessibility, including affordability, adaptability, and acceptability also for Roma children and children facing destabilising poverty and/or social exclusion so that those children and their families conceive themselves the system as a fulfilment of their rights and duties imposed on them by the society.

22. The CESCR Committee emphasised that 'it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In field such as … education … legislation may also be an indispensable element for many purposes.'[19] This is even more true in a situation of systemic discrimination, which is characterised, *inter alia*, by predominant cultural attitudes.[20] Unfortunately, from the government's actions as described in its observations, only the extension of the exemption from attendance fees takes the form of a legislative measure introducing a clear and enforceable legal requirement for children and families. Concerning other costs relating to children's attendance to kindergartens, children and families are still dependent on public authorities to decide whether and in what amount they will launch a subsidy scheme in a given year, as well as on representatives of kindergartens or other entities to include them in the programme and under what conditions. The dimension of discrimination and obligations deriving from its prohibition is completely lost here. It is a typical example of a welfare approach which, unfortunately, contrary to the rights-based approach is not eligible to break the dominant discriminatory paradigm.

23. It is worth noting that the government itself implicitly admits the importance of clear legal entitlements when it refers to the fact that decision-making on admission to a kindergarten takes the form of an administrative decision issued in administrative proceedings (para. 108). Indeed, unless the necessary support is enshrined as an enforceable right, it will completely bypass the guarantees attached to legal proceedings and decisions.

3. Other examples of the government's inadequate understanding of the obligations deriving from the prohibition of discrimination

[17] *D.H. and Other v. the Czech Republic*, judgment of the European Court of Human Rights of 13 November 2007, complaint No. 57325/00.
[18] Government's Action Plan on the Execution of the Judgment of D.H. and Others v. the Czech Republic submitted to the Committee of Ministers of 21 December 2023, DH-DD(2024)8, p. 16. The Action Plan is available at: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680ae0bb8.
[19] CESCR Committee, General Comment No. 3, para. 3.
[20] E/E.12/GC/20, para. 12.

24. Further, we argue that even in other parts of its observations, the government demonstrates its insufficient understanding of the conditions in which Roma families and families facing destabilising poverty live, as well as its obligations deriving from the prohibition of discrimination. We will gradually focus on the problem of 1) preparatory classes and 2) the government's approach to children without their place of permanent residence in the kindergarten's catchment area.

3.1 The problem of preparatory classes

25. In its submission, the government refers to children who attend preparatory classes to argue that the overall proportion of Roma children who complete their compulsory preschool education in an educational facility is higher than the estimated number of five-year-old Roma children in kindergartens because children attending preparatory classes are not included in those estimates (para. 62). The government further argues that preparatory classes may be a response to the situation when the child's obligatory school attendance is deferred during the school year (para. 117). Nevertheless, it should be noted that preparatory schools do not necessarily contribute to combat discrimination against Roma children and children facing destabilising poverty and/or social exclusion in the access to preschool education.

26. Indeed, preparatory classes are not mainstream educational facilities and should not be considered as such. The law defines these educational facilities as being designed for children at the age of compulsory preschool attendance with the need to compensate for their development. In contrast, children with deferred obligatory school attendance should be prioritised for admission.[21] Preparatory classes are thus segregated classes, even if established by a mainstream school, for children in vulnerable situations. They are rather a welfare than a rights-based response to that vulnerability and cannot make up for the child's admission in a mainstream kindergarten with the necessary support the child needs.

27. Furthermore, it is worth noting that the government implicitly confirms the alleged dependence of Roma children and children facing destabilising poverty and social exclusion on the representatives of kindergartens and public authorities when it confirms that there is no legal claim for children whose obligatory school attendance has been deferred after the school year began. The government states that 'it can be inferred that the head of a primary school, considering the best interests of the child, should decide on late-stage deferment only when they can be sure that the child's education is secured after leaving the primary school, whether that takes the form of admission to a preparatory class or to a kindergarten.' (para. 117). In other words, the government implicitly relies on the head of the primary school to ensure that the child does not drop out of the educational system. This is, however, a flawed assumption in a system where discriminatory attitudes against those children are common, including among the representatives of the educational system, as described in the collective complaint.

3.2 The problem of children with their place of permanent residence outside of the catchment area of the kindergarten in the place where they live

[21] Act No. 561/2004 Coll., § 47 (1).

28. Concerning the link between the child's legal claim for admission to a kindergarten and the place of the child's permanent residence, the government argues in its submission that the change of the place of permanent residence does not depend on the consent of the owner of the housing unit and that if Roma families or families facing destabilising poverty and/or social exclusion do not register the place where they live as their place of permanence residence, it is rather about their lack of awareness than some legislative barrier (para. 111). This government's argumentation shows how little insight it has into the situation of those families who very often live in precarious tenant relationships in shelters and other forms of precarious housing and often do not receive the rental contract in their hands as described in the collective complaint (paras. 107 and 110–111).

29. The government itself admits that the other possible solution, i.e., to register the place of permanent residence at the address of the municipal authority, may not be appropriate because it still does not guarantee the child that the kindergarten will be near the place where the family lives (para. 111 of the government's observations). We want to add to this account that the registration of the place of permanent residence at the address of the municipal authority is also very stigmatising because the general population associates such a measure with persons in a situation of homelessness, and it can thus seriously worsen the family's position, e.g., on the labour market.

30. The government, nevertheless, holds that 'the requirement of registering permanent residence is justified, as it allows municipalities to administer the availability of preschool education in their territory and, under current conditions, there is no other suitable criterion that would make it possible to predict and organise the kindergarten capacity necessary for the citizens of the municipality.' (para. 111). Although we understand the need for some organisational principles, their importance must not be construed as absolute. This brings us back to the obligations arising from the prohibition of discrimination. Indeed, the government's argument, referring to the organisational necessity of the criterion of permanent residence as the unbreakable rule, denies that the legal claim to the admission could be justified differently. Nevertheless, the prohibition of discrimination constitutes such a basis.

31. The legal regulation of kindergarten admissions should be flexible enough to entitle these most vulnerable children to be admitted. We must not lose sight of the fact that the different place of permanent residence from the place where the family actually lives is only a symptom of deeper systemic failures, especially in ensuring and protecting the right to adequate housing, and that these systemic failures are closely linked to ethnicity and destabilising poverty, i.e., social status. In other words, the different place of permanent residence harbours in case of these children forbidden discriminatory reasons. Thus, for these groups, the application of the place of permanent residence as the only criterion that constitutes the entitlement to admission to a kindergarten loses its legitimacy because it distinguishes among children on the grounds of discriminatory reasons.

32. We argue that two anti-discriminatory concepts are here of particular relevance – the concept of special measures on the general level and the concept of reasonable accommodation on the individual level. Article 2(2) of the UN Convention on the Elimination of All Forms of Racial Discrimination imposes on the states, when the circumstances so warrant, the obligation to take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. The UN CERD Committee then confirmed that special measures also include legislative measures and emphasised that 'States parties should include … provisions on special measures in their legal systems, whether through general

legislation or legislation directed to specific sectors in the light of the range of human rights referred to in article 5 of the Convention and through plans, programmes and other policy initiatives referred to above at national, regional and local levels.'[22] Article 4 (1) of the CERD then provides for that special measures 'shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

33. The anti-discrimination concept of special measures thus creates a sufficient legal basis to adopt special preferential rules for children who currently lose the practical and effective legal claim for admission to a kindergarten in the place where they live since due to their precarious housing situation, their place of permanent residence differs from this place.

34. The concept of reasonable accommodation is then crucial in individual cases when the special measures may not be entirely sufficient and, as with acceptability, it plays a crucial role until the special measures framework is in place. As the CRPD Committee emphasised, the reasonableness of the accommodation should be understood as a reference to its relevance, appropriateness, and effectiveness for the concerned person. 'An accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made, and is tailored to meet the requirements of the person…'[23] The only legitimate liberation from the obligation to provide the person with reasonable accommodation is the situation when the reasonable accommodation constitutes a disproportionate or undue burden. This must be, however, assessed on an individual basis. Even the concept of reasonable accommodation thus shows that in the present context, the government's argument referring to the organisational necessity of the rule of the place of permanent residence as a general rule is not appropriate.

35. In this part, we would like to finally add a brief remark on the government's presentation of the data relating to the capacities of kindergartens. In its observations, the government presents the data on the capacities of kindergartens and the vacancies and argues that 'there is no district of a municipality with extended powers where capacity has been filled to more than 95%.' (para. 102). The government thus concludes that 'the capacity of kindergartens appears to be sufficient' (para. 103). We find it important to note that these data can never be sufficient to draw any conclusions about the situation of children at admission to kindergartens if they are not accompanied by the data on children whose admission was rejected and who thus cannot attend a kindergarten. As mentioned in the collective complaint (para. 105), these data are not currently systematically collected. The current data are not appropriately disaggregated. The statistically recorded number of rejected applications may also include children who have been admitted at another kindergarten and whose parents have submitted multiple applications to be on the safe side. We thus do not know the number of children who, despite applying for admission to a kindergarten, stay rejected and outside the preschool education, nor their age and the locality where that happened. It is important to emphasise that the government's conclusion that the capacity of kindergartens appears to be sufficient does not correspond to the lived experience of even the majority of the population.

4. Misinterpretations and inaccuracies concerning the collective complaint in the government's observations

[22] CERD/C/GC/32, para. 13.
[23] CRPD/C/GC/6, para. 25 (a).

36. In the final part of our response, we would like to briefly clarify several misinterpretations and inaccuracies concerning the content of the collective complaint.

37. First, the government claims that in the collective complaint, we argue that Article 16 of the 1961 ESC 'encompasses the right to education within the meaning of Article 17§2 of the Revised Charter' and that 'the right to preschool education and care enjoys the same level of protection as the right to education within the meaning of Article 17§2 of the Revised Charter.' (para. 12). This is not, however, true. The collective complaint refers to Article 17§2 of the Revised Charter in the context of the 4-A scheme (para. 11). The argument is thus that the 4-A scheme expresses the quality requirements for an educational system and should also be applicable to preschool education and not that preschool education should be provided for free as the government is trying to interpret it. We still maintain this argument since the 4-A scheme is currently widely used whenever the State creates a system of services to fulfil its obligations deriving from economic, social, and cultural rights. The 4-A scheme appears in slight variations, for instance, in the context of the right to health, [24] the right to social security,[25] or the right to independent living of persons with disabilities.[26] It we accept preschool education as a right of the child and their family, there is no legitimate reason why it should stand outside the application of the otherwise widely used 4-A scheme.

38. Second, the government opposes in its observations the argument that 'the fee exemption is inadequately addressed in relation to children attending lower years'. As mentioned above, the government may make this statement, especially thanks to the amendment to the ministerial decree No. 14/2005 Coll., which will come into effect on 1 September 2024 and which was adopted after the collective complaint was submitted. Thus, by the amendment, the government on the contrary confirmed the correctness of the arguments formulated in the collective complaint. Furthermore, the government tries to give the wrong impression that in the collective complaint, we stated that fees are exempted always at the discretion of the kindergarten director. This is not true. We transparently described the situations when the exemption is required directly by the law (see para. 77 of the collective complaint) and we rightly mentioned that exemptions beyond these situations are possible but fall within the discretion of kindergarten directors (see para. 79). It is obvious that with the new amendment significantly enlarging the target group exempted from the attendance fee directly by the law, the cases of discretion of kindergarten directors become less critical. Nevertheless, as argued above, the amendment did not resolve the problem of affordability of preschool education sufficiently since it concerns only attendance fees while other costs relating to the child's attendance at kindergarten may be supported through subsidy schemes, which, unfortunately, place the child and their family in a dependent and thus precarious position vis-à-vis representatives of kindergartens and public authorities (see above paras. 14–24).

39. Third, when the government describes the social security system for families in vulnerable situations (para. 98), it fails to explicitly mention that the 'one-off emergency assistance' (in the collective complaint, we used the translation 'extraordinary immediate assistance'- para. 80) is fully at the discretion of public authorities. There is no legal claim of the families to receive this form of support, and it is thus accompanied by the same problems as the distribution of resources through subsidy schemes and programmes (see above paras. 14–24).

40. Fourth, the government argues that we wrongly claim that the support provided for Roma children and children facing destabilising poverty and/or social exclusion is aimed only at

[24] E/C.12/2000/4; CRC/C/GC/15.
[25] E/C.12/GC/19.
[26] CRPD/C/GC/5, para. 32.

the compulsory preschool year (para. 68). The government refers to para. 85 of the collective complaint. It should be clarified that in the cited paragraph, the collective complaint describes one of the government's strategic documents, namely *The Long-term Plan of Education and Development of Educational System 2019-2023* and all the given information fully corresponds to the content of this document. We insist that we transparently inform about all the government's efforts in the field. In the collective complaint, we mentioned that the Ministry of Education's subsidy scheme for support to increase the participation of children in preschool education in the Karlovy Vary and Ústí nad Labem, including the information that the scheme also covered preschool education (para. 89 of the collective complaint). The scheme extension to other regions took place only after the collective complaint was submitted.

41. Fifth, the government points out that we are incorrectly stating that the findings of the research Evaluation of the impacts of introducing a compulsory final year of preschool education are not published (para. 54). On 20 September 2022, FORUM applied by email to the Ministry of Education for the analysis. The Ministry replied on 3 October 2022 that 'all conclusions on the analysis of the implementation of compulsory preschool education are not published to the public' and shared some of the most important outcomes as they are cited in the collective complaint (paras. 56, 88–89). Thus, the analysis must have been published after the collective complaint had been submitted.

5. Conclusion

42. To conclude, ERRC, together with FORUM, would like to summarize the Government's key argument pointing out that Article 16 of the 1961 ESC 'does not commit a Party to any specific results' (para. 49) is not appropriate because it completely overlooks that the subject matter of the collective complaint is discrimination. Unfortunately, the government does not take this fact into account at all – not only in its observations but in its actions as well.

43. The government's observations confirm that when planning its action in the field of preschool education for Roma children and children facing destabilising poverty and/or social exclusion, it fails to consider the systemic discrimination of those children that are deeply rooted in the Czech society. This makes the government rely on inappropriate mechanisms and miss the traditional antidiscrimination goal of emancipation of the discriminated groups. It does not focus on breaking the asymmetry of power in the relationships between the representatives of the educational system and public power on one side and children and their families in vulnerable situations on the other side, nor the dependence of the latter on the former. Neither the creation of conditions for active participation of the concerned persons in the solutions is the subject of the government's interest.

44. Thus, the 'solutions' formulated by the government take predominantly the form of different subsidy schemes that allocate the necessary resources to the hands of intermediaries, be those representatives of the educational system or non-governmental organisations delivering services, rather than to the hands of the children and their families. These mechanisms may easily create an atmosphere of increased social control and disciplining of minorities and their incapacitation and disempowerment. They belong to the welfare approach where the responses to adverse conditions in the lives of minorities are designed *for* them and not *with* them. Such an approach is not able to eliminate systemic discrimination. It rather replaces one form of systemic discrimination with another.

45. We argue that the vicious cycle of systemic discrimination may be broken only by the thorough application of the rights-based model which also strongly resonates with the concept of inclusive equality as formulated by the UN CRPD Committee. This approach understands that effective protection of persons in vulnerable situations cannot depend on the goodwill of the representatives of a system that is infected with disadvantageous attitudes and practices, but rather on clear barriers against the application of them. Those barriers cannot be in the hands of the representatives of the system, and since then, they cannot guarantee that they will not be used again to spread disadvantages. They must be in the hands of those affected by those disadvantages as their rights constitute their clear and enforceable entitlements.

46. From all the government's actions in the field, only the extension of the exemption from the attendance fee takes the form of a clear and enforceable legal entitlement. Unfortunately, attendance fees are only one of many barriers that Roma children and children facing destabilising poverty and/or social exclusion currently face in their access to quality and rights-based preschool education. That is why the government's action is not eligible to sustainably improve these children's situation in preschool education.

47. Therefore, we suggest that the Committee make the decision as set forth in the collective complaint.

Yours faithfully,

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