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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

26 October 2017

**Case Document No. 1**

**European Roma Rights Centre & Mental Disability Advocacy Centre v. the Czech  
Republic**  
Complaint No. 157/2017

## **COMPLAINT**

**Registered at the Secretariat on 3 October 2017**



Department of the European Social Charter  
Directorate General Human Rights and Rule of Law  
Council of Europe  
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## COLLECTIVE COMPLAINT

European Roma Rights Centre & Mental Disability Advocacy Centre v. the  
Czech Republic

For failure to ensure social and economic protection of young children who  
are segregated in child-care institutions

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Violation of Article 17 and equality principle of European Social Charter

### COMPLAINANTS:

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## I. PARTIES TO THE COMPLAINT

### (a) The complainant organisations

1. ERRC - the European Roma Rights Centre (*hereinafter* "the ERRC") is a Roma-led international public interest law organisation tackling discrimination of Roma in Europe and providing legal representation in cases of human rights violations. The ERRC has already submitted several collective complaints to the European Committee of Social Rights focusing mainly on the issues of discrimination, housing, and social protection.<sup>1</sup>
2. MDAC - Mental Disability Advocacy Centre (*hereinafter* "MDAC") is an international human rights NGO founded in 2002 that is independent of all governments. It has participatory status with the Council of Europe and a special consultative status with ECOSOC. Its mission is to use the law to secure equality, inclusion, and justice for people with mental disabilities worldwide. MDAC has already submitted two collective complaints on the rights of children with disabilities in connection with Articles 15, 17 and E of the Revised European Social Charter.<sup>2</sup>
3. Both the ERRC and MDAC have consultative status with the Council of Europe and are thus entitled to submit collective complaints under Article 1(c) of the Additional Protocol of 1995.
4. Taking into account the above-mentioned information and the fact that the Czech Republic ratified the European Social Charter (1961) (*hereinafter* "the Charter") and accepted the obligations in Article 17 of the Charter to which this complaint is related, the complainant organisations believe that this complaint is admissible.
5. The ERRC and MDAC are supported in this collective complaint by Central European non-governmental organisation, Forum for Human Rights (*hereinafter* "FORUM"). FORUM works to ensure that human rights are respected, protected and fulfilled in accordance with relevant international human rights standards, using litigation and advocacy to promote human rights before national and international human rights bodies. It provides support to domestic NGOs and conducts and supervises domestic and international litigation and advocacy activities. Recently, FORUM has cooperated with the International Commission of Jurists and they jointly submitted a collective complaint registered as International Commission of Jurists (ICJ) v Czech Republic, No. 148/2017.

### (b) The respondent State's European Social Charter obligations

6. This collective complaint has been lodged against the Czech Republic on the grounds of failure to discharge its obligations under Article 17 of the Charter to ensure the effective exercise of the right of mothers and children to social and economic protection, in line with the principle of non-discrimination. Specifically,

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<sup>1</sup> The list of cases is available online at: <http://www.errc.org/strategic-litigation-european-social-charter>

<sup>2</sup> One collective complaint - challenging the lack of education of children with disabilities on the basis of Article 17§2 alone and in conjunction with Article E of the Revised European Social Charter - has already been successfully litigated before the Committee (Mental Disability Advocacy Center (MDAC) v. Bulgaria, No. 41/2007), and one collective complaint - challenging the exclusion of children with disabilities from the mainstream education system in Flanders relying on Articles 15, 17 and E of the Revised Social Charter - is currently pending before the Committee (Mental Disability Advocacy Center v. Belgium, No. 109/2014).

the Czech Republic has failed to comply with its obligations to refrain from the institutionalisation of young children, and in particular infants under the age of 3. As the data shows, the institutionalisation concerns especially the most vulnerable children - children of Roma origin and children with disabilities who are discriminated against. Moreover, the Czech Republic has failed to put in place non-institutional and family-like alternative forms of care.

7. The Czech Republic ratified the Charter on 3 November 1999, accepting 52 of the Charter's 72 paragraphs, including Article 17. On 25 March 2008, it denounced the provision of Article 8 § 4 of the Charter. The Czech Republic ratified the Amending Protocol to the Charter on 17 November 1999. It signed the Revised Charter on 4 November 2000 but has not ratified it yet. The Czech Republic ratified the 1995 Additional Protocol providing for a system of collective complaints on 4 April 2012. Consequently, this complaint is admissible also in this respect.

## II. SITUATION IN THE CZECH REPUBLIC AND VULNERABLE GROUPS CONCERNED

8. Despite the convincing scientific evidence of the harm that institutional care can cause to very young children, the Czech Republic still institutionalises them. In this section, the complainants provide the European Committee with an overview of the relevant domestic legal framework allowing for institutionalisation of children regardless of their age, statistics proving that the issue concerns a significant number of young children with a disproportionate representation of Romani children and children with disabilities, a portrayal of institutional care of children under the age of 3 as described by the Czech Ombudsperson, and information on recent developments proving failure of the State party to reform the system despite knowing its harmful consequences.

### (a) Legal framework and available data

9. In the Czech Republic, in 2014, there were 8,285 children in total raised in state institutions which meant a slight decrease compared to 2013.<sup>3</sup> Children under the age of 3 with specific needs or in a specific situation where alternative care is not available are regularly placed into early childhood medical care institutions ("*dětské domovy pro děti do 3 let věku*" or "*kojenecké ústavy*"). This practice is based on Sections 43 and 44 of the Health Care Act no. 372/2011. The substantive ground for institutionalisation is found in Section 43 § 1 of the Health Care Act, which reads as follows:

*"Children homes for children below the age of 3 provide health care services and care to children usually until 3 years of age who cannot grow up in a family environment, who are especially ill-treated, neglected and abused and endangered in their development by the inappropriate social environment or to children with disabilities. The care means providing nutrition, accommodation, clothing and educational activity."*

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<sup>3</sup> Report on state of human rights in the Czech Republic/Zpráva o stavu lidských práv v České republice v roce 2015, p. 62, available at: <https://www.vlada.cz/cz/ppov/rlp/dokumenty/zpravy-lidska-prava-cr/zprava-o-stavu-lidskych-prav-v-ceske-republice-v-roce-2015-147918/>.

10. Available official data<sup>4</sup> show that since 2010, the number of places in these institutions has gradually decreased, from 1,963 places in 2010 to 1,470 in 2015. There has been a decrease in the number of institutionalised infants, from 2,077 in 2010 to 1,666 in 2015. At the same time, the number of institutionalised Romani children remained almost the same: 433 in 2010, compared to 406 in 2015. The same applies to children with disabilities: 710 in 2011 compared to 694 in 2015. Moreover, reasons for admission show that the vast majority of children are admitted either solely for health reasons (958 in 2011, decreasing to 567 in 2015) or for social reasons (954 in 2010 to 568 in 2015). The remainder of the children are admitted on the grounds of health and social reasons combined.

		2010	2011	2012	2013	2014	2015
Number of institutions		34	34	33	33	33	31
Number of places		1963	1783	1700	1638	1571	1470
Number of admitted children		2077	2131	1932	1740	1606	1666
Including	with special needs	358	710	720	698	714	694
	Roma	433	403	446	445	398	406
	abused	55	78	66	59	57	80
ground for admission	health reasons	743	958	881	701	567	567
	health + social	380	440	345	425	487	531
	social	954	733	706	614	552	568

11. As it follows from table no. 1, Romani children and children with disabilities are grossly overrepresented. Considering the data from the perspective of ethnicity and disability, Roma children consistently make up approximately 24% of all children placed in these early childhood care institutions for children under 3 years of

<sup>4</sup> Data collected by the Institute of Health Information and Statistics of the Czech Republic and provided to FORUM on the basis of a request for information under the Act on Free Access to Information.

age. Considering that approximately 1.4-2.8 %<sup>5</sup> of the population in the Czech Republic is Romani, this represents a significantly disproportionate number of institutionalised children. For children with disabilities, who consistently make up approximately 40% of the children in these institutions, the disproportionate representation appears to be even higher - children born with disabilities constitute approximately 4% of all children born in the Czech Republic.<sup>6</sup>

(b) Characteristics of care provided in early childhood medical care institutions

12. In 2013, the Czech Ombudsperson (*Public Defender of Rights*) conducted monitoring visits into medical early childhood care institutions (*kojenecké ústavy*) and examined the files of 400 institutionalised children. According to his findings, the predominant reason for placement was an inappropriate social environment; placement for reasons of abuse was rare and only a few children had severe and multiple disabilities.<sup>7</sup> Further, he discovered that 72% of all institutionalised children stay in the institutions longer than 6 months.
13. The Ombudsperson observed that care in institutions for children under the age of 3 is provided by nurses because these are medical facilities. Usually, one nurse takes care of at least five children at the same time. At times, due to holidays, sickness or shortage of employees, the number rises to about eleven.<sup>8</sup> The nurse-caregiver changes according to work shifts, may leave permanently if she or he decides to change jobs and generally is not present and available to the child in a stable and predictable manner. As they get older, the children change their peer groups as well as carers. There were too many carers taking care of any given child, according to the Ombudsperson.<sup>9</sup>
14. Further, the Ombudsperson noted that groups were based on age; siblings were usually not together. There were no guarantees that a child and a young mother would live together in the institution. Some of the expert recommendations (psychologist, speech specialist, special pedagogue) for specific children could not be implemented because carers did not have time.<sup>10</sup> The Ombudsperson concluded:

*“The less than ideal situation of placement of a small child into an institution has been further worsened by an aspect of depersonalisation and inadequate physical contact. The care is organised in a collective form, not individually and it aims mostly to provide medical-rehabilitation services. This report, based on visits into early childhood medical care institutions (kojenecké ústavy), or rather the whole system, can be best de-*

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<sup>5</sup> The unofficial data from: Minister for Human Rights, *The Roma Integration Concept 2010-2013*, available at: [http://ec.europa.eu/justice/discrimination/files/roma\\_czech\\_republic\\_strategy\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_czech_republic_strategy_en.pdf). See also European Commission, *An EU Framework for National Roma Integration Strategies up to 2020, Annex*: available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0173:FIN:EN:PDF>

<sup>6</sup> The statistics are available online in Czech:

<http://vozickar.com/statistici-pres-milion-lidi-v-ceske-republice-ma-zdravotni-postizeni/>.

<sup>7</sup> Public Defender of Rights Report on systematic visits of health care facilities, including institutions for children under three, p. 12. The report is available (in Czech) at:

[https://www.ochrance.cz/fileadmin/user\\_upload/ochrana\\_osob/2013/NZ-25\\_2012-kojenecke-ustavy.pdf](https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2013/NZ-25_2012-kojenecke-ustavy.pdf).

<sup>8</sup> *Ibid.*

<sup>9</sup> Too many caring persons lead to inability of children to establish necessary attachment to one person, which is harmful to their development.

<sup>10</sup> Public Defender of Rights Report on systematic visits of health care facilities, including institutions for children under three, fn. 7, p. 60.



scribed by the statement of one of the caring nurses: 'children have anything but love'<sup>11</sup> .<sup>12</sup>

(c) Failure of the Government to reform the existing system

15. The Czech authorities have been well aware of the human rights implications of the existing system. The 2012 National Strategy to Protect Children's Rights recognised that alternative care for children under 3 years of age should be provided exclusively in a family environment and obliged the Ministry of Social Affairs and the Ministry of Justice to introduce a legal ban on the institutionalisation of children of specific age by 2016.<sup>13</sup> On 15 December 2015, the Government's Council for Human Rights, an advisory body to the Government, adopted a resolution calling on the Government to implement systemic changes in order to substantially restrict the possibility of placing children under the age of seven into institutional care.<sup>14</sup> At their session held on 23 November 2016, the Government discussed this resolution and requested, by their own resolution no. 1033, the Ministry of Social Affairs, in cooperation with the Ministry of Health, to prepare the required changes.<sup>15</sup>

16. In December 2016 and later in March 2017, the Ministry of Social Affairs introduced to the Government an Action Plan to fulfil the National Child Protection Strategy for 2016-2020. The Action Plan presumed a ban on the institutionalisation of children under the age of 3. The introductory part contains a remark that neither of the other Ministries cooperated. At their session of 22 March 2017, the Minister of Social Affairs withdrew the proposal as several members of the Government disagreed with it.<sup>16</sup> The Ministry of Health, responsible for early childhood care institutions (*kojenecké ústavy*), openly disagreed with a ban on the institutionalisation of children of specific age. Eventually, the document was introduced to the Government on 21 August 2017 but it was not adopted. The Ministry of Health voted against it.

(d) Concluding remarks

17. In the Czech Republic, children under the age of 3 with specific needs have been routinely placed in early childhood medical care institutions (*kojenecké ústavy*). This practice is based on the existing legal framework which expressly permits the institutionalisation of young children despite the profoundly negative effects on the child's development, and the lack of alternatives to institutionalisation. This systemic violation of children rights concerns a significant number of the most

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<sup>11</sup> The original Czech expression uses the word "armful" (*náruč*).

<sup>12</sup> Public Defender of Rights Report on systematic visits of health care facilities, including institutions for children under three, fn. 7, p. 61.

<sup>13</sup> The strategy stipulated one of the key activities as "taking measures in the system of care of vulnerable children in order to define in legislation the age limit below which children cannot be placed in institutional care (3 years of age and subsequently 7 years of age). See National Strategy to Protect Children's Rights, 2012, pp. 21-22. The Strategy was adopted by the Government in January 2012 and is available in English at:

<http://www.mpsv.cz/files/clanky/13456/strategy.pdf>

<sup>14</sup> Relevant documents are available in Czech at:

<https://www.vlada.cz/cz/ppov/rlp/cinnost-rady/zasedani-rady/zasedani-rady-dne-15--prosince-2015-142203/>.

<sup>15</sup> The Government's resolution no. 1033 of 23 November 2016. Available (in Czech) at:

<https://apps.odok.cz/attachment/-/down/RCIAAG6B3ZDR>.

<sup>16</sup> The minutes are available in Czech at:

<https://apps.odok.cz/djv-agenda?date=2017-03-22>.

vulnerable children in society – children of Roma origin and children with disabilities, as shown above (see table no. 1) – and raises serious issues under Article 17 of the Charter, separately and in conjunction with the prohibition of discrimination.

### III. SUBJECT MATTER OF THE COMPLAINT

18. The complaining organisations argue, first, that the issue of institutional early childhood care of all children, falls within the ambit of Article 17 of the Charter. In particular, institutional early childhood care of Romani children and children with disabilities under 3 years of age falls within the ambit of Article 17 and the principle of non-discrimination. Second, as Article 17 of the Charter provides for an obligation to establish or maintain *appropriate* institutions or services to ensure social and economic protection of children, it is further argued that the existing early childhood medical care institutions (*kojenecké ústavy*) in the Czech Republic cannot be considered an appropriate alternative care for children under 3 years of age and are discriminatory based on ethnicity and disability. This argument is grounded on a child rights approach and international human rights standards, taking into account the well-known effects of institutionalisation on children and their development and the disproportionate representation of Romani children and children with disabilities in institutional early childhood care. Institutional early childhood care is a form of violence against children, runs counter to their best interests, i.e. the leading principle in consideration of the rights of children, and interferes with their dignity in contravention to Article 17 of the Charter. Moreover, the statistics show that it has a disproportionately negative impact on children of Roma origin and children with disabilities. Third, it is argued that the State Party has failed to fulfil its obligation to ensure available and accessible alternative care to children younger than 3 years who are temporarily or permanently deprived of their family environment.

(a) The subject matter falls within the ambit of Article 17 of the Social Charter

19. The complainants raise their complaints under Article 17 of the Charter, in conjunction with the prohibition of discrimination as formulated in the Preamble. The relevant provisions read as follows:

Preamble of the Charter

*“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;”*

Article 17 of the Charter

*“The right of mothers and children to social and economic protection*

*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.”*

20. The present situation raises two issues under Article 17 of the Charter, namely rights of children in public care and the protection from ill-treatment and abuse, and it falls clearly within the ambit of Article 17 of the Social Charter.<sup>17</sup>
21. From a similar perspective, the issue has been also included by the European Committee within the ambit of Article 17 of the Charter in its conclusions on the Czech Republic (2015, 2011, 2005 and 2004). In 2011, the European Committee criticised the Czech Republic for a high (and growing) number of children living in institutions, with Romani children and children with disabilities being disproportionately represented.<sup>18</sup> The same was noted in 2015<sup>19</sup>, with reference to the Concluding Observations of the UN Committee on the Rights of the Child (*hereinafter* "the CRC Committee") from 2011, also emphasising that Romani children were disproportionately represented. In other instances, the European Committee stressed that foster care must be given preference over institutionalisation and that supportive and community-based services should be implemented in order to lower the number of children in institutions.<sup>20</sup>
22. Considering the wording of Article 17 of the Charter and well-established practice of the European Committee, the complainants argue that the subject matter of the present complaint falls within the ambit of Article 17 of the Charter. Further, given the disproportionate representation of Romani children and children with disabilities, the principle of non-discrimination set out in the preamble is also engaged.

(b) Right to community-based care

23. The UN Convention on the Rights of Persons with Disabilities (*hereinafter* "the CRPD") protects the right of all persons with disabilities, including children, to live in the community and to services necessary to support living and inclusion in the community (Article 19). Article 23 of the CRPD requires States, where the immediate family is unable to care for a child with disabilities, to undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.
24. According to General Comment no. 7 of the CRC Committee: "... *young children are holders of all the rights enshrined in the Convention. They are entitled to special protection measures and, in accordance with their evolving capacities, the progressive exercise of their rights.*"<sup>21</sup> Due to their age, children are especially vulnerable. Article 23 of the CRC recognises that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. It further requires that States must assist in this regard shall be designed to ensure that the disabled child has access to a range of enumerated services and opportunities "*in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.*" As the CRC Committee further noted

<sup>17</sup> Conclusions XV-2, Statement of Interpretation on Article 17, p. 26; Conclusions XV-2, Statement of Interpretation on Article 17 § 1, p. 30; Conclusions 2005, Moldova, 2005/def/MDA/17/1/EN.

<sup>18</sup> Conclusions XIX-4 - Czech Republic - Article 17, XIX-4/def/CZE/17/EN.

<sup>19</sup> Conclusions XX-4 - Czech Republic - Article 17, XX-4/def/CZE/17/EN.

<sup>20</sup> See, e.g. Conclusions XV-2, Statement of Interpretation on Article 17 § 1, p. 30; and Conclusions 2011, Belgium, 2011/def/BEL/17/1/EN.

<sup>21</sup> UN CRC, General comment No. 7: Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, 2005, para. 3.

when comparing family based care and institutional care: *"To the extent that alternative care is required, early placement in family-based or family-like care is more likely to produce positive outcomes for young children."*<sup>22</sup>

(c) Harmful impact of institutional care on young children

25. In 2010, the UN General Assembly adopted via resolution the Guidelines for the Alternative Care of Children. The UN Guidelines unequivocally state in para. 22 that alternative care for young children shall be provided in family settings: *"In accordance with the predominant opinion of experts, alternative care for young children, especially those under the age of three years, should be provided in family based settings. Exceptions to this principle may be warranted in order to prevent the separation of siblings and in cases where the placement is of an emergency nature or is for a predetermined and very limited duration, with planned family reintegration or other appropriate long-term care solution as its outcome."*<sup>23</sup>
26. These legal arguments are based on a simple fact, proved by psychological research, that institutional care is harmful to all individuals and in particular to children.<sup>24</sup> The UN Office of the High Commissioner for Human Rights has noted that, in practical terms, activities in institutions such as eating, waking and sleeping are organised routinely, irrespective of the child's preferences or needs.<sup>25</sup> These rules, regulations, routines, and processes of institutions can be distinguished from a child-centred approach which always places the rights and needs of the child as paramount.<sup>26</sup>
27. Already in 1974, Czechoslovak psychologists Langmeier and Matějček described the negative effects of institutional care on young children resulting in deprivation syndrome.<sup>27</sup> This conclusion is in line with the seminal attachment theory developed by John Bowlby who linked early infant separation from the mother with dysfunctional behaviour and famously noted that *"the determinant of attachment is not food but care and responsiveness."*<sup>28</sup> A more recent study<sup>29</sup> on effects of institutions on children's development has revealed that young children placed in institutional care without parents may be at risk of harm. The research evidence on the impact of institutional care on brain growth, attachment, social behaviour, and cognitive development show that young children placed in institutional care are at risk of harm in terms of attachment disorder and developmental delays in social, behavioural and cognitive domains.<sup>30</sup> Delays in physical growth, neural at-

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<sup>22</sup> *Ibid.*, para. 36 (b).

<sup>23</sup> UN General Assembly: Guidelines for the Alternative Care of Children, A/RES/64/142, para. 22.

<sup>24</sup> OHCHR, *Forgotten Europeans, Forgotten Rights - The Human Rights of Persons Placed in Institutions*, 2011, p. 6.

<sup>25</sup> Office of the High Commissioner of Human Rights, Europe Regional Office. *The rights of vulnerable children under the age of three: Ending their placement in institutional care*, 2011. Available online at: [http://www.europe.ohchr.org/Documents/Publications/Children\\_under\\_3\\_webversion.pdf](http://www.europe.ohchr.org/Documents/Publications/Children_under_3_webversion.pdf)

<sup>26</sup> Mental Disability Advocacy Centre. *The CHARM Toolkit: The child Human Rights Abuse Removal Monitoring Toolkit*, 2017, p. 26. Available at [http://mdac.org/sites/mdac.info/files/charm\\_methodology\\_en.pdf](http://mdac.org/sites/mdac.info/files/charm_methodology_en.pdf)

<sup>27</sup> LANGMEIER, J., MATĚJČEK, Z. *Psychická deprivace v dětství (Psychological deprivation in childhood)*. Praha, Avicenum, 1974.

<sup>28</sup> BOWLBY, J. *Attachment. Attachment and loss. Vol. 1. Loss*. New York, Basic Books, 1969.

<sup>29</sup> JOHNSON R., BROWNE K.D. and Hamilton-Giachritsis C.E. *Young children in institutional care at risk of harm. Trauma Violence and Abuse*, 2006, v. 7, no. 1, pp. 1-26. The abstract is available at: <https://www.ncbi.nlm.nih.gov/pubmed/16332980>.

<sup>30</sup> SHERIDAN M., FOX N., ZEANA C., MCLAUGHLIN K. and NELSON C. *Variation in neural development as a result of exposure to institutionalization early in childhood*. PNAS, 2012, v. 109, no. 31.

rophy, and abnormal brain development have also been implicated. In addition, children in institutions suffer a variety of medical problems and sensory integration difficulties and stereotypes (such as body rocking).<sup>31</sup> The findings suggest that the lack of a one-to-one relationship with a primary caregiver is a major cause of harm to children in residential care.<sup>32</sup> The evidence indicates that infants who are placed in institutional care will suffer harm to their development if they are not moved to family-based care by the age of 6 months.<sup>33</sup> The researchers concluded that neglect and damage caused by early privation and deprivation are equivalent to violence and every child should have the opportunity to grow up in a family environment.<sup>34</sup>

28. The existing literature provides strong evidence that institutionalisation of infants and young children, has profound effects on essentially all domains of their development. When young children experience institutional care, their social and interpersonal development is often impaired, physical growth and cognitive and language development are delayed.<sup>35</sup> In the institution, appropriate care, inherently and by definition, cannot be provided by one primary caregiving person who is attending to the child.

(d) ) Institutional early childhood care is a form of violence against children

29. As demonstrated above, early childhood care in institutions has significant harmful effects on childhood development. In addition, it has been also reported that institutions are places where other systemic violations of children's rights happen.<sup>36</sup> The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the UN CRC Committee have indicated that institutional early childhood care amounts to violence against children owing to the particularly vulnerable position that exposes children to numerous types of

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<sup>31</sup> NELSON C., *A neurobiological Perspective on Early Human Deprivation*. Child Development Perspectives, vol. 1, pp. 13-18.

<sup>32</sup> Young children need both stable emotional attachments with and touch from primary caregivers to develop the brain properly and develop caring behaviour and cognitive capacities: PERRY B., *Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*. Brain and Mind, 2002, vol. 3, pp. 79-100.

<sup>33</sup> Also, other studies suggest that children placed into an institution before their sixth month suffer from long term developmental deprivation, see RUTTER, M. *Developmental catch-up, and deficit, following adoption after severe global early privation*. Journal of Child Psychology and Psychiatry, 1998, vol. 39, pp. 465-476; MARCOVITCH, S., GOLDBERG, S., GOLD, A., WASHINGTON.J., WASSON, C., KREKEWICH, K., HANDLEY-DERRY, M. *Determinants of behavioural problems in Romanian children adopted in Ontario*. International Journal of Behavioral Development, 1997, vol. 20, pp. 17-31.

<sup>34</sup> JOHNSON R., BROWNE K.D. and HAMILTON-GIACHRITSIS C.E. *Young children in institutional care at risk of harm*. Trauma Violence and Abuse, vol. 7, no. 1, 2006, pp. 1-26. Also, VON IJZENDOORN, Marinus H., et al. *Children in institutional care: delayed development and resilience*. Monographs of the Society for Research in Child Development, vol. 76, No. 4, 2011, pp. 8-30. The results were also discussed in BROWNE, K. *The Risk of Harm to Young Children in Institutional Care*. London, Better Care Network and Save the Children, 2010, p. 14. The book is available at: [http://www.savethechildren.org.uk/sites/default/files/docs/The\\_Risk\\_of\\_Harm\\_1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/The_Risk_of_Harm_1.pdf).

<sup>35</sup> See DOZIER, M., et al. *Institutional Care for Young Children: Review of Literature and Policy Implications*. Social Issues and Policy Review, vol. 6, no. 1, pp. 1-25, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3600163/> and NELSON A. C., *A Neurological Perspective on Early Human Deprivation*, *Child Development Perspectives*, v. 1, 2007, pp. 13-18, available at: [http://www.ecdgroup.com/docs/lib\\_005520114.pdf](http://www.ecdgroup.com/docs/lib_005520114.pdf)

<sup>36</sup> UN study on violence against children, A/61/299, 29 August 2006, paras. 53-59. The study is available at: [https://www.unicef.org/violencestudy/reports/SG\\_violencestudy\\_en.pdf](https://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf)

risks. They have also directly linked the State's obligation in this respect to the prohibition of ill-treatment.<sup>37</sup>

30. In 2006, the UN adopted a seminal study on violence against children which acknowledged States' responsibility for ensuring the safety of children in residential care and recommended that States:

*"prioritize reducing rates of institutionalization of children by supporting family preservation and community-based alternatives, ensuring that institutionalized care is used only as a last resort. Family-based care options should be favoured in all cases and should be the only option for infants and very young children".*<sup>38</sup>

31. In 2011, the UN CRC Committee adopted General Comment no. 13 on the right of the child to freedom from all forms of violence. Violence was defined as *"all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse"*. They rightly insist on a flexible understanding of the term as *"it must not be interpreted in any way to minimize the impact of, and need to address, non-physical and/or non-intentional forms of harm (such as, inter alia, neglect and psychological maltreatment)."*<sup>39</sup> The same year UNICEF and UN OHCHR showed the prevalence of institutional care in Central and Eastern Europe, described the harmful effects of institutionalisation and advocated for a ban on the institutionalisation of children under the age of 3.<sup>40</sup> One of the studies, prepared by Dainius Puras, the current UN Special Rapporteur on the Right to Health, convincingly argues:

*"Institutional culture that unavoidably inhabits and infiltrates residential institutions for children (including those for the youngest ones) may be considered as equivalent to a culture of violence. When reviewing research on violence against children and institutionalization of children, both their causes and consequences appear to be strikingly similar, overlapping and reinforcing each other. In this respect, the UN study on violence against children can be read to a certain degree as a study on institutional care and its prevention and general comment no. 13 can be read as normative guidance on why and how institutional care of children and especially young children should be prevented and eliminated."*<sup>41</sup>

32. Later, in 2015, the UN Special Rapporteur on the Right to Health recalled that *"it is of special importance that all stakeholders understand the harmful effects of institutional care in early childhood; it is a form of violence against young chil-*

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<sup>37</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Ernesto Mendez, A/HRC/28/68, 5 March 2015, para. 69, available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>; UN CRC General comment no. 13 on the right to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011, para. 3(i).

<sup>38</sup> UN study on violence against children, fn. 36, para.112 (a).

<sup>39</sup> UN CRC General comment no. 13, fn. 37, para. 4.

<sup>40</sup> See, UNICEF. *At home or in a home? Formal care and adoption of children in Eastern Europe and Central Asia*. 2011, Geneva; OHCHR. Available at: [https://www.unicef.org/ceecis/At\\_home\\_or\\_in\\_a\\_home\\_report.pdf](https://www.unicef.org/ceecis/At_home_or_in_a_home_report.pdf); OHCHR Regional office for Europe. *Forgotten Europeans - forgotten rights*. 2011, Brussels. Available at: [http://www.europe.ohchr.org/Documents/Publications/Forgotten\\_Europeans.pdf](http://www.europe.ohchr.org/Documents/Publications/Forgotten_Europeans.pdf); PURAS, D. OHCHR Regional office for Europe. *The rights of vulnerable children under three - ending their institutional care*, 2011. Available at: [http://www.europe.ohchr.org/Documents/Publications/Children\\_under\\_3\\_webversion.pdf](http://www.europe.ohchr.org/Documents/Publications/Children_under_3_webversion.pdf).

<sup>41</sup> PURAS, D., fn. 40, p. 12.

dren." He urged to "expedite the process of eliminating institutional care for children under 3 years of age" and further called for "recognition of the detrimental effects of institutional care on the health and development of all young children and for the adoption of a common understanding that institutional care should not be accepted for children under 5 years of age."<sup>42</sup> The Rapporteur recommended:

*"To eliminate institutional care for children during the first five years of life and promote investments in community-based services for families at risk, including for families living in poverty and those with young children with developmental and other disabilities."*<sup>43</sup>

33. In a similar fashion, the UN Special Rapporteur on Torture considered that "one of the most egregious forms of abuse in health and social care settings is unique to children." He linked the absence of satisfaction of basic emotional needs in early child care institutions with ill-treatment and noted that, "this fundamental need for connection is consistently not met in many institutions, leading to self-abuse, including children banging their head against walls or poking their eyes. In reaction, care-givers use physical restraints as a long-term solution, or hold the children in cages or their beds, practices that have been linked to muscular atrophy and skeletal deformity."<sup>44</sup>
34. Institutionalisation of young children as a form of violence is not dependent on material conditions because the culture of violence is inherent to even well-equipped institutions, as the deprivation and suffering is caused predominantly by emotional, mental or physical neglect, the non-existence of a primary caregiving person and the lack of stability. It has been observed that "supporters of institutional care for children commonly argue that since conditions have significantly improved in institutional placements, these should now be regarded as safe and suitable places for children to stay". However, this argument has been rejected, especially with regard to children under 3 years of age, because "their long-term stay in institutional care is always accompanied by emotional neglect, which is a form of violence - and therefore should not be tolerated."<sup>45</sup>
35. The Council of Europe has also been systematically calling for the deinstitutionalisation of child care. Recommendation CM/Rec(2010)2 of the Committee of Ministers on institutional care for children with disabilities provides that "the creation of new institutions and new placements of children with disabilities in institutions should be prevented. For this reason, preventive measures of support for children and families in accordance with their special needs should be provided as early as possible."<sup>46</sup>
36. The Committee of Ministers' Recommendation CM/Rec(2011)12 on children's rights and social services friendly to children and families stipulates that when decisions of alternative care cannot be avoided, the principle of appropriateness to the child's needs identified by a rigorous assessment should be the determining

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<sup>42</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/70/213, 30 July 2015, para. 73. Available online at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/70/213](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/213)

<sup>43</sup> *Ibid.*, para 112 (k).

<sup>44</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Juan Ernesto Mendez, fn. 37, para. 56.

<sup>45</sup> PURAS, D., fn. 40, p. 12.

<sup>46</sup> Recommendation CM/Rec(2010)2 of the Committee of Ministers to member states on deinstitutionalisation and community living of children with disabilities, para. 18.

factor with regard to individual decisions and intensive social services should be based on several principles, including the requirement that *"programmes for de-institutionalisation need to be developed in co-ordination with efforts to increase family and community-based care services, especially for children under the age of 3 and children with disabilities."*<sup>47</sup>

37. The current Council of Europe Strategy for the Rights of the Child (2016-2021) expressly states that *"the Council of Europe will also pay specific attention to the situation of children in all forms of alternative care"* and where *"large residential care facilities (institutions) remain, the Council of Europe will promote the deinstitutionalisation of care of children, in particular of children under the age of three."*<sup>48</sup>
38. Nowadays there has been growing consensus that institutional care is simply not compatible with human rights. The mass-treatment typical of institutions is utterly inadequate for providing services in a modern society and fails to recognise individual requirements or to empower users, families, and communities. Certainly, it is not a suitable system to meet children's rights and developmental needs.<sup>49</sup> This consensus has been strengthened by the adoption of the UN Convention on the Rights of Persons with Disabilities which provides a clear framework of reference concerning children and how alternative care should be understood. Pursuant to Article 23 § 5 of the CRPD *"States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting."* The Convention clarifies under Article 23 § 4 that *"in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents."*
39. Therefore, the complainants argue that institutional early childhood care is not capable of ensuring the basic needs of young children, and especially Romani children and children with disabilities, as it causes severe emotional suffering and developmental damage and constitutes a specific form of violence against children. It runs contrary to the best interest principle, which should be interpreted consistently with *"the obligation to protect children from all forms of violence"* and which *"cannot be used to justify practices ... which conflict with the child's human dignity and right to physical integrity."*<sup>50</sup>

(e) Care provided in early childhood medical care institutions (*kojenecké ústavy*) is not in conformity with Article 17 of the Charter

40. Article 17 of the Charter, similarly to Article 20 of the UN CRC, provides for an obligation to ensure alternative care for children deprived of their family environment or children who in their best interest cannot be allowed to remain in that environment. The provision refers to *"appropriate"* institutions (Article 20 UN CRC speaks of *"suitable"* institutions), which should be understood from the perspective of present-day conditions and reality and interpreted in the light of the current child rights approach, the consensus around deinstitutionalisation of

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<sup>47</sup> Recommendation CM/Rec(2011)12 on children's rights and social services friendly to children and families, p. 10.

<sup>48</sup> Council of Europe Strategy for the Rights of the Child (2016-2021), para. 31. Document is available at: <https://rm.coe.int/168066cff8>.

<sup>49</sup> Eurochild, *Deinstitutionalisation and quality alternative care for children in Europe. Lessons learned and the way forward*. Working paper, 2012, p. 9.

<sup>50</sup> UN CRC General comment no. 13, fn. 37, para. 61.



early childhood care, as well as the more recent provisions of the CRPD, especially Article 23(5) and the requirement to undertake every effort to provide alternative care within the wider family or in a family setting in the community. In this regard, it is to be noted that in the text of Article 17 of the Revised Charter it has been clarified that it provides for "*the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities*".

41. Indeed, the Charter has been understood as a living instrument which ought to be interpreted in accordance with developments in relevant international instruments.<sup>51</sup> The interpretation should be based on the notion of an effective and practical human rights treaty, as "*the aim and purpose of the Social Charter, being a human rights instrument, is to protect rights not merely theoretically, but also in fact.*"<sup>52</sup> Children's rights play an especially significant role and the Charter is "*the most significant treaty at the European level for children's human rights*"<sup>53</sup> and "*complements the European Convention on Human Rights in this area and reflects the United Nations Convention on the Rights of the Child ...*".<sup>54</sup> In practical terms, the European Committee explained that "*when ruling on situations where the interpretation of the Charter concerns the rights of a child, the Committee considers itself bound by the internationally recognised requirement to apply the best interests of the child principle.*"<sup>55</sup> When it concerns rights of persons with disabilities, it has also relied on the UN Convention on the Rights of Persons with Disabilities as it "*reflects existing trends in comparative European law in the sphere of disability policies.*"<sup>56</sup>
42. There is also a wide consensus that in assessing compliance with children rights the child rights approach should be adopted. It presumes that "*respect for the dignity, life, survival, well-being, health, development, participation and non-discrimination of the child as a rights-bearing person should be established and championed as the pre-eminent goal of States parties' policies concerning children*".<sup>57</sup> In relation to the institutionalisation of young children, it has been argued by Dainius Puras that:

*"The human rights imperative should be the cornerstone for addressing and eliminating the long-term institutionalization of young children. Securing and promoting children's fundamental rights to respect for their human dignity and integrity, through the prevention of institutionalization are essential for promoting the full set of child rights ... Strategies and systems to prevent and respond to the institutional placement of young children as a form of institutional violation of*

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<sup>51</sup> World Organisation against Torture (OMCT) v. Greece, Complaint no. 17/2003, para. 31.

<sup>52</sup> International Commission of Jurists (ICJ) v. Portugal, Complaint no. 1/1998, 10 September 1999, para 32.

<sup>53</sup> Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on merits of 20 October 2009, para 26.

<sup>54</sup> International Federation for Human Rights (FIDH) v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, para 36 and World Organisation against Torture (OMCT) v. Greece, Complaint No. 17/2003, decision on the merits of 7 December 2004, para 31.

<sup>55</sup> Defence for Children International (DCI) v. the Netherlands, complaint no. 47/2008, decision on the merits of 20 October 2009, para 29.

<sup>56</sup> International Federation for Human Rights (FIDH) v. Belgium, complaint No. 75/2011, decision on the merits of 18 March 2013, para 112 et seq.

<sup>57</sup> UN CRC General comment no. 13, fn. 37, para 59.

*human rights must therefore adopt a child-rights approach, not a charity concept or welfare approach.*"<sup>58</sup>

43. Turning to the situation in the Czech Republic, the international as well as domestic human rights authorities (see above, paragraphs 15, 16 and 21) have repeatedly and systematically criticised the State party for the widespread institutionalisation of children, and especially Romani children and children with disabilities. In its latest Concluding Observations from 2011, the CRC Committee expressed its concern over the widespread attitude of accepting institutionalised care as a "*primary alternative to the family environment*" and noted:

*"there is a lack of preventive services and admission criteria for placement into institutional care, which results in large numbers of children, especially children with disabilities and/or of Roma origin, being placed in care outside their home, particularly in institutional care, and that in the majority of such cases, the material and financial situation of the family has been the main basis for such removal."*<sup>59</sup>

44. In 2015, the UN Committee on Elimination of Racial Discrimination noted with concern that "*Roma children are disproportionately represented in institutional care settings*" and recommended that the Czech Republic take "*all measures necessary to reduce the number of Roma children in institutional care, including by providing financial and social support to families facing economic hardship and alternative care options for those without parental care.*"<sup>60</sup>

45. Similarly, the same year, the UN Committee on the Rights of Persons with Disabilities (*hereinafter* "CRPD Committee") indicated in relation to Article 7 CRPD (rights of children with disabilities) that it "*is deeply concerned at the persistence of the public policy of caring for children with disabilities in institutions and the insufficient development of support services to boys and girls with disabilities and their families in local communities.*" The CRPD Committee called upon the Czech Republic "*to abandon the concept of residential institutional care for boys and girls with disabilities and to step up its efforts to develop support services for boys and girls with disabilities and their families in local communities, with a clear timeline and concrete benchmarks for implementation that are monitored effectively at regular intervals.*"<sup>61</sup> In addition, as regards compliance with Article 19 of the CRPD (right to independent living), the CRPD Committee expressly stated:

*"... the Committee urges the State party to abolish the placement of children under 3 years of age in institutionalized care as soon as possible."*<sup>62</sup>

46. As was shown above, the most recent data confirm that 1,470 children under the age of 3 were placed in medical early childhood care institutions (*kojenecké ústavy*) in 2015. Out of this number, 406 were Roma and 694 were reported to have a disability. These numbers clearly demonstrate that Romani children and children

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<sup>58</sup> PURAS, D., fn. 40, p. 8.

<sup>59</sup> Concluding observations of the UN CRC to the Czech Republic, CRC/C/CZE/CO/3-4, 4 August 2011, para. 45.

<sup>60</sup> Concluding observations of the UN CERD to the Czech Republic, CERD/C/CZE/CO/10-11, 31 March 2014, paras. 19-20.

<sup>61</sup> Concluding observations of the UN CERD to the Czech Republic, CRPD/C/CZE/CO/1, 15 May 2015, paras. 15-16.

<sup>62</sup> *Ibid.*, para. 40.

with disabilities are over-represented. Institutional forms of alternative care have been subjected to criticism in the Czech Republic and the Ombudsperson presented serious concerns about the system's deficiencies (see above, paragraphs 18-20).

47. The UN CRC Committee interpreted what is meant by "*institutional and system violations of child rights*". Such a situation would occur when:

*"the authorities responsible for the protection of children from all forms of violence may directly and indirectly cause harm by lacking effective means of implementation of obligations under the Convention. Such omissions include the failure to adopt or revise legislation and other provisions, inadequate implementation of laws and other regulations and insufficient provision of material, technical and human resources and capacities to identify, prevent and react to violence against children. It is also an omission when measures and programmes are not equipped with sufficient means to assess, monitor and evaluate progress or shortcomings of the activities to end violence against children. Also, in the commission of certain acts, professionals may abuse children's right to freedom from violence, for example, when they execute their responsibilities in a way that disregards the best interests, the views and the developmental objectives of the child."*<sup>63</sup>

48. The long-lasting and widespread persistence of institutional early childhood care in the Czech Republic, despite its recognised harmful effects, clearly calls for specific measures to redress the situation. As the Committee has explained, "*the state must take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question.*"<sup>64</sup> The Czech Republic has, however, failed to take any relevant measures fulfilling the criteria of (i) a reasonable time-frame, (ii) measurable progress and (iii) financing consistent with the maximum use of available resources.<sup>65</sup> This is particularly striking given that at domestic level, a number of institutions and plans - including the 2012 National Strategy to Protect Children's Rights, the Government's Council for Human Rights (see above, paragraph 15) - have explicitly recognised the need to deinstitutionalise care for young children.

49. In this regard, it must be noted that in a number of European States institutional early childhood care has been abandoned as it cannot be a suitable form of care for young children, especially those under 3 years of age. For example, it is not permissible to place children below the age of 3 into institutions in Slovakia, Poland, Austria, Germany, Croatia, Slovenia, Serbia, Romania, the United Kingdom, Iceland, and Italy. Further, comparing neighbouring countries, in Slovakia<sup>66</sup>

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<sup>63</sup> UN CRC General comment no. 13, fn. 37, para. 32.

<sup>64</sup> See, for example, European Roma Rights Centre (ERRC) v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, § 35.

<sup>65</sup> See, *mutatis mutandis*, Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003, § 53.

<sup>66</sup> However the Law no. 305/2005 (Act on the Social and Legal Protection of Children and Social Guardianship) provides for an exemption when it concerns children with disabilities. It was criticised by the UN CRC which called on the Slovak Government to "*Amend the Act on the Social and Legal Protection of Children and Social Guardianship to prohibit the institutionalization of children with disabilities under the age of 6.*" See CRC/C/SVK/CO/3-5 of 20 July 2016, para. 37 (c).

the age threshold is 6 years of age and in Poland<sup>67</sup> institutionalisation is not permissible for children under 10. In addition, the European Union has encouraged Member States to use EU funding to transition children to community-based services rather than institutions.<sup>68</sup> The Czech Republic remains one of the few European countries adhering to the policy of institutionalisation of children under the age of 3, in the face of a growing consensus that such institutionalisation is contrary to the rights of the child.

(f) Discrimination against children of Roma origin and children with disabilities

50. Young Romani children and children with disabilities are significantly overrepresented in early childhood care institutions (see above, paragraphs 10 and 11). This situation constitutes discrimination on the grounds of ethnicity and disability. Relying on the recent jurisprudence of the European Committee, this ground of the present complaint is also covered by the non-discrimination requirement as formulated in the Preamble to the Charter and as defined by the European Committee and general principles of human rights law, in conjunction with the substantive rights of the Charter.<sup>69</sup>
51. The European Committee has defined discrimination as "*a difference in treatment between persons in comparable situations where it does not pursue a legitimate aim, is not based on objective and reasonable grounds or is not proportionate to the aim pursued*"<sup>70</sup> and has noted that "*human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.*"<sup>71</sup> Importantly, the European Committee has further affirmed that "*the non-discrimination clause in the preamble to the Charter applies to all the provisions of the Charter.*"<sup>72</sup>
52. Even though the Czech Republic is not a party to the Revised Charter, the European Committee has clarified in *ERTF v. the Czech Republic* that as it "*pays particular attention to the situation of disadvantaged and vulnerable groups*", it considers that "*any restrictions on [a particular right] must not be interpreted in such a way as to impede the effective exercise by these groups of the right.*" This interpretation, as expressly noted by the European Committee, "*imposes itself*

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<sup>67</sup> In Poland, the law (o wspieraniu rodziny i systemie pieczy zastępczej) provides for a similar exemption as in Slovakia. However, the Act puts a ban on placing children under 7 in institutions, beginning from 1 January 2015 (from 1 January 2020 the ban will apply to children under 10). At the same time, it emphasises the principle of placing siblings together, which means that if just one of the children is older than the age limit, then the decision makers will be allowed to place the whole sibling group in an institution. See NGOs report on the application of CRC, 30 October 2014, p. 16, available at:

[http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/POL/INT\\_CRC\\_NGO\\_POL\\_21892\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/POL/INT_CRC_NGO_POL_21892_E.pdf)

<sup>68</sup> European Commission, Directorate-General for Regional Policy, "Transition from institutional to community-based services (Deinstitutionalisation)", available at [http://ec.europa.eu/regional\\_policy/en/policy/themes/social-inclusion/desinstit/](http://ec.europa.eu/regional_policy/en/policy/themes/social-inclusion/desinstit/), last accessed on 14 September 2017. See, also, European Expert Group on the Transition from Institutional to Community-based Care, "Toolkit on the Use of European Union Funds for the Transition from Institutional to Community-based Care", June 2014, available at <http://www.deinstitutionalisationguide.eu/wp-content/uploads/2016/04/Toolkit-07-17-2014-update-WEB.pdf>.

<sup>69</sup> *European Roma and Travelers Forum (ERTF) v. the Czech Republic*, European Committee of Social Rights Complaint No. 104/2014, Decision on the merits of 17 May 2016, para. 112.

<sup>70</sup> *Syndicat national des professions du tourisme v. France*, European Committee of Social Rights Complaint No. 6/1999, Decision on the merits of 10 October 2000, paras. 24-25.

<sup>71</sup> *Association internationale Autisme-Europe (AIAE) v. France*, European Committee of Social Rights Complaint No. 13/2000, Decision on the merits of 4 November 2003, para. 52.

<sup>72</sup> Council of Europe, Explanatory report to the European Social Charter (revised), ETS 163, (1996), para. 135.

*because of the non-discrimination requirement.*"<sup>73</sup> In addition, the European Committee has relied on the jurisprudence of the European Court of Human Rights<sup>74</sup> as well as UN standards on equality and non-discrimination.<sup>75</sup>

53. In *D.H. and others v. the Czech Republic*, the Court found indirect discrimination, when the Government failed to provide a legitimate and proportionate reason why approximately 56% of all pupils placed in special schools in Ostrava city were Roma, when in population, Roma children represented only 2.26 % of the total number of pupils attending primary schools in Ostrava. This disproportionality was capable of shifting the burden of proof to the Government.
54. In other cases, the Court has held that, as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority and thus require a special protection (see e.g. *Oršuš v Croatia*, § 147). The vulnerable position of Roma means that special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases (see e.g. *Chapman v. the United Kingdom*, § 96).
55. Furthermore, in *Horváth and Kiss v. Hungary* (§ 116), the Court held that States have a positive obligation to avoid the perpetuation of past discrimination or discriminative practices. In June 2011, the ERRC published "Life Sentence: Romani Children in state care in the Czech Republic" report which concluded that "*Romani children are disadvantaged within the Czech child protection system and highly overrepresented within the system of Czech institutional care.*"<sup>76</sup> In a similar manner, the Court has considered the special vulnerable position of people with disabilities as a group which has been historically discriminated against.<sup>77</sup>
56. Assessing discrimination, the Court has stated that once an applicant has shown a difference in treatment, it is for the Government to show that the differential treatment was justified.<sup>78</sup> In further jurisprudence, the Court has repeatedly said that the differential treatment may be established by a *de facto* situation.<sup>79</sup> In fact, such discrimination may be caused by the absence of a differential treatment in situations, where factual inequalities exist.<sup>80</sup> In such cases, the European Court has relied extensively on statistics, which established disproportionate treatment of groups in similar situations.<sup>81</sup> In the *Hoogendijk*, the European Court stated:

*" [W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule - although formulated in a neutral manner - in fact affects a clearly higher percentage of women than men, it is for the respondent Government to*

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<sup>73</sup> European Roma and Travelers Forum (ERTF) v. the Czech Republic, European Committee of Social Rights Complaint No. 104/2014, Decision on the merits of 17 May 2016, para. 112.

<sup>74</sup> see, for example, European Roma and Travelers Forum (ERTF) v. the Czech Republic, European Committee of Social Rights Complaint No. 104/2014, Decision on the merits of 17 May 2016, para. 95, when referencing the European Court of Human Rights jurisprudence on indirect discrimination.

<sup>75</sup> *ibid*, ERTF v. the Czech Republic, §§ 18-20

<sup>76</sup> ERRC. *Life Sentence: Romani Children in State Care in the Czech Republic*. June 2011, available at: <http://www.errc.org/article/life-sentence-romani-children-in-state-care-in-the-czech-republic/3973>

<sup>77</sup> See *Alajos Kiss v. Hungary*, no. 38832/06, § 42.

<sup>78</sup> see, *inter alia*, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92.

<sup>79</sup> see, e.g. *Horváth and Kiss v. Hungary*, no. 11146/11, § 105, and *Cam v. Turkey*, no. 51500/08, §§ 54, 57.

<sup>80</sup> see *D.H. and others v. the Czech Republic* (GC), no. 57325/00, § 175, and *Cam v. Turkey*, cited above, § 54.

<sup>81</sup> see *Hoogendijk v. the Netherlands*, (dec.) no. 58641/00; *Zarb Adami v. Malta*, no. 17209/02, §§ 77-78; and *D.H. and others v. the Czech Republic*, cited above, §§ 187-193.

*show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination."*<sup>82</sup>

57. For vulnerable groups, allegations of discrimination must be taken particularly seriously, as States enjoy a significantly narrower margin of appreciation.<sup>83</sup> The European Court also repeated that in such cases, it is the obligation of the State to help correct the factual inequalities, which should entail upholding their positive obligations.<sup>84</sup> This specifically vulnerable position of Roma children and of children with disabilities has repeatedly been considered and emphasised by the European Committee as well.<sup>85</sup> While the Czech Republic has been aware for years of the overrepresentation of children with disabilities and Romani children in State institutions, it has failed to carry out any steps to deal with the situation and thus, it did not fulfil its positive obligations.
58. In the present case, Romani children consistently constitute approximately 24% of all children placed in medical early childhood care institutions for children under 3 (*kojenecké ústavy*), with Romani people constituting only approximately 1.9 % of the population in the Czech Republic.<sup>86</sup> For children with disabilities, the disproportionate representation in institutions is even higher and consistently constitutes approximately 40% of children in medical early childhood while children born with disabilities constitute only approximately 4 % of all children.<sup>87</sup>
59. The complaining organisations therefore recall that "*the burden of proof should not rest entirely on the complainants, but should be the subject of an appropriate adjustment.*"<sup>88</sup> The burden is on the Czech Republic to show objective and justified reasons for the overrepresentation of Romani children and children with disabilities among those children under the age of 3 who are in care institutions.

(g) Concluding remarks

60. As has been clearly shown by various experts (see above, paragraphs 27-28) and also emphasised by human rights authorities, institutional early childhood care is never appropriate for children under 3 years of age as it cannot ensure the highest possible degree of satisfaction of the child's developing emotional needs and well-being.
61. In the Czech Republic, considering that early childhood care has been ensured in institutions which have been recognised as an inappropriate form of care, and the fact that institutionalisation concerns predominantly the most vulnerable children in the population, namely Romani children and children with disabilities, the early

<sup>82</sup> *Hoogendijk v. the Netherlands*, cited above.

<sup>83</sup> see, e.g. *Horváth and Kiss v. Hungary*, cited above, § 127.

<sup>84</sup> See *Horváth and Kiss v. Hungary*, fn. 79, § 127, and *Cam v. Turkey*, fn. 80, §§ 54 and 65.

<sup>85</sup> *European Roma Rights Centre (ERRC) v. Ireland*, European Committee of Social Rights Complaint no. 100/2013, Decision on the merits of 1 December 2015, para. 70; *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, European Committee of Social Rights Complaint no. 41/2007, Decision on the merits of 3 June 2008, para. 34; see also, for example, the latest Conclusions of 2016, art. 1, on Armenia, Austria, Bosnia and Herzegovina.

<sup>86</sup> Council of Europe, *Estimates on Roma population in European Countries*, available at: <http://hub.coe.int/web/coe-portal/roma>.

<sup>87</sup> The statistics available online in Czech: <http://vozickar.com/statistici-pres-milion-lidi-v-ceske-republice-ma-zdravotni-postizeni/>

<sup>88</sup> *Mental Disability Advocacy Centre v Bulgaria*, complaint no. 41/2007, para 52.

childhood care provided in medical institutions (*kojenecké ústavy*) has not been in compliance with Article 17 of the Social Charter, read alone or in conjunction with the Preamble to the Social Charter.

62. Moreover, the situation of institutionalised children under 3 years of age has required legal and practical measures. In this regard, it would be appropriate to introduce a ban on the institutionalisation of children as has been done in the other European States (see above, paragraph 49). This must be accompanied by the establishment of a sufficient network of in-home and community-based support services along with family-like alternative forms of care where necessary. As the Czech Republic has failed to take these concrete and targeted steps to de-institutionalise the existing system of early childhood care, affecting especially Romani children and children with disabilities, or to establish appropriate community-based and family-like services, there is a violation of Article 17 of the Social Charter, read alone or in conjunction with the Preamble of the Social Charter.

#### IV. CONCLUSION

63. In ratifying the European Social Charter, the Czech Government signified that it intended to fully ensure the social and legal protection of children in public care and protect all children against any form of violence and ill-treatment. However, children under the age of 3, especially Roma children and children with disabilities, have been routinely placed in early childhood medical care institutions (*kojenecké ústavy*). These institutions cannot be regarded as appropriate within the meaning of Article 17 of the European Social Charter.
64. In addition, the State party has failed to take necessary legal and practical measures to redress this situation, namely a ban on institutionalisation of children, accompanied by the establishment of a sufficient network of in-home and community support services and family-like alternative forms of care where needed. The present situation concerns more than one thousand children which, as a matter of urgency, requires a structurally organised solution.
65. *For these reasons*, the European Roma Rights Centre and Mental Disability Advocacy Centre, jointly with Forum for Human Rights, ask the European Committee of Social Rights to find:
- a violation of Article 17 of the European Social Charter;
  - a violation of Article 17 of the European Social Charter read in conjunction with the principle of non-discrimination as enshrined in the Preamble to the Charter.
66. The complainant organisations also ask the Committee to invite the Committee of Ministers to recommend that the Czech Republic pay the sum of 10,000 euros (provisional estimate) to the complainants by way of costs. A detailed budget will be supplied to the Committee in due course.

Budapest and Prague, 26 September 2017

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