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Discriminazione e mancata adozione da parte dello Stato di misure di desegregazione (CEDU, sez. III, sent. 31 maggio 2022, ric. nn. 73548/17 e 45521/19)

Il caso definito dalla Corte EDU riguarda la presunta discriminazione lamentata dai ricorrenti per la mancata adozione da parte delle autorità nazionali di misure di desegregazione presso una scuola elementare frequentata da bambini rom ed egiziani. In particolare, essi hanno denunciato la violazione dell'art.1 del Protocollo n. 12 della Convenzione per non aver ricevuto idonee garanzie a tutela del loro diritto ad un'istruzione inclusiva.

Nel merito, la Corte ha ribadito che "discriminazione" significa trattare in maniera diversa – senza una giustificazione obiettiva e ragionevole – persone che si trovano in situazioni sostanzialmente simili. E che, d'altro canto, la desegregazione razziale è un valore fondamentale delle società democratiche da perseguire con ogni misura utile a rimuovere situazioni di fatto discriminatorie. Come è stato osservato, nel caso di specie il Governo non ha rispettato l'obbligo positivo di adottare misure complete ed efficaci per ridurre la disuguaglianza di fatto generata dalla sovrarappresentazione degli alunni rom ed egiziani, volte a riequilibrare il rapporto tra questi ultimi e gli altri alunni. Per conseguenza, la mancata attuazione di misure di desegregazione in assenza di giustificati e ragionevoli motivi ha leso l'art. 1 del Protocollo n. 12 della Convenzione.

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EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF X AND OTHERS v. ALBANIA

(Applications nos. 73548/17 and 45521/19)

JUDGMENT
STRASBOURG
31 May 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of X and Others v. Albania,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georges Ravarani, *President*,
Georgios A. Serghides,
María Elósegui,
Darian Pavli,
Peeter Roosma,
Andreas Zünd,
Frédéric Krenc, *judges*,
and Milan Blaško, *Section Registrar*,
Having regard to:
the applications (nos. 73548/17 and 45521/19) against the Republic of Albania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on the dates indicated in the appendix by eighteen Albanian nationals of Roma and Egyptian ethnic origin forming six households ("the applicants"), who were represented before the Court by the European Roma Rights Centre ("ERRC"), a non-governmental organisation based in Brussels, Belgium;
the decision not to have the applicants' names disclosed;
the decision to give notice of the applications to the Albanian Government ("the Government") represented by their former Agents, Mr A. Metani, Ms E. Muçaj and, subsequently, by Mr O. Moçka of the State Advocate's Office;
the observations submitted by the respondent Government and the observations in reply submitted by the applicants;
the comments submitted by the T'Reja Centre, a non-governmental organisation based in Tirana, Albania, which were granted leave to intervene by the President of the Section;
Having deliberated in private on 10 May 2022,
Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the alleged discrimination of the applicants as a result of the Government's failure to implement swift and comprehensive desegregation measures in an elementary school, which was attended almost exclusively by children of the Roma and Egyptian minorities.

THE FACTS

I. THE AUTHORITIES' FINDINGS IN RESPECT OF THE "NAIM FRASHËRI" ELEMENTARY SCHOOL

2. The applicants live in XXX, a city in the southeast of Albania counting 76,000 inhabitants. According to local government data, during the 2018/19 academic year around 1,200 Roma and Egyptian children were enrolled in the city's mandatory education system.

3. The Roma and Egyptian pupils in the "Naim Frashëri" elementary school in Korça during the 2012/19 academic years accounted for 89 to 100 % of the school's pupils. As of 2012 the Government have implemented a food assistance programme whereby food packages have been

provided to Roma and Egyptian pupils attending that school with the aim of increasing school attendance rates of the children of those communities. The children applicants attended that same school.

4. In a general recommendation of 11 September 2014, the Commissioner for the Protection from Discrimination (the "Commissioner" or "Commissioner against Discrimination"), a domestic body established by the Anti-Discrimination Act (Law no. 10221 of 4 February 2010) recommended to the Ministry of Education and Sport ("Ministry") to have due regard of the ratio between Roma/Egyptian and other pupils in schools and take measures to avoid creating schools attended only by pupils of the said communities.

5. On 3 July 2015 the ERRC lodged a complaint with the People's Advocate, which is also an institution established to uphold the rights of citizens against public authorities, alleging that the over-representation of Roma/Egyptian pupils in the "Naim Frashëri" school amounted to segregation. Having considered the matter and having heard the Ministry's position that the over-representation in question was an unintentional effect of the food assistance programme, on 12 August 2015 the People's Advocate recommended to the Ministry to take proactive actions to end the discrimination of the said pupils. In addition, the People's Advocate also recommended that the Ministry establish a mechanism for monitoring the implementation of desegregation measures in all schools.

6. Following a similar complaint by the ERRC and another organisation, to which the Ministry responded once again that the over-representation complained of was unintentional, on 22 September 2015 the Commissioner against Discrimination delivered a binding decision finding that the Roma and Egyptian children of the "Naim Frashëri" school were suffering indirect discrimination on account of their over-representation in the school.

7. Relying on Article 18 of the Constitution which prohibits discrimination (see paragraph 17 below) and the Court's judgment in the case of *Lavida and Others v. Greece* (no. 7973/10, 30 May 2013), the Commissioner found that the placement of Roma pupils in a special school segregates them and does not allow for their integration into mainstream social activities. Moreover, noting that the Ministry was the public body responsible for admissions at the school, the Commissioner pointed out that under Section 7 (1) of the Anti-Discrimination Act (see paragraph 23 below) both actions and inactions that gave rise to a breach of the equality between persons could amount to discrimination. Finally, the Commissioner noted that under Section 18 (1) of the Anti-Discrimination Act (see paragraph 24 below) the Council of Ministers and the Ministry were under an obligation to take positive measures against discrimination related to the right to education.

8. Accordingly, the Commissioner ordered the Ministry to take "immediate measures to improve the situation and change the ratio" between Roma/Egyptian and other pupils attending the school.

II. IMPLEMENTATION OF THE COMMISSIONER'S DECISION

9. On 14 December 2015 the Ministry informed the Commissioner that it would implement several desegregating measures in the school, including the expansion of the food assistance programme to pupils from all communities and to four additional schools in the area, followed by the merger of the "Naim Frashëri" school with three local schools.

10. On 22 February 2017 the Government expanded the food support programme to all the pupils of the "Naim Frashëri" school (Decision of the Council of Ministers no. 132 of the same date).

11. On 14 April 2017 the Ministry informed the ERRC that the school continued to be attended almost exclusively by Roma and Egyptian pupils. They further explained that as the academic year was ongoing, it was inappropriate to implement the merger between different schools at that time and assured them that at the beginning of the new academic year in September, the segregation in the school would come to an end. In addition, the Ministry stated that they would request the competent authorities to organise the renovation of the school.

12. The renovation work was carried out during the 2018/19 academic year and was completed in September 2019.

13. On 6 November 2019 the Government submitted before the Court that for the 2019/20 academic year the Roma/Egyptian pupils accounted for 90% of the pupils at "Naim Frashëri" school.

14. On 25 February 2020 the Ministry informed the State Attorney that the percentage of Roma/Egyptian pupils at the school was 60%. They also stated that the merger of the school with neighbouring schools had not been implemented due to the school's renovation work.

15. The applicants contested the above figure and submitted that in reality many non-Roma/Egyptian pupils had been administratively registered in the "Naim Frashëri" school, but in fact attended other nearby schools.

III. OTHER EVENTS

16. On 16 December 2015 the Commissioner delivered a decision finding that the "Avdyl Avdia" elementary school in Berat was attended exclusively by Roma pupils which amounted to discrimination contrary to the Anti-Discrimination Act. She accordingly ordered the Ministry to arrange for the transportation and attendance of the school's pupils to another nearby school. In its correspondence of 14 April 2017 to the ERRC (see paragraph 11 above), the Ministry stated that the "Avdyl Avdia" school had been closed in line with the Commissioner's decision and the transportation arrangements were being addressed by the relevant municipality.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAWS

A. Constitution

17. Article 18 of the Constitution provides:

"1. All are equal before the law.

2. No one may be unfairly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage.

3. No one may be discriminated against for the reasons mentioned in paragraph 2 without a reasonable and objective justification."

18. Article 57 provides that everyone has the right to education.

B. Education Act of 2012 (Law no. 69/2012 of 21 June 2012 on the pre-university educational system in the Republic of Albania)

19. The general principles applicable to educational institutions are provided under section 6 of Education Act of 2012. Paragraph 4 of that section reads:

"In educational institutions the principle of inclusiveness of pupils shall be applied."

C. Anti-Discrimination Act of 2010

20. The Anti-Discrimination Act (Law no. 10221 of 4 February 2010), as in force prior to its amendment by Law no. 124/2020 of 15 October 2020, provided for the principle of equality before the law in connection to everyone's gender, race, ethnicity, and a number of other grounds (section 1).

21. Section 3 (3) of the Act defined "indirect discrimination" as a form of discrimination that occurs when a provision, criterion or practice which appears neutral, puts a person or group of persons in an unfavourable situation on the grounds set forth in section 1 of the Act, in comparison to another person or group of persons and when that provision, criterion or practice is not justified by a legitimate aim, or when the means of achieving that aim either are not appropriate or are not necessary and proportionate to the situation that caused it.

22. Section 3 (9) of the Act defined "organisations with legitimate interests" as organisations that are registered in the Republic of Albania and have as their declared object of activity the protection of human rights, or that offer assistance to victims of discrimination. Section 33 (1) of the Act provided that an organisation with legitimate interests that claims discrimination on behalf of a person or a group of persons may file a complaint with the Commissioner together with any available evidence.

23. Section 7 (1) of the Act provided:

"Any action or inaction of public authorities or natural or legal persons that participate in the public or private sectors, which creates the basis for a breach the [principle of] equality towards a person or group of persons, or which exposes them to an unfair and unequal treatment, when they are in the same or similar circumstances as another person or group of persons, amounts to discrimination."

24. Section 18 (1) of the Act reads:

"The Council of Ministers and the Minister of Education and Science are responsible for taking measures of a positive nature to combat discrimination in relation to the right to education."

25. Sections 21 and 22 of the Act provided for the establishment of the Commissioner against Discrimination, an independent public authority tasked to ensure effective protection against discrimination. The Commissioner was to be appointed by Parliament for a five-year term which could be renewed once (sections 23 and 25). Under section 26 of the Act the Commissioner was to report to Parliament by way of an annual report on its activities.

26. The Commissioner is competent to hear discrimination complaints by natural persons or organisations, carry out administrative enquiries and impose administrative sanctions (section 32 (1) (a), (b) (c) and (ç)).

27. Moreover, under section 32 (1) (f) the Commissioner is competent to publish reports and put forward recommendations for any matter related to discrimination.

28. Pursuant to section 32 (3), in reviewing the complaints submitted before her, except when a specific procedure was provided under the act, the Commissioner had to apply the Code of Administrative Procedure and she was to decide by way of a decision that would set forth the appropriate measures to be taken and a time-limit for their implementation (section 33 (10)).

29. Under section 33(11) the Commissioner can also issue a fine to the party that fails to implement its decisions.

30. Section 34 of the act provided that anyone who had been discriminated against had the right to seek damages before the competent court independently from whether he or she had filed a complaint with the Commissioner.

D. Law no. 124/2020 of 15 October 2020 amending the Anti-Discrimination Act of 2010

31. Section 3 (16) of the amended Anti-Discrimination Act defines "segregation" as a form of discrimination which occurs in cases where a person or group of persons are separated from others without an objective and reasonable justification, and this separation is made on the grounds of at least one of the reasons provided in section 1 of the Act.

32. Section 33 (18) of the amended Anti-Discrimination Act provides that the Commissioner's decision may be challenged before the competent court pursuant to rules applicable to administrative disputes.

E. Code of Administrative Procedure

33. Article 18 of the Code of Administrative Procedure of 1999 (Law no. 8485 of 12 May 1999, as amended), as in force until 28 May 2016, sanctioned the principle of judicial control over administrative decisions.

34. Article 130 and 131 provided that administrative acts were enforceable upon their entry in force, except when an appeal having suspensory effect had been lodged.

F. Other materials

35. In its 2015 annual report to the Parliament, the Commissioner stated that she had acted as a defendant in fourteen judicial proceedings where the parties had challenged its decisions before the courts, the latter being administrative acts.

36. By way of a decision no. 1072 of 23 December 2015 the Council of Ministers adopted the "National Plan for the Integration of Roma and Egyptians in the Republic of Albania 2016-2020". One of the strategic objectives of the plan was the increase of the Roma and Egyptians' access to education without discrimination or segregation.

37. The Council of Ministers' decision no. 682 of 29 September 2017, as amended, set forth, amongst others, the procedures pursuant to which public funds were to be used for the purpose of transporting students into their respective schools if they resided a certain distance from them.

II. COUNCIL OF EUROPE MATERIALS

38. In a report of 15 February 2006 on the Human Rights Situation of the Roma, Sinti and Travellers in Europe (CommDH(2006)1), the Council of Europe Commissioner for Human Rights noted that segregated education denied both Roma and non-Roma children the chance to know each other and to learn to live as equal citizens. The Commissioner further noted that segregation excluded Roma children from mainstream society at the very beginning of their lives, increasing their risk of being caught in the vicious circle of marginalisation.

39. In Recommendation CM/Rec(2009)4 on the education of Roma and Travellers in Europe (adopted on 17 June 2009 at the 1061st meeting of the Ministers' Deputies), the relevant parts of which have been set out in *Oršuš and Others v. Croatia* ([GC], no. 15766/03, §§ 79-80 ECHR 2010), the Committee of Ministers recommended that where *de facto* segregation of Roma and Traveller children based on their racial or ethnic origin exists, authorities should implement desegregation measures.

40. In Resolution 1927 (2013) of 23 April 2013 on ending discrimination for Roma children, the Parliamentary Assembly of the Council of Europe urged member States to end school segregation

and promote inclusion by, amongst others, requiring local municipalities to produce desegregation plans (§ 7.3.3).

41. On 12 September 2017 the Council of Europe Commissioner for Human Rights published a position paper[1] on fighting school segregation in Europe through inclusive education. The paper provided a number of recommendations to address school segregation and achieve inclusive education including, amongst others, the adoption of desegregation strategies, regulating and monitoring school admissions and defining socially balanced school districts.

42. The relevant extract of the Report (CommDH(2018)15) of 13 September 2018 by the Commissioner for Human Rights of the Council of Europe, following her visit to Albania from 21 to 25 May 2018, reads as follows:

"While noting with satisfaction that the principle of inclusive education and the prohibition of discrimination in education are enshrined in Albanian legislation, the Commissioner is concerned about the lack of inclusion of some Albanian children, in particular Roma children [...], in mainstream education."

43. The Report on Albania of the European Commission against Racism and Intolerance (ECRI) (sixth monitoring cycle), adopted on 7 April 2020 and published on 2 June 2020, contains the following passages:

"46. In their report [...], the authorities state that segregation of Roma and Egyptian children in schools does not exist. However, in recent years segregation has been reported in some schools, namely in Korca, Morava and Elbasan. Roma NGOs also mentioned an alleged case in Shkodra in this regard. ECRI visited Korca and had meetings with the city's administration and representatives of the Roma community. It understands that the situation regarding segregation in the schools is not one created intentionally, but the result of a traditionally very high concentration of Roma and Egyptians in particular neighbourhoods of the city (neighbourhoods 6, 8 and 17). In this area, the three existing schools have a majority of Roma and Egyptian pupils with 530 out of 700 (according to self-declaration, since no ethnicity is recorded in the civil registry). The overall average by school is 70%: Naim Frasheri (95%), Asdreni (51%), Ismail Qemali (67%). ECRI noted a constructive and pragmatic approach by the Mayor and his team to resolve this issue. In response to complaints about its sub-standard conditions, €250 000 have been spent on renovating and refurbishing the Naim Frashëri school, which as a result is now considered to be among the best in the city in terms of material infrastructure. Furthermore, as concerns the ethnic make-up of the pupils, the municipal administration is considering merging two of the three schools so that none has a higher ratio than 75% of Roma or Egyptian children. Apparently, a similar attempt to mix pupils is considered in Shkodra, for example by providing transport to different school districts [footnote references omitted].

47. ECRI recommends that the authorities closely monitor the situation regarding *de facto* structural segregation of Roma and Egyptian pupils in schools and assist, if necessary, local authorities in finding workable solutions to address this problem."

44. In its General Policy Recommendation No. 13 on combating antigypsyism and discrimination against Roma, adopted on 24 June 2011 and amended on 1 December 2020, the ECRI recommended that the governments of member States of the Council of Europe take urgent measures, including

legal and political ones, to put an end to the segregation at school which Roma children are subjected to, and integrate them into schools attended by pupils from the majority population (§4 (d)).

III. EUROPEAN COMMISSION PROGRESS REPORTS

45. The European Commission issues annual progress reports on countries which wish to accede to the European Union. The reports analyse, amongst other things, the capacity of such countries to implement European standards.

46. In the 2014 report on Albania (SWD(2014) 304) the European Commission stated that "Roma and Egyptian children are still not fully integrated in the education system which occasionally leads to segregation and exclusion" (page 62).

47. The 2016 report (SWD(2016) 364) stated that "[s]chool segregation is a matter of serious concern" (page 68). A similar finding appears in the 2018 report (SWD(2018)151) (page 32) where the European Commission added that Albania should "tackle segregation in the education field for vulnerable groups, in particular for Roma and Egyptians" (page 25), as well as in the 2019 report (SWD(2019) 215) (page 32), the 2020 report (SWD(2020)354) (page 38) and the 2021 report (SWD(2021)289) (page 36).

IV. OTHER INTERNATIONAL MATERIALS

48. The United Nations (UN) International Convention on the Elimination of All Forms of Racial Discrimination was adopted in New York on 21 December 1965 and came into force in respect of Albania on 11 May 1994. Articles 2 and 3 are worded as follows:

Article 2

"1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organisations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organisations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, 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. These measures shall in no case

entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

Article 3

"States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

THE LAW

I. JOINDER OF THE APPLICATIONS

49. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment pursuant to Rule 42 § 1 of the Rules of the Court.

II. PRELIMINARY ISSUES

50. The Court notes in respect of the first application, no. 73548/17, that applicants nos. 14 to 18 informed the Court that they wished to withdraw from the application. Applicants nos. 16, 17 and 18 subsequently lodged the second application, no. 45521/19.

51. Accordingly, having regard to Article 37 § 1 (a) of the Convention, the Court concludes that it is no longer justified to continue the examination of application no. 73548/17 insofar as it concerns applicants nos. 14 to 18. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of this part of the application.

52. In view of the above, it is appropriate to strike out the part of application no. 73548/17 insofar as it concerns applicants nos. 14 to 18, without prejudice to the second application, no. 45521/19 which was subsequently lodged with the Court by applicants nos. 16, 17 and 18.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 12 TO THE CONVENTION

53. The applicants complained under Article 1 of Protocol No. 12 to the Convention that they were discriminated against in their right to an inclusive education as a result of the authorities' failure to implement desegregating measures to address the over-representation of Roma/Egyptian pupils in the "Naim Frashëri" school.

54. Article 1 of Protocol No. 12 to the Convention, reads as follows:

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

55. Protocol No. 12 to the Convention was ratified by Albania on 26 November 2004 and entered in force in respect of that country on 1 April 2005.

A. Admissibility

1. *The parties' submissions*

56. The Government submitted that the recommendations of the People's Advocate and the Commissioner, as well as the latter's decision of 22 September 2015, were insufficient to conclude that the applicants had exhausted domestic remedies which could be exhausted only by lodging a discrimination claim with domestic courts pursuant to Section 34 of the Anti-Discrimination Act (see

paragraph 30 above). They also submitted a number of domestic judgments which had recognized discrimination claims and had awarded damages to plaintiffs.

57. The applicants contested that view and submitted that the domestic judgments relied on by the Government were issued in cases where there was a dispute about whether the plaintiffs had suffered from discrimination. They argued that the Commissioner against Discrimination was the competent domestic authority to hear discrimination complaints and reiterated that neither the Ministry nor any other party had challenged the conclusion of the Commissioner that the pupils of the school were subjected to discrimination. In view of the absence of a dispute over that point, they expected the authorities to implement the decision of 22 September 2015 of the Commissioner against Discrimination and argued that it would have been futile to start additional judicial proceedings for the purpose of obtaining another finding that the discrimination of pupils in the school must come to an end. In addition, the applicants submitted that their primary purpose was to put the school segregation to an end rather than obtain damages.

58. Finally, the applicants maintained that the public interest litigation initiated by ERRC before the Commissioner against Discrimination corresponded to the complaint that they have brought before the Court.

2. *The Court's assessment*

59. The Court reiterates that the rationale behind the exhaustion rule is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Convention institutions. It is based on the assumption, reflected in Article 13, that the domestic legal order will provide an effective remedy for violations of Convention rights. This is an important aspect of the subsidiary nature of the Convention machinery (see, for example, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). Indeed, the Court has frequently held that, in accordance with the principle of subsidiarity, it is appropriate that the national courts should initially have the opportunity to determine questions of compatibility of the domestic law with the Convention and that, if an application is nonetheless subsequently brought to it, the Court should have the benefit of the views of the national courts, being in direct and continuous contact with the driving forces of their countries (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008).

60. At the same time, there is a need to apply the rule with some degree of flexibility and without excessive formalism, given the context of protecting human rights (see *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13). The rule of exhaustion is neither absolute nor capable of being applied automatically; in monitoring compliance with this rule it is essential to have regard to the circumstances of the individual case (see *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009).

61. Turning to the present case, the Government did not develop in detail their argument that only judicial proceedings are capable of satisfying the requirement to exhaust domestic remedies. However, it appears that their argument was based on the allegation that the Commissioner and its decisions had an administrative – rather than judicial – nature.

62. In this connection, the Court notes that under Albanian law the Commissioner against Discrimination is an independent authority with the power to issue binding decisions on both public and private entities and to order anti-discrimination measures to be implemented by such entities

(see paragraph 28 above). The Commissioner' decisions can be challenged before the courts (see paragraphs 32 and 35 above). In the absence of any appeal by the Ministry, the Commissioner's decision of 22 September 2015 became final and enforceable (see paragraph 34 above, and, *mutatis mutandis*, *Ramadhi and Others v. Albania*, no. 38222/02, § 49, 13 November 2007 where the Court held that irrespective of whether the final decision to be executed takes the form of a court judgment or a decision by an administrative authority, domestic law as well as the Convention provides that it is to be enforced).

63. In response to the Government's argument that the applicants could have sought damages before domestic courts, the Court reiterates that the domestic remedies must be "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred (see *A.H. and Others v. Russia*, nos. 6033/13 and 15 others, § 347, 17 January 2017). In the present case the crux of the applicants' complaints concerned the authorities failure to put an end to an ongoing situation, namely the segregation of their school. Accordingly, a remedy that offered the prospect of financial compensation alone, without preventing the continuation of the alleged violation, cannot be considered effective (see, *mutatis mutandis*, *Patranin v. Russia*, no. 12983/14, § 86, 23 July 2015). In this connection, the Government failed to explain why a discrimination court proceeding had been necessary when the authorities did not dispute the discrimination of the applicants. Similarly, the government did not explain why the desegregation measures which all parties considered to be necessary would have been implemented more effectively if ordered by a court judgment compared to an independent administrative authority such as the Commissioner (see, *mutatis mutandis*, *Lavida and Others v. Greece*, no. 7973/10, §§ 47-48, 30 May 2013).

64. The Court further notes that the Government did not take issue with the fact that it was the ERRC – rather than the applicants – who complained to the Commissioner against Discrimination about the situation in the school. In view of the Commissioner's decision to recognize ERRC's standing before that authority, the Court has no reason to doubt that domestic law provided for the ERRC's right to initiate the proceedings in question on behalf of the Roma and Egyptian pupils attending the "Naim Frashëri" school (see, *mutatis mutandis*, *Kósa v. Hungary* (dec.), no. 53461/15, §§ 56-57, 21 November 2017, and *J.M.B. and Others v. France*, nos. 9671/15 and 31 others, § 214, 30 January 2020). Neither was it disputed before the Court that the subject matter of ERRC's complaint and the ensuing Commissioner's decision of 22 September 2015 corresponded to the individual situation and specific complaints of the applicants before the Court.

65. Accordingly, the applicants were not required to file a discrimination claim, which had essentially the same objective as ERRC's action before the Commissioner (see *Kozacıoğlu*, cited above, § 40), before domestic courts. The Government's non-exhaustion objection is therefore dismissed.

66. The Court notes that the applications are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submission

67. The applicants submitted that their segregation in the "Naim Frashëri" school amounted to discrimination on the grounds of their ethnicity prohibited by Article 1 of Protocol No. 12 to the Convention and that the authorities had not implemented the desegregating measures that they

themselves had proposed such as the merger between different schools to obtain more inclusive classes.

68. The Government submitted that the segregation complained of was the result of the demographic changes in the areas around the school where many non-Roma/Egyptian inhabitants had moved out of the area and many Roma/Egyptian inhabitants had moved in.

69. As regards the food support scheme, the Government stated that such support had been requested by many representatives of the Roma and Egyptian inhabitants, including the applicants' representative. They further stressed that the authorities had not prevented the applicants from attending a different school or the other pupils from attending the "Naim Frashëri" school. Therefore they had not contributed in any way to the situation complained of.

70. Furthermore, the Government submitted that they had taken several measures to implement the Commissioner's decision of 22 September 2015, including the adoption of the National Plan for the Integration of Roma and Egyptians in the Republic of Albania 2016 – 2020 (see paragraph 36 above), the extension of the food support scheme to all school pupils and the reconstruction of the school which ended in time for the 2019/20 academic year.

71. In view of the absence of any discriminatory intent or action by the authorities and the measures adopted to address the situation, the Government concluded there had been no violation of Article 1 of Protocol No. 12 to the Convention.

2. Third party's submissions in respect of the application no. 73548/17

72. The third party intervener – T'Reja Center – primarily made submissions on the general principles within which to examine applications and provided a number of observations on the situation of Roma and Egyptian children in Albania.

73. In particular, they submitted that school segregation is one of the most severe forms of discrimination. In their view segregation of Roma/Egyptian pupils undermined their ability to learn in a diversified environment and to acquire essential life skills through contact with other pupils.

74. Moreover, T'Reja Center also submitted statistics which in their view showed that segregation of Roma/Egyptian pupils existed in numerous schools in Albania.

3. The Court's assessment

(a) Relevant principles

75. Notwithstanding the difference in scope between Article 14 of the Convention and Article 1 of Protocol No. 12, the meaning of the notion of "discrimination" in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraphs 18 and 19 of the Explanatory Report to Protocol No. 12). In applying the same term under Article 1 of Protocol No. 12, the Court therefore sees no reason to depart from the established interpretation of "discrimination" (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 55, ECHR 2009, and *Napotnik v. Romania*, no. 33139/13, § 69, 20 October 2020).

76. It can further be inferred that, in principle, the same standards developed by the Court in its case-law concerning the protection afforded by Article 14 are applicable to cases brought under Article 1 of Protocol No. 12 (see, for example, ibid., § 70).

77. In this vein, the Court has established that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual

inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14 (see *Horváth and Kiss v. Hungary*, no. 11146/11, § 101, 29 January 2013).

78. The Court has also held that the coexistence of members of society free from racial segregation is a fundamental value of democratic societies (see *Vona v. Hungary*, no. 35943/10, § 57, ECHR 2013).

79. As regards the particular sphere of school segregation, the Court has adopted a number of judgments which concerned different contexts. The case of *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, ECHR 2007-IV) concerned a situation where a nationwide practice of placing a disproportionate number of Roma children in schools for pupils with learning difficulties amounted to discrimination based on the applicants' ethnic origin.

80. In *Oršuš and Others v. Croatia* ([GC], no. 15766/03, ECHR 2010) the applicants were Croatian nationals of Roma ethnic origin who had been placed in separate Roma-only classes from time to time during their education on account of their insufficient command of the Croatian language. The Court found a violation of the prohibition of discrimination on account of, amongst others, the authorities' failure to take all the necessary steps to ensure the applicants' speedy progress in learning the language and their subsequent integration into mixed classes.

(b) Application of the principles to the present case

81. The Court notes at the outset that the right to inclusive education, in the enjoyment of which the applicants alleged to have been treated differently, was provided for by domestic law (see paragraphs 18 and 19 above).

82. The Government did not dispute that the applicants' situation amounted to segregation and that desegregation measures were called for, neither had these points been disputed by the Ministry in the domestic proceedings (see paragraphs 5, 6 and 62 above), their only arguments being that that situation had been unintentional.

83. In that connection, the Court notes that the "Naim Frashëri" school was not created exclusively for Roma/Egyptian children. Moreover, the applicants did not allege that their segregation was intentional. However, the Court has already held in the past that discrimination that is potentially contrary to the Convention may result from a *de facto* situation (see *Zarb Adami v. Malta*, no. 17209/02, § 76, ECHR 2006-VIII) and does not necessarily require discriminatory intent (*D.H. and Others v. the Czech Republic*, cited above, § 184).

84. In the Court's view, the salient question is therefore whether the Government complied with their positive obligation to take steps to correct the applicants' factual inequality and avoid the perpetuation of the discrimination that resulted from their over-representation in the school (see paragraphs 24 and 77 above and, *mutatis mutandis*, *Horváth and Kiss*, cited above, § 116 and § 127) thereby breaking their circle of marginalization and allowing them to live as equal citizens from the early stages of their life (see paragraph 38 above). In this regard, the Government stated that the authorities took immediate action to address the applicant's segregation. However, the Court notes that the decision to remove the ethnicity criterion for the pupils that benefited from the food support programme, in an effort to attract pupils of all ethnicities in the school, was adopted on 22 February 2017 (see paragraph 10 above), almost one and a half years after the Commissioner's decision of 22 September 2015. The Government did not put forward an explanation for this delay, or the delay in the implementation of the second measure ostensibly carried out to diversify the student body of

the school, namely the renovation of the school building which ended in September 2019, four years after the Commissioner's decision. In the Court's view, these delays were incompatible with the time sensitivity of a situation where children were segregated and with the Commissioner's decision that measures be taken "immediately" (see paragraph 8 above).

85. Most importantly, the Government did not set forth any objective reason for failing to implement two of the measures that were discussed in the Ministry's letters of 14 December 2015 and 14 April 2017 (see paragraphs 9 and 11 above), namely the extension of the food support programme to four additional schools in the area – which could presumably encourage some of the Roma/Egyptian pupils of the school to move to other schools – and the merger of the "Naim Frashëri" school with three other schools (see paragraphs 9 and 11 above). Both these measures were likely to have a more immediate beneficial effect on the Roma and Egyptian children. In this regard, the Court is unable to accept the authorities' justification that the merger was not implemented due to the reconstruction of the "Naim Frashëri" school, as the reconstruction work lasted only for a limited period of time (see paragraph 12 above). By as late as the 2019/20 academic year the Roma/Egyptian pupils continued to represent 90% of the schools' pupils.

86. In view of the Government's argument that the segregation complained of was caused by the concentration of the Roma/Egyptian population in particular neighbourhoods near the segregated school, the authorities' proposal to merge the latter with non-segregated schools in the city appeared a very pertinent solution indeed. Such a merger could have contributed to the creation of schools where the ratio between Roma/Egyptian and other pupils was reasonably proportional to the city-wide ratio for elementary schools. The authorities had already implemented similar solutions in respect of segregated schools elsewhere in the country where in addition they had also provided transportation for the pupils (see paragraphs 16, 37 and 43 above). While it is not for the Court to indicate the specific measures to be undertaken to remedy a school segregation situation, it is nevertheless difficult to understand the reasons why this approach was not implemented in the present case too.

87. The Court observes that it has already found a violation of the prohibition of discrimination in a similar context where the State had failed to implement desegregating measures (see *Lavida and Others*, cited above, § 73). It considers that in the present case too, the delays and the non-implementation of appropriate desegregating measures cannot be considered as having had an objective and reasonable justification.

88. There has accordingly been a violation of Article 1 of Protocol No. 12 to the Convention.

IV. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

A. Article 41 of the Convention

89. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

90. The applicants claimed 4,500 euros (EUR) for each child applicant in respect of non-pecuniary damage.

91. The Government submitted that the claim is unreasonable and unsubstantiated.

92. Regard being had to the documents in its possession and to its case-law (see, in particular, *Lavida and Others*, cited above, § 80), the Court considers it reasonable to award EUR 4,500 per applicants' household in respect of non-pecuniary damage.

2. *Costs and expenses*

93. The applicants did not submit any claim for costs and expenses. Accordingly, the Court does not award them any sum under that head.

3. *Default interest*

94. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

B. Article 46 of the Convention

95. Article 46 of the Convention provides:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

96. The Court reiterates that, by virtue of Article 46 of the Convention, the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, with execution being supervised by the Committee of Ministers of the Council of Europe. It follows, *inter alia*, that where the Court finds a breach in a judgment it imposes a legal obligation on the respondent State, whether or not the applicant has requested just satisfaction, to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress the effects as far as possible. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46, provided that such means are compatible with the conclusions and the spirit of the Court's judgment (see *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, § 221, 20 September 2018, with further references). In view of the violation found in the present case, the Court considers that measures to be taken must ensure the end of the discrimination of Roma and Egyptian pupils of the "Naim Frashëri" school, as ordered by the Commissioner's decision of 22 September 2015.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Decides* to strike the application no. 73548/17 out of its list of cases in so far as it concerns applicants nos. 14 to 18;

3. *Declares* the remainder of the applications admissible;

4. *Holds* that there has been a violation of Article 1 of Protocol No. 12 to the Convention in respect of both applications;

5. *Holds*

(a) that the respondent State is to pay to each of the applicants' household, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of

non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 31 May 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar

Georges Ravarani President