Pfv.IV.20.241/2015/4

The Kúria, at the hearing relating to the application for review lodged by the second, third and fourth defendants, application No. 32, and by the first defendant, application No. 3, in the procedure of the applicant, represented by dr. Lilla Farkas and dr. Adél Kegye, lawyers, against the first defendant, Local Government of the Municipality of Nyíregyháza, represented by dr. Előd Kovács, lawyer, the second, third and fourth defendants, represented by dr. Károly Czifra, lawyer, and the fifth defendant, represented by dr. Gabriella Rubi, lawyer, seeking a declaration of the violation of his individual rights and the application of the legal consequences, initiated before the Nyíregyháza Regional Court, case No. 10.G.40.099/2012, and terminated with the final judgment of the Debrecen Regional Court of Appeal, judgment No. Gf.I.30.347/2014/10, delivered the following
judgment:

The Kúria sets aside the final judgment affected by the application for review, alters the judgment of first instance as to its main subject-matter, and rejects the full entirety of the applicant's action.

It obliges the applicant to pay, within 15 days, to the first defendant HUF 50,000 (fifty thousand forint) as procedural costs of the first and second instances and of the review procedure.

The review procedure fees not yet paid, of HUF 70,000 (seventy thousand forint) shall be paid by the State.

No review shall lie against this judgment.

S t a t e m e n t o f R e a s o n s

According to the relevant facts underlying the final judgment, ... elementary school No.13 had been functioning since 1958 as the school for the residential area. According to the expertise of the assembly of the first defendant on the review of the network of educational and teaching institutes of 26th March 2007, the school functions in slum-like isolation among Roma living in extreme poverty, where, out of the 100 pupils, 98 suffer from multiple disadvantages or are entitled to systematic child protection support.

The Szabolcs-Szatmár-Bereg County Court closed the proceedings, case No.P.22.020/2006, on unlawful segregation, as the applicant

had withdrawn his application, with regard to the fact that the assembly of the first defendant closed elementary school No. 13 without legal successor, with effect as of 23rd April 2007, and decided that the pupils would be placed in six other schools. The first defendant promised to organise a school bus for these children from the settlement to go to school. The closing of the school was immediately supported by the Roma Minority Self-Government of the Municipality ... in its resolution Nr.13/2007 (IV. 3.). After closing the school, the children placed in the host-schools determined by the local government were subject to a so-called rigid integration.

On 4th May 2011, the second defendant made an expression of interest towards the first defendant, according to which, from September 2011 on, through pre-school education it would start a programme of pastoral care for the families, in co-operation with social institutes and bodies. Afterwards, on 23rd May 2011, it modified its declaration, in that if the city council could provide the necessary conditions, from the 2011/2012 school year, it would undertake to provide, in an ascending system starting with a class of first year, public elementary schooling.

According to resolution No.11/2011 (V.24.), adopted on the meeting of the ... Roma Minority Self-Government on 24th May 2011, they agreed to restart the elementary school. They requested that when enrolling pupils, special attention be paid to admitting children with multiple disadvantages.

On 31st May 2011, the first and the second defendant signed a cooperation agreement and an aid contract. The objective of the cooperation agreement was to define the public schooling duties to be carried out in the ... settlement in the framework of the pastoral care for Roma. The subject-matter of the agreement involved the participation of the ... Elementary School, founded by the church, in carrying out these public education duties from 1st September 2011 on, for an indefinite period. The church committed to perform public service tasks in the context of upbringing and education, such as to accept, bring up and educate, within the frame of the maximum number of 200 pupils determined in the operating licence, all children of Nyíregyháza aged 6+, whose parents agree to their children receiving a Catholic upbringing. According to the agreement, the church would pay special attention to accepting children with multiple disadvantages, whose enrolment

would never be refused. The church would ensure that within, the number of pupils admitted to the institute, the proportion of children with multiple disadvantages would reach the proportion of children with multiple disadvantages in the city elementary schools, and committed itself to follow a Roma minority educational programme. The church would carry out upbringing and education tasks free of charge. It guaranteed to provide an adequate standard of education in this institute, as well as the necessary personal and objective requirements for the special needs of the school. To this end, the church would apply for budgetary contributions pursuant to the regulations in force and, as the maintainer of the institution, would take all necessary steps to ensure the functioning of the school through applying for other funding. It committed to seek, without delay, to make a unilateral declaration at the government agency for public education, according to section 118 (9) of Act LXXIX of 1993 on Public Education. The church committed to involve the school in the integration programme of the first defendant, acknowledging inspection of its following the regulations. The parties to the agreement also agreed that making movable or immovable property available for the purposes of the duties, should be subject to a separate loan-for-use contract.

According to the aid contract signed the same day, the first defendant committed to provide budgetary support to the second defendant, if the latter committed to educating children with multiple disadvantages and to endeavouring to realise Roma minority education in the institution established or maintained by itself.

According to Resolution No.197/2011 (X. 27.) of the first defendant, instead of transporting the pupils for the closed elementary school No.13, they would provide 30% support for season tickets and tickets for all pupils affected by the reorganisation.

The statutes of the third defendant were amended on 20th May 2011 in order to register the premises of the fourth defendant.

The government agency authorised the fourth defendant to work autonomously from the 2012/2013 school year on, with a task determined under the sectoral order, defining it as elementary school upbringing and education in classes 1 to 4, with 60 pupils.

In his application, the applicant sought a declaration that the cooperation agreement and aid contract signed by the first and second defendants on 31st May 2011 infringes section 5, section 75

(3) and section 200 (2) of the Civil Code and therefore they are null and void. For this reason, he sought the re-establishment of the former status quo. The applicant also sought a declaration that the first defendant, when providing a gratuitous loan-for-use of the school building in its property, terminating the school bus and allocating further financial support to the second defendant, unlawfully segregated the Gypsy children of the ... settlement from non-Gypsy ones on the grounds of ethnicity, from the beginning of the 2011/2012 school year. He also sought a declaration that the second defendant, managed by the third defendant in the 2011/2012 school year, and by the fourth defendant in the 2012/2013 school year, unlawfully segregated the Gypsy children of the ...-settlement from non-Gypsy ones. Moreover, he sought a declaration that the third defendant unlawfully segregated the Gypsy children of the ...-settlement from non-Gypsy ones during the 2011/2012 school year. His application went further, in order to establish that the fourth defendant, with no mandatory enrolment district, unlawfully segregated the Gypsy children of the ...-settlement from non-Gypsy ones from the beginning of the 2012/2013 school year, when creating segregated classes. On the grounds of the above, he requested the termination of an infringement to be ordered, as well as injunctive relief against the recurrence of such infringements. He requested that the fifth defendant, as legal successor to the first defendant in public education matters, be obliged to re-establish the status quo prior to 31st May 2011.

IAs an alternative, he requested that the first defendant be obliged to terminate the building in question being loaned free of charge.

He requested, in relation to the Gypsy children of the settlement learning in the school of the fourth defendant, that the second defendant be obliged to place the Gypsy children of the settlement, who were willing to further participate in religious education, into ethnic majority (not Roma) classes.

The defendants requested in their statement of defence for dismissal of the application.

The court of first instance found in its judgment that the first defendant, by providing a gratuitous loan-for-use of the school building in its property, by terminating the school bus and allocating further financial support to the second defendant, unlawfully segregated the Gypsy children of the ... settlement from

non-Gypsy ones on the grounds of ethnicity, from the beginning of the 2011/2012 school year,

- *the second defendant, managed by the third defendant in the 2011/2012 school year, and by the fourth defendant in the 2012/2013 school year, unlawfully segregated the Gypsy children of the ...-settlement from non-Gypsy ones,*
- *the third defendant unlawfully segregated the Gypsy children of the ...-settlement from non-Gypsy ones during the 2011/2012 school year,*
- *the fourth defendant unlawfully segregated the Gypsy children of the ...-settlement from non-Gypsy ones during the 2012/2013 school year, by creating segregated classes.*

The court ordered the second, third and fourth defendants to terminate the infringement, and made a prohibitory injunction. The application was dismissed as to the remainder.

The court of first instance granted legal standing to bring an action on the basis of section 28 (1) c) of Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities (hereinafter: Equal Treatment Act).

On the grounds of the equal opportunities programmes for 2007 and 2011, containing data of public interest, the court stated that the majority of the population living in the spontaneously segregated ...-settlement are Roma; the proportion of individuals with disadvantages or multiple disadvantages is very high compared to the city population and, therefore, pursuant to section 10 (2) of the Equal Treatment Act, the first defendant's decision to loan a building, placed at the site of the segregation, free of charge for educational reasons to the second defendant, amounts to unlawful segregation. Although the second defendant did not take part in developing or maintaining the spontaneous segregation, his action however constituted unlawful segregation at an institutional level, thus within an educational institute, pursuant to section 27 (3) a) of the Equal Treatment Act, when committing in 2011 to maintain a school in the segregated settlement beside the already functioning school in the city centre. Since the second defendant invoked the pastoral care of the Roma as a special exemption under section 28 (2) b) of the Equal Treatment Act, and did not argue with the education for minorities, the court of first instance therefore only examined whether the school of the settlement was

really placed to be maintained by the church at the initiation and by the voluntary choice of the parents, based on their convictions. On the basis of the assessment of evidence, the court stated that the first and second defendants held negotiations on placing the school of the ...-settlement under church maintenance, but the second defendant's intention only concerned placing the.. street kindergarten within the settlement under church maintenance. The first defendant took the initiative that the church should start a first-year education one year earlier. The pre-enrolment sheets of pupils starting school in 2011 is evidence that the creation of a church school had not been initiated by parents, since out of 15 enrolments only two mentioned the relevance of the Greek Catholic church; the majority referred to the proximity of home. This was corroborated by the report on the fieldwork carried out on 31st May 2011, as well as the testimonies of ... and ...

The court of first instance stated that the applicant met his obligation to substantiate under section 19 (1) a) of the Equal Treatment Act. Based on the testimonies of ... ..., the court found that it could be established beyond doubt that segregated education is detrimental since, for children with disadvantages, the only chance to escape from extreme poverty is to obtain secondary or tertiary education of an appropriate level, which is not possible in the case of separate education, it may only be achieved in public education together with children of the ethnic majority.

The declared pastoral care for Roma does not allow for the separate education of Roma children, as stated by the representatives of the church, since its aim is mutual acceptance between the Roma and the ethnic majority population. The court of first instance also examined the group in a comparable situation, which was the group of pupils learning in the elementary school maintained by the first defendant. In this context, the court stated that according to data for 2011, 35.3 % of the pupils learning in the elementary school maintained by the first defendant suffered disadvantages, whilst 7.1 % of them had multiple disadvantages. In the school at issue, 100 % of the children were in a disadvantaged situation, among whom 56.3 % had multiple disadvantages. On this basis,, the existence of unlawful segregation may be established to the detriment of the first defendant. The court also stated that in 2011, 17.4 % of the pupils of the ... Elementary School were in a disadvantaged situation, and 3.9 % of them had multiple

disadvantages.

The court of first instance found that the applicant had substantiated the breach of the principle of equal treatment and the damage caused, and that the second defendant's submission of evidence was not successful.

The court of first instance found the first defendant's call for evidence by addressing the Central Statistical Office (KSH) in relation to the population structure of ... as unjustified, since the attached documents provided sufficient data. The court found the request of the third and fourth defendants for evidence from ethnic educational experts unnecessary, since there was no education for minorities involved. The applicant did not invoke the quality of education, and the institute responsible for education in the settlement was not entitled to hold separate remedial classes.

The court found the argument based on the nullity of the contract signed between the first and second defendants as being obviously contrary to good morals to be unfounded. It is not contrary to good morals that the first defendant gave a school building on loan for the purposes of education to the second defendant, or that the pupils of the ...-settlement would have been therefore unlawfully segregated during education, since this is not against the generally prevailing moral expectations of society.

The court held the plea for a declaration of the infringement and for the termination of that infringement well-founded and, on the basis of section 84 (3) a) and b) of Act CXC of 2011 on National Public Education (hereinafter: Public Education Act), because of the ascending educational system, the fourth defendant cannot carry out any further first-year teaching in the school of the settlement, subject to the final judgment. The court held that the application based on section 84 (1) d) of the Civil Code, due to being too general, is devoid of legal effects. The applicant filed a plea, on the one hand, in relation to the manner of closing the school, which would not be enforceable judicially, and on the other hand, which would infringe the rights of the parents to free choice of school, should they decide not to educate their children in a church school, and therefore the court dismissed it.

The first, second, third and fourth defendants lodged an appeal against the judgment of first instance, whilst the applicant lodged

a cross-appeal.

The court of second instance upheld the judgment of the court of first instance with a small change in the wording, that the second, third and fourth defendants shall be ordered to refrain from 'further' infringements, instead of 'such or similar' infringements. The court ordered that the parties should pay their own costs incurred in the procedure on appeal.

The Regional Court of Appeal explained on the grounds of section 4 g) of the Equal Treatment Act: the second defendant was not a genuine educational institute but its maintainer; it therefore falls within the remits of this provision. However, it could also fall under section 5 c) of the Act. In the event of a contrary conclusion, the rulings against the third and fourth defendants would not be enforceable if the second defendant as holder were not a party to the proceedings.

According to the Regional Court of Appeal, the court of first instance correctly stated the ethnic composition of the settlement based on the report of 2007 on equal opportunities in public education. The equal opportunities programme for 2011-2016 listed the ...-settlement and the ... settlement among the segregated areas, mentioning that the majority of the Roma population in the city lived in these settlements. After preparing the equal opportunities programmes and reports, there emerged no data on any changes within the population; the court of first instance therefore correctly stated that the majority of the population living in the spontaneously segregated ...-settlement were Roma; the proportion of individuals in a disadvantaged or multiple disadvantaged situation is abnormally high compared to the city population.

The Regional Court of Appeal confirmed the finding of the court of first instance concerning that the conditions defined in section 28 of the Equal Treatment Act had been met. The expression of interest made by the church, followed by the negotiations with the local government, the reasons indicated by the parents on the enrolment sheet of first year pupils, the testimonies and the documentary evidence all prove that there had been no parental initiative involved.

The second, third and fourth defendants were incorrect when asserting that having one class per grade excludes, by definition,

segregation since, in the case at issue, segregation did not happen between the classes of a grade, but on the grounds of ethnicity in the school, re-opened in an area of segregation. The termination of the school bus forced the parents to send their children to the settlement school. A further motivation was that this was a Roma school, so any child would not be ostracised. On the grounds of the above, according to the court of first instance, the defendants' justifications for their conduct were not successful.

The first, second and fourth defendants lodged an application for review against the final judgment.

The first defendant sought in its application for review primarily to set the unlawful final judgment aside and to dismiss all pleas by the applicant; or as an alternative, to order the court of first or second instance to initiate new proceedings, conduct a new assessment of evidence and give a new ruling.

First, it underlined that the educational institute maintained at present by the second and third defendant cannot be deemed as the successor to the closed school, previously maintained by the first defendant.

As the first defendant argues, the report of 2007 on equal opportunities mirrors the situation in 2007; no unconcerning conclusions can therefore be drawn from that in relation to the present situation. It stressed that this analysis contained statistics concerning children in disadvantaged and multiple disadvantaged situations, on the basis of which neither the court of first instance, nor the court of second instance could have deduced that the majority of the population living in the ...-settlement were Roma. According to the first defendant, the testimony of ... before the ruling courts confirms the statement that the ...-settlement is a slum where people of both Hungarian and Roma origin are living.

In its opinion, it amounted to an infringement of an essential procedural requirement that the court of first instance dismissed the call for evidence by addressing the Central Statistical Office. Pursuant to section 2 (4) of the Code of Civil Procedure, the ethnic population structure of the ...-settlement at the time constitutes an essential circumstance, under section 19 (2) of the Equal Treatment Act, therefore dismissing the call for evidence has unduly limited the chances of the defendants' exculpation. In

the event of dismissing the relevant call for evidence, the legal consequences set out in section 3 (3) of the Code of Civil Procedure cannot be applied.

The court established the existence of unlawful segregation by comparing the data on elementary schools maintained by the first defendant and data on the school in the ...-settlement maintained by the second defendant, and concluded that the first defendant's conduct constitutes unlawful segregation. However, the first defendant had no duties and functions concerning the arrangement of education in the public educational institute of the second defendant. The second defendant carries out its own education arrangements.

Concerning the termination of the school bus and providing financial support to the second defendant, it asserted that the ruling courts did not give reasoning as to why the conduct of the first defendant constituted unlawful segregation. Providing the use of a means of transport or its termination does not mean that the persons previously using this mode would be cut off. During the proceedings, the first defendant argued that, when terminating the school bus transport for financial reasons, it introduced financial support for season tickets, which equally serves the transport of the children from their homes to school. Neither the applicant nor the court of first instance referred to provisions, on the basis of which the first defendant would have the obligation to operate a school bus without interruption. Concerning the free choice of school, it argued that the fact that the Greek Catholic school had been recommended by the President of the Roma Minority Self-Government, does not damage the rights of the parents; in fact, it made the choice even larger, when the parents were informed of the new school. It depends on the parents, on their free choice of school, whether they choose the district school, or the Greek-Catholic school following different convictions; as such, there is no mention of segregation. The courts of the first and second instance infringed section 221 (1) of the Code of Civil Procedure when they did not fulfil their obligation to give a statement of reasons in relation to the pleas mentioned above.

It argued that the first defendant's duties in the area of public education ceased on 1st January 2013;, it does not have rights or functions through which it could accomplish segregation, or possibly remedy eventual segregation and therefore the judgment's

wording in the present tense is unlawful.

The second, third and fourth defendants sought in their application for review to set the final judgment aside and to dismiss the pleas of the applicant.

According to their legal reasoning, the final judgment is not in compliance with section 4 g), section 5 c), section 8, section 10 (2), section 19, section 27 and section 28 of the Equal Treatment Act. Furthermore, it infringes the provisions of Act CLXXIX of 2011 on the Rights of Minorities (hereinafter: Minorities Act), and of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities (hereinafter: Church Act), as well as the provisions of Article 10 of the United Nations Convention on the Rights of the Child, signed in New York on 20th November 1989 (hereinafter: New York Convention). According to the second, third and fourth defendants, the final judgment also infringes fundamental rights, especially the right to freedom of conscience and religion and the right of the parents to free choice of school.

It constitutes an infringement of section 8 (2) and section 19 (2) of the Church Act, that the courts ruling in this case delivered their judgments concerning the question of pastoral care for Gypsies and, with regard to the aims and intentions to found a school, without authorisation by law, in fact, ignoring the prohibition in law. They argued that the bishop could have decided to open the school on the grounds of the Codex Canonum Ecclesiarum Orientalium (CCEO), and not for segregation reasons as alleged by the applicant. In this sense, the third and fourth defendants are organisations operating on the basis of the internal law of the Church. The assessment of the courts infringes section 8 (2) of the Church Act, since they involved themselves in the essence of pastoral care for Gypsies, being a special reason, and in the internal decision of the church on this question, when making them subject to assessment in the light of the respect of equal treatment and in relation to unlawful segregation. They invoked Conceptual Decision No.2005.1216, according to which not even on the grounds of state aid may the autonomy of the Church be infringed, if it is based on specific beliefs. The founding of a public educational institute cannot be criticised for reasons, for which it could be condemned under the Equal Treatment Act in the secular world that are not even proved. Neither can it be criticised just on the

grounds of the rights of parents to a free choice of school, nor for the fact that the Church might impose additional conditions when enrolling children, hence acceptance is not automatic. The founding of a school cannot constitute an infringement of law, if it occurs on the basis of the internal regulations of the Church, and it is not prohibited by secular law. The same applies to students' enrolment, where the Church is entitled to decide with whom to enter into a legal relationship.

They contested that the ruling courts did not examine section 11 (1) and section 15 of the Minorities Act, therefore the finding of the final judgment, according to which the majority of the population living in the ...-settlement belong to the Gypsy nationality, is unfounded. Not even in the light of the Equal Treatment Act may the adjective 'ethnic' be used on anyone, including pupils and their parents. In the absence of self-determination as such, not even courts may classify pupils or their parents as Gypsies.

The right of the parents and children to freedom of conscience and religion, and the right to free choice of school were infringed when the courts found that establishing and maintaining the school had been unlawful, and deprived the parents from the possibility to enrol their children in a religious school of their choice. In this context, they invoked section 2 of the Church Act, and Article 14 (3), Article 28 and 29 of the New York Convention. According to the second, third and fourth defendants, the ruling courts limited the parents and the children in their rights relating to education and religious education, and in their rights to free choice of school, and their rights to freedom of conscience and religion were thereby infringed. According to the second, third and fourth defendants, the final judgment is not enforceable. They claimed that the fourth defendant may commit an infringement only if the parents exercise their rights to free choice of school. The fourth defendant is a school with full rights; therefore it is entitled by law to carry out enrolments. If pupils whose parents identify themselves as Gypsies, exercising their rights under section 15 (1) of the Minorities Act, are enrolled, the fourth defendant infringes the law by enrolling the child. This means that the exercise of the right to free choice of school by the parent constitutes at the same time an infringement of law.

They also contested that the ruling courts did not examine the

conflicts of fundamental rights and did not carry out a cross-examination of concurring fundamental rights, as they did not debate the rights to free choice of school and to freedom of conscience and religion against the prohibition of unlawful segregation.

Nor did a debate on equal treatment, unlawful segregation and equal rights against the rights of the parents to free choice of school, take place, nor on the freedom of the church to found institutes and the right of the Church to freedom of conscience and religion.

They underlined that, according to Article 14 (3) of the New York Convention, the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, public order, health or morals, or the fundamental rights and freedoms of others. Unlawful segregation or equal treatment does not give rise to limitations, as they are not included in the exhaustive list.

They found the position that the courts, when applying section 28 (2) a) of the Equal Treatment Act, deemed the circumstance of which church the parents and the children belonged to, and how many persons had identified themselves as Greek Catholic as relevant was incorrect. They submitted that the right to freedom of conscience and religion means the free choice of religion, faith and spiritual identity. An exclusionary interpretation, according to which only those belonging to a specific church have the right to religious identity, is not allowed. The Equal Treatment Act does not impose any requirement that only parents identifying themselves as Greek Catholics may initiate a Greek Catholic religious education. The reason for parents 'initiation of religious education is irrelevant. According to section 28 (2) a) of the Equal Treatment Act, only the objective of education based on religious convictions is relevant and not the conviction of the parents. The initiation is not invalidated if it is based on factors such as proximity or fear of discrimination experienced in other schools. The pre-enrolment sheet is in full compliance with the parents' initiative pursuant to section 28 (2) a) of the Equal Treatment Act.

The second, third and fourth defendants argued that neither the protected characteristic set out in the Equal Treatment Act, nor the circumstance that the segregation was related to the protected characteristic have been proven. In this context, they invoked

Conceptual Decision No.2010.2272. They also argued that the ruling courts did not give reasons for a protected characteristic under section 8 of the Equal Treatment Act being involved in the established infringement of law, and on which facts underpin the segregation. It is not clear from the judgment whether the segregation occurred on the grounds that those concerned belonged to a minority group and, lacking this ground, even if factually established, segregation would not be unlawful. In the present case, no data have emerged to justify that, in the enrolment practice of the third and fourth defendants, belonging to the Gypsy minority would have been relevant. In the absence of such data, the unlawfulness of the factually unproven segregation is missing.

They also argued that the final judgment did not exhaust the pleas of the second defendant's statement of defence, and did not respond to the majority of the arguments therein.

The application of the Equal Treatment Act, as stated in the final judgment, was not in compliance with common sense and the common good; in fact, it created a situation which cannot be deemed ethical or economical.

The fourth defendant has only one class per grade, hence unlawful segregation can be excluded by definition. They found the statement of the final judgment, that in the school reopened in the segregated area segregation took place on the grounds of ethnicity to be incorrect. According to the Regional Court of Appeal, there is no difference in this respect between the church and the public body in charge of the school, which is a fundamentally incorrect premise. The church in charge of the school is not subject to the same regulations or not only those regulations applicable to the public authority in charge. They pointed out that the Church Act is not applicable to the state authority in charge of the school.

As to the second defendant, they contested its capacity to bring actions on the grounds of section 4 g) and section 5 c) of the Equal Treatment Act.

They contested the position of the court concerning the hearing of ..., minister of the Ministry of Human Resources. They argued that the minister, the primary enforcement authority in this field, had not found operating the school to be unlawful.

They sought, on the basis of the reasons presented on appeal, in compliance with section 155/B of the Code of Civil Procedure, to

initiate a procedure before the Constitutional Court, thereby suspending the present case, in relation to the Equal Treatment Act, especially its section 7 (3).

The applicant, in its counter-application for review, sought the final judgment to be upheld.

The fifth defendant made no observations on the substance of the dispute in the review procedure.

The Kúria reviewed the final judgment, in compliance with section 275 (2) of the Code of Civil Procedure, within the framework of the application for review.

The application for review lodged by the first, second, third and fourth defendants is founded for the following reasons.

The Kúria first examined, with regard to the plea of the second, third and fourth defendants, the necessity of proceedings under section 155/B (1) of the Code of Civil Procedure. The second, third and fourth defendants based their plea to initiate the proceedings of the Constitutional Court on the fact that, since the adoption of the Equal Treatment Act, the Fundamental Law has entered into force, with which the provisions of the Equal Treatment Act are not in compliance. Furthermore, they contested that in the event of a claim arising from unlawful segregation, section 7 (3) of the Equal Treatment Act does not allow the general grounds of exemption under section 7 (2) to be invoked.

The Kúria found that the fact itself that the Fundamental Law has entered into force since the adoption of the Equal Treatment Act, does not suffice to raise constitutional concerns about the provisions of that Act. Section 7 (3) of the Equal Treatment Act has been enacted by section 1 of Act CIV of 2006, especially with regard to the fact that Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter: Racial Equality Directive), does not allow for the general grounds of exemption to be invoked in cases of direct discrimination and unlawful segregation. The Kúria therefore had no concerns as to the constitutionality of the Act, thus held it unjustified to initiate a procedure before the Constitutional Court and to suspend the present proceeding.

Concerning the substance of the present litigation of the parties,

the Kúria stated the following.

The Kúria primarily stresses that the issue in question was not to be decided from a sociological point of view, but based on the legal regulations. It did not have to evaluate a social situation giving rise to the litigation, but had to assess the specific case on the basis of the relevant legal regulations.

The applicant alleged in its application – under review – that the defendant's conduct constitutes unlawful segregation, and sought to establish this fact and apply the relevant legal consequences.

According to the International Convention on the Elimination of All Forms of Racial Discrimination, signed in New York on 21st December 1965 and ratified by Legislative Decree No. 8 of 1969, any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere.

According to Article 14 of the European Convention on Human Rights, the enjoyment of the rights and freedoms set forth in this Convention 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.

According to section 75 (1) of Civil Code inherent rights shall be honoured and respected by everyone. Inherent rights are protected by law. Pursuant to section 76 of Civil Code, any breach of the principle of equal treatment shall, inter alia, be deemed as violations of inherent rights. The legal protection of those who have been wronged is regulated by the Equal Treatment Act. This Act fills the requirement of equal treatment with content.

The second defendant contested that it falls within the remits of the Equal Treatment Act. In this context, the Regional Court of Appeal stated correctly that, on the grounds of section 5 c), the Act is applicable to the second defendant.

According to Article 28 of the Fundamental Law, in the course of the application of law, courts shall interpret the text of legal regulations primarily in accordance with their purposes and with the Fundamental Law. When interpreting the Fundamental Law and other legal regulations, it shall be assumed that they are in

compliance with common sense and the common good, and serve ethical and economic purposes.

Therefore, o decide on the issue of litigation, the provisions of the Equal Treatment Act on unlawful segregation shall be interpreted in the light of its objectives, as well as in accordance with the Fundamental Law, assuming that they are in compliance with common sense and the common good, and serve ethical and economic purposes.

Pursuant to section 10 (2) of the Equal Treatment Act, unlawful segregation is conduct that separates individuals or groups of individuals from other individuals or groups of individuals in a similar situation on the basis of their characteristics as defined in section 8, without any law expressly allowing it.

According to the finding of the final judgment, the first defendant, by providing a gratuitous loan-for-use of the school building, by terminating the school bus and allocating further financial support, committed unlawful segregation from the beginning of the 2011/2012 school year.

According to the legal position of the Kúria, this conduct attributed to the first defendant does not constitute unlawful segregation.

Lending a building that formerly functioned as a school in charge of the local government to the church for the purposes of founding a school, in reality response to the needs of the practice of religion; it is necessary to carry out tasks in the area of upbringing and education by the church, and therefore the first defendant's conduct did not amount to unlawful segregation.

The local government, after closing the settlement's school, provided a school bus for transporting the children. In this context, it had no obligation by law; it committed to do so on its own initiative. Since terminating the school bus transport, it provides financial support for season tickets. This conduct and this support cannot be deemed as conduct defined under section 10 (2) of the Equal Treatment Act.

On the grounds of the above, and with regard to the fact that it had and has no education authority rights in relation to the given school building, the first defendant's conduct did not constitute an infringement of the law.

The Kúria found the application in relation to the second, third and fourth defendants unfounded for the following reasons.

According to section 19 (1) of the Equal Treatment Act on the burden of proof, in procedures instigated because of a violation of the principle of equal treatment, the injured party or the party entitled to an actio popularis must make it probable that the injured person or group has suffered a disadvantage or, in the case of an actio popularis, there is a direct danger of such a disadvantage, and the injured party or group – actually or as assumed by the offending party – possessed any of the characteristics defined in Article 8 at the time of the violation of law.

On the grounds of all the above, an infringement of the principle of equal treatment – in the present case unlawful segregation – may be established if the offending party engages in conduct, causing the contested disadvantage, towards the given group because of their protected characteristics.

As shown in the documents submitted during the procedure, the applicant substantiated that the majority of the children in this school possessed the characteristic defined in section 8 e) of Equal Treatment Act. Establishing this fact does not infringe the provisions of the Minorities Act. It was therefore unnecessary to comply with the first defendant's call for evidence, namely to address the Central Statistical Office. Substantiating the predominance of children belonging to Gypsy ethnicity is also confirmed by the circumstance that the second, third and fourth defendants' intention, as detailed in their application for review, with taking charge of and operating the school was to ensure pastoral care for Roma, which is acceptable, and no other information emerged to discredit this reason. It can be reasonably deduced from this that the second, third and fourth defendants searched for an operable school at a place where pastoral care for Roma could be effective, i.e. a place where all or an overwhelming majority of the pupils were children belonging to the Gypsy ethnicity. At a place where the ethnic composition is not present, pastoral care for Roma obviously cannot achieve its goals.

The Kúria stated in its Decision No. Pfv.IV.20.037/2011/7 that unlawful segregation in itself constitutes a disadvantage, therefore a prima facie evidence thereof is acceptable.

In accordance with the above, pursuant to section 19 (2) of the Equal Treatment Act, the defendants had to prove that the circumstances rendered probable by the injured party or by the entity entitled to an actio popularis did not prevail, or that it did observe the principle of equal treatment, or that it was not obliged to observe the principle of equal treatment in respect of the relevant relationship.

The second, third and fourth defendants had satisfied their burden of proof.

Section 28 (2) of the Equal Treatment Act provides that the principle of equal treatment is not violated if, in public education, at the initiation and by the voluntary choice of the parents, such education based on religious or other ideological conviction, or education for ethnic or other minorities is organised, the objective or programme of which justifies the creation of segregated classes or groups; provided that this does not result in any disadvantage for those participating in such an education, and the education complies with the requirements approved, laid down and subsidised by the State.

Under this provision, educational and teaching activities carried out in an educational institute for religious purposes and on voluntary basis do not constitute unlawful segregation, if they provide an education in compliance with the parents' request, does not result in any disadvantage for the children and the quality of education is guaranteed.

The provisions of section 28 (2) of the Equal Treatment Act, according to which only the initiation and voluntary choice of the parents may give rise to exemption, refer to the requirement of voluntary action, namely that participation in the given education must be based on the free choice of the parents or guardian. The Parliamentary Commissioner of national and ethnic minority rights took the same position in his annual report of 2005.

According to Article VII (1) of the Fundamental Law, everyone shall have the right to freedom of thought, conscience and religion, also stated in section 76 of the Civil Code. This right shall include the freedom to choose or change one's religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practice or teach his or her religion or other belief through religious acts, rites or otherwise, either individually or jointly

with others, either in public or in private life.

The Supreme Court stated in its Decision No. Pfv.IV.20.678/2005/5 that religious training (of pastors and religious instructors) given in academic institutes founded by the church is inherent to the religious convictions (faith) of the given church, to its principles on moral questions, and expectations towards its pastors and instructors. Religious training (not theological studies in general) is therefore adjusted to the religious doctrines of the church, to the individual and community forms of practicing faith, and to the perception of the way of life of the members, especially pastors and instructors, of that church. The defendant, founded by the Reformed church (regardless of whether it obtains state aid), represents, throughout its religious training for pastors and instructors, the approach of the church in this question in a legitimate and uncriticisable manner.

The Constitutional Court, in its Decision No. 4/1993. (II.12.) made a connection between the right to practice religion and the right to human dignity, as it stated that convictions, including – if appropriate – religion, are part of human nature, and their freedom is a condition for the right to the free development of personality to prevail. Concerning the latter, it noted that the freedom of conscience and religion may only be affected by legislation, whenever the thoughts or convictions are expressed.

According to Article 2 of the First Protocol to the European Convention on Human Rights, no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

According to Article 18 (4) of the International Covenant on Civil and Political Rights, the States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 14 of the United Nations Convention on the Rights of the Child, signed in New York on 20th November 1989, ratified by Act LXIV of 1991, declares the right of the child to freedom of thought, conscience and religion, and the rights of the parents to provide

direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

According to Article XVI (2) of the Fundamental Law, parents shall have the right to choose the upbringing to be given to their children.

According to section 72 (2) of the Public Education Act, parents have the right to the free choice of a kindergarten, school or a hall of residence in compliance with their children's abilities, skills and interests and their own religious and ideological convictions and their nationality. This provision of the Act ensures the right for parents to choose the most appropriate institute for educating and teaching their child.

It is a fact that, after closing the previous school, formerly maintained by the local government, the church did not take the existing educational institute over, but founded a new school in its own right. The Church committed, in the cooperation agreement concluded with the local government, to enrol all children of Nyíregyháza aged 6+, moreover not to refuse the enrolment of children with multiple disadvantages.

The leaders of the Roma Minority Self-Government confirmed in their testimony that an initiative had come also from the side of the parents to open the school. The Roma Minority Self-Government expressed in its resolution that it agreed with opening the elementary school.

On the basis of the information provided in the proceedings, it can be established that the parents had been aware of the circumstance that their children would receive, at the kindergarten and in the school, an upbringing and education dedicated to the Greek Catholic religion. They enrolled their children with this knowledge and made their decision freely. It cannot be stated with justification that the parents had not been informed sufficiently, since, as is clear from the files of the proceedings, the Roma Minority Self-Government and the Diocese itself had informed the residents of the education represented by the school. The parents had the chance to learn, at the open day, the religious, educational and upbringing mission of a church-run school. Having all this information, it depended on the free decision and informed choice of the parents whether they enrolled their children, or chose another kindergarten or school for their education. It is a fact

that the upbringing and education offered by the Greek Catholic church in this institute is not only accessible by a restricted circle of persons; the school of the defendant is not a district school and children from other districts may enrol as well. Furthermore, the possibility is ensured for parents to enrol their children in the district school or in another church-run school. On the basis of the above, the effective right of the parents to a free choice of school cannot be questioned. The possibility to found a church school in the ...-settlement cannot be denied, nor for the parents to enrol their children in the school of the fourth defendant which is dedicated to Greek Catholic values. Since, in Nyíregyháza, there are district schools in the scope of the local government and other church schools as well, the parents were, and at present are not limited to enrolling their children in another kindergarten or school in the city, if they consider that the given educational institute provides a more appropriate environment for the upbringing and educational needs of their children However, the rights of the parents and pupils to freedom of conscience and religion and to free choice of school must be respected; therefore, by invoking the prohibition of unlawful segregation, those parents who take the position that the educational institute of the fourth defendant provides their children's upbringing and education, as required and accepted by them, in conformity with their own convictions, cannot be deprived of their right to free choice of school. The parents have the right to enrol their children in the church school of their choice, which is at the same time near to their home. In the light of the above, the reasons indicated on the pre-enrolment sheet are irrelevant. The right to a free choice of school includes that the parents may decide – for the benefit of their children – in which school, the city school or the settlement's church school, they enrol their children. On the grounds that there is another church school in the city, the decision of the parents, thus of their children, based on the exercise of the right to freedom of conscience and religion, cannot be limited. Moreover, the pathway between the two church schools is ensured.

All children are accepted wherever they enrol, and in fact, neither of the institutes requires tuition fees, therefore there is no obstacle for the parents to exercise their rights of free choice of school.

The applicant invoked in the proceedings the judgment of the

European Court of Human Rights (hereinafter: ECHR) in the case of D.H. and others v. the Czech Republic, where the ECHR established that there had been a violation of the prohibition of discrimination under Article 14 of the Human Rights Convention, and of the right to education under Article 2 of Protocol No. 1, since the ECHR was not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued.

According to the facts underlying the decision of the ECHR, special schools were established for children with special needs, including those suffering from a mental or social handicap. Owing to the entrance requirements of the elementary schools and the resulting selection process, most Roma children attended special schools. The ECHR stated: the schooling arrangements for Roma children were not accompanied by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class. The children received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary elementary schools and develop the skills that would facilitate life among the majority population. The consent of parents, suffering from social disadvantages, to their placement in a given school cannot be deemed as a waiver of the right to education.

In the present case this is not at issue. The applicant did not contest in the procedure the standards of upbringing and education or pedagogical programme of the school. The appropriate quality of education was not at issue. The parents did not waive the right to education, and did not consent to a different schooling; therefore, the participants in the education did not suffer disadvantages. It can be stated as fact that, in the school of the defendant, education is provided in small classes, in an ascending system, which in conjunction with the exercise of the right to free choice of school, excludes segregation.

In view of the above, the second, third and fourth defendants' exculpation was well-founded.

Although it is of no decisive importance, due to the reference in

the application for review, it has to be stated that the objection of the defendants concerning the failure to take into account the testimony of dr. ... was unfounded. The court of first instance heard the minister, dr ... as a witness. According to section 167 (1) of the Code of Civil Procedure, a witness is a means of evidence to corroborate the arguments of the party, and dr. ... , when founding, operating and maintaining, etc. the school at issue, did not carry out enforcement activities, and as such made no testimony on these facts. The witness of opinion is not recognised by the Code of Civil Procedure, therefore the opinion of dr. ... on the segregated nature of the school at issue is irrelevant for the resolution of the dispute.

On the grounds explained above, the violation of the principle of equal treatment and unlawful segregation cannot be established; therefore, the Kúria set the final judgment aside, pursuant to section 275 (4) of the Code of Civil Procedure, altered the judgment of the first instance in accordance with section 253 (2) of the Code of Civil Procedure, and dismissed the application.

According to section 78 (1) of the Code of Civil Procedure and to section 3 (3) and (5) of Decree 32/2003 (VIII.22.) of the Minister of Justice, the applicant shall pay the costs incurred by the first defendant on first and second instance and in the review procedure.

The second, third and fourth and fifth defendants did not claim for the reimbursement of their procedural expenses; there is therefore no need to adjudicate.

According to section 5 (1) of Act XCIII of 1990 on fees, the applicant is exempt from fees; therefore, on the basis of section 14 of Decree 6/1986 (VI. 26.) of the Minister of Justice, the review procedure fees not yet paid shall be covered by the State.

Budapest, 22nd April 2015

Dr. Mátyás Mészáros (signed), President of the Chamber, dr. Katalin Böszörményiné Kovács (signed), Judge Rapporteur, Dr. Zsuzsanna Kovács (signed), Judge

In witness whereof:

Vné

officer of the court