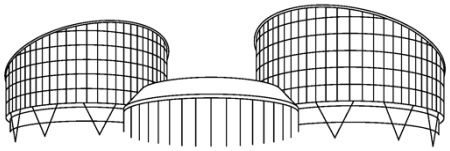

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ÁDÁM AND OTHERS v. ROMANIA

(Applications nos. 81114/17 and 5 others)

JUDGMENT

Art 1 P12 • Prohibition of discrimination • Alleged discrimination in final high school exams of pupils belonging to national minorities studying in their mother tongue • Art 14 case-law standards applicable to Art 1 P12, including positive obligation to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different • Domestic policy designed to provide education in minority language while at the same time ensuring sufficient knowledge of official language • Additional exams the inevitable consequence of voluntary choice to study in a minority language • Content of curriculum and examination timetable not placing excessive burden on applicants • Margin of appreciation afforded to States • Applicants not placed in a different situation to Romanian peers that was sufficiently significant for the purposes of Art 1 P12

STRASBOURG

13 October 2020

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 Ádám and Others v. Romania,

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

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Branko Lubarda,
Carlo Ranzoni,
Jolien Schukking,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the applications (see Appendix I below) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Romanian nationals ("the applicants"), on the various dates indicated in Appendix I below;

the decision to give notice of the applications to the Romanian Government ("the Government");

the decision to give priority to the applications (Rule 41 of the Rules of Court);

the parties' observations;

Having deliberated in private on 10 March, 12 May and 1 September 2020,

Delivers the following judgment, which was adopted on that last-mentioned date:

INTRODUCTION

1. The case concerns alleged discrimination in the baccalaureate (school-leaving) qualification of pupils belonging to national minorities studying at school in their native tongue. The applicants, who are ethnic Hungarians, complained under Article 1 of Protocol No. 12 to the Convention that they had had to sit two additional exams (oral and written in their mother tongue) during the same, rather short, period set for the final exams throughout the country. Moreover, the exams they had had to sit in Romanian language and literature had been very difficult for them. For this reason, ethnic Hungarian pupils had less time than Romanian pupils to prepare for their exams or to simply rest between them, and less chance of success in the baccalaureate.

THE FACTS

2. The applicants' names, years of birth and place of residence are listed in Appendix I below. They were represented by Mr D.A. Karsai, a lawyer practising in Budapest.

3. The Government were represented by their Agent, most recently Ms O.F. Ezer, of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicants live in an area inhabited primarily by ethnic Hungarians. They attended school in Romania and were taught in Hungarian, their mother tongue, and because of this, had to take two additional exams in the baccalaureate, to assess their proficiency in their mother tongue (see paragraph 12 below). They all failed their baccalaureate because they did not obtain the required grades to pass the exams in Romanian language and literature (Ms Ádám, Mr Petres, Mr Bakos, Mr Forika and Mr Maxem) or Hungarian language and literature (Mr Ambrus). They all retook the exams but failed to obtain the required grades (see Appendix I below). Some of the applicants contested the marks (Mr Bakos, Mr Ambrus, Mr Forika and Mr Maxem), but after reassessment, their grades were still not sufficient to pass the exams. They all obtained the required grades in the other exams in the baccalaureate.

6. Under the applicable rules, in order to pass the baccalaureate, candidates must obtain a minimum of 5.00 in each exam and the overall grade must be a minimum of 6.00 (see paragraph 12 below). The maximum grade is 10.

7. The Ministry of Education sets the timetable for the baccalaureate at the beginning of each school year (see paragraph 12 and Appendix II below). The written exams are organised over consecutive days: Romanian language (written), mother tongue (written) and the first exam in a curriculum subject. Pupils sitting the additional exams in their mother tongue have three consecutive days of written examination, whereas pupils not sitting them have a day of rest in between (see Appendix III below).

8. According to data provided by the Government, in the period 2013 to 2018 the success rate in the final exams was 58.1 to 73.9% for all pupils and 58.4 to 70% for pupils taught in Hungarian. During the same period, the success rate in the Romanian language and literature exams was 17 to 18% lower for Hungarian language students than for their Romanian peers.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. National Education Act (Law no. 1/2011)

9. The National Education Act (hereinafter "the NEA"), published in the Official Bulletin on 10 January 2011 and entered into force thirty days after publication, provides that the State "grants equal rights of access to all levels and forms of pre-university and higher education, as well as lifelong learning, for all nationals of Romania, without any form of discrimination" (Article 2 § 8).

10. The NEA also provides as a defining principle "the recognition and the guarantee of rights of persons belonging to national minorities, the right to preserve, develop and express ethnic, cultural, linguistic and religious identity", as well as the principle of "ensuring equal opportunities" (Article 3).

11. The following provisions regulate the right to education in minority languages:

Article 45

"(1) Persons belonging to national minorities shall have the right to be taught in their mother tongue, at all levels and in all forms of [primary and secondary] education, in accordance with the law.

(2) Any Romanian national and any national of a European Union State or Switzerland may register and be taught in all forms of education in the Romanian language, a minority language or a foreign language, irrespective of their mother tongue or of the language they were taught in previously."

Article 46

"(1) In [primary and secondary] education, where teaching is done in a minority language, all subjects shall be studied in that language, with the exception of the subject of Romanian language and literature.

(2) The subject of Romanian language and literature shall be taught, throughout [primary and secondary] education, in accordance with the school curriculum and from textbooks specifically designed for the relevant national minority.

(3) By way of exception, in schools where teaching is done in a minority language, the subject of Romanian language and literature may be taught from textbooks used in schools where teaching is done in the Romanian language, at the request of parents, the organisation representing the national minority elected into Parliament or, if the respective national minority is not represented in Parliament, at the request of the parliamentary group representing national minorities.

(4) Exams in the subject of Romanian language and literature shall be based on a special school curriculum.

(5) In [primary and secondary education], evaluation assessments and exams for pupils enrolled in schools where teaching is done in a minority language shall be based on the requirements of the national curriculum.

...

(12) In [primary and secondary] education, pupils may sit the entrance and final exams in the language in which they were taught the relevant subjects, in accordance with the law."

12. The content and organisation of the baccalaureate are regulated as follows:

Article 77

"(1) Secondary school graduates shall receive a diploma and record of [their] grades, as part of their educational portfolio, attesting to the fact that [they] finished their secondary school studies and may ... take the baccalaureate exam.

(2) Pupils who passed their [final school year] shall sit the national baccalaureate exam.

(3) Secondary school graduates who sit and pass the national baccalaureate exam shall receive a baccalaureate diploma, which gives them access to university education, in accordance with the law.

(4) The national baccalaureate exam consists of the following exams:

- Exam A: an assessment of oral communication skills in the Romanian language;

- Exam B: an assessment of oral communication skills in the mother tongue, for pupils whose high school education was in a minority language;

- Exam C: an assessment of oral communication skills in two foreign languages studied at high school ...;

- Exam D: a digital [computer] skills assessment ...;

- Exam E: a written assessment of competences obtained throughout high school, as follows:

(a) a written exam in Romanian language and literature – a standard exam for pupils in all branches, profiles and specialisations;

(b) a written exam in the [maternal] language and literature – a standard exam for pupils in all branches, profiles and specialisations whose high school education was in a minority language;

(c) written exams in two subjects ...

(5) The content of the exam curriculum is set by the Ministry of Education ... and publicly announced to pupils at the beginning of the first year of secondary school, in accordance with the law. The timetable, methodology and organisation of the baccalaureate exam are set by the Ministry of Education ... and are publicly announced for each year group at the beginning of the last year of secondary school.

..."

Article 78

"1. [Secondary] school graduates shall be considered to have passed the national baccalaureate exam if all the following conditions are met:

(a) [they] sat exams A, B, C and D provided for by Article 77 § 4;

(b) [they] sat written exams E provided for by Article 77 § 4 and obtained at least grade 5 in each;

(c) [they] obtained at least 6 as the average grade, calculated to two decimal points, in exams E.

2. School graduates who pass the baccalaureate exam shall receive a baccalaureate diploma.

3. School graduates who pass exams A, B, C and D provided for by Article 77 § 4 shall receive certificates attesting to their level of language and digital skills respectively. These certificates are issued irrespective of whether they have passed exams E provided for by Article 77 § 4.

4. If a pupil does not pass the national baccalaureate exam, the grades obtained in assessments A, B, C and D ... and the results obtained in written exams E, if grade 5 or higher, shall be recognised in the next [exam] session, upon request.

5. Two national baccalaureate exam sessions shall be organised per school year.

...

6. Pupils may sit the baccalaureate exam twice free of charge. Any subsequent resits shall be subject to the payment of a fee set by the Ministry of Education ...

7. Assessments A, B, C and D provided for by Article 77 § 4 shall ... take place in each school during the school year, in the second semester...

8. Written exams E in the national baccalaureate exam, provided for by Article 77 § 4, shall take place at the end of the school year, in the presence of a committee set up by the school inspectorate."

B. Discrimination under domestic law

13. Discrimination is prohibited by Article 16 of the Constitution, and is defined in Article 2 § 1 of the Anti-discrimination Ordinance (Government Ordinance no. 137/2000 on preventing and punishing all forms of discrimination). In addition, Article 11 of the Ordinance provides as follows:

"(1) Under the ordinance herein, denying a person or group of persons access to the State-owned or private education system of any kind, degree or level, on account of their belonging to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, age, gender or sexual orientation, shall constitute a contravention.

(2) The provisions of the paragraph above shall apply at all stages and levels of education, including admission or enrolment in education institutions and the assessment and examination of students' knowledge.

(3) Under the ordinance herein, requiring a declaration to prove that a person or group belongs to an ethnic group as a condition of access to education in their mother

tongue shall constitute a contravention. The exception to this rule is the situation where candidates apply in the secondary and higher education system for places allocated specifically for a certain minority, in which case they shall prove that they belong to this minority by means of a document issued by a legally established organisation [representing] the relevant minority.

(4) The provisions of paragraphs (1), (2) and (3) shall not be interpreted as a restriction of the right of an education institution to refuse the application of a person whose knowledge and/or prior results do not meet the required admission standards of that institution, as long as the refusal is not determined by [his or her] belonging to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of his or her beliefs, age, gender or sexual orientation.

...

(6) Under the ordinance herein, any restrictions based on belonging to a race, nationality, ethnic group, religion, social category or disadvantaged group in the establishment and accreditation of education institutions set up in accordance with the legal framework in force shall constitute a contravention."

14. On 3 July 2008 the Constitutional Court adopted four decisions (nos. 818, 819, 820, and 821) declaring Articles 1, 2 and 27 § 1 of the Anti‑discrimination Ordinance unconstitutional in so far as they could be interpreted as granting the domestic courts the power to repeal laws which they found to be discriminatory. The decisions were adopted following an examination of constitutional complaints lodged by the Ministry of Justice in four sets of proceedings in which the domestic courts had declared various legal provisions concerning salary adjustments discriminatory. The decisions were published in the Official Gazette on 16 July 2008. In all four decisions, the Constitutional Court held:

"Interpreting the provisions of the [Anti-discrimination Ordinance] so as to allow the courts to have power to repeal legal provisions and replace them with new provisions or existing provisions from other laws is clearly unconstitutional, as it breaches the principle of the separation of powers enshrined in Article 1 § 4 of the Constitution, as well as Article 61 § 1, which states that Parliament is the only legislative body in the country.

...

Accordingly, the Constitutional Court ... rules that the provisions of Articles 1, 2 § 3, and 27 § 1 of Government Ordinance no. 137/2000 on preventing and punishing all forms of discrimination are unconstitutional, in so far as they can be interpreted as allowing the courts to revoke or refuse to apply [laws] on the grounds that they are discriminatory and replace them with provisions created on the basis of case-law or provisions of other laws not considered by the legislature when adopting the provisions [considered discriminatory]."

C. Administrative Proceedings Act (Law no. 554/2004)

15. The relevant parts of the Administrative Proceedings Act read as follows:

Article 1: Who can apply to court

"(1) Anyone who considers that their rights or legitimate interests were breached by a public authority by an administrative act or failure to respond to a request within the statutory time-limit, may apply to court for annulment of that act, acknowledgement of the right or legitimate interest at stake and compensation for the damage sustained. The legitimate interest may be either private or public."

Article 2: Meaning of terms

"1. In accordance with the present law, the following words and phrases have the meaning set out below: ...

(c) administrative act: unilateral act, either individual or normative, issued by a public authority, in the exercise of its public power, with a view to organising the application of a law or concrete application of a law, and which gives rise to, modifies or extinguishes legal relations;

..."

Article 8: Subject of the legal action

"1. Anyone who considers that their rights or legitimate interests were breached by a unilateral administrative act, and who is unsatisfied with the response received to their preliminary request [*plângere prealabilă*] or who has received no response within the time-limit specified in Article 2 § 1 (h), may lodge an action with the court, seeking partial or total annulment of that act, compensation for the damage sustained, and, if applicable, non-pecuniary damages ..."

D. Order no. 4799 of 31 August 2010 of the Ministry of Education concerning the organisation and administration of the baccalaureate

16. Ministerial Order no. 4799 regulates the baccalaureate exam procedure. The relevant provisions read as follows:

Article 43

"1. Subjects for the written exams shall be set by the National Assessment and Examination Centre in accordance with the following criteria:

(a) [they] shall comply with the school curricula and the baccalaureate programme approved and published by the [Ministry of Education] ..."

Article 47

"3. The National Assessment and Examination Centre shall ensure translation of the subjects into the languages of national minorities."

II. CONSTITUTIONAL COURT DECISIONS

A. Decision no. 2/2011

17. In decision no. 2/2011, issued on 23 February 2011, the Constitutional Court examined a challenge to the constitutionality of the NEA made by a group of parliamentarians. Several provisions were called into question, including Article 46 § 2 providing for the right to education of national minorities (see paragraph 11 above). The Constitutional Court dismissed all objections.

The relevant parts of the Constitutional Court's decision read as follows:

> "... the Court observes that Article 6 of the Constitution guarantees the right to identity of people belonging to national minorities; the constitutional provision expressly provides that 'the State recognises and guarantees the right of persons belonging to national minorities to preserve, develop, and express their ethnic, cultural, linguistic and religious identity'. The method of implementation of this right is specified in paragraph 2 of the same constitutional provision, which requires that adequate measures be taken to this end. The State's positive obligation is inferred from the phrase: 'protection measures taken by the State' which must respect 'the principles of equality and non-discrimination in relation to other Romanian nationals'.
>
> ...
>
> Numerous international instruments provide for the right to education ... of persons belonging to national minorities ...
>
> Consequently, positive measures may be necessary to protect the identity of a minority and the rights of members of that group to enjoy and develop their own culture and language, and practice their religion ...
>
> These international instruments refer to the specific situation of persons belonging to national minorities, which requires the State to treat them differently ...
>
> The [NEA] has implemented and developed these obligations so as to allow and guarantee the continuous development of the cultural identity of persons belonging to national minorities ...
>
> The legislature has chosen to make specific provisions concerning [primary and secondary] education for persons belonging to national minorities.
>
> ...
>
> The fact that the law provides for a special school curriculum for learning the Romanian language designed for members of a national minority signifies that the specific situation of these persons has been taken into account, notably the fact that they have a different mother tongue than Romanian. In other words, the different situation in which members of a national minority find themselves evidently calls for different treatment by law, in order to ensure effective equality and access to quality education for all. Consequently, the legislature must take this fact into account and adapt the requirements to learn Romanian language and literature to the specific situation of persons belonging to national minorities. Last but not least, the authorities have an obligation to ensure that a sufficient number of hours are provided for the proper study of Romanian language and literature."

B. Decision no. 670/2015

18. Z.I.A., the father of an ethnic Hungarian student, complained that Ministerial Order no. 5610/2012 setting the timetable for the baccalaureate exams discriminated against pupils belonging to a national minority who had to sit two additional exams in the same time period as their Romanian peers.

19. In decision no. 148/2014, issued on 5 March 2014, the National Council for Combatting Discrimination ("the NCCD") found that that situation did not constitute discrimination. It accepted that pupils taught in their mother tongue and not Romanian had to make additional efforts during their final exams. It considered, however, that these efforts were rewarded by the fact that they obtained a certificate of language proficiency which was not awarded to Romanian pupils. Moreover, it reiterated that being taught in a language other than Romanian was a choice and not a right for students. This choice involved additional efforts on the part of the State and the students themselves, and both parties had to accept this choice.

20. In the operative part of its decision, the NCCD recommended that the authorities:

> "... set a timetable [for the baccalaureate] taking into account the days necessary for rest, set a timetable allowing an equal amount of days between the [exams] in the baccalaureate, for instance by scheduling the [exams] in the mother tongue – oral and written – at the end of the baccalaureate exam period, in so far as possible."

21. Z.I.A. lodged an action with the Bucharest County Court complaining of discrimination against ethnic Hungarian pupils and seeking annulment of the decision issued by the NCCD on 5 March 2014. In his action, he requested that the matter of discrimination be referred to the Constitutional Court.

22. Following a referral by the Bucharest Court of Appeal, the Constitutional Court examined the compatibility with the non-discrimination clause of the NEA. In his complaint, Z.I.A. argued that during the same period of time allocated to all students for the final exams, ethnic Hungarians had to sit more exams than their Romanian peers. This, in his view, created a difference in treatment amounting to discrimination. He also suggested that the solution for eliminating discrimination would be to have pupils sit exams in only one of the two languages, namely their mother tongue.

23. In decision no. 670/2015, issued on 20 October 2015, the Constitutional Court dismissed the complaint. It reiterated that the Constitution guaranteed the right of the persons belonging to a national minority to preserve their collective identity through the use of their mother tongue. This right however, was related to the obligation to integrate into society in general, by learning the official language. Consequently, the Constitutional Court dismissed the argument that there was no objective and

reasonable justification for requiring students belonging to ethnic minorities to sit the Romanian language exams.

24. The Constitutional Court further held that the fact that students belonging to ethnic minorities had to sit more exams in the same time period was not a question of constitutionality. It reiterated that it was for the legislature to set the timetable for the final exams.

25. Consequently, Z.I.A.'s initial action was dismissed by the Bucharest Court of Appeal on 24 November 2014. In a final decision of 7 March 2017 the High Court of Cassation and Justice declared his appeal on points of law null and void, on the grounds that he had failed to state the reasons for his appeal.

III. COUNCIL OF EUROPE MATERIALS

A. Framework Convention for the Protection of National Minorities

26. The Framework Convention for the Protection of National Minorities, adopted by the Council of Europe in 1995, entered into force in respect of the respondent State on 1 February 1998. The relevant parts read as follows:

> "The member States of the Council of Europe and the other States, signatories to the present framework Convention,
>
> ...
>
> Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity;
>
> ..."

Article 5

> "1. The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.
>
> 2. Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.
>
> ..."

Article 10

> "1. The Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing.

...”

Article 12

“1. The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.

2. In this context the Parties shall *inter alia* provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.

3. The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.

...”

Article 14

“1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.

2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.

3. Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.”

B. European Charter for Regional or Minority Languages

27. The European Charter for Regional or Minority Languages, adopted by the Council of Europe in 1992, entered into force in respect of the respondent State on 1 May 2008. The relevant provisions read as follows:

“Preamble

The member States of the Council of Europe signatory hereto,

...

Considering that the right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights, and according to the spirit of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms;

...

Stressing the value of interculturalism and multilingualism and considering that the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them;

Realising that the protection and promotion of regional or minority languages in the different countries and regions of Europe represent an important contribution to the

building of a Europe based on the principles of democracy and cultural diversity within the framework of national sovereignty and territorial integrity;

Taking into consideration the specific conditions and historical traditions in the different regions of the European States,

..."

Article 1 – Definitions

"For the purposes of this Charter:

a 'regional or minority languages' means languages that are:

i traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and

ii different from the official language(s) of that State;

it does not include either dialects of the official language(s) of the State or the languages of migrants;"

THE LAW

I. PRELIMINARY REMARKS

28. The Court notes from the outset that the applicants complained about the manner in which the baccalaureate was organised. The necessity and benefits of learning Romanian was not called into question by them (see paragraph 71 below). It was likewise reaffirmed by the Constitutional Court (see paragraph 23 above). In this connection, the Court also stresses that the Council of Europe instruments relevant to the protection of national minorities, notably the Framework Convention for the Protection of National Minorities (see paragraph 26 above) and the European Charter for Regional or Minority Languages (see paragraph 27 above), expressly recognise that the protection and encouragement of minority languages should not be to the detriment of official languages and the need to learn them.

Consequently, the importance for national minorities to study the official language of the State was not called into question in the present applications.

II. JOINDER OF THE APPLICATIONS

29. Having regard to the similar subject matter of the applications, the Court finds it appropriate to order their joinder (Rule 42 § 1 of the Rules of Court).

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

30. The applicants complained that they had been discriminated against because of the manner in which the baccalaureate was organised, as in the same short time period they had had to take two additional exams in the baccalaureate compared to their Romanian peers. Moreover, the exams they had had to sit in Romanian language and literature had been very difficult for them. This situation imposed a more significant burden on Hungarian pupils than on their Romanian peers. The applicants claim that as a consequence, they had failed their baccalaureate. They relied on Article 1 of Protocol No. 12 to the Convention, which 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."

A. Admissibility

1. The Court's jurisdiction ratione materiae

31. At the outset, the Court reiterates that as the question of applicability is an issue of its jurisdiction *ratione materiae*, the general rule of dealing with applications should be respected and the relevant analysis should be carried out at the admissibility stage unless there is a particular reason to join this question to the merits (see *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018). No such particular reason exists in the present case and the issue of the applicability of Article 1 of Protocol No. 12 falls to be examined at the admissibility stage.

32. The Court reiterates that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 introduces a general prohibition of discrimination (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 53, ECHR 2009, and *Baralija v. Bosnia and Herzegovina*, no. 30100/18, § 45, 29 October 2019).

33. It is important to note that Article 1 of Protocol No. 12 extends the scope of protection not only to "any right set forth by law", as the text of paragraph 1 might suggest, but beyond that. This follows in particular from paragraph 2, which further provides that no one may be discriminated against by a public authority (see *Savez crkava "Riječ života" and Others v. Croatia*, no. 7798/08, § 104, 9 December 2010). According to the Explanatory Report on Article 1 of Protocol No. 12, the scope of protection

of that Article concerns four categories of cases, in particular where a person is discriminated against:

> "i. in the enjoyment of any right specifically granted to an individual under national law;
>
> ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
>
> iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
>
> iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)."

The Explanatory Report further clarifies that:

> "... it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1. It should also be borne in mind that the distinctions between the respective categories i-iv are not clear-cut and that domestic legal systems may have different approaches as to which case comes under which category."

34. Therefore, in order to determine whether Article 1 of Protocol No. 12 is applicable, the Court must establish whether the applicants' complaints fall within one of the four categories mentioned in the Explanatory Report (see *Savez crkava "Riječ života" and Others*, cited above, § 105).

35. In this connection, the Court notes that all pupils are granted by law the option to be taught in their mother tongue and that the authorities are expected to take measures to facilitate it (see paragraph 11 above). Consequently, the applicants may claim that they had been discriminated in the enjoyment of a right specifically granted to an individual under national law.

36. It follows that Article 1 of Protocol No. 12 applies to the facts of the present case.

2. Non-exhaustion of domestic remedies

(a) The parties' submissions

(i) The Government

37. The Government pointed out that the applicants had not brought their grievances to the attention of the domestic authorities. They could have lodged an administrative complaint against the ministerial orders setting the timetable for the baccalaureate exams. A complaint under the Administrative Proceedings Act (see paragraph 15 above), would have allowed the domestic courts to examine the timetable and, if found in

violation of the claimants' fundamental rights, annul the ministerial order in question.

38. Moreover, the applicants could have also lodged a complaint with the NCCD similar to that lodged by Z.I.A. (see paragraphs 18-20 above).

(ii) The applicants

39. The applicants pointed out that the Government had not produced any evidence to show that the remedies suggested would be able to provide them with redress. They reiterated that the NCCD had found that the situation complained of did not constitute discrimination, thus proving its ineffectiveness in the matter (see paragraph 20 above).

40. They further reiterated that their complaint concerned not only the time to rest between exams, but also the difficulty of the exams in Romanian language and literature, which had drastically reduced their chances of applying for university.

41. They argued that the only way Hungarian students could have similar rest and preparation time as Romanian pupils was by setting a longer exam period and possibly altering the sequence of the exams. However, as the structure and sequence of the final exams were laid down in the NEA, they had no domestic remedy at their disposal to complain about it.

42. Lastly, the applicants argued that the ministerial orders setting the exam timetable were published about ten months before the actual exams. In their view, this was insufficient time to obtain a final ruling in a complaint lodged under the Administrative Proceedings Act (see paragraph 15 above).

(b) The Court's assessment

(i) General principles

43. On the requirement to exhaust domestic remedies, the Court refers to the well-established principles of its case-law (as reiterated notably in *Gherghina v. Romania* (dec.) [GC], no. 42219/07, §§ 83-89, 9 July 2015, and *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

44. In particular, the Court reiterates that the obligation to exhaust domestic remedies requires applicants to make normal use of remedies which are available and sufficient in respect of their Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Gherghina*, cited above, § 85, with further references).

45. Nevertheless, there is no obligation to have recourse to remedies which are inadequate or ineffective. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously

futile is not a valid reason for failing to pursue it (ibid., § 86, with further references).

46. The Court has, however, also frequently stressed the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (ibid., § 87, with further references).

47. The Court also reiterates that as regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. The availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case-law (ibid., § 88, and *Molla Sali v. Greece* [GC], no. 20452/14, § 89, 19 December 2018).

(ii) Application of those principles to the facts of the case

48. Turning to the facts of the present case, the Court notes that Government suggested two possible remedies: a complaint under the Administrative Proceedings Act and an action before the NCCD (see paragraphs 37 and 38 above). The Court will examine in turn the effectiveness of each of those remedies.

(1) Complaint with the administrative courts

49. The Court notes at the outset that the Government did not provide any examples of domestic case-law demonstrating that an administrative complaint would be both effective and available in practice (see paragraph 47 above; see also, *mutatis mutandis*, *Romeo Castaño v. Belgium*, no. 8351/17, § 57, 9 July 2019, and *Butrin v. Russia*, no. 16179/14, § 43, 22 March 2016). Moreover, the Court cannot find, in the material submitted before it, any indication of the prospects of success of this remedy. It cannot assess in the abstract how the domestic courts would deal with an action brought by the applicants against the ministerial order (see paragraphs 15 and 42 above). For instance, the Court cannot speculate about the applicants' victim status under domestic law at the moment it was published, that is, before they graduated and qualified to take the baccalaureate (see Article 77 § 1 of the NEA, cited in paragraph 12 above).

50. The Court finds no justification for the complete absence of domestic case-law from the Government's submissions (contrast *Gherghina*, cited above, § 100). In this connection, it notes that the remedy suggested by the Government is provided for by the Administrative Proceedings Act, which constitutes the *lex generalis* for any action against an administrative act when such an action is permitted by law (see paragraph 15 above). Even assuming that the ministerial orders setting the baccalaureate exam timetable have never been challenged in the past, the Government should have provided the Court with relevant domestic

decisions concerning actions brought against other such ministerial orders, issued in other fields. It is therefore inconceivable that the action has been rarely used in the past (ibid.), and the Government have not argued that either. In failing to submit relevant case-law, the Government failed to prove that the administrative complaint constituted in practice an effective remedy.

(2) Complaint with the NCCD

51. As to a complaint before the NCCD (see paragraph 38 above), the Court notes that in a similar action brought against Ministerial Order no. 5610/2012 (see paragraph 18 above) the NCCD decided that the situation of Hungarian pupils sitting their baccalaureate exams did not constitute discrimination (see paragraph 19 above). As the applicants' situation is identical to that already examined by the NCCD in the above action, the Court considers that, in the concrete circumstances of the present case, the prospects of success are so low as to render the remedy futile (see the case-law referred to in paragraph 45 above).

52. Lastly on this point, and in the absence of any information provided by the Government, the Court cannot speculate as to whether the domestic courts would entertain a complaint of discrimination by the applicants against the ministerial orders. It reiterates that the Constitutional Court instructed the domestic authorities to set the timetable for the baccalaureate exams by law (see paragraph 24 above). At the same time, it also effectively forbade the domestic courts from repealing laws which they found to be discriminatory (see paragraph 14 above).

(3) Conclusion

53. In view of the foregoing, the Court considers that the applicants did not have at their disposal an effective domestic remedy. Consequently, the Government's objection of failure to exhaust domestic remedies should be dismissed.

3. Six-month rule

(a) The parties' submissions

(i) The Government

54. The Government argued that the applicants should have lodged their applications with the Court within six months of the date the Ministry of Education had adopted the relevant order setting the timetable for the relevant school year's baccalaureate exams (see Appendix II below). These orders were adopted each school year and published both on the Ministry's website and in the Official Gazette.

55. In addition, the Government argued that Ms Ádám and Mr Ambrus should have lodged their respective applications within six months of the date they had become aware for the first time of the final exam results, that is, 4 September 2014 and 10 July 2017 respectively. However, they had both failed to comply with the requisite time-limit.

(ii) The applicants

56. The applicants argued that they had become directly affected by the measures complained of each time they had obtained the results of their baccalaureate. Consequently, they had all respected the six-month time-limit set by the Convention for lodging their applications.

(b) The Court's assessment

(i) General principles

57. The object of the six-month time-limit under Article 35 § 1 of the Convention is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see *Lekić v. Slovenia* [GC], no. 36480/07, § 64, 11 December 2018).

58. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 157, ECHR 2009).

(ii) Application of those principles to the facts of the case

59. Turning to the facts of the present case, the Court notes that the applicants sat the baccalaureate exam on several occasions, as permitted by domestic law (see Article 78 § 6 of the NEA, cited in paragraph 12 above). As the Court has established above that the applicants had no effective domestic remedy at their disposal to complain about the alleged violation of their rights (see paragraph 53 above), the six-month time-limit started running from the date they became aware of the effect of the measure complained of and the prejudice they had incurred because of it (see the case-law quoted in paragraph 58 above), that is, the date they received the results of their most recent baccalaureate.

60. In this regard, the Court notes that all six applicants observed the six-month requirement (see Appendix I below). In particular, Ms Ádám,

who sat the baccalaureate most recently in August and September 2017, lodged her application on 24 November 2017. Mr Petres, who sat the baccalaureate in June and July 2018, lodged his application on 15 October 2018. Mr Bakos, who sat the baccalaureate in June and July 2018, lodged his application on 18 October 2018. Mr Ambrus, who sat the baccalaureate most recently in August and September 2018, lodged his application on 19 October 2018. Mr Forika, who sat the baccalaureate most recently in August and September 2018, lodged his application on 8 November 2018. Mr Maxem, who sat the baccalaureate most recently in August and September 2018, lodged his application on 13 November 2018.

61. Consequently, the Court dismisses the Government's preliminary objection under this head.

4. Actio popularis

(a) The parties' submissions

(i) The Government

62. The Government contended that the applications with the Court represented an *actio popularis* in so far as the applicants had complained not only about their personal situation but also of "decades-long discrimination of all pupils not sitting their final exams in Romanian, that is, all national minorities living in Romania". Moreover, the applicants had not explained concretely what consequences they had personally endured because of the manner in which the baccalaureate was organised. They reiterated that the Court's role was not to examine in the abstract the compatibility of domestic legislation with the Convention.

(ii) The applicants

63. The applicants refuted the Government's allegations. They pointed out that they had all sat the baccalaureate on several occasions and had suffered the consequences of the measures taken by the authorities in this regard. They had not raised the issue in general terms, although it was true that many Hungarian pupils were discriminated against in the context of the final high school exams.

(b) The Court's assessment

(i) General principles

64. The Court has consistently held in its case-law that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention. Accordingly, in order to be able to lodge an application in accordance with Article 34, an

individual must be able to show that he was "directly affected" by the measure complained of. This is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, with further references).

(ii) Application of those principles to the facts of the present case

65. The Court notes that the applicants did not pass the baccalaureate. Their grievances concerned the consequences they had personally suffered because they had failed it (see paragraph 30 above). As to the assertions highlighted by the Government as constituting an *actio popularis*, they are no more than supporting arguments on the merits of the alleged violation and shall be treated by the Court as such.

66. In addition, the mere fact that others might also be potentially affected by the measures complained of is not an element that would qualify the current applications as being an *actio popularis*.

67. Accordingly, the Court dismisses this preliminary objection.

5. Other grounds for inadmissibility

68. Lastly, the Court notes that the case is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicants

69. At the outset, the applicants reiterated that they had not only complained about the time allowed for rest and preparation, but also about the fact that the exams they had had to sit in Romanian language and literature had been very difficult.

70. Relying on *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, §§ 175-181, ECHR 2007-IV), the applicants reiterated that the State had a duty to protect the security, identity and lifestyle of ethnic minorities, not only for the purpose of safeguarding the interests of the minorities themselves, but to preserve a cultural diversity of value to the whole community. In this connection they argued that the manner in which the final exams were organised had a far greater prejudicial effect on the Hungarian community than on the majority of Romanian pupils.

71. They did not question the usefulness of learning the Romanian language or of having their knowledge of it tested in the final exams. They argued that in the final exams, all students should pass a literature exam in

their mother tongue. Testing their level of Romanian on an equal footing with Romanian native speakers was, in their view, a clear case of discrimination. On this point, they argued that the Romanian language and literature exams were difficult, even for native speakers. They sometimes involved complicated and outdated language which had nothing to do with the practical use of the Romanian language and their real needs. Moreover, they were living in a region where Romanian was not spoken in daily life, which meant that they had no possibility of practising their language skills and preparing for the exams. They contended that as non-native speakers, their level would never be as high in Romanian as that of their native speaker peers. In their view, this difference should be acknowledged both in the baccalaureate and the university entry exams.

72. The applicants further refuted the Government's argument (see paragraph 80 below) that since it had been their choice to be taught in Hungarian, they had to accept the consequences of that choice. In their view, advising Hungarian native speakers to be taught in Romanian in order to alleviate the burden of their baccalaureate amounted to an agenda of forced assimilation. They reiterated that the possibility to be taught in Hungarian was essential for maintaining their Hungarian ethnic identity.

73. The applicants argued that the authorities' plans to adapt the curriculum for learning Romanian, albeit laudable, did not benefit them in any way, as it only concerned pupils currently in middle school (see paragraph 78 below).

74. The applicants also rejected the Government's assertion that the Hungarian language certificate was an added benefit for Hungarian students (see paragraph 81 below). They pointed out that they had failed the baccalaureate, and had thus been denied any possibility of continuing their studies. Moreover, the Government had failed to provide any statistical evidence to demonstrate that pupils belonging to a national minority would benefit in any way from passing the exam in Romanian literature.

75. Lastly, they pointed out that their situation should be examined in comparison with that of pupils who had taken the baccalaureate in the same years as them.

(b) The Government

76. The Government pointed out that not all pupils belonging to the Hungarian minority chose to study in Hungarian. The choice of language of education belonged to pupils, and there was no obligation for an ethnic Hungarian to enrol in a school where teaching was done in Hungarian.

77. The Government contended that the treatment that the applicants complained of did not amount to discrimination. It was provided for by law, in so far as the number of exams, timetable and administration of the final exams were set by the NEA (see paragraph 12 above). The implementation of these provisions was done by the Ministry of Education, whose orders

could be contested before the administrative courts (see paragraph 37 above).

78. The NEA also dictated that Romanian language and literature be taught throughout the school curriculum, following school programmes and textbooks specific for each minority. Moreover, in 2016 the Ministry of Education and representatives of the Hungarian community had started developing Romanian language and literature textbooks designed specifically for Hungarian pupils. The exercise had started with middle grade classes and would continue at secondary level.

79. Moreover, the treatment in question pursued a legitimate aim, that of ensuring equal opportunities for all nationals, be they ethnic Romanians or members of ethnic minorities. Eliminating any of these language exams would cause irreparable damage to students in terms of social integration.

80. As to the justification for this difference, the Government pointed out at the outset that the additional exams taken by the applicants had been the consequence of their own choice to receive education in their mother tongue. They had freely chosen to be taught in Hungarian. This choice had not been imposed on them by the authorities, nor had it been a consequence of their ethnicity. The possibility to receive education in Hungarian was offered by the State by virtue of the principle of non-discrimination on grounds of ethnicity and in order to help those belonging to an ethnic minority to preserve their cultural identity and language. The Government pointed out that the choice for pupils to receive education in their mother tongue did not come without consequences: it imposed on the authorities a corresponding obligation to assess the language skills acquired by pupils.

81. The fact that the applicants had sat additional exams in their mother tongue had brought extra benefits for them. They had received language certificates, which opened up more career possibilities than those available to pupils who did not obtain such certificates.

2. The Court's assessment

(a) General principles

82. Notwithstanding the difference in scope between Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention, the meaning of the notion of "discrimination" in Article 1 of Protocol No. 12 was intended to be identical to that of Article 14 (see paragraphs 18 and 19 of the Explanatory Report to Protocol No. 12). The Court therefore sees no reason to depart from the settled interpretation of "discrimination", in applying the same term under Article 1 of Protocol No. 12 (see *Sejdić and Finci*, cited above, § 55).

83. It can 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.

84. In this vein, the Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations. In other words, the requirement to demonstrate an analogous position does not require that the comparator groups be identical. For the purposes of Article 14, a difference in treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see *Molla Sali v. Greece* ([GC], no. 20452/14, §§ 133 and 135, 19 December 2018).

85. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017).

86. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even if not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a *de facto* situation (see *D.H. and Others v. the Czech Republic*, cited above, § 175, with further references).

87. Thus, the Contracting States must refrain from subjecting persons or groups to different treatment where, under the above principles, such treatment would qualify as discriminatory. However, this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. The prohibition deriving from Article 14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different (see *J.D. and A. v. the United Kingdom*, nos. 32949/17 and 34614/17, § 84, 24 October 2019 with further references, notably *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV). In this context, relevance is measured in relation to what is at stake, whereas a certain threshold is required in order for the Court to find that the difference in circumstances is significant. For this threshold to be reached, a measure must produce a particularly prejudicial impact on certain persons as a result of a protected ground, attaching to their situation and in light of the ground of discrimination invoked (see *J.D. and A. v. the United Kingdom*, cited above, § 85).

88. For instance, the Court considered that applicants who had been in particular need of protection for reasons directly related to their status – severe disability and gender respectively – and who, if left without

protection, had risked exceptional hardship or their personal safety, had been in a significantly different situation with respect to the measure complained of (the reduction of the Housing Benefit – see *J.D. and A. v. the United Kingdom*, cited above, § 92). Furthermore, an applicant who had been convicted for refusing to wear military uniform was in a significantly different situation to someone convicted of a serious crime because, unlike the latter, the applicant had been convicted for exercising his freedom of religion and not of an offence involving dishonesty or moral turpitude (see *Thlimmenos*, cited above, §§ 44 and 47). The Court also found that, with regard to eligibility for a residence permit for family reasons, a homosexual couple was in a significantly different situation to heterosexual partners who had decided not to regularise their situation (see *Taddeucci and McCall v. Italy*, no. 51362/09, § 85, 30 June 2016).

89. On the other hand, the Court was not convinced that, because of its doctrine concerning worship in its temples, an applicant religious organisation had been in a significantly different position from other churches for the purposes of tax exemptions (see *The Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, no. 7552/09, § 31, 4 March 2014). Likewise, the Court considered that biological children and foster children were in a relevantly similar objective situation for the purpose of the manner in which a survivor's pension had been divided between them (see *Ruszkowska v. Poland*, no. 6717/08, § 55, 1 July 2014).

90. Moreover, the Court reiterates that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. In that regard, the Court has stated that national authorities by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 91, ECHR 2001-I, and *Muñoz Díaz v. Spain*, no. 49151/07, § 48-49, ECHR 2009). The same is true with regard to the necessity to treat groups differently in order to correct "factual inequalities between them" (see *Stummer v. Austria* [GC], no. 37452/02, § 88, ECHR 2011, and *Guberina v. Croatia*, no. 23682/13, § 72, 22 March 2016).

(b) Application of those principles to the facts of the present case

91. The Court notes that the basis of the applicants' complaint is that pupils belonging to national minorities who received secondary education in their mother tongue were severely impacted by the content of the school curriculum and the timetable of the baccalaureate. The importance for members of a national minority to study the official language of the State and the corresponding need to assess their command of it in the baccalaureate is not called into question (see paragraphs 28 and 71 above).

92. Turning to the facts of the case under examination, the Court observes that the applicants, who are all ethnic Hungarians who attended school in their mother tongue, had to sit the same exams as their Romanian peers. In addition, they also had to sit, in the same time period, two additional exams, to test their knowledge of Hungarian language and literature, in order to pass the baccalaureate. It can be inferred that the scheduling of the baccalaureate placed the applicants at a disadvantage. They were thus treated in the same manner as Romanian pupils sitting it, even though their situation was different. It remains to be determined whether the difference was sufficiently significant to reach the threshold implied by Article 1 of Protocol No. 12 (see paragraphs 87 to 89 above) and whether the State had a positive obligation under that provision to take specific measures to alleviate the applicants' additional burden.

93. At the outset, it needs to be borne in mind that the setting and planning of the school curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era (see, *mutatis mutandis*, and in the context of Article 2 of Protocol No. 1, *Folgerø and Others v. Norway* [GC], no. 15472/02, § 84 (g), ECHR 2007-III). Therefore, the Court considers that it is not its role to replace the State in deciding what subjects will be tested in the baccalaureate or the order and pace of the exams. It reiterates that a certain margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate the local needs and conditions (see the case-law cited in paragraph 90 above and also, *mutatis mutandis*, *Efstratiou v. Greece*, 18 December 1996, § 29, *Reports of Judgments and Decisions* 1996-VI).

94. The Court notes that there is an emerging international consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (see, in particular, the Council of Europe's Framework Convention for the Protection of National Minorities, cited in paragraph 26 above), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community (see *Chapman*, § 93; *D.H. and Others v. the Czech Republic*, § 181; and *Muñoz Díaz*, § 60, judgments cited above). Moreover, the rights of persons belonging to national minorities to use their mother tongue and receive education in this language, as well as the State's corresponding obligation to protect and encourage the development of minority languages, are among the principles safeguarded by the international instruments on the matter, to which the respondent State is a party (see paragraphs 26 and 27 above).

95. Domestic law, in particular the NEA, provides that people belonging to a national minority are entitled to receive education in their mother tongue (see paragraphs 10 and 17 above), in compliance with the State's international obligations. In addition, Article 46 of the NEA (cited in paragraph 11 above) sets out several measures to be taken by the State in the field of education in order to accommodate the needs of pupils belonging to national minorities, notably a different curriculum for studying Romanian language and literature, and different exams in that subject in the baccalaureate for pupils studying in their mother tongue.

96. It is noteworthy that in 2016 the authorities started taking steps towards bringing the school curriculum for national minorities in line with the legislative requirements by developing, together with representatives of the Hungarian community, Romanian language and literature textbooks designed specifically for Hungarian pupils (see paragraphs 73 and 78 above).

97. Moreover, in its decision of 5 March 2014 the NCCD suggested possible avenues to be explored for the reorganisation of the baccalaureate exams in order to accommodate the specific needs of pupils studying in their mother tongue (see paragraph 20 above).

98. That said, the Court must reiterate that its task is not to assess and review in abstract the State's policy in this field, but to consider the consequences that this policy had for the applicants, in the specific circumstances of their situation, that of pupils who had to pass two additional baccalaureate exams because they received secondary education in their mother tongue

99. In this context, the Court accepts that, in line with the domestic legislative requirements and international obligations outlined in paragraphs 94 and 95 above, the aim of this policy was to create equal opportunities for all pupils to obtain education in their mother tongue (see paragraph 79 above). It was thus designed to provide education in the applicants' mother tongue while at the same time ensuring sufficient command and knowledge of Romanian language and literature. The manner in which the authorities chose to test that knowledge and the level of difficulty of the exam – which the applicants submitted had been high not only for them but also for their Romanian peers (see paragraph 71 above) – falls undoubtedly within the scope of the margin of appreciation of each State.

100. Although it took the authorities some time to start implementing the measures set out in the NEA (see paragraphs 9 and 78 above), and they may have not yet fully explored all the possibilities provided for by law and pointed out by the NCCD, the Court cannot but take note of the progress already made. Moreover, while the delays in the implementation of some measures may have had a certain impact on the applicants' situation, bearing in mind the margin of appreciation in the matter, these setbacks

alone cannot allow the Court to find, and the applicants did not provide any evidence in this respect, that the content of the curriculum in itself imposed an excessive burden on them for the purposes of Article 1 of Protocol No. 12 to the Convention.

101. The Court will now turn to the matter of the sequence of the baccalaureate exams. It notes at the outset that irrespective of the arrangements made by the State, the fact remains that pupils in the applicants' situation have to pass two more exams than pupils studying in Romanian. That is however the direct and inevitable consequence of the applicants' conscious and voluntary choice to study in a different language and the State offering them such an opportunity. In this connection, the Court observes that the law recognises a right but does not impose an obligation on pupils belonging to a national minority to study in their mother tongue (see paragraphs 11 and 76 above).

102. Moreover, the timetable for the baccalaureate exams is set by order of the Ministry of Education at the beginning of each school year and does not seem to differ significantly from one year to another (see paragraphs 7 and 12 above, and Appendix II below). The pupils concerned thus have sufficient time to prepare both academically and mentally for the exams.

103. In addition, the Court is not persuaded that the schedule of the baccalaureate, viewed as a whole, imposed an excessive burden on the applicants. In fact, the Court cannot but note that in the reference years when the applicants sat the baccalaureate, the period allotted for the exams (six for pupils studying in Romanian and eight for pupils studying in a different language) varied. It was nine days in September 2017; eleven days in 2014, September 2015 and September 2018; twenty-four days in June 2017; and twenty-five days in June 2015 (see Appendix III below). Moreover, the timetable for the June to July 2018 exam session created less pressure for the applicants sitting the baccalaureate at that time, as the oral exams were scheduled to take place four months before the written ones (see Appendix III below). It cannot be inferred that the applicants had on average significantly less time to rest than their Romanian peers.

104. The same conclusion remains valid even when the alleged imbalance is regarded exclusively from the standpoint of the exams that the applicants had to take over consecutive days, unlike their Romanian peers, who had a day of rest in between. Given the particular circumstances, the Court is not convinced that the inconvenience suffered by the applicants was so significant as to reach the threshold of Article 1 of Protocol No. 12 to the Convention.

105. On this point, the Court also notes that the statistics provided by the Government indicate, for the period 2013 to 2018, similar success rates in the final baccalaureate exams for all pupils (see paragraph 8 above).

106. The Court is satisfied that there is nothing in the case to allow it to conclude that the applicants were deprived in practice of a real choice to

receive education in their mother tongue or that the State had an agenda of forced assimilation, as argued by the applicants (see paragraph 72 above).

107. The foregoing considerations are sufficient to enable the Court to conclude that the consequences for the applicants of the choice of language of study and the authorities' organisation of the education in a minority language and baccalaureate exams, albeit relevant to the alleged difference in treatment they experienced *vis-à-vis* their Romanian peers, did not place them in a different situation that was sufficiently significant for the purposes of Article 1 of Protocol No. 12 to the Convention. Therefore, there is no need to assess the justification provided by the State in this regard.

108. There has accordingly been no violation of Article 1 of Protocol No. 12 to the Convention.

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, by a majority, the applications admissible;

3. *Holds*, by five votes to two, that there has been no violation of Article 1 of Protocol No. 12 to the Convention.

Andrea Tamietti
Registrar

Jon Fridrik Kjølbro
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint partly dissenting opinion of Judges Kjølbro, Ranzoni and Schukking;
(b) statement of dissent of Judges Motoc and Paczolay.

JFK
ANT

Appendix I

List of applications

No.	Application no.	Case name	Lodged on	Applicant Year of Birth Place of Residence	Final exam sessions attended (month/year)
1.	81114/17	Ádám v. Romania	24/11/2017	Katalin-Ibolya ÁDÁM 1995 Gheorgheni	08-09/2014 06-07/2015 08-09/2015 08-09/2017
2.	49716/18	Petres v. Romania	15/10/2018	Krisztián PETRES 1999 Mădăraș	06-07/2018
3.	50913/18	Bakos v. Romania	18/10/2018	Ernõ BAKOS 1999 Gheorgheni	06-07/2018
4.	52370/18	Ambrus v. Romania	19/10/2018	Norbert AMBRUS 1998 Lăzarea	06-07/2017 08-09/2017 06-07/2018 08-09/2018
5.	54444/18	Forika v. Romania	08/11/2018	Csaba-Lajos FORIKA 1999 Suseni	06-07/2018 08-09/2018
6.	54475/18	Maxem v. Romania	13/11/2018	Csaba MAXEM 1998 Sândominic	06-07/2018 08-09/2018

Appendix II

Relevant Orders of the Ministry of Education setting the timetable for the baccalaureate exams

No. and date of the ministerial order	Date of exam sessions (month/year)	Date of final results
Order no. 4923 29/08/2013	08-09/2014	04/09/2014
Order no. 4430/2014, amended by Order no. 4265 of 23/06/2015	06-07/2015 08-09/2015	10/07/2015 04/09/2015
Order no. 5070 31/08/2016	06-07/2017 08-09/2017	10/07/2017 06/09/2017
Order no. 4792 31/08/2017	06-07/2018 08-09/2018	09/07/2018 06/09/2018

Appendix III

Dates of the relevant baccalaureate exams

Exam	**2014**	**2015** **June *and* *September***	**2017** **June *and* *September***	**2018** **June *and* *September***
Exam A: Romanian (oral)	18-19/08	8-10/06 *17-18/08*	6-7/06 *25, 28/08*	12-13/02 *24, 27/08*
Exam B: Hungarian (oral)	18-19/08	10-12/06 *17-18/08*	8-9/06 *28/08*	14-15/02 *28/08*
Exam C: Foreign languages (oral)	19-20/08	22-26/06 *18-19/08*	14-16/06 *30-31/08*	21-22/02 *30-31/08*
Exam D: Digital	21-22/08	15-19/06 *20-21/08*	9, 12-13/06 *29-30/08*	16, 19-20/02 *29-30/08*
Exam E(a): Romanian (written)	25/08	29/06 *24/08*	26/06 *21/08*	25/06 *20/08*
Exam E(b): Hungarian (written)	26/08	30/06 *25/08*	27/06 *22/08*	26/06 *21/08*
Exam E(c): Subject 1	27/08	01/07 *26/08*	28/06 *23/08*	27/06 *22/08*
Exam E(d): Subject 2	29/08	03/07 *28/08*	30/06 *24/08*	28/06 *23/08*

JOINT PARTLY DISSENTING OPINION OF JUDGES KJØLBRO, RANZONI AND SCHUKKING

1. While we agree with the finding of no violation of Article 1 of Protocol No. 12 of the Convention and the corresponding reasoning, in our view the applications should have been declared inadmissible, either for non-exhaustion of domestic remedies or for non-observance of the six-month rule.

2. As far as the exhaustion of domestic remedies is concerned, the Government argued that the applicants, first, could have lodged an administrative complaint under the Administrative Proceedings Act against the ministerial orders setting the timetable for the baccalaureate exams. Secondly, the applicants had at their disposal a complaint with the National Council for Combating Discrimination ("the NCCD").

3. It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights (see, among other authorities, *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 69, ECHR 2010, and *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014). If a complaint raised before the Court has not been put, either explicitly or in substance, to the national courts, when it could have been raised in the exercise of a remedy available to the applicant, the national legal system has been denied the opportunity to address the Convention issue which the rule on exhaustion of domestic remedies is meant to give it (see, among other authorities, *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III, and *Nicklinson and Lamb v. the United Kingdom* (dec.), nos. 2478/15 and 1787/15, § 90, 23 June 2015).

4. It should be emphasised at the outset that the applicants did not lodge any complaint at the national level and did not use any remedy at all. They rather directly lodged their applications with the Strasbourg Court.

5. As regards the administrative complaint, the most relevant parts of the Administrative Proceedings Act are set out in paragraph 14 of the judgment as follows:

Article 1: Who can apply to court

"(1) Anyone who considers that their rights or legitimate interests were breached by a public authority by an administrative act or failure to respond to a request within the statutory time-limit, may apply to court for annulment of that act, acknowledgement of the right or legitimate interest at stake and compensation for the damage sustained. The legitimate interest may be either private or public."

Article 2: Meaning of terms

"1. In accordance with the present law, the following words and phrases have the meaning set out below: ...

> (c) administrative act: unilateral act, either individual or normative, issued by a public authority, in the exercise of its public power, with a view to organising the application of a law or concrete application of a law, and which gives rise to, modifies or extinguishes legal relations; ..."

6. The Ministry of Education sets the timetable for the baccalaureate at the beginning of each school year (see paragraph 6). It seems to us that the fact of a Ministry setting such a timetable is an administrative act within the meaning of Article 2 of the Administrative Proceedings Act, against which an administrative complaint can be lodged. This is a very common administrative law procedure, available in most, if not all, member States, which should in principle be exhausted. In a legal system in which fundamental rights are protected by the Constitution and the law, it is incumbent on the aggrieved individual to test the extent of that protection and allow the domestic courts to apply those rights and, where appropriate, develop them in exercising their power of interpretation (see, *mutatis mutandis*, *A, B and C v. Ireland* [GC], no. 25579/05, § 142, ECHR 2010, and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 101, 9 July 2015).

7. We are not convinced by the majority's argument that the Government should have provided domestic decisions concerning actions brought against other ministerial orders, issued in other fields (see paragraph 49). We fail to see which inferences could be drawn from such decisions, which are not at all germane to the present issue.

8. Insofar as the applicants argued (see paragraph 40) that the structure and sequence of the final exams was strictly regulated by the National Education Act ("the NEA"), we observe that, in particular, the sequence of the exams was not regulated by that act. On the contrary, according to Article 77 (5) of the NEA the content of the exam curriculum as well as the timetable, methodology and organisation of the baccalaureate exam were set by the Ministry of Education and publicly announced for each year group at the beginning of the last year of secondary school (see paragraph 11).

9. Accordingly, we do not see any convincing argument why the applicants should have been exempted from lodging an administrative complaint against the ministerial order.

10. As far as the second remedy referred to by the Government is concerned, that is to say the complaint with the NCCD, the majority held that the applicants' situation was identical to that already examined by the NCCD in a similar action against another ministerial order, and therefore the prospects of success were so low as to render the remedy futile (see paragraph 50).

11. In this respect, we would confine ourselves to noting that the applicant in that other case did suggest that the solution for eliminating discrimination would be to have pupils sit exams in only one of the two languages, namely their mother tongue (see paragraph 21), which means that his arguments were not identical to those of the applicants in the present

case. Moreover, the High Court of Cassation and Justice declared his appeal null and void because he had not stated the reasons for his appeal (see paragraph 24). In other words, he had failed to exhaust all the available remedies. Consequently, we cannot support the majority's conclusion that the prospects of success for the applicants in the present case were so low as to render that remedy futile.

12. Even if both of those remedies were to be considered ineffective and therefore did not need to be exhausted, the question arises whether the applicants lodged their complaints within the six-month time-limit pursuant to Article 35 § 1 of the Convention. The Government argued that the applicants should have lodged their applications with the Court within six months of the date the Ministry of Education had adopted the relevant order setting the timetable for the relevant school year's baccalaureate exams (see paragraph 53).

13. We are in agreement with the Government's point of view. In order to complain about the discriminatory manner in which the baccalaureate is organised, an applicant should do so at the time the timetable has become available and the possible consequence, the alleged discrimination, is foreseeable, and not a year later, when he or she has actually failed the exam. To argue otherwise would mean that the State only acts in a discriminatory manner against a section of all Hungarian students, namely those who failed their exams but not against those who passed them.

14. The majority did not engage at all with such arguments, but rather, without giving specific reasons, took as the starting point the date when the applicants received the results of their most recent baccalaureate (see paragraph 58). In particular, they did not explain why the applicants did not realise the effect of the impugned measure until after their failure in the most recent exams, even though that effect had been perfectly foreseeable from the outset. It is neither clear nor comprehensible why the date the prejudice actually occurred should be decisive, if such consequences had been foreseeable and, therefore, the applicants had already become aware of the alleged violation of their Convention rights at an earlier stage. In this context, we would like to point out that the applicants' discrimination complaint concerns not the fact that they failed their exams but the alleged additional burden they had to endure as students having chosen to study in their mother tongue.

15. The majority simply referred to "the case-law quoted in paragraph 57" which makes reference to one single judgment, namely *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 157, ECHR 2009. However, in the said paragraph the Court had only made the following general statement concerning the issue in question: "Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to

the applicant." No explanation whatsoever was given by the majority as to why, in the circumstances of the present case, they applied the last criterion, the only one in favour of the applicants. Moreover, our view that the six-month period ran from the moment the applicant became aware of the possible consequences of the ministerial order for them, that is to say the date of the publication of the respective order itself, seems to be supported by the decision referred to in paragraph 157 of the *Varnava* judgment, namely *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002.

16. For all these reasons, whether we rely on the non-exhaustion principle or the six-month rule, the present applications should in any event have been rejected as inadmissible.

STATEMENT OF DISSENT BY JUDGES MOTOC AND PACZOLAY

We are unable to follow the finding of the majority.