IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 57325/00

D.H and Others v. Czech Republic

WRITTEN SUBMISSIONS OF INTERIGHTS AND HUMAN RIGHTS WATCH

A. INTRODUCTION

1. These written comments are submitted by INTERIGHTS (The International Centre for the Legal Protection of Human Rights) and Human Rights Watch pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.[1] These written comments supplement, and should be read in conjunction with, the interveners original comments to the Second Chamber dated 11 June 2004 (Original Comments, annexed).

2. This case concerns, *inter alia*, racial discrimination within the context of education for Roma children. It raises critical issues concerning the interpretation of Article 14 of the European Convention on Human Rights ("the Convention") which fundamentally affect the extent to which the Convention provides meaningful protection against discrimination and the extent to which all persons and groups within the jurisdiction of the Convention are able to enjoy and exercise the substantive rights guaranteed therein. While this Court has well developed case law with respect to direct discrimination, it has not had the opportunity to develop as comprehensive an approach to indirect discrimination. For this reason these comments are limited to approaches to indirect discrimination, which is also pleaded in this application. As noted in our Original Comments, it is rarely possible to neatly categorise direct and indirect discrimination, and the Canadian Supreme Court has indeed rejected this distinction. However, regardless of the terminology or methodology adopted, it

[1] See also letter from the Deputy-Registrar of the Grand Chamber dated 26 September 2006

is critical that Article 14 of the Convention effectively protects against the substance of indirect discrimination. These comments focus on approaches to indirect discrimination and its proof before other international human rights bodies.

3. Indirect discrimination reflects systemic inequalities in society – echoing accepted societal stereotypes and commonly held prejudices. Because it is structural – in that a particular neutral policy or practice has a disproportionately prejudicial effect on a particular minority group – it is particularly difficult to prove. This makes its discriminatory impact no less real on its victims.

4. In the two years since our Original Comments, this Court has elaborated its understanding of discrimination and methods of proof. In cases such as *Timishev v. Russia*,[2] *Zarb Adami v. Malta*[3] and *Hoogendijk v. the Netherlands*[4] this Court has strengthened the protection provided to vulnerable groups under Article 14. Despite these positive developments, it is respectfully submitted that aspects of Chamber's reasoning in *D.H and Others v. Czech Republic*[5] are out of step with positive developments in this Court's approach, and are inconsistent with established principles of equality law internationally.

5. Three aspects of the Chamber judgment are particularly problematic in terms of indirect discrimination. First, the emphasis placed by the Chamber on the *reasons for* – that is the intention behind – the segregation of Roma children.[6] Second, the failure of the Chamber to attach appropriate significance to statistical data as evidence of indirect discrimination.[7] Third, the Court's rejection of consideration of the broader social context in which Roma children have been segregated.[8] The Grand Chamber's consideration of this application provides a pivotal opportunity for this Court to revise the Chamber's approach, to consolidate a purposive interpretation of Article 14, and to bring this Court's jurisprudence on indirect discrimination in line with existing international standards.

---

[2] *Timishev v. Russia*, nos. 55762/00 and 55974/00, Judgment of 13 December 2005
[3] *Zarb Adami v. Malta,* no. 17209/02, Judgment of 20 June 2006
[4] *Hoogendijk v. the Netherlands,* no. 58641/00, Admissibility Decision of 6 January 2005
[5] *D.H and Others v. Czech Republic*, no. 57325/00, Judgment 7 February 2006
[6] *Ibid* at § 44
[7] *Ibid* at § 46
[8] *Ibid* at §§ 45-46

B. CONTOURS OF INDIRECT DISCRIMINATION

6. 'Indirect discrimination' occurs where an apparently neutral provision, criterion or practice places certain persons at a disadvantage compared with other persons. It is concerned with the impact that a policy or practice has on an individual or group.[9] The concept of indirect discrimination was first recognised by the Supreme Court in the USA in *Griggs v. Duke Power*[10] and has subsequently been widely incorporated by courts and legislatures internationally.[11] The parameters of indirect discrimination are outlined in our Original Comments at paragraphs 9-27.

7. Earlier this year, in *Zarb Adami v. Malta,*[12] this Court confirmed that discrimination is not always direct or explicit and that in certain cases a policy or general measure will have disproportionate, prejudicial effects on a group of people, even if it is not aimed or directed at a particular group and this may amount to indirect discrimination.[13]

8. Similarly the European Court of Justice ("ECJ") has recently confirmed that the principle of equal treatment prohibits not only overt discrimination but also all covert forms of discrimination.[14] The UN Committee on the Elimination of Racial Discrimination ("CERD Committee") last year defined indirect racial discrimination, as extending *"beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect*."[15] The UN Human Rights Committee has also endorsed this approach.[16]

---

[9] Original Comments at § 5
[10] 401 U.S. 424 (1971)
[11] Original Comments at § 9-10
[12] *Zarb Adami v. Malta*, *supra* n. 3, at § 72
[13] *Ibid* at § 80. See also: *Hugh Jordan v. United Kingdom*, no. 24746/95, Judgment of 4 May 2001, § 154; *Nachova and Others v. Bulgaria,* nos. 43577/98 and 43579/98, Judgment of 26 February 2004, § 167
[14] Case C147/03, *Commission v. Austria*, Judgment of 7 July 2005 at § 41; C-209/03, *Bidar* [2005] ECR I-0000, at § 51
[15] *L.R et al v. Slovakia*, Comm No. 31/2003, U.N Doc. CERD/C/66/D/31/2003 (2005) at § 10.4
[16] Human Rights Committee General Comment No. 18, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003) at § 2; CERD General Recommendation No. 19, (1995), U.N. Doc. A/50/18 at 140 at § 3 and CERD General Recommendation 14, (1994), U.N Doc. A/48/18 at 114 at § 2

Intention to Discriminate

9. Critically – and in line with the approach of regional and national courts[17] – this Court has accepted that intent is not required in cases of indirect discrimination.[18] This needs to be distinguished from discrimination cases where intent is already an element of the underlying offence, such as in cases involving violent acts motivated by racial prejudice.[19]

10. In the case of indirect discrimination, it is sufficient that the practice or policy results in a disproportionate adverse effect on a particular group. It is not necessary for the applicant to prove that the impugned measure was designed or applied with any discriminatory intent.[20]

C. PROVING DISCRIMINATION

11. This Court has already acknowledged the complexity of proving discrimination cases.[21] Due to its subtle character, these difficulties of evidence are compounded in cases of indirect discrimination. For this reason, courts and legislatures are increasingly accommodating in the evidence they allow of indirect discrimination. It is respectfully submitted that this Court should similarly confirm a flexible approach, for victims to be able to secure effective protection. This does not, however, detract from the necessity of the Court having to scrutinise and weigh up the relevance of all evidence.

Burden of Proof

12. This Court has accepted that once an applicant has shown that there has been a difference of treatment, it is then for the respondent Government to show that the difference in treatment can be justified.[22] This Court has also accepted that if the onus does not

[17] Courts have recognised that a lot of indirect discrimination is inadvertent and may be based on cultural or societal assumptions and may even have been adopted in good faith. See Original Comments at § 9 including authorities cited there. See also CERD General Recommendation No. 19 in which it notes that racial segregation might arise as an "unintended by-product" of individual action; A/50/18. § 3. This has also been confirmed by the ECJ in Case 170/84, *Bilka-Kaufhaus*, [1986] ECR 1607.

[18] *Hugh Jordan*, *supra* n. 13, at § 154; *Nachova*, *supra* n. 13, at § 167

[19] *Nachova*, *supra* n. 13, § 157

[20] *Perera v. Civil Service Commission and Department of Customs and Excise* [1982] ICR 350 (EAT), affirmed [1983] ICR 428 (CA) (paragraph 17)

[21] *Nachova*, *supra* n. 13, at § 161; *Hoogendijk*, *supra* n. 4 at pg. 21-22

[22] *Timishev*, *supra* n. 2, at § 57

shift to the government at this stage of the indirect discrimination enquiry, it will "in practice be extremely difficult for applicants to prove indirect discrimination."[23] Internationally, it is widely accepted that the burden of proof shifts once a *prima facie* case of discrimination is established.

13. As noted in our Original Comments, pursuant to recent European Community Directives,[24] ("EC Directives") all EU Member States have, or are in the process of adopting legislation to shift the burden of proof in discrimination cases.[25] This principle reflects the well established practice of the ECJ,[26] the United Nations treaty bodies[27] and many national courts.[28]

14. The burden of proof shifts when a *prima facie* case of discrimination is established. In cases of indirect discrimination, where the applicant has demonstrated that significantly more people of a particular category are placed at a disadvantage by a given policy or practice, a presumption of discrimination arises. At this point, the burden then shifts to the State to reject the basis for the *prima facie* case, or to provide a justification for it.[29] It is therefore critical that this Court engages with the type of evidence that might be adduced in order to shift the burden of proof.

The Role of Statistics

15. The Chamber in this matter held – in line with *Hugh Jordan* – that "statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory."[30] With respect, it is submitted that this position is at variance with international and comparative practice.

---

[23] *Hoogendijk*, *supra* n. 4, at pg. 22

[24] Race Directive 2000/43/2000 of 29 June 2000; Framework Directive 2000/78/2000 of 27 November 2000; Revised Directive 76/207/EEC

[25] See Original Comments, § 29

[26] *Bilka-Kaufhaus*, *supra* n. 17, at § 31; Case C-33/89 *Kowalska* [1990] ECR I-2591, § 16, and C-184/89 *Nimz* [1991] ECR I-297, § 15; Case 109/88 *Danfoss* [1989] ECR 3199, § 16

[27] The Human Rights Committee has stated that "substantive reliable documentation" will shift the burden of proof to the Respondent State; *Chedi Ben Ahmed Karoui v. Sweden*, Case No. 185/2001 of 25 May 2002, § 10. See also Conclusions of the Committee of Economic, Social and Cultural Rights on Luxembourg, U.N.Doc. E/C.12/1/Add.86 (2003) § 10, and Poland, U.N.Doc. E/C.12/1/Add.82 (2002) § 7; Conclusions of CERD, United Kingdom of Great Britain and Northern Ireland, U.N.Doc. CERD/C/63/CO/11 (2003) § 4

[28] Original Comments at § 29

[29] EC Directive 97/80 of 15 December 1997, Article 4(1)

[30] *D.H*, *supra* n. 5, at § 46; *Hugh Jordan*, *supra* n. 13, at § 154

16. Internationally, statistics are the key method of proving indirect discrimination. Where policies and practices are neutral on their face, statistics provide the best means of identifying the varying impact of measures on different segments of society. The effective protection against indirect discrimination requires that statistical data is admissible as strong evidence of discrimination, and that in some cases they are sufficient to establish a *prima facie* case.

17. As noted in our Original Comments, the EC Directives construct indirect discrimination in such a way as to relax requirements of applicants to demonstrate comparative disparity. At the same time, these Directives leave open the possibility that cases of indirect discrimination be proved "*by any means* including on the basis of statistical evidence."[31] Statistics are accepted as proof of discrimination by the UN treaty bodies,[32] and before the ECJ.[33] In many European countries such as Germany,[34] Switzerland,[35] the United Kingdom[36] and the Netherlands[37] statistics are a standard means of proving indirect discrimination. This reflects the reality that sometimes statistics are the only way in which indirect discrimination might be proven.

18. In Zarb *Adami* this Court relied on statistics which evidenced that the civic obligation of jury service was predominantly on males in Malta and that this constituted *prima facie* proof of a difference in treatment between men and women.[38] Similarly, in the *Hoogendijk*[39] admissibility decision this Court relied on statistical results of research carried out by the Social Insurance Council, which evidenced that the neutral law in place, *in fact*, had a disproportionate impact on married women, as opposed to men, in relation to disability benefits.[40]

19. It is submitted that the approach to statistics by this Court in these cases is appropriate and consistent with established practice in

---

[31] Race Directive, Preambular § 15 (emphasis added)

[32] The Committee on the Elimination of Discrimination against Women has emphasised that statistics are "absolutely necessary" in understanding discrimination in General Recommendation 9, *Statistical Data Concerning the Situation of Women*.

[33] *Bilka-Kaufhaus*, *supra* n. 17, at § 7

[34] BVerfGE 97, 35 (44)

[35] BGE 124 II 529 (cons. 5h.bb)

[36] Original Comments, § 31

[37] *Ibid*

[38] *Zarb Adami*, *supra* n. 3, at §§ 77-78

[39] *Hoogendijk*, *supra* n. 4

[40] *Ibid*, at pg. 20-21

other jurisdictions. As noted in our Original Comments, courts do not accept statistical evidence unhesitatingly, and must assess the credibility, strength and relevance of statistics to the case at hand, requiring that they be tied to the applicant's allegations in concrete ways.[41] The ECJ requires that courts take into account "whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether in general, they appear to be significant."[42]

20. Where the credibility of statistics has been positively assessed, their significance needs to be given legal effect, most often through the shifting of the burden of proof. The weight given to statistics will depend upon the extent of disadvantage that they reveal. Where they reveal an overwhelming disparity, the statistics alone should amount to a *prima facie* case capable of shifting the burden of proof.[43] While yet to find a violation on this basis, the Inter-American Court of Human Rights has accepted in principle that statistics alone might shift the burden of proof, provided that the statistical evidence is "sufficient."[44]

21. It is respectfully submitted that the correct principle to apply is that statistical evidence is sufficient, without more being required for an applicant to establish a *prima facie* case of indirect discrimination requiring objective justification on the part of the respondent State. However, if this Court maintains the position that statistics alone are not sufficient to disclose a discriminatory practice, it is submitted that consideration of statistics in conjunction with credible evidence of the context of widespread societal discrimination should be sufficient to shift the burden of proof.

<u>Consideration of the Context of Discrimination</u>

22. The Chamber in this matter states that it is the Court's role to examine the individual applications before it, not to "assess the

---

[41] The ECJ has stated that statistics should be "relevant and sufficient" – see Original Comments at § 32 including the references contained there.

[42] Case 127/92, *Enderby* [1993] ECR 673 at § 17

[43] For example in Ireland, *Irish Aviation Authority v. Irish Municipal, Public and Civil Trade Union*, DEP/99. In the US statistics are sufficient to establish a *prima facie* case, as per the cases of *Teamsters v. United States* 431 US 324 at 339; *Hazelwood School District v. United States* 433 U.S. 299 (1977) at 307-308.

[44] *Celestine Case,* Annual Report of the Inter-American Commission on Human Rights 1989-90, Resolution No. 23/89 (Case 10.031), United States, 28 September 1989; *William Andrews v. United States,* Case 11.139, Report Nº 57/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 570 (1997)

overall social context."[45] The interveners agree that it is the Court's role to adjudicate on violations against particular individuals – as expounded in an application to this Court – rather than to pronounce, for example, on the general situation of discrimination against Roma in the Czech Republic. However, when assessing the impact of apparently neutral measures on a particular minority, it is submitted that it is appropriate for this Court to be mindful of the broader context in which indirectly discriminatory practices and policies are adopted and are allowed to operate.

23. As outlined in our Original Comments, in evaluating disproportionate effect, it is common for courts to consider evidence of "a general picture" of disadvantage, or "common knowledge" of discrimination to establish a *prima facie* case.[46] In Switzerland, for example, courts are encouraged to look beyond the facts of the case at hand and to take account of knowledge of facts from general life.[47] In some cases this common knowledge evidence will be so persuasive that it alone will be sufficient to establish a *prima facie* case, in the absence of any statistical support at all.[48]

24. In the recent case of *Yean & Bosico,* the Inter-American Court of Human Rights took into account the broader context of racism against Haitians in the Dominican Republic in finding a violation of Haitian children's equal right to education.[49] The Court found that the discriminatory treatment imposed by the State had to be situated within the broader context of the vulnerable situation of the Haitian population in the Dominican Republic.[50] In this regard, it considered conclusions of widespread discrimination against Haitians by both the UN Committee on the Rights of the Child, and the UN Human Rights Commission's Independent Expert on the question of human rights and extreme poverty.[51] Similarly, the CERD Committee has recently held that in assessing indirect

---

[45] *D.H*, *supra* n. 5, at § 45

[46] See Original Submissions at §§ 33-34

[47] Botschaft zum Bundesgesetz über die Gleichstellung von Mann und Frau (Gleichstellungsgesetz) und zum Bundesbeschluss über die Genehmigung einer Änderung der Verordnung über die Zuweisung der Ämter an die Departemente und der Dienste an die Bundeskanzlei vom 24. February 1993, BBl 1993 I 1248 subs., at 1295

[48] For example Swiss cases in which the sex-specific nature of certain jobs has been accepted by courts without statistical elaboration: BGE 124 II 409, cons. 8b; BGE 124 II 436, cons. 6b; BGE 126 II 217, cons. 4b. This is also the approach in Australia. See Original Comments at §§ 34-35

[49] *Case of the Yean & Bosico children v. Dominican Republic*, Judgment of I/A Court for Human Rights, 8 September 2005

[50] *Ibid* at §§ 168 and 170

[51] *Ibid*

discrimination, full account should be taken of the particular context of the case, as by definition indirect discrimination can only be demonstrated circumstantially.[52]

25. While courts are not called upon to adjudicate on a general situation of inequality, the context of discrimination provides valuable evidence for courts in assessing the disproportionate impact experienced by particular applicants. Where the social context reveals systemic discrimination, it is respectfully submitted that this Court should comprehensively scrutinise evidence of patterns of disadvantage and commonly understood discrimination in considering shifting the burden of proof.

D. CONCLUSION

26. This case provides a critical opportunity for this Court to consolidate an approach to indirect discrimination that is elaborated in such a way so as to ensure that people are practically protected from the harmful effects of indirect discrimination by Article 14. In order to do so, this Court must acknowledge the inherent difficulties in proving indirect discrimination, and confirm a flexible approach to its proof. Many national and international bodies, and most significantly the European Community law, are moving towards a more liberal method of defining and proving indirect discrimination. This flexibility does not mean that claims of discrimination can be lightly brought or that courts do not retain a duty to carefully scrutinise evidence. It simply means that the possibilities for effective legal protection are extended with respect to this type of discrimination.

27. In the past this Court has indicated its adherence to "the principle of free assessment of all evidence."[53] Mindful of this, it is hoped that this Court will further develop its position on the use of statistical evidence. While not requiring the presentation of statistical evidence to prove indirect discrimination, it is respectfully submitted that this Court should leave open this possibility. Where credible statistics are overwhelming in the disproportionate effect they reveal, it is submitted that such statistical evidence alone should be capable of establishing a *prima facie* case of discrimination and shifting the burden of proof to the

[52] *L.R et al v. Slovakia*, *supra* n. 15, at § 10.4
[53] *Nachova*, *supra* n. 13, at § 166

respondent. In addition, the Court might consider that social context alongside any other evidential sources may be an indication of *prima facie* discrimination.

28. It has long been the position of this Court that the European Convention must provide practical and effective protection for human rights.[54] The broad language of Article 14 has allowed it to evolve over time, to respond to changes in the understanding of discrimination and to provide increasing protection against it. It is respectfully submitted that this Court should establish a flexible framework for protection under Article 14, that allows those most marginalised in society to use the law meaningfully to combat indirect discrimination and to ensure that they are able to access, exercise and enjoy the fundamental rights set out in the Convention to the same extent as others within its jurisdiction.

Andrea Coomber and Nikki Naylor
Equality Programme
INTERIGHTS

Michael Bochenek
Counsel, Children's Rights
Human Rights Watch

Aisling Reidy
Senior Legal Advisor
Human Rights Watch

[54] *Airey v. Ireland*, Judgment of 9 October 1979, Series A, No. 32 (197901980) at § 24. This principle has been confirmed in a number of cases since *Airey*, such as in the case of *Podkolzina v. Lativa*, Appl. No. 46726/99, Judgment of 9 April 2002 at § 35