

Ending Racial Segregation in Schools: The Promise of *D.H.*

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SHORTLY after the ERRC was born, a considered decision was taken to focus scarce legal resources on two issues repeatedly cited by Romani communities as among their greatest concerns: Violence and discrimination in access to education. Over the past decade, ERRC litigation has yielded a progressive expansion of normative protection against police and racially-motivated violence. Discrimination in the field of education has proven more resistant to legal challenge. But last November's judgment of the Grand Chamber of the European Court of Human Rights in the case of *D.H. and Others v. the Czech Republic (D.H.)* marked a breakthrough.

This issue of *Roma Rights* outlines the immediate follow-up advocacy on the implementation of the judgment and examines the future impact of *D.H.*, including:

1. The NGO Communication to the Council of Europe's Committee on Ministers on implementation of the judgment;
2. An address by Louise Arbour, former UN High Commissioner for Human Rights, on the importance the judgment;
3. An analysis of the evolution of the Czech government's response to the issue of segregated schooling of Romani children by Katerina Hruha;
4. An assessment of the judgment's potential impact on anti-discrimination law and litigation in Czech Republic by attorney David Strupek;
5. An exploration of the short-term impact of the judgment on strategic litigation in Europe by attorney Lilla Farkas; and

6. A discussion of the social and political impact of the judgment by Larry Olomofoe.

Access to quality education is fundamental to any community's economic and political advancement. Its pervasive denial has been a continuing obstacle for Roma. Barriers to education take different forms. In some countries, many Roma do not attend school at all, because they lack proof of identity or any means of transport from isolated ghettos. In other countries, Roma are segregated into Roma only schools of lower quality because educational placement simply reproduces pre-existing patterns of residential segregation. Roma only classes in some schools reflect often arbitrary and erroneous assessments of language or behaviour. Finally, in a number of countries, a majority of Romani children are streamed for psychological tests, deemed unfit for "normal" education and shunted into "special" remedial schools and classes for the "mentally disabled" or "mentally retarded." Throughout Europe, Romani children attend school less often than others, remain for shorter periods and are regularly provided education of substandard quality.

In 1998, the ERRC decided to focus substantial resources on a test case aimed at securing a judicial finding that the state of Roma education in at least one country amounted to unlawful racial discrimination. Such a case – successful or not in the courtroom – would help galvanise the debate around Roma education by focusing attention on a particularly well-documented example, and by introducing both a new concept for understanding the source of the problem – discrimination – and

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a new tool to address it – litigation. Moreover, insofar as the discrimination at issue concerned the unequal application of facially neutral laws and regulations, education was emblematic of the kind of discrimination Roma suffered more broadly. Thus, an education case could potentially enhance legal protection against discrimination in all fields of public life.

The Czech Republic was chosen as a primary focal point for litigation for several reasons. As one of the most enlightened and wealthiest of the Central and Eastern Europe countries, it was a representative symbol for the post-Communist region. A finding that even the much praised Czech school system breached the law would send a powerful signal that Roma education had to change. The pseudo-scientific basis for student assignments to Czech schools offered a target vulnerable to legal challenge. And finally, several local Romani and other NGO actors in the Czech Republic had already been discussing issues related to Roma education for some time. Hence, any litigation effort would take place in a relatively fertile environment. The city of Ostrava, the third largest, was attractive in view of its large Romani population and the number of community organisations present.

The first problem was, in many ways, fundamental to any effort to challenge discriminatory practices: How to obtain data to document the claim. Like many other European governments, the Czech Republic professed ignorance of the number of Roma in special schools. Indeed, some officials suggested that the mere act of counting Romani and non-Romani children would breach Czech data protection law. Given the historic abuses of personal data to which Roma, and other groups, had been subjected at various points during the 20th century, many Czech Romani leaders were sceptical of statistics.

To address these concerns, a process of dialogue was initiated with Romani communities, lawyers, and human rights NGOs. It became clear that data would have to be independently collected, in a manner that did not compromise the privacy of particular individuals. Inquiries

were made to obtain statistics from the government. But it was only when local Romani representatives contacted schools in the Ostrava region that administrators and teachers at dozens of schools produced precise class lists, broken down by ethnic origin.

Several months of intensive research yielded comprehensive data that demonstrated an overwhelming practice of disproportionate assignment of Romani pupils to special schools. Although Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava, 56% of all pupils placed in special schools in Ostrava were Romani. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Romani pupils in Ostrava assigned to special schools was 50.3%. Overall, Romani children in Ostrava were more than 27 times as likely as non-Romani children to be sent to special school. These findings seemed to confirm the conclusion of the United Nations Committee on the Elimination of Racial Discrimination that Roma in the Czech Republic were subjected to “de facto racial segregation” in the field of education.²

In order to build a concrete case, the team sought out children in Ostrava special schools whose individual cases might serve as representative examples of the broader pattern. Lawyers and researchers met with hundreds of Romani children and their families. It was important that whoever went forward understood and fully accepted the unlikelihood of success, the possibility of retaliation and the long time before a final result would be known. The team endeavoured to ensure that claimants genuinely wanted – in a manner not inconsistent with their individual circumstances – to address the systemic problem. In the end, 18 plaintiffs went to court. All were Romani students assigned to special schools whose initial test results – and/or subsequent academic performance – raised questions about the propriety of their placement.

Having identified plaintiffs, the next step was to determine the appropriate legal forum. In the

² *United Nations Committee on the Elimination of Racial Discrimination. 1998. Concluding Observations: Czech Republic. UN Doc. CERD/C/304/Add.47 (30 March 1998).*

late 1990s, the Czech Republic had no law expressly prohibiting discrimination on grounds of racial or ethnic origin. In light of this clear legislative gap, the ERRC team considered filing an application directly with the European Court of Human Rights (ECtHR) on the grounds that was no domestic remedy to exhaust. Ultimately, it was considered more prudent – particularly given the unprecedented nature of the substantive claims – to offer the Czech courts an opportunity to address the discrimination at issue. Two procedural routes through the Czech legal system were chosen – administrative review and a challenge in the Constitutional Court; neither succeeded.

In early 2000, all 18 plaintiffs filed an application with the European Court in Strasbourg. The ECtHR application alleged violations of Articles 3 (prohibition against degrading treatment), 6 (right to a fair trial), and Article 2 of Protocol No. 1 (right to education) taken together with Article 14 (prohibition of discrimination). The submission contended that, as a result of their segregation in dead-end schools for the “mentally deficient,” the plaintiffs, like many other Romani children in Ostrava and throughout the Czech Republic, had suffered severe educational, psychological and emotional harm.³ Race neutral factors failed adequately to explain the gross racial disparity evident in the statistics. There existed a virtual consensus amongst government officials and independent

experts that many Roma assigned to special schools were not, in fact, mentally deficient. The evaluation mechanisms employed to assess intelligence were flawed and unreliable.⁴ In violation of government regulations, the Romani children plaintiffs assigned to special schools, like most other Romani children, had not been adequately monitored to ensure the continuing suitability of their placement.

Having demonstrated that the plaintiffs had suffered massive differential treatment, producing significant harm, without any objective justification, the submission asked the Court to declare the system of school placement discriminatory in practice and thus in breach of the Convention. And so it did.

In November 2007, the Grand Chamber of the Court found the Czech government in breach of its obligation not to discriminate on the basis of racial or ethnic origin in access to education.⁵ The Court found that the data gathered by the applicants, supplemented by the reports of numerous monitoring bodies and by government admissions, established a “strong presumption of indirect discrimination.”⁶ The Court found no objective justification for the discriminatory treatment. As to the Government’s suggestion that “the applicants were placed in special schools on account of their specific educational needs, essentially as a result of their low

³ *The range of harm included the following: (i) they had been subjected to a curriculum far inferior to that in basic schools; (ii) they had been effectively denied the opportunity of ever returning to basic school; (iii) they had been prohibited by law and practice from entrance to non-vocational secondary educational institutions, with attendant damage to their opportunities to secure adequate employment; (iv) they had been stigmatised as “stupid” or “retarded” with effects that will brand them for life, including diminished self-esteem and feelings of humiliation, alienation and lack of self-worth; (v) they had been forced to study in racially segregated classrooms and hence denied the benefits of a multicultural educational environment.*

⁴ *Many of the tests had been selected, and their results continued to be used, even though they had previously been shown to generate racially disproportionate effects. Few, if any, Roma were consulted in the selection or design of the most commonly used tests. None of the tests had ever been validated for the purpose of assessing Romani children in the Czech Republic. In administering tests to these and other Romani children, insufficient care had been taken to account for and overcome predictable cultural, linguistic and/or other obstacles which often negatively influence the validity of “intelligence” assessments. No guidelines effectively circumscribed individual discretion in the administration of tests and the interpretation of results, leaving the assessment process vulnerable to influence by racial prejudice, cultural insensitivity and other irrelevant factors.*

⁵ *D.H. and Others v. the Czech Republic, Application. No. 57325/00, judgment of 13 November 2007.*

⁶ *Ibid, para. 195.*

intellectual capacity,”⁷ the Court “consider[ed] that, at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Romani children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment.”⁸ Nor was purported parental consent a justification. The Court was “not satisfied that the parents of the Romani children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent.”⁹

In reaching these conclusions, the Court went out of its way to note that, though its decision is legally binding only on the Czech Republic, the problem is of European scope. It is thus all the more important that the ruling advanced non-discrimination jurisprudence under the European Convention on Human Rights in several ways. The *D.H.* judgment clarifies for the first time that the Article 14 prohibition against discrimination applies not only to specific acts, but to systemic practices; that racial segregation which disadvantages members of a particular racial or ethnic group amounts to discrimination in breach of the Convention; that Article 14 bars the “indirect discrimination” of a general policy or measure which, though couched in neutral terms, generates disproportionately prejudicial effects; that intent to discriminate is not an essential element of a claim of discrimination; that while they are not required, statistics can be used to

establish discrimination; and that, where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State to show that the difference in treatment is not discriminatory. In many respects, these normative developments bring Strasbourg jurisprudence in line with European Union standards as reflected in the EU Race Equality Directive and similar legislation.

The *D.H.* judgment constituted a major legal victory. But what of its impact on the ground?

For the 18 applicants, the decision came too late. Only one of the applicants was still in school at the time the Court issued its final judgment. The rest of the applicants had completed their education within the special school environment, without having pursued any form of higher education. The Court’s award of 4,000 EUR each in non-pecuniary damages seems, by any standard, insufficient.

With respect to the situation of other Romani children in the Czech Republic, it’s too soon to tell. Comparative experience with desegregation in other countries suggests decades – not months or years – may be needed to measure progress.¹⁰

The very pursuit of the *D.H.* litigation has already forced changes in Czech educational law. At the time the initial lawsuit was brought, Czech legislation prohibited graduates of special schools from qualifying for normal secondary education. In 2000, the government revoked this rule.¹¹ In addition, in 2004, while the application was pending before the

⁷ *Ibid*, para. 197.

⁸ *Ibid*, para. 201.

⁹ *Ibid*, para. 203.

¹⁰ In 1954, the US Supreme Court case of *Brown v. Board of Education* outlawed racial segregation in public schools. It was only in 1965, when the US Government threatened to freeze federal funding for state education systems, that school systems began to desegregate in earnest. See, Kluger, R. 2004. *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality*. Vintage, p. 759. Follow-up litigation was brought to challenge ongoing segregation in the 1970s; *Ibid*, p. 768. But evidence in recent years suggests that many school systems in the US are experiencing re-segregation. See, for example, UCLA Civil Rights Project. 2002. *Race in American Public Schools: Rapidly Resegregating School Districts*. Available online at: http://www.civilrightsproject.ucla.edu/research/k12_ed.php.

¹¹ See, “Summary of Facts on Special Schools” in *D.H. and Others v. the Czech Republic*, para. 17.

Strasbourg Court, the Czech parliament adopted legislation which abolished special schools in name and modified the system of special education. Notwithstanding the shortcomings of the new law,¹² it implicitly acknowledged that the practice of school assignment had to change and that “special schools” as previously constituted could not remain.

However, as of the publication of this issue of *Roma Rights*, the situation of Roma education in practice in the Czech Republic remains essentially the same. Most Roma continue to attend racially segregated schools or classes and receive inferior quality education. For this to change, Romani communities and their allies will have to make *D.H.* and equality of educational opportunity matters that cannot be ignored in schools, municipal governments and the corridors of power in Prague. International actors may still play a role, particularly as the Committee of Ministers of the Council of Europe must

supervise the government’s adoption of general measures in fulfilment of the judgment. And yet, the longer term impact of *D.H.* will depend primarily on the actions of civil society and government in the Czech Republic.

More generally, *D.H.* offers an opportunity for other courts and legal advocates to apply its expansive principles to the many other fields across Europe – from housing to employment to social benefits – where disadvantaged groups suffer discrimination. How and whether this happens will depend, in part, on the knowledge and receptivity of judges, the creativity and persistence of lawyers and NGOs, and the extent to which political actors – in national governments and the European Union – underscore the fundamental teaching of *D.H.* Discrimination and segregation are no longer policy options. Governments must act affirmatively to end these practices. European law demands nothing less.

¹² *The shortcomings of the law are outlined in Communication on General Measures Needed for the Implementation of D.H. and Others v. the Czech Republic (included in this journal from page 7).*