

Before and After the Ostrava Case: Lessons for Anti-Discrimination Law and Litigation in the Czech Republic

David Strupek¹

THE judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in the case *D.H. and Others v. the Czech Republic* triggered passionate discussions in the Czech Republic about its effects and consequences. Actually, the emotions – mostly negative – already arose with the launch of the case before domestic authorities in 1999. In fact, as regards general media, the case has never attracted as much attention as in its very beginning. The opponents of the lawsuit were pleased by the negative decision of the European Court's Chamber of the Second Section of February 2006, which did not provoke any extensive discussion, as the outcome of the case was considered rather obvious. The judgment of the Grand Chamber was an unexpected and surprising blow and the opponents as well as the supporters began to discuss again the eventual consequences of the decision on life in the Czech Republic.

However, the discussion was concerned mostly with aspects regarding the educational system. Are the conclusions of the judgment still applicable when the special schools have been abolished? Is the system still deficient and do we have to regard the judgment at all? Have all the defects not already been remedied? And, of course, there were a lot of comments by journalists and columnists in general media.

Surprisingly, no thorough legal analysis of the judgment by Czech legal academics and experts

has been presented yet. A short commentary was published in the magazine that presents the ECtHR's case law,² very interesting discussion by lawyers – both academics and practitioners – evolved the very day after the judgment was published on the specialised internet server *Jiné právo* ('Different Law'),³ but it was rather an informal exchange of first sight views than a deep analysis. But, of course, such an analysis may still be pending as a relatively short period of time has passed from the judgment so far.

This article is not supposed to be a legal analysis of the judgment either. My task is rather to contemplate what changes the conclusions of the ECtHR may bring to anti-discrimination doctrine and practice in the Czech Republic.

By coincidence, while I have been working on this article, another significant occurrence for the Czech anti-discrimination law has taken place: this April the Czech Parliament finally passed the Anti-Discrimination Act, implementing the EU directives on equality in a complex and unified manner.⁴ The law contains the definitions of all types of discrimination defined by the EU directives, including indirect discrimination, and introduces a special anti-discrimination lawsuit. This offers us an opportunity to add a colour to our prognoses and to consider the effects of the *D.H. and Others* judgment in light of new legislation. After all, one of the key arguments of the applicants in the *D.H. and Others* case, especially when appealing to the

¹ David Strupek is an advocate practising in Prague and has been a member of the Czech Bar since 1998. Mr Strupek played a key role in the case *D.H. and Others v. Czech Republic*.

² *Soudní judikatura – Přehled rozsudků Evropského soudu pro lidská práva 1/2008*, ASPI, a.s.

³ See, for example, *Ostravo, Ostravo...*, Available at: www.jinepravo.blogspot.com/2007/11/ostravo-ostravo.html.

⁴ Unfortunately, on 16 May Mr Václav Klaus, the President of the Czech Republic, vetoed the law. The Chamber of Deputies of the Czech Parliament was considering whether or not to outvote the President as of the end of October.

Grand Chamber, was that the ECtHR's concept of prohibition of discrimination should be closer to that found within EU law, including the case law of the European Court of Justice (ECJ). As we know now, the ECtHR satisfied this request and referred extensively to EU law, e.g. explicitly quoting the definition of indirect discrimination and the stipulation of the reversal of the burden of proof from European Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, as well as whole passages from ECJ judgments regarding indirect discrimination and use of statistical evidence.⁵ Let us therefore start with the issues of indirect discrimination and statistical evidence, as that is where the contribution of the judgment is most significant.

Indirect discrimination and statistical evidence

The case *D.H. and Others* was from its very beginning based on the theory of indirect discrimination.⁶ This does not mean that open racism and a direct intention of school directors or child psychologists had not played a role in the placement of Romani children into special schools. It obviously had, but it simply could not be proven. Similarly, we hardly could base the application on requesting the ECtHR to review the mental capacity of our applicants at the moment of placement – first, it is scientifically practically impossible to do so retroactively, and second, it is not the Court's task to reassess the factual issues. That is why we based the case solely on statistical figures

collected by the European Roma Rights Centre,⁷ supported by reports from various organisations and the State's own admissions.

The Constitutional Court of the Czech Republic as well as the Chamber of the Second Section of the ECtHR refused that concept. The Chamber admitted that discrimination cannot be ruled out if a policy or general measure has disproportionately prejudicial effects on a group of people, even if it is not specifically aimed or directed at that group. However, according to the Chamber, statistics are not by themselves sufficient to disclose a practice that could be classified as discriminatory.⁸ Thus, the Chamber regarded as significant for its conclusions whether the reason or even a criterion for the applicants' placement to the special schools had been their ethnic or racial origin.⁹

The Grand Chamber completely reversed this view. It reacted to new development in the ECtHR's case law and referring to the decision *Hoogendijk v. the Netherlands*¹⁰ and the judgment *Zarb Adami v. Malta*,¹¹ it stated that where an applicant is able to show, on the basis of reliable statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of members of one group than members of a comparative group, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination.¹² As regards the standard of statistical figures, the Grand Chamber admitted that the reliability of those submitted by the applicants

⁵ Paras. 81-91, *D.H. and Others v. the Czech Republic*. Grand Chamber judgment.

⁶ Of various definitions of indirect discrimination, let us quote the most frequently used definition from Article 2 of European Council Directive 2000/43/EC: "Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

⁷ Summarised in para 18 of the Grand Chamber judgment.

⁸ Para. 46 of the Chamber judgment.

⁹ Paras. 45 and 48 of the Chamber judgment.

¹⁰ Application no. 58461/00, decision of 6 January 2005.

¹¹ Application no. 17209/02, judgment of 20 June 2006.

¹² Para. 180 of the Grand Chamber judgment.

might be questioned, however, the Government had not succeeded to rebut them, especially by submitting their own. What is more, the figures submitted by the applicants had been supported by reports of various other organisations.¹³ Finally, the Grand Chamber concluded that the statistical figures themselves sufficed to establish a *prima facie* case of discrimination and the burden of proof therefore shifted to the Government.¹⁴

The most explosive conclusion is contained in the very end of the text of the Court's assessments. The Grand Chamber established that the relevant legislation as applied in practice at the time had had a disproportionately prejudicial effect on the whole Romani community. It therefore considered that the applicants, as members of that community, had necessarily suffered the same discriminatory treatment. Accordingly, the ECtHR judged that it did not need to examine the individual cases.¹⁵

Michal Bobek, a distinguished Czech legal theorist, assistant of the President of the Supreme Administrative Court and leading joint author of the most complex book on anti-discrimination law by Czech authors,¹⁶ called this conclusion in the abovementioned Internet discussion "a deadly cocktail of proof (because irrebuttable) for every government."¹⁷ It is questionable how the conclusion of the Grand Chamber should be read. Does it apply only in this specific case, or can it be generalised for every case of indirect discrimination based on statistical figures? Even

if the ECtHR refused to examine the individual cases, did the Government hypothetically have a chance to rebut the presumption of discrimination in individual cases, for example, by offering a strong piece of evidence proving that one of the applicants is objectively mentally disabled? Or does the Grand Chamber indicate that even a mentally disabled Romani child, who would have been placed in a special school even if the practice had not been discriminatory, would win the case simply because he is a member of the community unjustifiably disadvantaged by the practice? We will have to wait for the next ECtHR's judgments on indirect discrimination to know the answers. In any case, the Czech courts will deal with the "deadly cocktail" very soon, as I describe below.

Before the adoption of the Czech Anti-Discrimination Act, the definition of indirect discrimination had been contained in only a couple of specialised acts, like the Labour Code or the Act on Employment. Apart from the Ostrava case, I have not spotted nor has it been reported that Czech courts ever dealt with a case actually concerning indirect discrimination.¹⁸

In fact, the general public and legal professionals only very slowly have accepted the fact that unintentional discrimination is also prohibited. In the cases of direct discrimination, the defendants' lawyers often argue that open racism has to be present. Thus, for example, the restaurant operators sued for discrimination in access to public

¹³ *Paras. 190-192 of the Grand Chamber judgment.*

¹⁴ *Para. 195 of the Grand Chamber judgment.*

¹⁵ *Para. 209 of the Grand Chamber judgment.*

¹⁶ *Bobek Michal and Pavla Boučková, Zdeněk Kühn (eds.) 2007. Rovnost a diskriminace C.H. Beck; Prague.*

¹⁷ *See footnote 3.*

¹⁸ *In a couple of cases, the plaintiffs claimed (sometimes eventually) that they had been indirectly discriminated against, but their statements of facts corresponded rather to direct discrimination. For example the plaintiff in one case alleged that the employer had attempted through his dismissal measures to get rid of the older employees and hire younger ones, and supported the allegations with statistical data, but in fact claimed intentional discrimination based on age, not a discriminatory effect of an apparently neutral measure (Prague 1 District Court, file no. 27 C 5/2005). In another case, a female judge claimed to be indirectly discriminated against on the basis of her sex in being refused a change of her engagement to part time work. The judge, however, compared her situation with the situation of specific individual comparators belonging to the same group (another female judge had been engaged for part time work under different circumstances), therefore she did not complain about an apparently neutral practice with a disparate impact either (Prague-West District Court, file no. 10 C 5088/2004).*

accommodation tried to rebut the presumption of discrimination by proving that they do not hate Roma, as they had e.g. employed Romani workers or that they had served other Romani customers aside from the plaintiff.

The other problem was procedural. Action on the protection of personality rights has been used as a provisional and substitute type of lawsuit for anti-discrimination cases, as no special anti-discrimination lawsuit has been provided for by Czech law. The doctrine and case law on the protection of personality, however, requires that an act infringing upon someone's personality rights must be aimed against a specific individual or at least against a group of identifiable individuals. For example, this approach has become – so far – an obstacle for success in the lawsuit concerning racial harassment caused by the interior of a restaurant where a statue of a man holding a baseball bat with the inscription “to be used on Gypsies...” had been placed.¹⁹ The courts of first and second instance were not willing to accept that any person of Romani ethnic origin coincidentally entering the premises and seeing the statue could be considered harassed, discriminated against, or having an arguable legal claim. Currently, seven years after the case was launched, the plaintiff's second appeal on the points of law to the Czech Supreme Court is pending.

Due to these limitations, it can hardly be imagined that the courts would approve an action for the protection of personality rights based on an indirect discrimination claim. The objective disproportionate effect of an apparently neutral measure on a whole disadvantaged group would not be considered interference with the moral integrity of a particular individual as required so that the action for the protection of personality rights could be successful.

These difficulties should be eliminated with the adoption of the Anti-Discrimination Act. It provides for a special anti-discrimination civil action through which a plaintiff can seek redress for all

types of discrimination listed in the law, including indirect discrimination and harassment. However, even the Anti-Discrimination Act has its limits – it covers only the necessary minimum required by the EU directives.²⁰ If a person would be indirectly discriminated against in relation to rights outside the scope of the EU directives, the Anti-Discrimination Act could not be directly applied. The question is whether the courts would apply that law by analogy, or whether they would insist that outside the scope of the EU directives a special anti-discrimination action cannot be filed while the action on the protection of personality rights has – as explained above – low prospect of success in cases of indirect discrimination or harassment not aimed against specific individuals.

The *D.H. and Others* judgment will surely help Czech lawyers regarding both substantive and procedural issues. Firstly, it clearly says that intent is not necessary for the conclusion that discrimination occurred. Secondly, it gives a clear example of an indirect discrimination case. This is important, since the definition contained in the text of the law itself may not suffice, especially in case that quite a new legal concept is introduced. What is more, the judgment labels as discriminatory the practice that an overwhelming majority of the population does not consider to be discrimination at all.

The judgment does not explicitly prescribe what kind of legal remedy the damaged person should seek. Nonetheless, Article 13 of the European Convention on Human Rights (Convention) stipulates that such a remedy must be effective. Article 6 of the Convention guarantees to everyone access to an impartial and independent judicial tribunal in defence of his/her civil rights. Since the Grand Chamber in the *D.H. and Others* judgment included indirect discrimination under the scope of Article 14 of the Convention (in fact, it was included already by the above cited *Hoogendijk* and *Zarb Adami* judgments, that, however, are not as strong precedents as the judgment of the Grand Chamber), it can be implied that a person is entitled to a remedy before the independent court against

¹⁹ *Prague Municipal Court, file no. 34 C 66/2001.*

²⁰ *As regards discrimination on the basis of racial or ethnic origin, see Article 3 of European Council Directive 2000/43/EC.*

indirect discrimination, even if beyond the scope of the EU directives. Therefore the judgment helps with the procedural aspect, too.

Similarly, Czech courts will have to regard the Grand Chamber's conclusion that the *prima facie* case of indirect discrimination can be established merely through reliable statistics showing disproportionate impact of the apparently neutral procedure. As regards the reliability of the statistics, the Grand Chamber refers to the criteria formulated by the ECJ's case law,²¹ and adds that even if the reliability of the unofficial statistics may be questioned, they may cause the shift of the burden of proof to a defendant if they are corroborated by other complementary evidence or if they are not sufficiently disproved by the defendant. For cases falling within the scope of the EU directives, these principles applied already before the *D.H. and Others* judgment (but only after the Czech Republic's accession to the EU) due to the ECJ's case law. Now they apply also in cases beyond the scope of the EU directives, but within the scope of the Convention.²²

The practical problem is the collection of data on the racial or ethnic origin of individuals. This topic itself would require a whole article, if not a book, so that it is not dealt with superficially or in a simplifying manner. While during the Communist regime official statistics on representation of people of "Gypsy nationality" (including numbers of Romani children in special schools) were collected, shortly after the democratic changes it was found inappropriate. In 1995, European Council Directive 95/46/EC on the protection of individuals with regard to the processing of

personal data and on the free movement of such data was adopted, which generally prohibits the processing of data on ethnic origin. The directive stipulate some exceptions in an exhaustive manner, among others that ethnic data may be collected and processed if the data subject has given his explicit consent or if the processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law.²³ Some EU countries allow the collection of personal data on racial or ethnic origin (such as the United Kingdom or the Netherlands), applying these exemptions,²⁴ while other countries meet difficulties when trying to implement such measures.²⁵

In the Czech Republic, the Act on the Protection of Personal Data was adopted in 2000.²⁶ As regards the processing of data on race and ethnicity, it practically duplicates the text of the directive. The collection of data that would link a specific individual to information on his ethnicity remains prohibited; it seems that the exceptions provided for in the law are not sufficient to cover all necessary fields (especially beyond the scope of the employment law), unless they are interpreted purposefully. However, nothing prevents authorities from keeping anonymous statistical data to get a picture about representation and proportions, which cannot be linked to the records of specific individuals.

Another problem is the method of data collection. In most countries that collect sensitive data for the purposes of fighting discrimination, the method of self-identification is used. This method can be, however, hardly employed in case of Roma. According to the experience with census

²¹ See, for example, *Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, judgment of 9.2.1999, C-167/97, points 51, 57, 62, 65 and 77.

²² There still remains a gap concerning cases that fall outside the scope of both EU directives and the Convention. These cases can be argued, for example, under the International Convention on the Elimination of All Forms of Racial Discrimination or the International Covenant on Civil and Political Rights. However, the views of the United Nations committees are not as respected as the case law of the international judicial bodies like the ECtHR or the ECJ.

²³ Article 8 of European Council Directive 95/46/EC.

²⁴ See, for example, European Commission 2004. *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, the United Kingdom and the Netherlands*. Office for Official Publications of the European Communities; Luxembourg:

²⁵ See, for example, the decision of the French Constitutional Council of 15 November 2007, no. 2007-557 DC.

²⁶ Act no. 101/2000.

taking, the majority of Roma do not refer to their ethnicity. In this article, I have no space to explain the cause, nor am I sufficiently competent to do so. I believe that historic reasons play a role, as does persisting social and economic exclusion of Roma that causes a general mistrust of Roma in the majority. In any case, it is a notorious fact and statistics based on self-identification in the case of Roma would not work adequately as the picture would be too distorted. The only remaining possibility is therefore identification by a third party observer. It can never be sufficiently exact either, but I still believe that most Czech Roma can be identified by visible criteria. The picture would be definitely much more precise if the number of Romani children in a classroom would be determined by a well-instructed teacher (as it was, after all, done in the Ostrava case) rather than based on the self-declaration of parents.

In any case, the Czech Republic lost the *D.H. and Others* dispute because the Government was not able to rebut the statistics submitted by the applicants and corroborated by reports of international organisations with their own figures. Some discussions about the necessity to start again collecting statistical data concerning race and ethnicity for the purposes of fighting discrimination had opened already before the *D.H. and Others* judgment. The conclusions of the Grand Chamber will surely add more impetus to those discussions. The question how to collect the data and not violate the rules of protection of sensitive personal data will have to be solved and the choice made as to the proper method of identifying Roma for statistical purposes.

Segregation

While the ECtHR clearly linked the discriminatory placement of Romani pupils in special schools with the vast statistical overrepresentation finding indirect discrimination, it regretfully did not make a similarly explicit conclusion as regards segregation.

The Court referred to various sources – mainly from the Council of Europe – that had reported

the existence of a *de facto* segregation of the Romani children caused by their overrepresentation in the special schools,²⁷ however, in its own consideration it mentioned segregation only once: In paragraph 198 of the judgment, the Court stated that it “shares the disquiet of the other Council of Europe institutions who have expressed concerns about ... the segregation the system causes.” The ECtHR did not make its own explicit finding of segregation, nor a clear statement that *de facto* segregation *per se* amounts to a violation of Article 14 of the Convention.

It is a pity because such a clear statement would be so desirable in the present day. While the Czech general public as well as the authorities start to slowly accept that even unintentional discrimination is prohibited, the term “segregation” is still exclusively linked to an intention. What is more, a qualified intensity of malice is required before the division of a group of people is deemed to be a prohibited form of segregation. I believe that it is – at least partially – a heritage from the times of communist rule, when the official propaganda, pointing at the evil West, used the words “racism” and “segregation” only in connection with the most visible and condemnable acts, often exaggerated, mainly executed by the South African apartheid or colonial regimes in Africa. That is why in post-communist countries the word “segregation” is usually associated with barbed wire fences or at least “White Only” signs. The fact that the mere disproportionate concentration of people of a certain ethnic origin in a block of houses or a classroom may be violating the law is something unthinkable.

I met this difficulty myself when representing a Romani plaintiff in a lawsuit concerning the infamous wall in Matiční street in Ústí nad Labem. I alleged that the concentration of Romani people in the houses on one side of the street knowingly caused by the municipal authorities had amounted to *de facto* segregation. The construction of the wall was not capable of physically separating the Romani inhabitants, as it could have been walked through or around, but it held the symbolic meaning of separation and thus it had

²⁷ Paras. 54 – 80 and 103 – 104 of the Grand Chamber judgment.

a degrading effect on the people living behind it. As recently as in June 2006, the court stated, “Segregation means separation, exclusion; racial segregation means prevention of contacts between non-white and white population [sic!] and it’s [the non-white population’s] isolation. It is absolutely inappropriate to assess the construction of the fence in such terms [...]”²⁸ I do not think that any comment is necessary.

Separating walls are not a frequent phenomenon in the Czech Republic, but *de facto* segregation in housing is. Municipalities with a significant Romani community launch various eviction plans and actions that lead to a so-called ghettoisation.²⁹ The ECtHR’s case law that would at minimum stipulate that *de facto* segregation constitutes a presumption of discrimination prohibited by Article 14 of the Convention, which should be rebutted by the defendant, would surely help to tackle these inconvenient trends.

On one hand, the ECtHR’s restraint in this respect can be understood. It is not only post-communist East that has problems with *de facto* segregation. For example, whole city quarters in many Western European countries are predominantly inhabited by immigrants. Therefore, an insensitive generalisation may cause an inflation and consequent devaluation of the legal protection against discrimination. However, I believe that the ECtHR could have indicated the unacceptability of *de facto* segregation and at the same time avoided an inadequate generalisation, for example by stressing the necessity of a consideration of all individual circumstances of each case and by granting Member States a wide margin of appreciation.

Due to the indirect binding effect of the ECtHR’s case law on Czech authorities, it would have been very helpful if the Court’s comments on *de facto* segregation in the *D.H. and Others* judgment were

more extensive and explicit. For now, we can refer only to the case law of the US Supreme Court,³⁰ in respect of which Czech courts may find a thousand reasons for refusing to apply it.

Discrimination in education

After the *D.H. and Others* judgment was published, the most frequent questions of journalists were: Will there be more lawsuits? Do you recommend other Roma sue the State? Could we expect the courts to be overloaded by the actions of past and present special school pupils? How much will the taxpayers pay in damages in such a case?

At the first moment I expressed restraint rather subconsciously than intentionally. I simply did not want to create an image that the *D.H. and Others* case was won just to let thousands of plaintiffs pump billions from the state budget. On the other hand, I clearly stated that anyone who feels damaged by his/her placement in a special school should not feel constrained to go to the court. I also mentioned the difficulties – expensive lawsuits on the protection of personality rights and especially the necessity to bring reliable statistical data to establish a *prima facie* discrimination case. I personally have not expected that an individual without the support of a specialised NGO would be able and willing to bear all the risks of a civil lawsuit.

Recently, I was approached by a young Romani man who attended a special school from 1985-1995, wishing to bring his case to the court based on the *D.H. and Others* judgment. As he is indigent, he requested the court to appoint me as his lawyer and his request was approved. The case is currently pending before the court of first instance. This case, however, cannot serve as a model as there are too many specific facts, especially because the plaintiff attended the special school so long ago.

²⁸ *Judgment of the Ústí nad Labem Regional Court of 5 June 2006, file no. 30.6.2006, not published.*

²⁹ *See, for example, “Romani Housing Rights Concerns in Czech Republic” and “More Roma Evicted in the Process of Public Housing Privatisation in Czech Republic”. In Roma Rights 4/2006, European Roma Rights Centre; Budapest.*

³⁰ *See, for example, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Keyes v. School District, 413 U.S. 189 (1973); Havens Realty Corporation v. Coleman, 455 U.S. 363, (1982).*

First, former Czechoslovakia acceded to the Convention in March 1992, therefore it cannot apply to the placement itself but only to the four years of his attendance at the special school. However, the International Convention on Elimination of All Forms of Racial Discrimination applies to the preceding time period. Second, according to Czech law non-proprietary rights cannot be time limited, therefore the plaintiff can bring the case before the court even after such a long time.³¹ But what is most important, the plaintiff himself brought me copies of the official yearbooks from the archives, showing the numbers of Romani children in special schools in the 1980s. Therefore, it should not be as hard to establish a *prima facie* discrimination case and shift the burden of proof to the State. It will be very interesting to watch how the courts will regard the Grand Chamber's conclusion that individual cases do not have to be examined and to what extent the Ministry of Education will be granted space for attempts to prove that the plaintiff had been placed in the special school rightfully.

Similar cases concerning the past may emerge from time to time. A much more challenging question is whether the *D.H. and Others* judgment could be applied to a current situation. The special schools were formally abolished, nonetheless, according to NGOs monitoring the situation of Romani children in Czech schools, the situation has not sufficiently improved since then. It is reported that most Romani children are still educated in segregated classes where a significantly inferior curriculum is followed.³² If a Romani child (or rather his/her parents) would like to bring the contemporary case before the courts, to establish a *prima facie* discrimination case the plaintiff would have to submit data on the curriculum followed in particular classes within every elementary school belonging to the researched statistical sample. After that,

statistical data on the representation of Romani children in such classes must be presented. On the other hand, the plaintiff could use the advantages of the Anti-Discrimination Act, especially that he/she would be able to rely on the provisions on indirect discrimination which do not necessitate the requirements of the doctrine on the protection of personality rights.

Conclusion

The *D.H. and Others* judgment of the Grand Chamber is – in the first place – a revolutionary breakthrough within the framework of the case law of the ECtHR itself. Moreover it surely will influence the law in all Council of Europe countries, especially because it brings the ECtHR's concept of the prohibition of discrimination under Article 14 of the Convention very close to the approach of the European Union, as stipulated in the so called equality directives.

As regards the Czech Republic, the effect of the judgment may combine with the effects of the new Anti-Discrimination Act (if adopted). Czech lawyers – both attorneys and judges – have received a clear example of an indirect discrimination case, together with a guideline as to how a *prima facie* discrimination case can be established using statistical data and what are the criteria for the rebuttal of the presumption of discrimination. The judgment may form the basis of eventual further litigation in the field of education, involving the past as well as the contemporary situation.

In any case, it has to be stressed that litigation – however successful – can never bring an ultimate solution of the situation. Litigation helps to bring new impetus when negotiations are stuck as the defendant – the public authority – denies its

³¹ Generally, in the Czech Republic the right to protection of personality rights cannot be time limited. There is, nevertheless, a very odd situation regarding an eventual claim to payment of non-pecuniary damages that culminated recently. The specialised senate of the Supreme Court constantly concludes that such a claim cannot be time limited either and regularly reverses the judgments of High Courts in this respect. However, the civil law division of the Supreme Court published in its official digest of case law ("*Sbirka soudních rozhodnutí a stanovisek*") a judgment of the Olomouc High Court according to which the claim to non-pecuniary damage is in fact a proprietary right and can be time limited. It will be interesting to see how lower courts will deal with this confusing situation.

³² European Roma Rights Centre. 2007. *The Impact of Legislation And Policies on School Segregation of Romani Children*. Budapest.

responsibility. After its position is disproved in a legal case, the work must continue. In the Czech Republic, a coalition of NGOs is following up on the outcome of the Ostrava case and negotiations with the Ministry of Education are currently underway. Last, but not least, Romani parents themselves must be activated and motivated not only to fight for their rights in the courts, but also in their day-to-day lives. They should negotiate and discuss with teachers and school directors, insist on

their children receiving an adequate education and not automatically accept what is told to them by authorities. Litigation may point to tremendous statistical figures, governments may introduce effective positive measures and offer support, NGOs may help to keep everyone's eyes open, but it will be Roma themselves who will change those figures. They do not have the power do it without our help, but I believe, that one day they will reach the goal. Let the road be as short and straight as possible.