The European Court of Human Rights Missed the Opportunity to Recognise that Segregation in Education Can Also Take Place in Mainstream Schools

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SEVERAL pupils of Romani ethnicity were forced to spend their entire or most of their primary education in segregated classes for Roma only in what are otherwise "regular" primary schools in the villages of Macinec, Podturen and Orehovica in the county of Međimurje, Croatia. The teaching in the Roma only classes was significantly reduced in scope and volume as compared to the officially prescribed teaching plan; therefore, these pupils received substandard education. Statistics in the Međimurje region showed that there was a high likelihood of Roma being placed into separate classes and that they have lower chances of finishing primary school as compared to non-Roma.

On 19 April 2002, 57 Romani pupils challenged this practice before Croatian courts under Article 67 of the Administrative Disputes Act. They claimed that their placement in the Roma only classes stemmed from a blatant practice of discrimination based on their race/ethnicity carried out by the schools concerned, the dominating and pervasive anti-Romani sentiment of the local non-Romani community, and ultimately the unwillingness and/or inability of the Croatian authorities to provide them with redress as well as to abide by the relevant international and domestic legal standards. As a result of their segregation, they suffered severe educational, psychological and emotional harm, damage to their future educational and employment opportunities and stigmatisation. The effects of segregation on the concerned Romani pupils were substantiated by psychological research conducted during the domestic proceedings and by statistics showing the significantly lower chances of Romani pupils of finishing primary school as compared to their non-Romani peers. In their complaint, they requested judicial findings of racial discrimination/segregation, a violation of their right to education and a violation of their right to freedom from inhuman or degrading treatment. Furthermore, they requested an order that the school authorities desist from future discrimination/segregation, that they develop and implement a monitoring system and a plan to end racial discrimination/segregation and to achieve full integration and an order that the pupils be placed in racially/ethnically integrated classes and provided with the compensatory education necessary for them to overcome the adverse effects of past discrimination/segregation.

On 26 September 2002, the first instance court proclaimed that in general, unlike non-Romani students, most Romani students have serious Croatian language problems which makes it appropriate and legal to place them into separate classes for Roma only and for reasons of not breaking up the "stability" and "homogeneity" of such Roma only classes, it is equally appropriate not to integrate even those Romani students with sufficient Croatian language skills into racially mixed classes. The court ruled that teaching organised for the plaintiffs attending separate Roma only classes, due to alleged Croatian language difficulties, is itself in no way inferior compared to the officially prescribed teaching plan and programme.

The appeal filed on behalf of the pupils was rejected on 14 November 2002, confirming the first instance decision. On 19 December 2002, a complaint was filed with the constitutional court. Having received no ruling from the constitutional court for more than two years, the parents

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of fifteen Romani pupils (the applicants) filed a submission with the European Court of Human Rights in December 2004 claiming a violation of Article 3 (prohibition of degrading treatment), Article 2 of Protocol 1 (right to education), Article 14 (prohibition of discrimination) taken together with Article 2 of Protocol 1, Article 6 (right to fair trial) and Article 13 (right to an effective remedy) taken together with all the above mentioned rights enshrined in the European Convention of Human Rights (Convention).

The Strasbourg procedure

The applicants alleged that due to their placement in separate classes for Romani students only they had been subjected to racial/ethnic segregation in education, which is a particularly severe form of racial/ethnic discrimination. As a result of this practice they had suffered degrading treatment in violation of Article 3 of the Convention. In particular, due to their segregation they had to endure severe educational, psychological and emotional harm, which materialised in: a) stigmatisation, feelings of alienation and lack of self-worth (stigmatising them as different, less bright, intellectually inferior, they have to be separated from "normal" children so as to not exert a bad influence on them); b) denial of the benefits of a multicultural educational environment; and c) being subjected to a wider practice resulting in two separate school systems for members of different racial groups.

The Government argued that the applicants' claim of being taught in segregated Roma only classes cannot reach the minimum level of severity required under Article 3 of the Convention and that the notion of degrading treatment requires intent on the part of the authorities. The applicants argued that based on the established case law of the European Court, racial discrimination may amount to degrading treatment[2] and "the feelings of inferiority or humiliation caused by a discriminatory segregation in the area of education could, in exceptional circumstances [...] come under the effect of this provision."[3] Moreover, the notion of "inhuman and degrading treatment" does not require intent.

The applicants also alleged that as a result of their placement in separate classes for Romani pupils only, they had been denied their right to education: They were subjected to a curriculum far inferior to that in mainstream classes; sustained damage to their opportunities for further education and securing adequate employment in the future; denied the opportunity to study in integrated classes and perform well there; and were publicly stigmatised and deprived of the benefits of multicultural education.

The Government claimed that the applicants' right to education had not been violated as they had equal access to the existing educational institutions; they received the same programme as other pupils in Croatia. It also argued that the fact that they attended Roma only classes "for a specific period of time" does not amount to a restriction of their right to education. The applicants argued that they were denied equal access to mainstream classes without a legitimate aim for separation. There were no statutory grounds for using the "language criterion" as a precondition for entering mainstream classes, the applicants' Croatian language ability was not tested upon enrolment and all of them received good grades in Croatian language in the course of their studies. The fact that the applicants received substandard education was substantiated in the 2000 report by the Croatian Ombudsman, the pleadings of the respondents in the domestic procedure, as well as by official statistics. Forced to learn in a segregated environment, the applicants sustained damage to their opportunities for further education and securing adequate employment in the future.

Based on the established case law of the European Court, 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

[2] *See, for example, judgments in the cases East African Asians v. UK, Cyprus v. Turkey and Moldovan and Others v. Romania.*

[3] *D.H. And Others v. the Czech Republic. ECtHR admissibility decision of 1 March 2005.*

of proportionality between the means employed and the aim sought to be realised. Once the difference in treatment has been shown, the Government bears the burden of demonstrating that the difference is objectively justified.

The applicants' differential treatment in connection with their right to education was substantiated before the European Court by the Ombudsman's report, the admissions of the respondents' representatives at domestic court hearings, the psychological research conducted before the domestic procedure involving the applicants, official data provided by the Office of Education, Culture, Information, Sport and Technical Culture of the County of Međimurje, the applicants' school registration documents containing the Croatian language grades, findings and reports of intergovernmental monitoring organs as well as documentation of local and international non-governmental organisations concerning segregation of Romani children in Croatian schools.

The possibility of separating children with Croatian language difficulty, the criteria of assessment, monitoring the development and reintegration have no statutory grounds in Croatian law. The applicants also argued that their separation was not appropriate to serve the aim claimed; therefore the interference cannot be proportionate. Moreover, the applicants' Croatian language ability was not assessed upon enrolment and later they all received good or at least satisfactory grades in Croatian; nevertheless they were forced to spend years of or their entire education in a segregated environment.

The Government repeatedly claimed that the applicants failed to establish that their placement was motivated by, or undertaken due to their racial or ethnic origin. However, based on the jurisprudence of the European Court and the standards of the UN Committee of the Elimination of Racial Discrimination, the UN Human Rights Committee and EU directives, discrimination does not require intent.

In February 2007, the Croatian Constitutional Court, more than four years following the submission of the complaint, ruled "there is no objective and reasonable justification for not including into a regular class a pupil who has fully mastered the Croatian language in lower grades of primary school." Therefore, in a subsequent submission to the European Court of Human Rights the Government argued that the parents consented to keeping the children in segregated educational setting. The applicants argued that the parents had not only consented to their children's segregation but that they also challenged their separation in court. The right to education vests with the child, it cannot be overridden by parental consent and it is the legal responsibility of the Government to ensure the best interest of the child. Since the Government did not discharge its burden of providing an objective and reasonable justification for the differential treatment of the applicants, it must be concluded that the differential treatment was on racial grounds.

The applicants also argued that the length of the proceedings was in breach of the "reasonable time" requirement of Article 6(1) of the Convention. The proceedings before the Constitutional Court lasted for more than four years and neither the fact that the complaint concerned the human rights of children, nor the applicants' explicit request for expediency, warranted an earlier decision. The procedural delay resulted in the *de facto* determination of the applicants' complaint long before the decision was rendered in February 2007, denying any effective redress to the applicants, most of whom had left primary school by that time. Moreover the domestic procedure was fundamentally flawed as the courts ignored crucial evidences, made arbitrary conclusions and did not provide sufficiently reasoned judgments.

The applicants had at their disposal no effective domestic remedy as required by Article 13 of the Convention for their complaints under Article 3 or Article 2 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention. Although they produced a compelling case, turned to courts and used all available avenues for redress, they obtained no remedy for the violations suffered. Moreover, the constitutional court proceedings were delayed to such an extent as to result in the *de facto* determination of the applicants' complaint.

The European Court's ruling

In its decision announced on 16 July 2008, the Chamber of the European Court of Human Rights accepted the applicants' claim that the length of the proceedings was in breach of the "reasonable time" requirement of Article 6(1) of the Convention as the proceedings before the Constitutional Court had lasted for more than four years until the decision was finally reached in February 2007. The Chamber ruled, "such as the nature of a case and its importance in political and social terms, the Court finds that a period exceeding four years to decide on the applicants' case and in particular in view of what was at stake for the applicants, namely their right to education, appears excessive."

Although the applicants demonstrated the effects of segregation and the denial of the benefits of a multicultural education through not only their own statements but also with psychological research conducted before the domestic proceedings involving the applicants and statistics showing the significantly lower chances of Romani pupils of finishing primary school as compared to their non-Romani peers, the Chamber ruled, "applicants have not presented sufficient evidence that there existed a prevalent prejudice against them to attain the level of suffering necessary to fall within the ambit of Article 3 of the Convention."

Despite large volumes of clear factual evidence presented by the applicants, the Chamber ruled that they had failed to show sufficient evidence that the curriculum they followed was reduced compared to the one followed in regular classes and accepted the government's claim that the placement of the applicants in Roma only classes was based on their inadequate Croatian language skills, which allows for a wider margin of appreciation. The applicants had maintained throughout the case that the procedure of establishing their language deficiency was never substantiated objectively; also that segregation can never be an appropriate response to such an educational need even if it existed. At the same time, the Chamber failed to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the separation of the applicants.

In its assessment of the facts and subsequent judgment, the Chamber failed to refer to its recent judgment in the case *Sampanis and Others v. Greece,*[4] the facts of which are very similar to the instant case. In *Sampanis* there were no suitable tests given to the Romani children concerned in order to assess their capacities or potential learning difficulties when they were placed to a separate school building to prepare them for integration into the primary school. In *Sampanis,* the Court confirmed that it is the state's duty, under Article 2 of Protocol 1, to provide equal access to education, which includes an obligation to adequately assess the learning needs of all children, including children belonging to disadvantaged ethnic minority communities.

In evaluating the difference of treatment in the instant case, the Chamber seemed to put special emphasis to the fact that the separation of Romani children in separate classes materialised within the ordinary schools and that the children were not placed in special schools, as in the recently decided case *D.H. and Others v. the Czech Republic*, which – according to the Chamber – made the transfer from separate class to ordinary class "more flexible."[5]

The Chamber did not acknowledge that segregation could have several manifestations. The European Monitoring Centre on Racism and Xenophobia (EUMC)[6] provides the following classification of segregation:

- *Intra-school* segregation may arise from the organisation of separate Roma classes teaching the general curriculum or teaching an inferior, remedial curriculum, whereas non-Romani classes are taught an extra or general curriculum;

[4] *Sampanis and Others v. Greece, Application no. 32526/05.*

[5] *Orsus and Others v. Croatia. Application no.15766/03, para. 65.*

[6] *European Monitoring Centre on Racism and Xenophobia. 2006. Annual Report 2005. Part II, p. 69. Available online at:* ***http://eumc.europa.eu/eumc/index.php?fuseaction=content.dsp_cat_content&catid=4491232500002***.

- *Intra-class* segregation may stem from differing levels of curricular standards within the same class; and
- *Inter-school* segregation may have three separate sources: Existing regional or housing segregation between ethnic groups, inappropriate or culturally biased psychological testing leading to the placement of non-disabled children in remedial special schools for the mentally disabled, and the presence of private, foundation or faith schools that impose extra requirements, such as entrance exams or tuition fees from which Romani children are *de facto* excluded on account of their social disadvantage.

Hungarian sociologists have also identified *individual segregation* in the form of alleged home schooling as an additional form of segregation.[7]

Therefore segregation can also materialise within mainstream schools, such as the ones challenged by the applicants.

In the instant case the separation of the pupils – which, according to the Government was a special measure to accommodate their educational need – was not temporary. All the applicants who attended the Macinec primary school spent their entire primary education in Roma only classes. That means within the higher grades as well, where the lack of adequate Croatian language knowledge should not have been an issue as the pupils had by then completed two or more years of primary education with Croatian being the language of instruction. Nor had their alleged language barriers – used as a justification for their placement into separate classes at their enrolment – been actually addressed by the teachers. All of the applicants were taught for years in segregated classes irrespective of their command of the Croatian language, which was either good or satisfactory as demonstrated by their grades.

Elementary education has been also underlined by the European Court as being of primordial importance to a child's development.[8] The right to education means the right to effective education. For the right to education to be effective, "the education provided must be adequate and appropriate".[9] The negative results of the segregation of Romani children in education and channelling them into special schools and classes have been confirmed by numerous studies. Therefore the right to education to be effective requires a non-segregated setting.

The Chamber judgment also failed to take into account key facts in their assessment, pointing to the racist motives underlying the segregation of the Romani children, including: Widely publicised anti-Romani protests by non-Romani parents in 2002 and 2003 which resulted in the abandonment of official plans by the then Ministry of Education and Sports to move the Romani children into mainstream classes; the victimisation of the applicants throughout the entire process of the case, which resulted in many of the plaintiffs refusing to be involved in proceedings at the European level and one of the applicants dropping out of the case before the European Court; evidence of harassment of the Croatian Deputy Ombudsman who condemned the practice of school segregation in Međimurje County; the retraction in the course of the domestic proceedings of the 2000 Croatian Ombudsman report which confirmed the school segregation of Romani children in Međimurje County and which had already been adopted by the Croatian Parliament; and numerous reports from 2001 forward regarding the continuing existence of school segregation of Romani children in Croatia by international institutions and nongovernmental organisations, including the United Nations Development Program (UNDP), the Council of Europe's European Commission against Racism and Intolerance (ECRI), the European Commission, the European Monitoring

[7] *European Commission. July 2007. Segregation of Romani Children in Education: Addressing structural discrimination through the Race Equality Directive, p. 10. Available online at:* ***http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm***.

[8] *Timishev v Russia. Application Nos. 55762/00 and 55974/00. Judgment of 13 December 2005, para. 64.*

[9] *Orsus and Others v Croatia judgment, para 58.*

Centre on Racism and Xenophobia (EUMC), the US State Department, Amnesty International (AI) and the Roma Education Fund (REF).

Since the case concerns "serious question[s] affecting the interpretation or application of the Convention" and "serious issue[s] of general importance",[10] the applicants requested in October 2008 that this case be referred to the European Court's Grand Chamber pursuant to Article 43 of the Convention. If the referral request is accepted, the Grand Chamber will have the first opportunity to address the issue of segregation of Romani children within mainstream schools.

[10] *European Convention on Human Rights, Article 43 Section 2. Available online at:* ***http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf****.*