

A Fresh Wind Across the Prairie – The European Court of Human Rights Acknowledges Systemic Discrimination in the Case of Education of Romani Children from the Czech Republic

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ON 13 November 2007, the Grand Chamber of the European Court of Human Rights announced the much awaited decision in the case of *D.H. and others v. The Czech Republic*,² or as it has been commonly referred to, “the Ostrava case”. By a striking majority (13 votes to 4), the Grand Chamber held that there had been a violation of Article 14 (prohibition against discrimination) taken jointly with the Article 2 of Protocol 1 (right to education). Undoubtedly, the case will enter the court’s annals/history as the first one where it spelled out clearly its standards and approach on non-discrimination. Most importantly, it did so in the context of the most disadvantaged minority in Europe, Roma, who face and suffer from discrimination in all facets of their lives.

The case is by far the most important challenge of racial discrimination in the education system. It challenged the practice of channeling Romani children to special remedial schools based on assessment procedures designed for the majority.

The foregoing decision came amidst lots of skepticism following the Chamber decision in early 2006 that rejected all the claims raised by the applicants’ representatives and brought/raised serious doubts within the human/civil rights community as to the ability of this Court to define its

position/stance with regard to forms and constitutive elements of discrimination.³

Not without reason, the general feeling prevailing after 13 November was that the Court had redeemed itself and restored faith in its perceived image as guarantor of human rights in Europe, especially for vulnerable groups and minorities.

The decision is particularly important in light of the broader evolution of European anti-discrimination law in the past five years, since the entrance into force of the Race Equality Directive and subsequent domestic anti-discrimination laws adopted in most EU member countries. It paves the way for challenging similar practices in other countries and sends a strong message to the governments that the Court will not tolerate such situation.

This article will provide a brief overview of the case history and role of the ERRC, salient parts of the judgment as well as future implications.

Fighting the Good Fight

Since its inception in 1996, the ERRC has dealt with hundreds of legal cases involving Romani people. Struggling to reaffirm the principle that

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² *Application no. 57325/00.*

³ *The Chamber had held that there had been no violation of the Convention. In its view, the Czech Government had established that the system of “special schools” was not introduced solely to cater to Romani children and that considerable efforts had been made in those schools to help certain categories of pupils to acquire basic education. According to the Chamber, the rules governing children’s placement in “special schools” did not refer to the pupil’s ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children concerned. See Goodwin, Morag. “D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe.” In *German Law Journal*, Vol. 7, No. 04; Cahn Claude. 2006. “The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights.” In *European Anti-Discrimination Law Review*, Issue No. 4, 2006.*

the right to be free from racial discrimination is an entitlement of every individual and that the government has an obligation to ensure freedom from discrimination, the ERRC soon realised that the racial segregation of Romani children was a major problem in Europe.

However, little evidence existed to attest to this, and like other governments in the region, the Czech authorities turned down any requests for information because allegedly ethnic data was not gathered or maintained. Faced with such reality, in mid 1998 until early 1999, the ERRC undertook a mammoth task of collecting the evidence and spent eight months and considerable financial resources in setting up the legal case in Ostrava, the third biggest city in the Czech Republic. A dedicated team of ERRC staff and consultants, working closely with Romani organisations and individuals managed to pull together by far the most comprehensive and thorough account of race discrimination in schools.⁴ It was a painstaking and meticulous scanning of the Czech education system, which confirmed in unequivocal terms what had been known in the human/civil rights community for a long time: An overwhelming number of Romani children were educated in special schools designed to serve children with special needs and based on an inferior curriculum. The entire process was tainted by racial prejudice and therefore violated Czech national and constitutional law, as well as relevant European human rights law.

The groundwork carried out and combined with domestic litigation efforts and international advocacy is a textbook example of how to design and implement strategic litigation.⁵

According to the Ostrava School Bureau, in early 1999, there were 8 special schools in the district of Ostrava, responsible for “educating

mentally retarded pupils.” There were 70 basic schools for “normal” pupils. The ERRC collected statistics from every school in the city of Ostrava. Each special school and each basic school stamped and signed a document testifying to the exact number of Romani and non-Romani pupils in their school. The data showed that, whereas only 1.80% of non-Romani students in Ostrava were in special schools, 50.3% of Ostrava’s Romani students were in special schools. Thus, the proportion of the Ostrava Romani school population in special schools outnumbered the proportion of the Ostrava non-Romani school population in special schools by a ratio of more than 27 to 1. Stated differently, Romani children in Ostrava were more than 27 times as likely to end up in special schools as were non-Romani children.⁶

Ostrava’s special and basic schools were effectively segregated on the basis of race. In other words, there existed two separate school systems for members of different racial groups – special schools for Roma, basic schools for non-Roma.

Under domestic law, the decision to place a child in a special school was taken by the head teacher on the basis of results of tests to measure the child’s intellectual capacity carried out in an educational centre, and required the consent of the child’s legal guardian.

Armed with such overwhelming evidence, on 15 June 1999, 12 Romani children in Ostrava and their parents, with the support of several Romani leaders and human rights organisations, all co-ordinated by the ERRC, filed an action in the Constitutional Court of the Czech Republic, challenging and seeking remedies for systematic racial segregation and discrimination in Czech schools.

In brief, the 12 claimants asserted that they and numerous other Romani children had been

⁴ *The results of the ERRC research on the schooling of Romani children in the Ostrava area have been publicised in the report “A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech Republic”, published by the ERRC in June 1999. The report is available at: http://www.errc.org/Countryrep_index.php.*

⁵ *European Roma Rights Centre. “The ERRC legal strategy to challenge racial segregation and discrimination in Czech schools.” In Roma Rights, 1/2000. Available online at: <http://www.errc.org/cikk.php?cikk=601>.*

⁶ *Ibid.*



ERRC meeting with the applicants in D.H. and others v. The Czech Republic case following the Grand Chamber judgment. At the meeting, facilitated by local NGO Life Together, the ERRC gave the applicants a summary of the main points of the judgment and discussed their important contribution to the disaggregation movement in Europe.

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segregated in special schools for the mentally deficient because they were Romani. The result of such segregation has been a denial of equal educational opportunity for most Romani children. The lawsuit before the Constitutional Court was filed against five Ostrava special school directors, the Ostrava School Bureau and the Ministry of Education.

As a result of their segregation in dead-end schools for the “retarded,” the plaintiffs in the ERRC lawsuit, like many other Romani children in Ostrava and around the nation, have suffered severe educational, psychological and emotional harm, including the following:

- they have been prohibited by law and practice from entrance to non-vocational secondary educational institutions, with attendant damage to their opportunities to secure adequate employment;
 - they have 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; and
 - they have been forced to study in racially segregated classrooms and hence denied the benefits of a multi-cultural educational environment.
- The 12 plaintiffs requested the following remedies:
- they have been subjected to a curriculum far inferior to that in basic schools;
 - they have been effectively denied the opportunity of ever returning to basic school;
 - a judicial finding that they had been the victims of racial discrimination and segregation in violation of Czech and international law;

- the establishment of a compensatory education fund to pay for the extra education and training required to compensate the plaintiffs – and others similarly situated – for the harm caused them by segregation in special schools, and to enable them to compete adequately for entrance to non-vocational secondary education; and
- an order compelling the Ostrava school board and the Ministry of Education to end racial segregation in Ostrava schools within 3 years and to develop an educational reform plan capable of achieving racial balance in Ostrava schools within that time.

In addition, it was requested that components of the educational reform plan should include, at a minimum, the following:

- anti-racism training for all school teachers and administrators in Ostrava;
- promulgation of guidelines to ensure that assessments of educational ability are not influenced by racial prejudice;
- requirements that parental consent be given in writing and only after parents have been adequately informed of their rights and of the consequences of consent;
- systematic monitoring of the suitability of special school assignments; and
- re-orientation of special school curricula to provide for mainstreaming of most students into basic schools.

On 20 October 1999, the Constitutional Court issued its disheartening decision dismissing the 12 cases. The Constitutional Court found, *inter alia*, that the Applicants' allegations of racial segregation and discrimination were unsubstantiated. The Court, acknowledging that the "persuasiveness of the Applicants' arguments must be admitted," found that it had authority only to consider the particular circumstances of individual applicants, and was not competent to consider evidence demonstrating a pattern and/or practice of racial discrimination in Ostrava or the Czech Republic.

⁷ *Ibid.*

The Court stated that "the plaintiffs [substantiated] their complaint by [extensive] statistical data and expert opinions but that they failed to recognise that the Constitutional Court is entitled to decide – with regard to constitutional cases – only individual legal acts and is bound to evaluate only particular circumstances of the individual cases" [and is not authorised to comment or rule on societal or cultural discrimination as a whole]. It held that the Applicants had not proved the existence of racial discrimination on an individual basis.⁷

However, acknowledging the power of the Applicants' arguments, the Czech Constitutional Court urged the authorities to "[I]ntensively and effectively deal with the plaintiffs' proposals. This concerns in particular the proposals 1, 3 and 4 of this resolution." In other words, the Constitutional Court found merit in the Applicants' claims, but refused to consider them.

Procedures before the Strasbourg Court

Following the exhaustion of domestic remedies in the Czech Republic, on 17 April 2000, the ERRC lodged an application with the European Court of Human Rights, on behalf of 18 Romani children. The application alleged violations of a number of rights and freedoms guaranteed by the European Convention on Human Rights, such as Article 3 (racial segregation and racial discrimination amounting to inhuman or degrading treatment), Article 14 (prohibition against discrimination) together with Article 2 of Protocol 1, in that the applicants have been the victims of discrimination on the grounds of race in the enjoyment of their right to education; Article 2 of Protocol 1 (they had been denied their right to education); and Article 6 (the Applicants have been subjected to a determination of their civil rights through a procedure which is fundamentally unfair and lacks basic norms of due process).

On 6 February 2006, 6 years after the case was filed, a Chamber held by 6 votes to 1 that there had been no violation of Article 14 read in

conjunction with Article 2 of Protocol 1.⁸ The decision was met with utter disappointment and it brought into question the ability of the Court to grapple with systemic discrimination.

In May 2006, the Applicants' representatives requested that the case be referred to the Grand Chamber and this request was granted on 3 July 2006. In asking the Grand Chamber to accept the referral of this case, the Applicants noted that it raised several major issues concerning the prohibition against discrimination in Article 14 of the European Convention of Human Rights. At a time when Europe is struggling to address its growing racial and ethnic diversity, the capacity of law and courts to ensure equal treatment is of the highest importance.⁹

The Applicants argued that the Chamber's restrictive reading of the concept of discrimination was inconsistent with the broad protection against discrimination increasingly afforded by European law. If allowed to stand, it would render Article 14 theoretical and ill-usory rather than practical and effective. This would be particularly inappropriate where, as in *D.H. and others v. The Czech Republic*, there existed overwhelming evidence that Roma have been treated less favourably than similarly situated non-Roma for no objective and justifiable reason. The evidence included (i) actual admissions by the Czech government that disproportionate numbers of Roma were sent to special schools – on the basis of tests conceived for non-Roma – even though they were average or above-average in development; (ii) corroborating detailed and comprehensive statistical evidence that Roma in the city of Ostrava are routinely subjected to educational segregation and discrimination; and (iii) consistent findings by numerous inter-governmental bodies concerning discriminatory patterns in schools throughout the Czech Republic as a whole.

Seven years and 8 months after the case reached the Court, the Grand Chamber delivered a landmark decision. In an unprecedented move, the Court undertook a broad social inquiry and thorough scanning of the situation of Roma in Europe. Boldly, the Court noted from the outset that as a result of their turbulent history and constant uprooting, Roma had become a particular type of disadvantaged and vulnerable minority. This meant that they required special protection, including in the sphere of education.

The Court paid significant attention to the current trends in Europe and beyond, quoting and referring to sources within the Council of Europe machinery, European Union, UN mechanisms and national courts. What emerged from Sections III to VI of the judgment can be considered a catalogue of recommendations and reports on the situation of Roma in the Czech Republic and beyond, compounded by relevant case-law that clarified the underlying concepts in both race and sex discrimination.

What lies at the heart of this decision is that for the first time, the Court decided to look at deeply entrenched, systemic practices of discrimination and took a quantum leap with regard to its stance on applicable standards on discrimination. Until then, the Court's jurisprudence was seen to lag behind its peer in Luxembourg, the European Court of Justice (ECJ). While it had decided several cases involving discrimination claims in the context of policing and criminal justice, the Court had so far not dealt with discrimination claims in other areas of life. Furthermore, the concept of indirect discrimination remained a stone in the Court's shoes.¹⁰ Its case-law was not clear about what kind of statistical evidence was needed to present a *prima facie* case of indirect discrimination and how the burden of proof shifted once this had been established to the respondent.

⁸ *An earlier admissibility decision rejected as manifestly unfounded all original claims raised by the applicants, with the exception of Article 14 read in conjunction with Article 2 of Protocol. For an analysis of the Chamber decision, see Goodwin, Morag. "D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe." In German Law Journal, Vol.7, No. 04; Cahn Claude. 2006. "The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights." In European Anti-Discrimination Law Review, Issue No. 4, 2006.*

⁹ See: <http://www.errc.org/cikk.php?cikk=2591&archiv=1>.

¹⁰ *The EC Race Equality Directive provides that "indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular racial or ethnic origin at a practical 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."*

In its assessment, the Court built on its main principles in the area of discrimination and greatly expanded the principles of non-discrimination. According to the Court, the issue was whether the manner in which the legislation – neutral on its face – was applied in practice resulted in a disproportionate number of Romani children – including the Applicants – being placed in special schools without justification, and whether such children were thereby placed at a significant disadvantage.

For the first time, the Court accepted and defined in clear terms that indirect discrimination occurred in the instant case, because despite being couched in neutral terms, the relevant statutory provisions had considerably more impact in practice on Romani children than on non-Romani children and resulted in statistically disproportionate numbers of placements of the former in special schools. The Court went on to state that when legislation produces such a discriminatory effect, “it is not necessary to prove any discriminatory intent on the part of relevant authorities.”¹¹

The evidence submitted by the applicants was regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. The Court thus finally expounded its test on the use of statistics and the shifting of the burden of proof in cases of indirect discrimination. In the language of the Court,

“[...] when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.

¹¹ *D.H. and others v. The Czech Republic*, paragraph 194.

¹² *Ibid*, paragraph 189.

¹³ *Ibid*, paragraph 198.

¹⁴ *Ibid*, paragraph 201.

¹⁵ *Ibid*, paragraph 204.

¹⁶ A compendium of the relevant documents in this case is available on the ERRC website: www.errc.org/cikk.php?cikk=2945.

*1. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory.*¹²

The burden of proof therefore shifted to the respondent Government to show that the difference in the impact of legislation was the result of objective factors unrelated to ethnic origin. While the Czech Government attempted to explain the difference by relying on the “desire to find a solution for children with special educational needs”,¹³ the Court held that “there was 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 Roma children who took them.”¹⁴ Therefore, they could not constitute an “objective and reasonable justification” for the impugned difference in treatment.

Finally, the Court looked at the issue of parental consent and held that “in view of the fundamental importance of the prohibition of racial discrimination no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest.”¹⁵

The applicants were each awarded 4,000 EUR in non-pecuniary damages.¹⁶

The above discrimination standards finally bring the European Court of Human Rights in line with the law and jurisprudence of European Union and UN treaty bodies. In her address on occasion of the opening of the Court’s Judicial Year 2008, Louise Arbour, the United Nations High Commissioner for Human Rights, pointed out the Court’s frequent explicit reference to external legal materials, notably the United Nations’ human rights treaties, and the concluding

observations, general comments and decisions on individual communications emanating from the United Nations' treaty monitoring bodies.

Her remark particularly related to the Grand Chamber's decision in the instant case, which "made extensive reference to provisions of the International Covenant on Civil and Political Rights, of the International Convention on the Elimination of All Forms of Racial Discrimination and of the Convention on the Rights of the Child, as well as citing General Comments by the UN Human Rights Committee on non-discrimination and a relevant decision by the Committee on an individual communication against the same State party. The Court also referred to General Recommendations of the Committee on the Elimination of Racial Discrimination on the definition of discrimination, on racial segregation and apartheid, and on discrimination against Roma. I find this open and generous approach exemplary as it recognizes the commonality of rights problems, as well as the inter-connectedness of regional and international regime."¹⁷

While the underlying issues which led Roma to bring this suit still persist, the Court noted that the Czech Republic is not alone and that other governments in the region are not dealing with the problem. Particularly important is the fact that the Court has finally taken a stance against segregation, although not in very clear terms, when it "shared the disquiet of the other Council of Europe institutions who have expressed concerns about the segregation the system causes."¹⁸

The Day After

The case is a major victory not only for the ERRC but for the entire Romani movement. Now that the trumpets of victory are quiet, we have come to realise that the real challenge lies ahead. The Court stopped short of recommending general measures

and noted that the legislation impugned in the instant case has been repealed and did not reserve the question as to whether general measures need to be adopted so the violation found by the Court is redressed. Hence, the effect of the judgment is difficult to measure since it does not technically obligate the Czech Republic to take further steps in preventing and eradicating similar practices.

Without a full mobilisation of civil society to push for meaningful reform, little if no change will be achieved. And it will be a long and painstaking process that by no means will have deadlines. For one thing, this case has served to illustrate that real change in the system will not happen overnight, nor in 3 or 5 years. Dismantling segregation in education will require additional cases brought before the courts, challenging all forms of segregation that have been nowadays exposed at length by substantially increased monitoring and reporting of various organisations in the region.¹⁹ Without strong legislation banning all forms of segregation, there is little prospect of successfully litigating in the area of discrimination. When such laws have been introduced as is the case of Hungary, Bulgaria and Romania, along with comprehensive anti-discrimination legislation, they have resulted in several important cases that successfully challenged segregation.

Nevertheless, it would be wrong to put all the eggs in one basket. Litigation has its place but there is perhaps no better way of embedding human rights principles in the fabric of the decision-making process than to have schools and educational interest groups embrace these standards as their own.²⁰

Most importantly, these standards should provide the necessary benchmarks for when and how to dismantle school segregation.

The future won't be foretold. It will unfold.

¹⁷ The full text of Ms Arbour's speech is available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/96475D3D6D044429C12573DE007107F9?opendocument>.

¹⁸ *D.H. and others v. The Czech Republic*, paragraph 198.

¹⁹ Goldston, James A. 2006. *The role of European anti-discrimination law in combating school segregation: the path forward after Ostrava*. Available at: <http://www.enar-eu.org/Page.asp?docid=16034&langue=EN>.

²⁰ Lundy, Laura. "Bridging the divide: Education and Human Rights in Northern Ireland." *INTERIGHTS Bulletin*, 2007, 15.