



Decade of Roma Inclusion

Anti-discrimination workshop

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Grand chamber judgement D.H. versus Czech Republic

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Background

In the late 1990 school segregation of Romani children in eastern European countries was becoming more and more visible. The ERRC considered the negative impact such segregation can have on Roma communities unacceptable.

Segregation manifests itself in various forms:

Intra-class segregation

A 'soft' form of segregation is that Roma children are placed in classes together with majority children but are placed in the last row in the class. Teachers at times show the attitude that those children do not receive as much attention as the others and are therefore less stimulated to fulfil expectations of teachers.

Intra-school segregation

A rather widespread form of segregation is the intra-school segregation which groups Roma children of the same grade in one class within a school. Those children are taught separate from majority children often going along with lower achievements of the students, lower qualification levels of teachers, less teaching equipment, etc.

Segregated schools

An openly manifested form of segregation is that Roma children are grouped within a separate school. However we need to acknowledge that such segregation often goes hand in hand with the local concentration of Roma living in closed neighbourhoods and nearby schools mainly recruit their students' body from the surrounding.

An additional layer of segregation is manifested by systematically categorising Roma children as mentally disabled and their transferral to special schools.

The ERRC particularly investigated the situation of Romani children in special schools for the mentally handicapped. In 1999 8 special schools existed in Ostrava and 1.360 children in total attended such schools; 56 % out of the total number of those children were of Romani origin. A study carried out by the OECD in 1999 the Czech Republic ranked at the third place in the table of countries placing children with learning difficulties in special schools. In this report only the Czech Republic used social factors as reason to transfer to special schools.

Facts of the 'Ostrava case'

Between 1996 and 1999 the 18 applicants represented by the ERRC were placed in special schools in Ostrava after they were tested in educational psychology centres. The parents signed a form that they consented to the placement of their child in a special school. With the support of the ERRC most of the parents challenged the referral which was not sustained by the education authority. Two of the applicants lodged a constitutional appeal, inter alia, arguing that de facto discrimination occurred. Additionally it was argued that parents were not sufficiently informed about the consequences of their child being placed in a special school. On 20 October 1999 the Constitutional Court of the Czech Republic dismissed the applicants appeal partly because it was manifestly unfounded. However the education authorities were invited to give careful considerations to the applicants' proposals.

ERRC research undertaken during this period in the city of Ostrava, demonstrated that school selection processes frequently discriminate on the basis of race:

- Over half of the Romani child population is schooled in special schools.
- Over half of the population of remedial special schools is Romani.

The ERRC decided to present the case to the European Court of Human Rights:

- The applicants allege that they have been discriminated against in the enjoyment of their right to education by reason of their belonging to a national minority, and their ethnic origin. Given that an inordinately high number of Roma pupils are placed in special schools whose educational standards are substantially inferior to that of

primary schools, they regarded their treatment as a case of differentiated treatment, without objective or rational justification.

- The applicants complain of being victims of degrading treatment consisting of a segregation based (at least in part) on their racial origin, which resulted in their placement in special schools designed for children with mental deficiencies.
- Tests used to assess the children's mental ability were culturally biased against the children, and placement procedures allowed for the influence of racial prejudice on the part of educational authorities.

In March 2005 the case was declared admissible at the ECtHR. However after assessment by the Chamber in February 2006 it held that there had been no violation of Article 14 (non-discrimination) of the Convention in conjunction with Article 2 of Protocol 1 (right to education) was declared that no discrimination occurred in the given cases.

The only way forward was to bring the case to the last legal instance which is the Grand chamber of the European Court of Human rights.

On 13 November 2007 ruled the following issues which are path-breaking in a number of respects:

- *Patterns of Discrimination* – For the first time, the European Court of Human Rights has found a violation of Article 14 of the Convention in relation to a pattern of racial discrimination in public primary schools.
- *Segregation is Discrimination* - The Court clarified that racial segregation amounts to discrimination in breach of Article 14.
- *Equal Access to Education for Roma is a Persistent Problem throughout Europe* The Czech Republic is not alone but discriminatory barriers to education for Roma children are present in a number of European countries.

The Court established, clarified or re-affirmed the following principles:

- *Indirect Discrimination* - A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a racial or ethnic group.
- *Intent Not Required* – A difference in treatment without objective and reasonable justification may violate Article 14 even absent discriminatory intent.
- *Facially Neutral Law* - Even where the wording of particular statutory provisions is neutral, their application in a racially disproportionate manner without justification which places members of a particular racial or ethnic group at a significant disadvantage may amount to discrimination.
- *Statistics* - When it comes to assessing the impact of a measure or practice on an individual or group, the use of statistics may be relevant. In particular, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute prima facie evidence of indirect discrimination.
- *Shifting Burden of Proof* – Where an applicant alleging indirect discrimination establishes a reputable presumption that the effect of a measure or practice is

discriminatory, the burden then shifts to the respondent State, which have to demonstrate that the difference in treatment is not discriminatory.

- *No Waiver of Right to Non-Discrimination* - 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. This means that even by having the consent of the parents, referral to a special school can manifest discrimination.
- *The Special Situation of Roma* - As a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority who require special protection.

Since the Czech government had changed the relevant law on special schools in early 2006 it was not obliged by the Court to undertake changes. However it still means for education authorities to reflect upon the principles established by the Court and to work towards implementing them. In this context other governments might need to reflect on educational practices and readjust their policies to comply with international human right standards.

Conclusion

Given the danger that a growing part of the population is under-educated and will not be able to enter the employment market that requires highly skilled personnel, governments and school authorities have the responsibility to care for future generations and the social balance of their countries. Compulsory policies and measures throughout the national school system are, from our perspective, required to ensure that equal access to quality education is provided to all children residing in the country and in particular Roma. We believe that the D.H. versus Czech Republic judgement is clarifying legal concepts and general obligations of educational authorities. This is a good start for improving education for Roma children and we do hope that governmental authorities see this as an opportunity to work on equal access to education for Roma to the benefit of the full society.

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