CRIN CHILD RIGHTS INTERNATIONAL NETWORK

Czech Republic: First steps taken on ending anti-Roma discrimination in schools

Summary

Although many Roma people have lived in Europe for centuries, they have almost universally suffered rejection and persecution. The situation in the Czech Republic is no exception, as Roma children there are often segregated in schools, unfairly labelled as "mentally disabled" and shunted into "special" classes or schools. In 1999, D.H. became the first case in Czech history to seek an end to this discrimination. In 2007, after a series of rulings and appeals, the European Court of Human Rights called the practice what it is: racial discrimination.

Background

So-called "special schools" were first established in the Czech Republic after the first world war, set up to educate mentally disabled children. Starting in the 1960s, Czech authorities pushed for the mass enrolment of students from a Roma background into these institutions, which resulted in a huge overrepresentation of these children in schools for children with mental disabilities. By the early 1970s Roma children, part of a traditionally nomadic ethnic minority now widespread across Europe, were nearly seven times more likely than non-Roma children to end up in "special schools". By the late 1980s, they were twenty-eight times more likely to be enrolled in such schools.

James Goldston, legal director at European Roma Rights Centre (ERRC) in the late 1990s, explained that the organisation held a number of consultations with Roma communities in different countries to determine where legal action would be most effective. The two areas that were identified at the time as most pressing were violence against Roma, both by the police and by private parties, and the systematic exclusion of Roma children from mainstream education.

After two years of the research, ERRC decided to challenge discrimination in education within the Czech Republic. First and foremost they planned to challenge the means of segregating Roma children in the country, particularly the use of psychiatric tests in order to define students as mentally disabled and put them in special schools and classes. The country was seen as one of the most developed in Eastern Europe, yet in 1998 the UN

Committee on the Elimination of all Forms of Racial Discrimination noted ongoing segregation in education as form of unlawful racial discrimination in its review of the country.

ERRC quickly focused on the city of Ostrava, then the third largest metropolitan area in the country. The number of Roma in Ostrava was very high compared to the rest of the country and the problem of segregation in the school system was obvious. According to data gathered by ERRC, Roma children in Ostrava represented only 2.26 percent of the total of 33,372 primary school pupils. However, the total number of pupils placed in special schools in Ostrava came to 1,360, of whom 762 - or 56 percent - were Roma. According to the data they had gathered, a Roma child in Ostrava was, at one point, 27 times more likely to be placed in a special school than a non-Roma child.

“A vast majority of Roma kids were being subjected to substandard education in most countries that we were dealing with in Central and Eastern Europe,” commented Goldston, “The opportunity to change the pattern of systematic discrimination and second class citizenship was extremely limited. Absent change, that would be a cycle that would have been repeated forever. So education was thought to be a critical area to address”.

Goldston added that finding the right applicant was also a challenge: “Because, obviously, taking on the burden of litigation and officially challenging the school authorities in a particular place meant confrontation, meant conflict, meant the possibility of retaliation, the possibility of hostile reception from parents in the non-Roma community, of children of non-Roma community, of school administrators and teachers, of others. So it was a big thing to ask of people”.

The ERRC also needed to find the right lawyer to represent the applicants at the national level. After months of searching, they finally hired a Czech lawyer, David Strupek, who assisted in managing their case from the start, representing the applicants before the Constitutional Court of the Czech Republic and later before the European Court of Human Rights. Strupek noted, “There was no precedent, it was a new case. I think [other] lawyers might have thought that it could endanger their reputation”.

Circumstances of the case

The case they brought to the European Court of Human Rights in April 2000 involved 18 Roma children who were placed in “special schools” in Ostrava, either directly or after a period in an ordinary primary school. The decisions on placements were taken by the head teachers of the schools involved, after referring to the recommendations of the educational psychology centres where the applicants had undergone psychological tests. Their parents consented to, and in some instances expressly requested, their children’s placement in a special school. The parents were informed about their right to appeal, but they never used it.

When the case was initiated, some of the applicants were pressured to halt the litigation. Many special school officials and administrators were concerned about a legal challenge that could potentially affect their future employment. In addition, some within the Roma community sent their children to segregated schools deliberately, with some claiming that

this was due to the discrimination their children would face from non-Roma students. Strupek recalled: “After the parents signed the power of attorney for me, some of them were invited to the schools and it was “explained” to them that they had made a mistake, saying that I could abuse the authority, even take their children from them and place them somewhere else”.

National proceedings

The first step was to request reconsideration of the case outside the formal appeals procedure. The applicants asked the Ostrava Education Authority to reconsider the administrative decisions to place them in special schools in June 1999. They argued that their intellectual capacity had not been reliably tested and that their representatives had not been adequately informed of the consequences of consenting to their placement in special schools. The Education Authority informed the applicants that, as the decisions made about their placements complied with the relevant legislation, the conditions for bringing proceedings outside the formal appeal system were not satisfied. Several of the applicants also lodged a constitutional appeal on the same day, complaining of de facto discrimination in the operation of the special education system, but both sets of appeals were denied by October of that year.

In their appeal the applicants claimed that the system had resulted in racial segregation and discrimination that was reflected in the existence of two separately organised educational systems for members of different racial groups, namely special schools for the Roma and “ordinary” primary schools for the majority of the population. In their final written submissions, the applicants pointed out that that there was nothing in their school files to show that their progress was regularly monitored with a view to a possible transfer to primary school, that reports from the educational psychology centres contained no information on the tests that were used and that the recommendations for their placement in a special school were based on, among other things, “an insufficient command of the Czech language, an over-tolerant attitude on the part of the parents or an ill-adapted social environment”.

The four schools concerned pointed out that all of the applicants had been enrolled on the recommendation of an educational psychology centre and with the consent of their representatives. They added that despite having been notified of the relevant decisions, none of the representatives had decided to appeal. According to the schools, the applicants' representatives had been informed of the differences between the special school curriculum and the primary-school curriculum. The government asserted that each placement in a special school was preceded by an assessment of the child's intellectual capacity and that parental consent was a decisive factor. It further noted that there were eighteen educational assistants of Roma origin in schools in Ostrava. After weighing the arguments, the constitutional court dismissed the applicants' appeal, partly on the grounds that it was manifestly ill-founded, and partly on the grounds that it had no jurisdiction to hear it.

Goldston said that they were not optimistic that the Czech courts would afford meaningful redress, adding that it felt like an an achievement to get the constitutional court to consider the merits of the case at all. While the legal approach used by the applicants was familiar in

common law countries, in civil law systems strategic litigation of this sort was a comparative unknown at the time. Strupek added: “We felt that the constitutional court did not want to open something so explosive. They were afraid that the case could start a tsunami”.

Before the European Court of Human Rights

Strupek told CRIN that he didn’t initially expect the case to succeed in the constitutional court, explaining that the main aim was to bring the case to the European court. After all domestic remedies were exhausted ERRC, together with three independent lawyers, David Strupek, James Goldston, and Lord Anthony Lester of Herne Hill, filed an application to the European Court of Human Rights. Goldston underlined the importance of ERRC’s team: Lord Lester was one of the finest anti-discrimination litigators in Europe, and Strupek was an incredibly talented lawyer, knowledgeable of Czech law and open to new ways of applying European human rights law.

Goldston told CRIN: “When the opportunity came, finally, to go to the highest court in Europe, that was a huge deal. We recognised that the stakes were enormous. I think we felt that Strasbourg too had not had many opportunities to address the situation of Roma, let alone the concept of racial or ethnic discrimination under Article 14 of the Convention”.

The complaint was strongly supported by the third parties. According to studies conducted by UNICEF and Save the Children, disproportionately placing certain groups of students in special education resulted from an array of factors, including “unconscious racial bias on the part of school authorities, large resource inequalities... and power differentials between minority parents and school officials”. Research conducted in 1997 by Czech experts at the request of the Ministry of Education had also shown that Roma children had attained only marginally lower results in a standard test of intelligence than comparable non-Roma Czech children, roughly one point less on the IQ scale on average.

According to the European Commission against Racism and Intolerance poor results obtained by these children in the pre-school aptitude tests could be explained by the fact that in the Czech Republic most Roma children did not attend kindergarten. It also noted that Roma parents often favoured the channelling of Roma children to special schools, partly to avoid abuse from non-Roma children in ordinary schools and to avoid the isolation of their children from other neighbourhood Roma children.

Despite the government’s argument that the applicants had not exhausted all available remedies at the national level, the ECtHR agreed to hear the case. The Czech authorities continued to argue that none of the applicants had exercised their right to appeal. Six had failed to lodge a constitutional appeal and, of those applicants who had appealed to the constitutional court, only five had contested the decision to place them in a special schools. However, the Court noted that it would have been unduly strict to require the applicants to exercise a remedy which even the highest court of the country concerned had not obliged them to use.

When the ECtHR judgment was handed down in February 2006 it did not find a violation of

Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1. The decision was based on three factors. First, the system of special schooling was not established solely to cater for Roma children, but with the legitimate aim of assisting children with slight mental disabilities to obtain a basic education. Second, tests for placement in the school were administered by professional psychologists, and it was not the role of the court to go beyond the established facts of the case and require the government to show that individual psychologists had not discriminated against particular children. Finally, the applicants' parents failed to appeal against the decisions to place their children in special schools and in a number of the cases the parents had requested that their children be transferred to a special school.

Recalling the judgment, Goldston said: “I felt that the Chamber did not appreciate the importance of the issues presented. And they did not appreciate what an opportunity this was for the court to stand up as an institution, to take on board a matter that had been ignored for so long”. Despite their initial defeat, Lord Lester argued that they should go to the Grand Chamber, hoping for it to overturn the court’s first ruling.

The ruling of the Grand Chamber

The Grand Chamber’s decision came in November 2007, and justified their hopes. It reversed the previous decision and found that there had been a violation of Article 14, amounting to racial discrimination. The Court underlined that, as a result of their turbulent history and constant uprooting, the Roma had become a specific type of disadvantaged and vulnerable minority, requiring special protection, which should also extend to the sphere of education. It also noted that the applicants were minor children, for whom the right to education was vital.

The Court noted that when it came 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 could constitute the prima facie evidence the applicant is required to produce. Taking into the consideration the statistics provided by the applicants and the numerous third parties, and the fact that the government failed to produce any alternative statistical evidence, the Court concluded that even if the exact percentage of Roma children in special schools at the time remained difficult to establish, their number was disproportionately high.

Regarding the government’s decision to retain the ‘special’ school system, the court accepted that it was motivated by the desire to find a solution for children with special educational needs. However, it expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation that the system was causing. Finally, it concluded that the tests used to assess the children’s learning abilities, which were subject of scientific debate and research, were not capable of constituting an objective and reasonable justification for placing a child in the special education system for the purposes of Article 14 of the Convention.

On the point of parental consent, the Court noted that the parents of the Roma children, who were members of a disadvantaged community and were often poorly educated, were not

always capable of weighing up all the aspects of the situation and the consequences of giving their consent. Moreover, it underlined that the consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special school curriculum and the curriculum followed in other schools.

Nor did the domestic authorities take any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures. "It was a surprise that the reasons of the court were very resolute, very strong", commented Strupek, "some arguments surprised even us. Such as, for example, that the presumption of discrimination in similar cases cannot be reversed at all even in individual cases".

Goldston said, that at first he could not believe their success. Among other important findings of the Court, he appreciated the final paragraph of the judgment, saying: "The Chamber recognized, that it was not about the individual circumstances of these children, important, of course, though those were, but this was a nationwide problem. It was a national problem at a systemic level, that had been allowed to fester and worsen for decades and it had to be addressed. And the fact that the Grand Chamber of the ECtHR found that this was discrimination in breach of the European Convention was a huge statement that still resonates today".

Outcome

The ECtHR stated that the Czech Republic had a legal obligation to adopt general and, if appropriate, individual measures to put an end to the violation found by the Court and to redress, so far as was possible, its effects. After the judgment became final, the Committee of Ministers of the Council of Europe started monitoring the government's implementation of the decision. Despite several legislative amendments, surveys continued to show the lack of significant progress in life prospects for Romani children in the years following the judgment.

In June 2013, the European Roma Rights Centre together with Amnesty International and the Open Society Justice Initiative submitted a briefing on the Czech situation to the European Commission and urged it to initiate an infringement procedure. On one hand, the briefing supported the fact that the planned School Act amendment contained positive measures, such as the introduction of a new five-grade support system for children with learning difficulties that classifies all support measures in a comprehensive catalogue, and a mechanism of re-diagnosis; the legal recognition of the teacher assistant's' position; and the prioritisation of individual mainstream school integration among the support measures.

On the other hand, the organisations were seriously concerned about the provision of the 2012 amendment allowing children defined as "socially and culturally disadvantaged" to be placed in practical schools. They argued that placing children in programmes meant for those with intellectual disabilities based solely on perceived social and cultural differences would encourage further divisions, underlining that what was previously identified as indirect discrimination could easily become direct discrimination.

The European Commission has since initiated an action of non-compliance against the Czech Republic for continuing to discriminate against Roma children in education, on the basis of article 258 of the Treaty for the Functioning of the European Union. In response the Czech authorities announced a new action plan in 2015, including a set of tools and measures to provide equal access to quality education for Romani children and, ultimately, to introduce integrated education. A whole package of reforms has since been presented.

The most important short and medium term measures include the removal of the possibility of placing "socially disadvantaged" pupils or children without disabilities in groups or classes for children with any kind of "mild mental disability", the revision of the diagnostic tools used to identify pupils with such disabilities, the establishment of non-discriminatory checks on the accuracy of diagnoses and the carrying out of annual surveys to establish the number of Roma pupils educated in programmes designed for children with a “mild mental disability”.

Michal Zalesak, a lawyer currently working at ERRC explained that it is too early to evaluate adopted amendments as there is very little data available. “There were some estimates from the beginning of the academic year, when the amendments were implemented”, he explained, “By the end of September 2016 only around 200 pupils out of 18000 pupils diagnosed with mental disabilities were transferred to mainstream schools. So it is a slow process that is still hard to evaluate, but it has potential to be successful in terms of inclusive education in general”.

In addition, Zalesak told CRIN about a more recent case against the Czech Republic, which the European Roma Rights Center is now working on with David Strupek. The applicant in their new case was diagnosed with mental disability as a child and forced to attend an elementary school for children with mental disabilities.

He complained about being enrolled in a special school not on the basis of his cognitive abilities, but because of his Roma ethnicity. The case failed before the Czech Supreme Court, which claimed that discrimination only occurred where the proportion of Roma children in special schools was at least 50 percent. The constitutional court dismissed this decision, but still did not find that there had been discrimination in the case at hand, saying that the applicant’s diagnosis had been correct.

The case has been brought before the European Court of Human Rights, but has not been officially communicated yet. Zalesak concluded: “I think this is a perfect example that nothing works as a sole tool. In the D.H. case there was the litigation, advocacy, then the outside stakeholder came and pushed the changes, NGOs, obviously Roma themselves, who are an important part of it. Roma themselves have to be aware of their rights”.

Goldston compared the current situation in the Czech Republic with the United States after the 1954 Supreme Court decision in Brown vs. Board of Education. Brown declared the state laws establishing separate public schools for black and white students to be unconstitutional. “We are now 63 years after that judgment and I don’t think anybody would say that all children in [the United States] have an equal opportunity to a quality education today,”

Goldston noted, “That is not for a lack of trying. There have been all kinds of struggles. And the situation is better in many places than it was when the Brown decision was issued, but these are deeply rooted problems”.

“These human rights violations are embedded in societies and cultures, and they do not change overnight. They are product of social attitudes, cultural attitudes, political structures, economic conditions”.

He summarised the impact of the D.H. decision, saying: “I think people recognized that it was an important judgment, that it was the European Court of Human Rights. But I don’t think the government officials recognized how fundamentally this was changing the debate, not only in the Czech Republic, but also in the other countries, where the problem of Roma segregation in schools existed”.

He underlined the crucial role of those most directly affected, emphasising that long before the litigation happens, communities should be strengthened and empowered to work for their own rights. He concluded: “One of the big changes that I saw on my recent visit to Ostrava just a few weeks ago, was the fact that Roma parents are now organizing in a way that they were not fifteen or even ten years ago on behalf of quality education for their kids. They recognized this is a really important issue and they recognized that, unless they clamour for change, it won’t happen, and that is a very heartening sign”.

Further information

- Read CRIN’s case summary of D.H. and Others v. the Czech Republic.
- Find out more about strategic litigation.
- See CRIN's country page on the Czech Republic.
- Read CRIN’s report on access to justice for children in the Czech Republic.

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