

# The Scene After Battle: What is the Victory in *D.H. Worth* and Where to Go From Here?

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## Introduction

Following ten years of legal battle against the misdiagnosis of 18 Romani children in the Czech town of Ostrava and their misplacement in special schools for the intellectually disabled, on 13 November 2007 the Grand Chamber of the European Court of Human Rights found that the Czech Republic had violated the right of the applicant children to education without discrimination.

As recalled in the Grand Chamber judgment in *D.H. and Others v. the Czech Republic* (judgment of 13 November 2007) (hereinafter: *D.H. II*), Roma have been a topic of discussion at the European level from the late 1960s. Over the last 15 years this discussion has been kept lively by the European Roma Rights Centre (ERRC) led NGO movement that aims at protecting the rights of Roma all over Europe. The ERRC and its allies have fought dozens of cases before European and international fora – first and foremost the European Court of Human Rights (ECtHR). None of these actions has however been as strategic, laborious and lengthy as the litigation in *D.H.* This paper examines the verdicts rendered in *D.H.* to see the journey this case has taken the ECtHR on and attempts to map out what the consequences of the final judgment may be in the European legal arena.

There will be a focus throughout this paper on the Racial Equality Directive (RED),<sup>2</sup> its impact

on *D.H. II* and its future impact on strategic litigation against ethnic and racial discrimination in Europe. It is noteworthy in this context that although some domestic litigation – notably *actio popularis* litigation in Bulgaria and Hungary – has been made possible by the transposition of the RED, the majority of cases presently pending either predate it or fall in a sequence that pre-dates RED – eg Traveller and anti-Romani violence cases. Undoubtedly, however, a new wave of litigation is emerging and organisations engaged in such activities use the RED in their efforts. The judgment in *D.H. II* has significantly raised the profile of community law.

Over the past 13 years at the ECtHR, the bulk of anti-discrimination jurisprudence has been generated by the Open Society Institute-sponsored Roma rights movement. Other litigation, the Traveller cases, came from the UK and were limited in scope to the failure of local authorities at providing reasonable accommodation (housing but no finding of violation in relation to education), ie in essence depriving Travellers of their right to exercise their right to private and family life in full.<sup>3</sup> As we will see from the Court's reasoning in *D.H. II*, the Traveller accommodation cases have been instrumental in shaping the ECtHR's understanding of Roma rights.

These cases arose from (in)directly discriminatory legislation, on the basis of which Travellers had

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<sup>2</sup> Council Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial or ethnic origin.

<sup>3</sup> *Beard v. the United Kingdom*, Application No. 24882/94; *Buckley v. the United Kingdom*, judgment of 25 September 1996; *Chapman v. the United Kingdom*, judgment of 18 January 2001; *Connors v. the United Kingdom*, judgment of 27 May 2004.

often been forced to camp illegally. On account of the ‘forced illegality’ prior to *Connors* – who had complied with the law – the ECtHR had not found violations of Article 8 of the European Convention on Human Rights (ECHR). The ECtHR had, however, been sympathetic towards Travellers and already observed in *Chapman* that “there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.”<sup>4</sup> The ECtHR also noted that “the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.”<sup>5</sup> The House of Lords echoed the ECtHR’s concerns, when holding that the vulnerable position of Travellers as a minority group deserved more sympathetic attention and special consideration of their needs than had previously been the case in the planning and site allocation process.<sup>6</sup> Sadly, the practical impact of these decisions is not yet visible.

Prior to *D.H.*, however, the cases had been reactive. In the UK they reacted to individual instances of failure to accommodate Travellers, whereas in Central and Eastern Europe they reacted to violence or death inflicted on individual Romani victims by law enforcement personnel or mob violence directed against entire Romani communities. From *Assenov v. Bulgaria* (judgment of 28 October 1998) to *Stoica v. Romania* (judgment of 4 March 2008), the cases are telling of the attitudes of public officials, discriminatory administrative practice in the investigation of serious rights violations against Roma, and potential domestic judicial responses to such practices. They are also telling of the difficulties Romani victims of racial violence and discrimination may face in countries that seek to provide protection from discrimination in criminal law. Obviously, in criminal law the RED’s

great achievement, the reversed burden of proof, cannot be applied and it may be far more difficult to recover adequate moral damages in domestic criminal proceedings than before the ECtHR.

### ***D. H. and Others v. the Czech Republic: The judgments***

The ERRC hailed the judgment in *D.H. II* as bringing the ECtHR’s Article 14 jurisprudence in line with principles of anti-discrimination law that prevail within the EU. Undoubtedly, since the adoption and transposition of the RED the most important and publicised legal battle relating to Roma rights covered by the RED has been fought and won in this case. And even though litigation in *D.H.* predates the RED, the length of proceedings before the ECtHR made it possible to raise arguments in this case based on the RED.

Inspired by Soviet educational dogma, in the Czech Republic, as in many other Central European countries, a system of special schools had been established during Communism and maintained for decades even after studies by social scientists, psychologists and teachers found clear patterns of system failures resulting in ethnic discrimination. In the mid-1990’s the slow reconceptualisation of the issue of misdiagnosis as a legal, not only as a sociological or pedagogical problem began. The then ERRC legal director, James A. Goldston, initiated meetings with domestic stakeholders and argued that a legal challenge needed to be mounted to tackle this structural problem. In Hungary he failed to gather adequate support and it was not until 2006 that as a result of concerted efforts by Viktória Mohácsi, Member of European Parliament, and her team in this country that action for civil damages were brought on behalf of 17 misdiagnosed Romani children.

In the Czech Republic, the ERRC was successful at finding a Romani community whose members could be persuaded during months of

<sup>4</sup> *Paras. 93-94.*

<sup>5</sup> *Para. 96.*

<sup>6</sup> *In the cases of South Buckhamshire v Porter, Wrexham CBC v Berry and Chichester DC v Keet and Searle.*

field work to challenge their placement in special schools. However, in Ostrava, ERRC researchers did much more than identifying the victims. They systematically collected ethnic data to support the case and also to test what worth statistical data had as a piece of evidence.

The case originated with the unsuccessful filing of complaints in Czech courts in 1999 on behalf of eighteen children represented by the ERRC and local counsel. In 2000, the applicants turned to the ECtHR, alleging that their assignment to “special schools” for children with learning disabilities contravened the ECHR. According to the ERRC, “Tests used to assess the children’s mental ability were culturally biased against Czech Roma, and placement procedures allowed for the influence of racial prejudice on the part of educational authorities”.<sup>7</sup>

Statistical evidence compiled by the ERRC from Czech officials and authorities, and presented to the ECtHR demonstrated that school selection processes frequently discriminated on the basis of race; e.g. that any randomly chosen Romani child in Ostrava was more than 27 times more likely to be placed in schools for the learning disabled than a similarly situated non-Romani child.

The case miserably failed at first instance, and that judgment (hereinafter: *D.H. I*)<sup>8</sup> did not only meddle with facts presented to the ECtHR – for instance, refusing to consider that a number of applicants had not in fact been intellectually disabled and had been placed back into normal school – but was plainly biased against Romani parents and undisciplined in its reasoning. Despite the Czech Republic’s clear acknowledgement to Council of Europe monitoring bodies of structural discrimination against Romani children by way of misdiagnosis, the Chamber did not analyse the causes of such discrimination. It contented itself by finding that the legislation allowing for the maintenance of special

schools was not *intentionally* discriminatory, nor could intentional discrimination be proven on the part of professionals engaged in making decisions on placement.

The Chamber judgment was nothing out of the ordinary for domestic lawyers from the CEE region, used to poorly argued cases, where legal terminology could hardly hide the prejudices of the judges themselves. They could take consolation in the fact that at least the Portuguese judge voted against the majority and argued that given the respondent State’s acknowledgement of discrimination, there was no room for justification and a violation should have been found.

Similar to the Chamber judgment, in the first desegregation challenge in a Hungarian civil court – the so called *Miskolc* desegregation case – the *actio popularis* claim was dismissed at first instance<sup>9</sup> on the basis that the plaintiff had failed to show that the defendant local government did not only intend but directly aimed at segregating Romani children. This was, however, remedied on appeal and segregation was established as a failure to end a long-lasting spatial separation between Romani and majority children.<sup>10</sup> It goes without saying that intent – or in matters relating to the right to education under the ECHR – never needs to be proven to establish civil liability. However, once discriminatory intent is proven, that may be reflected in the severity of sanctions. Culpability in civil cases operates along different considerations from liability under criminal law. The Chamber ought to have noted that it was examining the liability of the Czech Republic in the field of education in a case that did not concern criminal liability at the domestic level either.

In *D.H. I*, the ECtHR Chamber was prepared to accept tacit parental consent as a potential justification for segregated education. According to the Chamber judgment, the “needs and aptitudes or disabilities of the children” themselves, and

<sup>7</sup> See: <http://www.errc.org/cikk.php?cikk=2945>.

<sup>8</sup> Chamber judgment of 7 February 2006.

<sup>9</sup> See trial records in case No. BAZ Megyei Bíróság, 13.P.21.660/2005.

<sup>10</sup> Judgment of 9 June 2006, *Debreceni Ítéltábla (Debrecen Appeals Court) No. Pf.I.20.683/2005*.

*parental behaviour* justified difference in treatment.<sup>11</sup> Regrettably, the Chamber chose not to address issues advanced by the complainants, such as the extent to which parental consent was ‘informed consent’, instead taking the perspective of the average majority person, who is familiar with her rights, has not experienced pressure from public authorities and has access to relevant information to make informed decisions on her own. Only from this perspective could factors such as lack of parental appeal against placement decisions be considered as evidence of genuine parental will. A similar finding in relation to parental behaviour has been made in a misdiagnosis case in Hungary as well.<sup>12</sup>

On appeal, the Grand Chamber, by a vote of 13 to 4, ruled that the disproportionate placement of Romani students into special schools is a form of unlawful discrimination in breach of Article 14 ECHR taken together with Article 2 of Protocol No. 1. The ERRC hailed the judgment as path breaking in a number of respects, including the following:

*Patterns of discrimination* – For the first time, the ECtHR found a violation of Article 14 of the Convention in relation to a pattern of racial discrimination in a particular sphere of public life, in this case, public primary schools. As such, the Court underscored that the Convention addresses not only specific acts of discrimination, but also systemic practices that deny the enjoyment of rights to racial or ethnic groups.

*Equal access to education for Roma is a persistent problem throughout Europe* – The ECtHR went out of its way to note that the Czech Republic is not alone – discriminatory barriers to education for Romani children are present in a number of European countries.

*Unified anti-discrimination principles for Europe* – the ECtHR further established, clarified or re-affirmed the following principles: indirect discrimination can constitute a violation of the ECHR; in such cases, the burden of proof can shift to the respondent State; intent

not required to prove violation; facially neutral law may be discriminatory in effect.

*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. The Court confirmed, however, that statistics are not a prerequisite for a finding of indirect discrimination.

*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, as it would be counter to an important public interest.

*The Special situation of Roma as an ethnic minority group* – As a result of their history, Roma have become a specific type of disadvantaged and vulnerable minority who require special protection.

## Appraisal of *D.H. II*

It is arguable that although in *D.H. II* discrimination in the right to education has been established, there remain unresolved issues that merit further attention and action at the practical as well as theoretical levels as follows:

1. *D.H. II* could not have been won had reports from Council of Europe bodies – such as the European Commission on Racism and Intolerance and the Advisory Committee of the Framework Convention on National Minorities – not brought to light patterns of segregation and discrimination against Czech Roma in education. Given the weight afforded to these reports in the final judgment, it may be suspected that some pressure has been put on the Court to reference these reports, thus taking into due consideration

<sup>11</sup> *Para. 49 and paras. 10-11 and 49-51, respectively.*

<sup>12</sup> *Bács-Kiskun Megyei Bíróság, 2.P.21.843/2006, on file with the author.*

the work undertaken by and according adequate acknowledgement to the respective bodies. Clearly, the referencing of political or soft law measures and reports in the final judgment is also intended to raise the profile of such endeavours.

2. Arguably, in *D.H. II* the Grand Chamber is wrong in finding indirect discrimination instead of direct discrimination, and not only because the facts do not substantiate this view. It is worthwhile recalling here that the applicants argued the case on the basis of direct as well as indirect discrimination. As is noted in the final judgment, “at the very least, there is 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 Romani children* who sat them. In these circumstances, the tests in question cannot serve as justification for difference in treatment.”<sup>13</sup> If this was the case, then obviously the tests themselves did not seem neutral, nor was the analysis of test results done in a neutral fashion – they were plainly discriminatory on the ground of ethnicity, as explained in a European Commission report.<sup>14</sup> Under these circumstances not only can the tests not serve as a justification, they were the primary sources of discrimination against Romani children.

According to its jurisprudence, the Court ought to have examined whether the applicants were successful in identifying the protected ground under Article 14, less favourable treatment and a comparator group which was in an analogous

situation to theirs. Once the applicants had established these elements, the Czech Republic could seek to justify its actions along the reasonable and objective justification test, or by claiming that the difference in treatment in fact arose as a result of positive action measures.<sup>15</sup>

Arguably, however, the Grand Chamber failed at running this test properly. The Court identified race and within that ethnic origin as a ground on which protection was due to the applicants,<sup>16</sup> and clearly stated that the applicants were less favourably treated because they were not tested and measured in a fashion that took their personal characteristics fully into account.<sup>17</sup> However, it failed at identifying properly the comparator group, that of majority Czech children whose personal characteristics were fully taken into account during testing. This failure may be the cause of controversy around the form of discrimination to be tested and justified.

In a typical case of indirect discrimination before the European Court of Justice, for instance, a difference can be discerned between groups that bear characteristics neutral to the protected ground. For instance, in *Enderby* a difference in payment was established between speech therapists and pharmacists.<sup>18</sup> Only at more rigorous examination could it be seen that women were grossly over represented among speech therapists, and thus indirectly discriminated by a seemingly neutral measure – the collective agreement. Differences in access to occupational pension in the *Bilka* case were revealed between full time and part time workers.<sup>19</sup> Again, only a closer

<sup>13</sup> Para. 201, *D.H. II* [emphasis added].

<sup>14</sup> European Commission. July 2007. *Segregation of Romani Children in Education: Addressing structural discrimination through the Race Equality Directive. Chapter 2.3.* Available online at: [http://ec.europa.eu/employment\\_social/fundamental\\_rights/policy/aneval/legnet\\_en.htm](http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm). (hereinafter: “Segregation Report”).

<sup>15</sup> Harris, D.J., O’Boyle and Warbrick. 1995. *Law of the European Convention on Human Rights.* Butterworths, pp. 462-488.

<sup>16</sup> Para. 176, *D.H. II*.

<sup>17</sup> Para. 201, *D.H. II*.

<sup>18</sup> *Enderby v Frenchay Health Authority, C-127/92 ECJ.*

<sup>19</sup> *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz, case 170/84 ECJ.*

look revealed that the vast majority of the part time workers were women as opposed to mainly male full time employees. In these cases, however, the provision or practice that resulted in indirect discrimination was indeed neutral, i.e. it was not linked to sex.

The same cannot be said in *D.H.* As the Grand Chamber noted at paragraph 201, there was a danger that the IQ tests and the professional code along which test results were analysed were not race and ethnicity neutral. Indeed, when identifying the comparator group as is suggested here, i.e., at the entry point of the testing process, the racially or ethnically loaded character of the tests and the testing process becomes apparent: The comparison is between Romani and non-Romani children, not intellectually disabled and non-disabled children. Given that there was evidence in the case as to the decade-long discriminatory impact of such testing on Czech Romani children, the Court ought to have addressed the issue of structural or systemic discrimination. Arguably, from such a system level perspective, entirely detached from the characteristics of individual Romani and non-Romani children, *D.H.* could only have been analysed as a form of direct discrimination.

3. A somewhat hidden and regrettably inconsistent argument based on ethnic minority rights can also be discerned in the Grand Chamber judgment. This argument flows from the ECtHR's findings in the UK Traveller cases<sup>20</sup> and is related to the vulnerable position of European Roma in general, and the specific ethnic minority characteristics of this ethnic group.<sup>21</sup> Tacitly, this argument elevates for protection Roma through their membership in a national minority group listed under Article 14 of the ECHR and specifically protected under the FCNM, and recognises a consensus, a self-imposed obligation on Member

States to reasonably accommodate the said ethnic minority characteristics in relation to substantive rights protected under the ECHR.<sup>22</sup>

Arguably however, such a duty of reasonable accommodation is a specific, free standing form of discrimination, for which no test needs to be elaborated: It is enough to prove that the applicant is Romani, that in relation to her substantive right such a public/state duty exists and that it is not complied with. In essence the central finding of the Grand Chamber at paragraph 201 of *D.H. II* is exactly this. But why run the test for indirect discrimination then? As discussed below, the Grand Chamber went out of its way in distinguishing the reasonable accommodation duty in relation to public education from any sort of mandatory positive action measure. This distinction, however, may collapse once the ECtHR's jurisprudence evolves on this matter, and will definitely fail under the RED, which is based on a purely individualistic right to non-discrimination as opposed to a collective rights based framework of minority rights.

Certainly, this minority rights based argument shows that the Court has recognised Roma as a protected group in the area of public education, employment and the access to goods and services and indicated its willingness to strictly scrutinise measures taken against them, and its readiness to impose a duty on States to reasonably accommodate the needs and specificities of Roma in the field of education.<sup>23</sup>

By elevating Roma for this special protection, and grounding this protection on their status as a recognised ethnic minority, the Court at the same time limited the scope of its protection, which at the moment does not extend to other ethnic groups, or indeed racial minorities – whether or not citizens of Member States.

<sup>20</sup> *Beard v. the United Kingdom*, Application No. 24882/94; *Buckley v. the United Kingdom*, judgment of 25 September 1996; *Chapman v the United Kingdom*, judgment of 18 January 2001; *Connors v the United Kingdom*, judgment of 27 May 2004.

<sup>21</sup> See at para. 181, *D.H. II*, a recapitulation of the finding that Roma are a vulnerable group whose situation and different lifestyle merit special consideration.

<sup>22</sup> Paras. 31 and 182, *D.H. II*.

<sup>23</sup> Para. 194, *D.H. II*.

4. It is not yet known whether direct race or ethnicity based discrimination would be more difficult to justify under the ECHR than indirect discrimination. What is known and relevant now that the ECtHR has taken the RED into consideration in its deliberations is that under the RED indirect discrimination can be far more easily justified than can direct discrimination. Moreover, even the test for indirect discrimination in the RED is more rigorous than that applied by the ECtHR in *D.H. II* (paras 196-204). This said, the difference between the approaches under Community law and the ECtHR jurisprudence may not be significant, as in subsequent cases – as is already indicated in the *Sampanis and Others v Greece* judgment – the ECtHR may limit justification to that known under the RED. When assessing how progressive future case law may be, it is also important to note that the ECtHR Grand Chamber did not find it difficult to break away from the ‘intent doctrine’ so cheerfully applied in *D.H. I* by the Chamber.
5. The Court in *D.H. II* correctly assesses the specific situation of Romani parents vis-à-vis average non-Romani persons. Although tacitly, in mapping out this specific situation the ECtHR adopts a multifaceted view of Roma as a dual racial and ethnic minority (particularities and characteristics of Romani children, members of disadvantaged community, often poorly educated, making decisions under constraint, social and cultural differences (possibly including language), risk of isolation and ostracism in majority settings),<sup>24</sup> as elaborated in the *Segregation Report (chapter 2.1.)*.

In order to avoid stereotyping and generalisations, there is a need, however, to explain in full this multi-faceted nature of Romani identity – among which social deprivation is an important element, an element that internalises in the definition of Romani identity the impact of long standing, historic discrimination that some may otherwise view as a result of present indirect

discrimination. The ECtHR still owes us this explanation, in fact in *D.H. II* it may itself have come a bit too close to stereotyping and generalising. Regrettably, when discussing the reasons of discriminatory application of the Czech law, the ECtHR did not maintain its definition of Romani identity as a multifaceted one.<sup>25</sup>

6. *D.H. II* could and ought to be argued differently in domestic courts and/or before the ECJ. First and foremost, litigators have a role in ensuring that courts have firm knowledge of discrimination against Roma in the given field. Second, they ought to advocate for principled reasoning. Third, all players should further the multifaceted definition of Roma as a dual racial and ethnic minority. Last, they need to argue for effective, proportionate and dissuasive remedies – in the form of reasonable accommodation duties or other types of mandatory positive actions if need be.

The ECtHR in the UK Traveller cases has developed a minority rights based definition recognising the special needs of Travellers, which is beneficial in that it is also able to capture Romani identity as a multifaceted one. The applicants in *D.H.* were conscious not to characterise their case as demanding positive action.<sup>26</sup> The ECtHR adopted this line of reasoning and ruled that positive action was not required vis-à-vis misdiagnosed Romani children, but that the respondent State was at fault when failing to take “into account these children’s special needs as members of a disadvantaged class.”<sup>27</sup>

In reality, however, these special needs cannot be taken into account by simply refraining from discrimination. In other words, unless reasonably accommodating the special needs of Roma in public education legislation, making special financial investments into developing new tests and training professionals including teachers in normal schools that formerly misdiagnosed Romani children now allegedly

<sup>24</sup> Paras. 201-203, *D.H. II*.

<sup>25</sup> See conclusions in paras. 205-210, *D.H. II*.

<sup>26</sup> Para. 183, *D.H. II*.

<sup>27</sup> Para. 207, *D.H. II*.

attend, the Czech Republic cannot facilitate the special interests of Romani children.

Under the RED, the reasonable accommodation of such special ethnic minority needs amounts to positive action, which hitherto has been rather narrowly defined in sex discrimination cases by the ECJ. It seems at the same time that on the ground of race and ethnicity, many Member States provide a broader reading to positive action.<sup>28</sup> Indeed, the question that needs to be resolved under the RED, i.e. mandatory positive action, is already on the table in relation to housing rights. In the UK and France, where Travellers are primarily itinerant, the key issues relate to the extent to which positive provision should be made for the special needs of Traveller families and the implementation of reasonable accommodation duties.

7. Consequently, in cases of structural discrimination, such as *D.H. II*, pursuant to Article 15 of the RED (proportionate, effective and dissuasive remedies for race and ethnic discrimination) domestic courts and/or the ECJ ought to impose positive action as the only effective, proportionate and dissuasive remedy. In failing to do so itself, the ECtHR failed to provide the applicants and tens of thousands of Romani children across Europe effective judicial protection. Just as the reversal of the burden of proof in indirect sex discrimination cases was “judge made law” introduced by the ECJ to ensure effective judicial protection, a similarly bold step needs to be advocated in relation to Roma and mandatory positive action.
8. Dissenting opinions in *D.H. II* warn us about the politics that underlie and can trump any Roma – let alone immigrant racial minorities – related litigation effort at the domestic as well as the EU level, notably in the relations of new versus old Member States. In this regard, the Czech judge Jungwiert’s remarks cannot be overlooked. In his dissenting opinion (particularly in paragraphs 6-8), Judge Jungwiert elaborated at length on how old EU Member States have been

unable to resolve issues relating to the education of Travellers and suggested that they ought to then exercise more self-restraint in criticising the Czech Republic (paragraph 15).

Furthermore, the Slovenian judge Zupancic in his dissenting opinion concludes that “No amount of *politically charged* argumentation can hide the obvious fact that the Court in this case has been *brought into play for ulterior purposes* [emphasis added], which have little to do with the special education of Romani children in the Czech Republic. The future will show what specific purpose this precedent will serve.” This is even more troubling, as his position is that only the Czech Republic has done something about the education of Romani children, thus it cannot be held in violation of anti-discrimination principles. The sheer level of ignorance on this topic is astonishing especially in light of the work of other Council of Europe bodies, such as the Advisory Committee of the Framework Convention on National Minorities and the European Committee on Racism and Intolerance – or indeed the Fundamental Rights Agency (formerly EUMC) at the EU level.

That out of the four dissenting judges only the Slovak judge, Sikuta, made an attempt at providing a legal, instead of a political, argument suggests structural problems at the level of the ECtHR in the selection and impartiality of judges, especially from the CEE region. One might wonder about the adequacy of domestic judgments and the attitudes of judges in the CEE region in similar cases. These are not concerns to be taken lightly as a hostile judiciary may undermine any reasonable attempt at strategic litigation for Roma and racial minority rights.

9. The ECtHR’s perception of de facto discrimination resulting from (in)directly discriminatory legislation and the tacit understanding supported by relevant Council of Europe treaties and mechanisms that minority rights are collective rights virtually transformed *D.H.* from an application brought by 18 individual applicants into an *actio popularis* or collective complaint; hence

<sup>28</sup> See, for example, positive action measures listed in Chapter 5 of the Segregation Report.

the finding that there was no need to examine the applicants' individual cases. It is a shame therefore that the ECtHR did not accord a remedy suitable for structural discrimination or a collective complaint. On the other hand, the transformation of the applications into a virtual collective complaint shall definitely be advertised and followed as best practice. It ought to be borne in mind though that domestic courts may find adopting the same line of reasoning difficult in a case brought by individual applicants seeking (non-)pecuniary damages on account of misdiagnoses.

There are a dozen cases initiated in 2006 in Hungary, in which individual Romani children seek compensation from Expert Committees and special schools for misdiagnoses and inadequate education. There are no final judgments yet. The first case rejected on first instance has been appealed using arguments as well as the judgment in *D.H. II*, and was sent back for retrial on account of procedural shortcomings. However, it is feared that, following *D.H. II* as an analogy, domestic courts will try these cases as indirect discrimination and thus defendants will find it easier to put forward justification defences. What is benefiting this case from *D.H. II* is that the Hungarian court, previously rejecting evidence on structural discrimination, is now ready to entertain sociological studies and data from the Ministry of Education.

In case these individual actions are rejected at the domestic level, litigators will have a difficult choice to make. They may compromise the achievements of *D.H. II* if they complain to the ECtHR seeking a finding based on direct discrimination.

### **Considerations for domestic action following *D.H. II***

Given that a dozen cases similar in fact to *D.H.* are pending before Hungarian courts, and that other *actio popularis* claims relating to segregation in normal schools are being heard in

Bulgarian and Hungarian courts, it is timely to analyse how they could and should be argued pursuant to the RED, and to highlight in what way the final judgment in *D.H.* may not necessarily be beneficial in these cases.

Under the RED it is arguable that the special education of intellectually sound Romani children that results from the lack of race neutral psychological testing is direct discrimination.<sup>29</sup> Psychological tests or any other method of pre-school screening that fail to accommodate the racial differences that arise from the social attributes of Roma (language, deprived social status and other ethnicity based special characteristics) in fact do not impose apparently neutral criteria. These tests and screening methods treat Roma less favourably than majority children on account of failing to accommodate their special minority needs and adequately measure their intellectual abilities. Thus it is direct, rather than indirect discrimination, and is not subject to a justification defence.

The fact that the bias in tests and screening methods is not expressly based on race including ethnicity, but arises on account of various essential minority characteristics, such as culture, history and social status does not mean that it is not racial or ethnic bias, since all these characteristics fall neatly under the notion of race. Clearly, a Romani child who fails a test administered in the majority language because she/he speaks her/his minority language is being treated less favourably than a majority child speaking the majority language. Again, it is preferable to conceptualise this as direct discrimination based on race, rather than indirect discrimination based on the application of an exclusionary condition, namely the majority language, which disproportionately discriminates against Roma and is unjustifiable. This is because, firstly, language is part of the definition of Roma, and therefore discrimination on grounds of their language is nothing less than discrimination on grounds of their race and ethnicity. Secondly, the justification for the majority language might appear plausible unless it is accepted that language is one of the many elements of Roma identity.

<sup>29</sup> For this and other arguments under the RED relating to the segregation of Romani children in public education see the Segregation Report.

The same holds true to Romani children whose parents pursue a travelling way of life: A test or screening method which is based on local culture, local educational achievements and the assumptions of a settled way of life would amount to less favourable treatment of Romani children on account of their racial and ethnic origin. There may well be situations outside of the field of educational segregation where indirect discrimination is an appropriate tool, but it is argued here that direct discrimination is the most appropriate way of understanding school segregation.

In practice one of the most common arguments for separate (be that equal or inferior) education is not free and informed parental choice, but often tacit parental consent. However, there is a significant distinction between choice and consent, as the former denotes a free standing parental decision, whereas the latter more often than not attaches to a recommendation from teachers, psychologists etc. Parental consent cannot *generally* be construed as a legitimate justification under RED, because direct discrimination cannot be justified under RED (except potentially under the provisions for a genuine occupational qualification or positive measures). In this respect one needs to bear in mind that in *D.H. II* the ECtHR Grand Chamber found that there could be no waiver – whether or not coming from parents – from the right not to be discriminated against. Furthermore, the FCNM Advisory Committee in its thematic report on education highlighted that the issue of consent should be very carefully examined.<sup>30</sup>

Institutional discrimination could also be conceptualised as direct discrimination, given that it “consists of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes, and behaviour which amount to

discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.”<sup>31</sup> Institutional discrimination adds up from individual acts that do in fact differentiate between Roma and non-Roma on the basis of racial stereotypes – even if such stereotyping is concealed as applying the ‘majority’ norm. In actions involving schools, the argument that Romani children are lazy, that they have lower expectations, that Romani girls fall pregnant at an earlier age, that Romani families are not supportive enough are commonplace. Such arguments in fact conceal teachers’ and education decision-makers’ attitudes that are based on racial grounds. As the UK House of Lords held in the *Prague Airport Case*,<sup>32</sup> acting or stereotyping on racial grounds is wrong, not only if it is untrue – otherwise it would imply that direct discrimination can be justified.

### **Structural remedies for structural discrimination: The Hajdúhadház desegregation case, 2007**

This Hungarian case deals with the admissibility and collection of ethnic data on Roma in the face of restrictive data protection laws. The trial court appointed a forensic education expert to collect school level data in collaboration with members of the Hajdúhadház Roma Minority Self-Government, based on membership of the local Roma minority community, perception thereof, and place of residence as proxies for the ethnic origin of Romani children.<sup>33</sup> The trial court found that the two schools and the local government segregated Romani children in buildings other than the main school buildings, and directly discriminated them by providing inferior physical conditions. The court ordered the local government to publish an apology through the Hungarian Press Agency, ordered the schools to

<sup>30</sup> *Advisory Committee on the Framework Convention for the Protection of National Minorities. Commentary on Education under the Framework Convention for the Protection of National Minorities. ACFC/25DOC(2006)002, p. 11.*

<sup>31</sup> *The Stephen Lawrence Inquiry. Report of an inquiry by Sir William Macpherson of Cluny. CM4262-I, para. 6.34. The report concluded an investigation into police practices in the UK following a racist murder of a black teenager.*

<sup>32</sup> *R. v. Immigration Officer at Prague Airport and Anor ex parte ERRC and others, [2004]UKHL 55.*

<sup>33</sup> *See trial records in case No. Hajdú-Bihar Megyei Bíróság, 6.P.20.341/2006.*

end segregation by 1 September 2007, and the local government – the maintainer of the two schools – to refrain from interference with desegregation.<sup>34</sup>

On appeal, the Debrecen Appeals Court upheld the finding of direct discrimination and ordered an end to it, but quashed the remaining part of the first instance judgment. The case is pending judicial review before the Supreme Court which has been asked to refer the following questions to the ECJ: 1. Does spatial segregation in the instant case amount to direct discrimination contrary to Article 2.2(a) RED? 2. If the answer to question 1 is yes, can the respondents justify such direct discrimination under provisions other than Article 5 RED (positive action)? 3. If the answer to question 2 is no, then can the respondents justify their conduct on the basis of Romani ethnic minority education or small classes, or special education as provided in the respondent schools? Given that facts in the case are based on ethnic statistics compiled during litigation, it is also hoped that through guidance to domestic courts, the ECJ will facilitate the use of such statistics and flesh out the procedural framework for requiring such evidence from respondents and assessing it. The admissibility of ethnic data in *D.H. II* will support this point.

**ERRC v. the Bulgarian Ministry of Education and Science, the 103<sup>rd</sup> Secondary School and Sofia Municipality, 2007**

The first instance domestic court found that “In the instant case since all students of the 103<sup>rd</sup> school are of Romani origin, there exists a separation on the basis of ethnic origin.<sup>35</sup> It is not, however coercive in the meaning of [Article 6 Supplementary Provision of the Protection against Discrimination Act, Bulgaria]. It is so since the separation is not a consequence of

circumstances beyond the will of the students, respectively – their parents or guardians and is not entirely against their will – it does not follow a normative or administrative act, containing an obligation to enrol the students of Romani origin in a specific school, therefore it does not obstruct their education in other schools.” Bulgarian law prohibits racial segregation, but defines it as forced division, separation or isolation.<sup>36</sup>

It is unknown whether this case has been or will be referred to the ECJ, where the definition of segregation as direct discrimination could be sought in line with the ECtHR’s reasoning in *D.H. II*, i.e. that there can be no waiver from the right not to be discriminated against.

***Sampanis and Others v Greece***<sup>37</sup>

The *D.H. II* judgment has already had an impact in the ECtHR’s jurisprudence. In *Sampanis* the Chamber unanimously found a violation against Greece for effectively denying education to Romani children for a certain period of time and then providing primary education in segregated special classes of lower physical conditions. The Court awarded just satisfaction to each applicant in the sum of 6,000 EUR which exceeds awards made in *D.H. II*. This may be explained by the facts of the *Sampanis* case, which revealed a more active engagement of Greek authorities (Ministry of Education and the school) in discrimination which effectively denied the applicants the right to any education for a whole academic year.

The Court emphasised that not only did the applicants have a right to education but that education in primary schools is obligatory.<sup>38</sup> This is a significant consideration which the Court will hopefully have an opportunity to elaborate on

<sup>34</sup> *Hajdú-Bihar Megyei Bíróság, judgment No. 6.P.20.341/2006/50.*

<sup>35</sup> *Judgment of February 2007 by the Sofia District Court, Civil College, IV B Division.*

<sup>36</sup> *PADA Additional Provisions para. 1.5: “Racial segregation” shall mean the issuing of an act, the commission of an action, or an omission leading to forced division, separation, or isolation of persons on grounds of their race, ethnicity or skin colour.*

<sup>37</sup> *ECtHR judgment of 5 June 2008 (hereinafter: “Sampanis”).*

<sup>38</sup> *Para. 66, Sampanis.*

in the future for two reasons. First, the right to education is not only unique as a substantive social right covered under the ECHR, but the right to public education is coupled with the individual's obligation to attend school and a state duty to provide schooling. In this context the duty to reasonably accommodate specific Romani needs in public education is all the more apparent.

In *Sampanis* the Court indeed called for such reasonable accommodation in providing access to Romani children to Greek schools, and noted that such measures – including initial enrolment in lieu of a birth certificate – were in effect in the respondent State but not availed of in the instant case.<sup>39</sup>

The protest of non-Romani parents against the inclusion of Romani children and the blockading of the local school was particularly noted by the Court, that clearly spelt out how integration in schools is a necessary element of integration into local society as a whole.

The *Sampanis* judgment reproduced the *D.H. II* line of reasoning in relation to soft law measures at the Council of Europe level, as well as the legal argument and the test for discrimination and its justification.

Even though the Court found that the placement of the applicants in special classes amounted to segregation in the given case, and that de facto segregation in other schools was tolerated by the authorities,<sup>40</sup> it failed to distinguish this form of discrimination as the most severe, gravest form which clearly allows for an extremely restricted justification defence on the part of the respondent State. It is noteworthy that the Court's analysis of the placement in special classes indicates that such measures would only be admissible if there were clear and non-discriminatory criteria for placement, regular assessment tests to monitor development and that such placement could only be provisional as a reasonable objective to enable children to enter ordinary classes in due course.<sup>41</sup>

<sup>39</sup> Paras. 86-87, *Sampanis*.

<sup>40</sup> Para. 81, *Sampanis*.

<sup>41</sup> Paras. 88-91, *Sampanis*.

<sup>42</sup> For details on the so-called Croatian school case, see: [www.errc.org](http://www.errc.org).

The judgment is also promising, because alongside the Greek judge the Cypriot and the Croatian judges also voted against Greece. Judge Vajic has done so while certainly being aware of a similar case pending before the Court against Croatia.<sup>42</sup>

### **Actio popularis, collective complaints and collective minority rights**

As was argued above, the ECtHR in *D.H. II* in effect transformed the case of 18 individual applicants into a collective complaint based on minority rights and by leaving the examination of each individual applicant's case aside, focussed on structural, systemic problems. By doing so, it followed a procedure similar to the European Committee on Social Rights, which has rendered decisions in various Roma rights cases revealing structural discrimination. But whereas the ECSR is dependent on the Committee of Ministers for sanctions, the ECtHR is free to impose sanctions that may go beyond the payment of individual compensation. It is to be seen whether a succession of cases similar to *D.H.* can persuade the Court to adjust the remedies it renders to the form of discrimination it finds.

When transposing the RED, Romania, Bulgaria and Hungary have introduced a procedural invention that is open to NGOs, i.e., the right to bring *actio popularis* claims. Similar standing is given in many Member States on the ground of disability, or in the field of consumer protection and environmental rights. As could be seen in the first instance judgment brought in the *Hajdúhadház* desegregation case, domestic courts have the power to impose sanctions that are adequate to address structural problems. Whether case law at the domestic level as well as before the ECJ will evolve in this direction remains to be seen.

The following characteristics make *actio popularis* a unique and most attractive tool: there is no need for an individual victim as the case is brought

by NGOs demonstrating an interest in rights protection and instead of injustices suffered by individual victims it focuses on patterns, trends and scenarios of discrimination. Thus, *actio popularis* is ideal in tackling institutional, structural, or *de facto* discrimination. In lieu of an individual client, there is a minimal risk of victimisation – in fact no client needs to be identified for the case. Perennial costs, such as maintaining contact with the client or indeed maintaining a client service for case selection can be saved. And as counsels for the applicants explained to the ECtHR in *D.H. II*, if a case is not about the violation of the rights of an individual victim, then remedies ought also to be tailored accordingly, i.e. they have to tackle ‘system failures’.

Ostrava represents the ERRC’s greatest strategic litigation action. It cost approximately 150,000 EUR and lasted for ten years (1998-2007). Primary research in the case was carried out by 12 people – staff members and local community and NGO activists – and lasted for eight months. Drafting the answer to the Government’s first observations on first instance engaged six staff members for two weeks. In 2006, following the admissibility decision, six researchers spent another one month in Ostrava, doing additional research. Excluding the core legal team (Lord Lester, David Strupek and James A. Goldston), ERRC staff spent about 1,000 hours with case work after filing the application with the ECtHR.<sup>43</sup> They recovered 10,000 EUR in costs.

Disregarding the operational costs of the litigating NGO, the contrast between actual and recoverable legal costs is enormous. It may in part explain why many domestic NGOs do not even consider litigation as an option. In any case, when Open Society Institute-funded litigation projects present their results at different European fora the most frequently asked question – regardless of the protected ground – is this: Where did you get the funding? If stakeholders at the European level wish to see Romani cases in domestic courts, the ECtHR and the ECJ, they ought to bear these considerations in mind and do their best to facilitate necessary domestic and regional litigation.

<sup>43</sup> Information provided by Andi Dobrush, ERRC legal officer in charge of the Czech Republic.

<sup>44</sup> *Stoica v. Romania*, judgment of 4 March 2008, ECtHR.

## Roma rights litigation after *D.H. II*

The Grand Chamber judgment in *D.H. II* and the transposition of the RED has fundamentally changed the European legal landscape and Roma rights defenders should explore it, travelling as far as possible. An in-depth study of how litigation strategies may change is beyond the scope of this article, so let me just flag a number of obvious points here.

### I. The scope of litigation

It is submitted here that following the ECtHR judgment in *Stoica v Romania*, where violations of both substantive and procedural branches were found, there is not much left for Roma rights defenders in improving jurisprudence under Article 3 of the ECHR.<sup>44</sup> Regrettably, horrendous cases of racially motivated deaths or ill treatment may surface any time, but as it has clarified legal arguments in this regard, it may not any longer be the ERRC’s call to engage in these cases. Also, in *Stoica* the ECtHR has made it abundantly clear that it will not tolerate racially motivated violence against Roma.

It is submitted that the transposition of the RED and *D.H. II* have created a momentum for breaking away from retroactive, individual complaint based legal defence work. There are ample opportunities to initiate collective actions, no matter whether civil or political or economic and social rights are at stake. Indeed, if racial violence within certain police forces is deeply embedded, if it is supported by local high ranking officials – such as the local mayor in *Stoica* – and if public prosecution continues to turn a blind eye on these practices, then the payment of compensation to an individual Roma victim may not be the remedy the Roma rights movement wishes to seek.

Anti-Romani hate speech and the threat or actual physical and verbal violence has been on the rise within the EU. Although freedom of expression is

not covered by the RED, it is precisely this instrument whose implementation has created a greater potential in fighting racially motivated verbal or physical violence. For instance, in Romania, the National Council for Combating Discrimination proceeded against President Băsescu on account of his anti-Romani speech under domestic law transposing the RED.<sup>45</sup> In Hungary, it is arguable that *actio popularis* action could be taken against members of the extreme right Hungarian Guards and ECHO TV, a private TV channel supporting extremist behaviour. Last, questions decided on preliminary referral by the ECJ in relation to the RED may also have an impact in litigation against anti-Romani hate speech – see in this regard the issue raised in the *Feryn* case of whether or not a ‘speech act’, i.e. a statement by an employer to the effect that he will not employ workers from a certain racial background is potential or actual discrimination and as thus prohibited under the RED and actionable under transposing national legislation by an equality body.<sup>46</sup>

## II. *Actio popularis* and collective action

*Actio popularis* action in the fields covered by the RED (employment broadly meant including equal pay, education, social security including

social protection and health care, social advantages, and access to and supply of goods and services including housing) can be brought in Bulgaria, Romania, Hungary and possibly in other EU Member States. To map the scope of collective action across Europe, procedural and charity laws should be closely studied.

Given that domestic legislation transposing the RED may not limit collective action rights to the fields covered by the RED, there is room to litigate in the field of civil and political rights, and social rights whose coverage is not straightforward under community law. In some fields, the ERRC itself has published studies detailing system level failures and putting forward proposals for structural changes – most lately for instance in relation to child protection.<sup>47</sup> In other fields, such as in the field of ethnic profiling by the police, domestic or regional NGOs or academic institutions have produced reliable data. Similar to domestic *actio popularis* litigation, these data can substantiate a legal action, and proposals can be transformed into remedies sought before domestic courts.

Moreover, there are a much greater number of EU and Council of Europe Member States that allow collective actions under the Revised European Social Charter (ESC) – e.g. France, Greece, Finland, Sweden, Belgium, Ireland,

<sup>45</sup> *Decision 92 of the National Council on Combating Discrimination, 23 May 2007. On 19 May 2007, the President of Romania was recorded during a discussion with his wife in his car, calling a journalist who allegedly harassed him “filthy Gypsy,” after publicly calling her “birdie” (păsărică), a pejorative with demeaning and sexual connotations. The NGO Romani CRISS filed a complaint with the National Council for Combating Discrimination for the racist remarks of the President. (The video recording and the press articles are available at [http://www.antena3.ro/Basescu-despre-o-jurnalista-tiganca-imputita\\_act\\_32833\\_ext.html](http://www.antena3.ro/Basescu-despre-o-jurnalista-tiganca-imputita_act_32833_ext.html), accessed on 21 May 2007.) The NCCD decided that the expression “filthy Gypsy,” is “discrimination according to Art.2.1 and 4 of the GO 137 from 2000...and that the use of this expression damaged the dignity of persons belonging to Roma community.” Mr Băsescu subsequently contested the decision before the courts of law arguing that the decision was illegal. The NCCD found that a) the act reported by the plaintiff in terms of discrimination on grounds of gender does not fall under administrative liability; b) the act reported by the plaintiff in terms of discrimination on grounds of ethnicity amounts to discrimination as per Article 2 (1 and 4) of the Governmental Ordinance 137/2000, republished and decided that Mr Traian Băsescu will be sanctioned with an administrative warning. The Court of Appeal upheld the NCCD decision in Dosar Nr: 4510/2/2007, Curtea de Apel Bucuresti, sentinta civila nr.2799, 8 November 2007. The decision of the Court of Appeal was quashed by the High Court of Justice and Cassation. At the time of writing this article the decision has not published yet. The President won by demonstrating the privacy of the speech and the lack of intention to discriminate.*

<sup>46</sup> *Opinion of Advocate General Poiares Maduro delivered on 12 March 2008 (1), Case C-54/07, Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV (Reference for a preliminary ruling from the Arbeidshof te Brussel (Belgium)), para 16.*

<sup>47</sup> *European Roma Rights Centre. December 2007. Dis-Interest of the Child: Romani Children in the Hungarian Child Protection System. Available at: <http://www.errc.org/cikk.php?cikk=2930>.*

Italy, the Netherlands and Portugal. Similar to *D.H.*, arguments based on the RED can be raised in proceedings under the ESC as well, and structural remedies going further than a mere adoption of government programmes for Roma can be sought. Information and lobbying from other Council of Europe bodies – such as ECRI and the FCNM Advisory Committee – should be relied on and generated here as well. It is arguable that given the hard law obligations flowing from the RED in the field of social rights, the reference to the RED could raise the profile of social rights litigation and change the way stakeholders view the justiciability of such rights.

The great thing about collective action is that in case of a failure on the part of governments to provide the remedies ordered, such an action can be repeated. This has in fact been done with regard to the housing rights of Roma in Greece: In 2003 the ERRC brought and won a collective complaint,<sup>48</sup> which in 2008 was followed by another complaint by Interights, claiming that the government continues to forcibly evict Roma without providing suitable alternative accommodation and that Roma in Greece continue to suffer discrimination in access to housing.<sup>49</sup> It remains to be seen whether or not the Committee of Ministers will go further in ‘remedying’ the situation as it had in 2005 when it resolved the issue as follows:

- Having regard to the information communicated by the delegation of Greece during the 924th meeting (20 April 2005) of the Ministers’ Deputies,
- Takes note that the implementation of the Integrated Action Plan (IAP) for the Social Integration of Greek Roma is still in progress, that evaluation and reform of the IAP is currently ongoing in order to ensure more effective coordination of the IAP between all partners involved (including the local authorities),

- Takes note of the extension and revision of the housing loans programme for Greek Roma,
- Takes note that a Commission for the social integration of Greek Roma has been established,
- Decides not to accede to the request for the reimbursement of costs transmitted by the European Committee of Social Rights.<sup>50</sup>

### III. Reasonable accommodation and ethnic minority rights

With respect to the duty to provide reasonable accommodation to Roma in public education and their right of housing falling under Article 8 of the ECHR, the ECtHR has been remarkably progressive. There is further room for manoeuvre in this regard. Litigation should go deeper and wider: 1. It should focus on seeking judgments rendering detailed and effective injunctions ensuring reasonable accommodation; and 2. It should litigate in all fields that are covered by the ECHR – e.g. child protection under Article 8 and further cases in the field of education under Article 2 of Protocol No. 1 – and the RED.

Structural problems arising in the field of child protection may flow from, for example, structural concerns in the field of housing. It has been reported by the ERRC that in Hungary for instance the lack of adequate housing, eviction, or inadequate financial resources may result in taking Romani children into state care – which is in violation of Article 8 of the ECHR.<sup>51</sup> Clearly, such a situation cannot be remedied by simply refraining from taking children into state care but by providing some sort of housing. Possibly, this issue can be argued on the basis of a reasonable accommodation duty under Article 8 of the ECHR. Even though the ECHR does not cover the right to housing *per se*, given the interlinkages between the fields in which discrimination against Roma occurs, litigation before the ECtHR may still in effect make it actionable.

<sup>48</sup> ESC, collective complaint No. 15/2003

<sup>49</sup> ESC, collective complaint No. 49/2008.

<sup>50</sup> Resolution ResChS(2005)11, Collective complaint No. 15/2003 by the European Roma Rights Centre (ERRC) against Greece.

<sup>51</sup> *Op. cit.*, p. 42.