

D.H. AND OTHERS v CZECH REPUBLIC

MEMORANDUM CONCERNING THE STATE AND IMPLEMENTATION OF GENERAL MEASURES TO THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE FROM THE EUROPEAN ROMA RIGHTS CENTRE AND THE OPEN SOCIETY JUSTICE INITIATIVE

MAY 2009

INTRODUCTION

1. This memorandum is presented in preliminary response to the *Report of the Government of the Czech Republic on general measures related to the execution of the judgment of the European Court of Human Rights in case no. 57325/00 – D.H. and Others v. the Czech Republic* dated 9 April 2009. This memorandum should be read together with the submission of 20 August 2008 by the European Roma Rights Centre, Open Society Justice Initiative, the Educational Support Program, the Early Childhood Program and the Roma Education Fund.
2. We submit that it is too early for the Committee of Ministers to assess with any accuracy the compliance by the Government with the General Measures required by the decision of the Grand Chamber, but that on a preliminary review the adopted measures are insufficient for the following reasons:
 - *Continuing violation.* Roma children continue to be disproportionately sent to special schools, now renamed “practical schools.”
 - *Integration.* There has yet to be the integration of schools (in particular the integration of Romani children from practical schools to standard schools) that was ordered by the Court.
 - *Safeguards.* The Government has failed to introduce the safeguards that are necessary to take into account the special needs of Roma.
 - *Publicity.* The ruling of the European Court has not been publicized sufficiently to legal professionals and the judiciary in the Czech Republic, meaning that recent domestic decisions have ignored the judgment of the ECtHR.
3. The government has recently issued two lengthy reports in the Czech language (see paragraph 7 below). It has not been possible to respond to them adequately in this preliminary memorandum. We will submit a full report in time for the next meeting of the Committee of Ministers in December 2009.

General Measures

4. Although the individual applicants in this case have received compensation, Article 46 of the European Convention requires general measures of implementation of the judgment of the European Court in any case where the Court has found a violation that involves a systemic problem in order to prevent further similar violations.¹ In this case the Court found “that the relevant legislation as applied in practice at the material time had a

¹ See also Resolution Res(2004)3 of the Committee of Ministers, the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (http://www.coe.int/t/e/human_rights/execution/02_Documents/MGindex.asp)

disproportionately prejudicial effect on the Roma community.”² In other words, the Court found this to be a general, national, problem requiring a national remedy.

5. Implicit in the above reference of the judgment to the application of legislation and existing practice is that general measures are necessary in order to ensure compliance. The Government, however appears to minimize the implications of this finding of the judgment by stating:³

In this regard it is necessary to remark that it is very difficult to foresee the real impact of the Court’s judgment in the case of *D.H. and Others*. In reality, in order to achieve specific results it is always necessary to take into account specific cases, which the judgment, however, intentionally omits. The future will show what results in the legal, pedagogical and social areas can be reached despite the particular generalizations on which the judgment is based to a significant extent.

6. In contrast, as we demonstrate below, general measures are critical to ensuring that the Government ends definitively the discriminatory policies and practices adjudged by the Court to be in violation of the Government’s legal obligations under the European Convention.

A. CONTINUING VIOLATION

7. The Court found that the violations complained of in the original application were still ongoing at the time of the Grand Chamber judgment. It established that “statistically disproportionate numbers”⁴ of Roma children were being assigned to the category of “special” (now “practical”) schools “where a more basic curriculum [is] followed than in ordinary schools” and “where they [are] isolated from pupils from the wider population.”⁵
8. Our research in 2008 confirmed that this practice is ongoing.⁶ Moreover, in April, 2009, the Government’s own research demonstrated the massively disproportionate representation of Roma children in practical schools where they continue to receive sub-standard education.⁷ The Government’s research confirms that an unacceptably large number of Roma children remain outside standard elementary schools. This seriously limits their further possibilities for active participation in society, including the possibility to gain access to higher education and subsequent access to the labor market, and stigmatizes them as being less intelligent and capable than non-Roma.

² *D.H. and Others v the Czech Republic*, Grand Chamber, judgment of 13 November 2007, at para. 209.

³ Government Report, 9 April 2009.

⁴ D.H. judgment., para. 193.

⁵ D.H. judgment., para. 207.

⁶ Report “Persistent Segregation of Roma in the Czech Education System”, November 2008, by the European Roma Rights Centre and the Roma Education Fund, in ANNEX.

⁷ “VZDĚLANOSTNÍ DRÁHY A VZDĚLANOSTNÍ ŠANCE ROMSKÝCH ŽÁKYŇ A ŽÁKŮ ZÁKLADNÍCH ŠKOL V OKOLÍ VYLOUČENÝCH ROMSKÝCH LOKALIT ZÁVĚREČNÁ ZPRÁVA” [“Education venues and possibilities available to Roma pupils in elementary schools in Roma populated places”] Prague, accessed at http://www.msmt.cz/uploads/soubory/tiskove_zpravy/vzdelanostni_drahy_a_vzdelanostni_sance_romskych_zakyn_a_zaku.pdf and “ANALÝZA INDIVIDUÁLNÍHO PŘÍSTUPU PEDAGOGŮ K ŽÁKŮM SE SPECIÁLNÍMI VZDĚLÁVACÍMI POTŘEBAMI (ZÁVĚREČNÁ ZPRÁVA) Únor, 2009” [“Analysis of the individual approach of teachers to pupils with special educational needs, Final Report February 2009”] available at http://www.msmt.cz/uploads/soubory/tiskove_zpravy/Analyza_individualniho_pristupu_pedagogu_k_zakum_se_specialnimi_vzdelavacimi_potrebami_PLNE_ZNENI.pdf. See also for an English summary: http://www.gac.cz/documents/nase_prace_vystupy/GAC_Educational_Disparities_of_Roma_Pupils_Summary.pdf

9. The Minister of Education stated in an interview on 4 April 2009:

The most important finding of these studies is that they have both proved our hypothesis, which was that these children are structurally excluded from the main educational framework, and that only one third of schools in these socially deprived areas are ready to build an inclusive educational environment. The rest, unfortunately, are not. And that is a very alarming message that shows how much our support is needed.⁸

10. A troubling aspect of the Government's report is the repeated use of the term "social-culturally disadvantaged children" introduced by the 2005 School Act⁹ and used almost exclusively as a synonym for Roma children. "Socio-cultural disadvantage" is supposedly an indicator that a child requires "special needs education." However, in reality it stigmatizes children from these "culturally and linguistically different environments," i.e. Roma, linking this to the supposition that those would be children with limited intellectual abilities.¹⁰
11. We reiterate, as in our report of 20 August 2008, that the practice of placing socially disadvantaged children – who in reality are almost entirely Roma children - in preparatory classes in practical schools remains unchanged since the Court's judgment: socially disadvantaged children are diagnosed as having a "light mental disability" necessitating their entry into a practical school. Once in a practical school, they are rarely able to switch to standard education, even if, formally, the system today allows this possibility.
12. The Court held that "this practice must be halted and reversed,"¹¹ finding that the placement of Roma children in practical schools must be suspended until such time as the Government has put in place a student placement system that is not racially disproportionate. Only those children diagnosed as having a genuine "mental deficiency,"¹² without any bias – not children from ethnic minorities, or different cultural, linguistic or social backgrounds – should attend special schools for mentally deficient children.
13. To date, notwithstanding the Court's ruling, this practice continues unabated. We therefore submit that the Committee should call on the Government to implement a moratorium on new admissions of Romani children to practical schools and to take steps to transfer Romani children from practical schools to standard schools.

B. POSITIVE OBLIGATION TO INTEGRATE

14. The Czech Government is failing in its positive obligation to integrate Roma pupils into schools teaching and ordinary curriculum. In its judgment, the Court made clear that, in light of the historically disadvantaged position of Roma, the Czech Government has a positive obligation, not merely to end segregation, but to design a system of education which "help[s Roma] to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population."¹³
15. The Ministry of Education has announced that it will design a National Action Plan for Inclusive Education: a system to ensure that "socially disadvantaged children" – including Roma children - receive proper support in enrolling in standard education in the long term. We submit, however, that the judgment imposes not just an obligation on

⁸ <http://romove.radio.cz/en/article/22318>.

⁹ Article 16 of the 2005 School Act (561/2004).

¹⁰ Government Memorandum to the Committee of Ministers of 9 April 2009 page 4 para. 2.

¹¹ D.H. judgment, para. 195.

¹² D.H. judgment, para. 16.

¹³ D.H. judgment, para. 207.

the Government to ensure this long term result, but an obligation on the Government to immediately integrate Romani children into standard schools with their non-Romani peers.

16. However, the “Planned Measures” contained within the Report of the Government of 9 April 2009 do not adequately address the issue of existing educational segregation of Roma children in the near or medium term.
17. Considering that one and a half years have passed since the judgment, the Government cannot be said to have taken prompt and adequate action to remedy the ongoing situation of segregation of Roma children from standard education. In order to comply with the Court’s substantive ruling, the Government should undertake the following measures:
 - Implement a moratorium on the admission of Roma children to practical schools and take steps to integrate Roma children presently in practical schools into standard schools.
 - Adopt legislation to affirmatively integrate all schools in the Czech Republic into inclusive schools.¹⁴
 - Adopt a plan with clear, time-specific targets for equalizing school assignments and curricula of Roma and non-Roma such that, by 2015, the numbers of Roma and non-Roma assigned to primary schools in the Czech Republic that provide the standard curriculum are not statistically disproportionate.
 - Undertake systematic monitoring of the assignment of children to schools, and publish the data regularly so that Roma communities and others concerned can assess progress toward the goal of integration.¹⁵
 - Commit to disclose budgetary information as regards a) resources being spent on all aspects of an inclusion program and (re)integration of Roma pupils and b) resources being expended on practical schools, other schools where Roma children make up a disproportionate number of pupils, and all other schools, so as to allow meaningful comparison.

C. SAFEGUARDS

18. The Czech Government must institute safeguards to take into account the special needs of Roma. The Court held that “schooling arrangements for Roma children” must be “attended by safeguards [to] ensure that ... the State [takes] into account their special needs as members of a disadvantaged class.”¹⁶ Such safeguards should include, *inter alia*:
 - Targeted early childhood education programs available at every school teaching the standard curriculum and promoting co-education with non-Roma children.¹⁷
 - The adaptation of tests and other assessment tools to accommodate the needs of Roma communities.
19. Safeguards that take into account the special needs of Roma children should include the creation of community-based institutions that assist Roma children in enrolling into the

¹⁴ E.g. “comprehensive” schools in Scandinavian countries or Gemeinschaftschulen in Germany.

¹⁵ This data would need to be anonymized so as to comply with European data protection requirements. See ECRI, “‘Ethnic’ statistics and data protection in the Council of Europe countries”, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/Themes/Ethnic_statistics_and_data_protection.pdf

¹⁶ D.H. judgment, para. 207.

¹⁷ Currently only available at the practical schools.

standard primary schools and where necessary provide intermediation between parents and schools to enhance communication.¹⁸

20. Transformation of practical schools into schools teaching the standard curriculum does not preclude special measures to accommodate special needs of Roma children that will allow them to follow the curriculum. Teachers, psychologists, and classroom assistants can continue to provide specialized educational support while providing better quality contents of education. Language training for children whose home language is not Czech could be part of this support, but language should not be a justification for separating Roma children from their non-Roma peers.

D. PUBLICITY

21. The Czech Government must inform the public and relevant professionals about the judgment and make effective remedies available. The Government's report does not mention the ways in which the judgment has been publicized among relevant educational and legal professionals. In order for it to be fully understood and implemented at the national level, it should be widely distributed and explained to educational institutions responsible for assignment of students to schools and support of Roma, as well as to those working for the child welfare authority (OSPOD) who are in a position to monitor the reasons for parents enrolling their children into practical schools.
22. A further audience to target is the legal profession, in particular the judiciary. Legal practitioners must understand the implications of the judgment and be able to rely on it effectively if a legal challenge to school placement is made. The judiciary must be sufficiently familiar with the Court's judgment to provide relief for current or potential victims of educational segregation. A recent judgment by the Prague City Court suggests that the judiciary is not giving effect to the European Court's judgment.¹⁹ In this case the Ministry held that the plaintiff had to *prove* that he was placed in the school for ethnic and social reasons. The Prague City Court reportedly agreed with the Ministry's position and rejected the plaintiff's claim.²⁰
23. Such a judgment is contrary to the Court's explicit finding of indirect discrimination in the DH case; when a prima facie case of discrimination is made out, even indirectly, the burden of proof should shift to the Government to prove that this practice was not discriminatory, i.e. that the differential treatment had an objective justification. The Court accordingly found that the Government failed to provide the justification required.²¹

CONCLUSION

24. In conclusion, we reiterate:
 - The practice of Roma school segregation continues, in contradiction to the DH judgment, and must be stopped.
 - The Czech Government is failing in its affirmative obligation to integrate Roma pupils into standard schools teaching an ordinary curriculum.

¹⁸ Cf. Belgium where there exist Mediation Centres for Travellers (e.g. Centre de Mediation des Gens de Voyage en Wallonie, www.cmyg.be)

¹⁹ Prague City Court, 10 April 2009, the text of the judgment was not yet available at the time of drafting of this memorandum. References can be found e.g. at the Prague Daily Monitor, available at <http://praguemonitor.com/2009/04/14/court-rejects-romas-complaint-against-discrimination>.

²⁰ See also "Romany man sues Czech state over bad education", available at <http://www.ceskenoviny.cz/zpravy/romany-man-sues-czech-state-over-bad-education/367167>.

²¹ D.H. judgment, paras 175-195.

- The Czech Government must institute safeguards to take into account the special needs of Roma.
- The Czech Government must sufficiently inform the public and relevant professionals about the judgment and make effective remedies available.

The Committee of Ministers should remain seized of the matter until the Government has met all of the above requirements.

20 May 2009

Enclosed:

- ERRC and OSJI, “Memorandum concerning the implementation and state of General Measures in the judgment of DH and others v Czech Republic,” August 2008.
- ERRC and Roma Education Fund, “Persistent Segregation of Roma in the Czech Education System”, November 2008.