

## **D.H. and Others v. Czech Republic: Establishing Council of Europe System Anti-Discrimination Law in Economic and Social Rights Areas**

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The European Court of Human Rights Grand Chamber ruling on 13 November 2007 justifiably made leading headlines in a number of international media. The judgment, in which the Grand Chamber overturned an earlier Chamber ruling of remarkably poor quality,<sup>2</sup> found that the Czech Republic had violated European Convention on Human Rights provisions banning discrimination in the realization of the right to education. The case concerns the systemic placement of Romani children in schools for the mildly mentally disabled. Its reach will be very large and very far-reaching, in many areas. Indeed it is not possible yet to know all areas of influence the ruling will have. This article sketches briefly some key aspects of the ruling, and some of the more foreseeable implications of it. In light of the new Protocol 12 to the European Convention, which provides a comprehensive ban on discrimination in the realization of any right secured by law, implications for social and economic rights are examined in particular.

### **The Lawsuit**

The lawsuit was brought by the European Roma Rights Centre on behalf of 18 Romani children who had been placed in so-called “special schools” or “remedial special schools” for the mildly mentally disabled in Ostrava, the Czech Republic’s third city. The complaint was brought before domestic tribunals in 1999. In 2000, following dismissal of a Constitutional Court complaint, the applicants filed at the European Court of Human Rights.

The complaint relied extensively on statistical data gathered in Ostrava during the 1998/1999 school year, showing that, during that year:

- Over half of the Romani child population was schooled in remedial special schools, of which there were eight in Ostrava that year;
- Over half of the population of remedial special schools was Romani (a similar-sounding, but different statistic from the one above);

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<sup>2</sup> For an analysis of the Chamber ruling, see Cahn, Claude, “The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights”, in *European Anti-Discrimination Law Review*, Issue 4, November 2006.

- Any randomly chosen Roma child was more than 27 times more likely to be placed in schools for the learning disabled than a similarly situated non-Roma child;
- Even where Romani children managed to avoid placement in remedial special schooling, they were most often schooled in substandard and predominantly Romani urban “ghetto” schools. Romani children in regular primary education in Ostrava (i.e., in the 70 standard primary schools) were heavily concentrated in 3 primary schools;
- 32 of 70 primary schools in Ostrava had not one single Romani pupil, and as a result 16,722 non-Romani children attended school every day without a single Romani classmate.

These figures were not markedly different in other areas of the Czech Republic. High-ranking Education Ministry officials stated that, nationwide, 75% of Romani children were in special schools. Research also revealed that in schools for the severely mentally disabled, there was no significant over-representation of Romani children; the institution “remedial special school” for the mildly mentally disabled had for the most part become simply a way of dismissing Romani children from mainstream education, in a context in which explicitly named racial segregation would be anathema.

In the standard case, a Romani child entering school would be assumed by school administrators to fail inevitably. She would then be sent to be subjected to a battery of tests generally unavailable to any person not a psychologist, but evidently awash in cultural presumptions. In many cases, the interaction would be the first time the child at issue had ever met a non-Romani person. Armed with the test results, school administrators would set the parents under intense pressure to agree to special school placement. Since schooling in mainstream education often means going to school with abusive non-Romani children, school administrators would simultaneously be communicating an intention not to protect Romani children from racist abuse inside and outside the classroom. Convinced that, indeed, their children would be “happier” in special schools, all but the most determined parents capitulated.

Once placed in such schools, no viable possibilities existed for transfer back to the normal system. Indeed, within six months of substandard education in the special schools system, children were very significantly behind children

in standard schools. Graduates of special schools were barred from going on to secondary education, and faced extremely diminished life chances.<sup>3</sup>

### **The Court's Approach**

The European Court of Human Rights has similarly struggled to address racism, and in particular racial discrimination. Until early 2004, the Court had never found a violation of the Article 14 ban on discrimination in a case involving allegations of racial discrimination. Until then, although the Court had repeatedly called racial discrimination a “particularly invidious” form of discrimination, it nevertheless displayed great difficulty in actually identifying any. Only two positive rulings on racial matters existed, none under the standard Article 14 provision.<sup>4</sup>

By the early 1980s, the Court had made noteworthy strides in developing jurisprudence to address social rights issues under the European Convention on Human Rights, a treaty with a distinctly civil and political rights bent; only one of the rights of the International Covenant on Economic, Social and Cultural Rights – the right to education – is explicitly protected under the European Convention. Nevertheless, in an Irish case, the Court came close to holding that poverty could be a ground of discrimination.<sup>5</sup>

In 1995, the Court found that Austria had violated the Convention when it refused to provide unemployment benefits to laid-off Turkish workers. Working creatively with the Convention’s narrow provisions, the Court held that unemployment benefits were “possessions” in the sense of the Article 1

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<sup>3</sup> Complete research results appear in European Roma Rights Centre, *A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech Republic*, Country Reports Series No. 8, June 1999.

<sup>4</sup> In a 2002 ruling in a Bulgarian police killing of a Romani man in which the Court found no violation of the Convention’s Article 14 non-discrimination provisions, Judge Bonello expressed frustration with the Court’s approach in a dissenting opinion: “Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court’s case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination. The present case energises that delusion ... Frequently and regularly the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it.” (see European Court of Human Rights, Judgment, *Anguelova v. Bulgaria*, (Application no. 38361/97), 13 June 2002).

<sup>5</sup> European Court of Human Rights, (Chamber), Case of *Airey v. Ireland*, (*Application no. 6289/73*), Judgment, Strasbourg, 9 October 1979.

of Protocol 1 guarantee of the “peaceful enjoyment of one’s possessions” and that the Austrian government’s criteria of allocating such worker protections solely on the basis of nationality was arbitrary and illegal, infringing the Convention’s Article 14 ban on discrimination.<sup>6</sup> A 2000 decision reversed the equation when the Court held that the failure to treat differently situated people differently also constituted a violation of the Convention.<sup>7</sup> Numerous cases have repeatedly affirmed the Court’s fundamental approach, namely that:

According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”.<sup>8</sup>

The Court has to date however been utterly flummoxed by the mechanics of racial discrimination as it exists in practice. In all of the aforementioned

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<sup>6</sup> See European Court of Human Rights, *Gaygusuz v. Austria*, Judgment, 31 August 1996. The Court has elsewhere worked on social and economic rights issues, via the filters of European Convention rights such as rights to private and family life (Article 8), as well as via procedural and remedial rights such as those set out in Articles 6 and 13. In *Connors v. United Kingdom* for example, it provided the following explanation of its approach to housing issues: “In this regard, a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key ... On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that ‘[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation’. ... The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature’s judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation. It may be noted however that this was in the context of Article 1 of Protocol No. 1, not Article 8 which concerns rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community. ... Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant.” (para 82).

<sup>7</sup> European Court of Human Rights, Judgment, *Thlimmenos v. Greece*, (Application no. 34369/97), 6 April 2000.

<sup>8</sup> *Willis*, 35 EHRR 21 (2002), p. 559, para. 39.

cases, the Court was presented with legal provisions or regulations which gave rise to obvious and evident different treatment. For example, in the Willis decision quoted above, the UK provided widows' pensions to women, but made no similar provision for men. When presented with a case in which a man had given up work to care for his dying wife and, following her death, remained in part-time work to take care of their children, the Court could see no "objective and reasonable justification" for treating men and women differently, and it found the UK in violation.

However, Roma -- and like them Muslims, Arabs, Jews, Maghrebis, Cameroonians, Nigerians, Turks and the many other diverse peoples of Europe laboring under stigma -- are generally not treated differently because of rules, regulations or laws (although in some cases they may be). By far the most frequent form of discrimination is the kind not set out in law, but rather arising from the coalescing of different peoples, in a situation of very disproportionate power, distributed along the axis white/non-white. It is the elusive problem of racial animus -- a phenomenon dogged by denial -- and its expression in racial discrimination arising to thwart fundamental human rights, which has given the Court so much trouble. The Court has haltingly overcome these issues in a series of cases involving violence.<sup>9</sup> *D.H. and Others v. Czech Republic* is the first case to test these issues in social and economic rights areas.

### **The Chamber Ruling**

In a terse 6-1 ruling delivered in February 2006 (close to seven years since the applicants first lodged the claim), the Chamber rejected the complaint of the 18 petitioners in *D.H. and Others*. The Court held, among other things, that, "... the Government have (sic) nevertheless succeeded in establishing that the system of special schools in the Czech Republic was not introduced solely to cater for Roma children [...]" and "The Court observes that the rules governing children's placement in special schools do not refer to the

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<sup>9</sup> See progressively European Court of Human Rights decisions in *Nachova and Others v. Bulgaria* (Chamber and Grand Chamber rulings), *Bekos and Koutropoulos v. Greece*, and *Sekic v. Croatia* addressing, respectively, discrimination in Article 2 right to life issues, Article 3 degrading treatment, and Article 3 degrading treatment involving non-state actors, all in cases involving violence against Roma by police or vigilantes. The Court first (i) relied on evidence of explicit racial epithets to determine evidence of racial discrimination (*Nachova* Chamber ruling) and then (ii) retreated to find no discrimination in the acts, but only racial discrimination in the failure to investigate them adequately (*Nachova* Grand Chamber, *Bekos* and *Sekic* rulings). For now, it seems the latter will be the dominant approach of the Court.

pupils' ethnic origin. [...]”<sup>10</sup> These considerations were apparently sufficient to avert, in the Chamber ruling, a Convention violation. The judgment concludes by holding blithely that although “the general situation in the Czech Republic concerning the education of Roma children is by no means perfect, the Court cannot in the circumstances find that the measures taken against the applicants were discriminatory”.<sup>11</sup>

Apart from its inherent inadequacy in delivering justice to 18 Czech Romani children, the Chamber ruling was particularly worrying in light of the recent entry into force of Protocol 12 to the European Convention. The new Protocol 12 to the European Convention supplements the existing Article 14 ban on discrimination – a prohibition on discrimination in access to any European Convention right – with a comprehensive ban on discrimination in the exercise of any right secured by law.<sup>12</sup> Although D.H. relied on Article 14 – Protocol 12 was not yet in effect when the lawsuit was brought – the case, centring as it does on the Convention’s only social right, was to provide an important marker for future Protocol 12 jurisprudence in economic and social rights areas, and in particular to test the Court’s willingness to address matters such as disparate impact or indirect discrimination. The Chamber judgement seemed to indicate a future of constricted, formalistic Court interpretations of discrimination, an approach which would nullify possibilities for remedy in all but the most egregious cases. Careful governments and others were evidently given license to discriminate at will, provided they did so politely.

### **The Ruling by the Grand Chamber**

In an astounding reversal, the Grand Chamber announced on 13 November 2007 that it had, by a vote of 13-4, overturned the Chamber decision, and found the Czech Republic in breach of Article 14 of the Convention (prohibiting discrimination), taken together with Article 2 of Protocol 1 (securing the right to education). The Court awarded 4,000 Euros to each of the applicants in respect of non-pecuniary damage and 10,000 Euros jointly

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<sup>10</sup> European Court of Human Rights, Second Section, Case of D.H. and Others v. the Czech Republic, (*Application no. 57325/00*), Judgment, Strasbourg, 7 February 2006, paras. 48 and 49.

<sup>11</sup> European Court of Human Rights, Second Section, Case of D.H. and Others v. the Czech Republic, (*Application no. 57325/00*), Judgment, Strasbourg, 7 February 2006, para. 52.

<sup>12</sup> Protocol 12 entered into effect on 1 April 2005. It has thus far been ratified by 15 states, and signed but not yet ratified by a further 22.

for costs and expenses. Many, many aspects of the Court's 90-page verdict are noteworthy. Here are some of them<sup>13</sup>:

Recognition of the "Gypsy" stigma attaching to Roma, independent of any desire or affirmation on the part of the individual person concerned: "Although they have been in Europe since the fourteenth century, often they are not recognised by the majority society as a fully-fledged European people and they have suffered throughout their history from rejection and persecution. This culminated in their attempted extermination by the Nazis, who considered them an inferior race. As a result of centuries of rejection many Roma communities today live in very difficult conditions, often on the fringe of society in the countries where they have settled, and their participation in public life is extremely limited." (para. 13)

Renewed affirmation of existing case law on the need to give particular policy attention to Roma/Gypsies, as a result of their vulnerable position: "... as noted in previous cases, 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...." (para. 181)

Renewed affirmation of the value of minority rights: "... the Court also observed 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." (para. 181) This recognition was welcome, in that the Court's endorsement of minority rights appeared to have been put into cold storage since it first established its views in this area in the 2001 decision in *Chapman v. United Kingdom*.<sup>14</sup>

Transposition of European Union anti-discrimination law into Council of Europe law: At paras. 81-91, the Court recites extensively the considerably more developed European Union law ban on racial and other forms of discrimination. This assessment colours its ultimate assessment considerably, particularly as concerns (i) the relationship between the

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<sup>13</sup> All citations below are from European Court of Human Rights, Grand Chamber, Case of *D.H. and Others v. the Czech Republic*, (*Application no. 57325/00*), Judgment, Strasbourg, 13 November 2007.

<sup>14</sup> European Court of Human Rights, Second Section, Case of *Chapman v. the United Kingdom*, Judgment, Strasbourg, 18 January 2001.

Convention ban on discrimination (described above) and the concept of “indirect discrimination”, which in an EU law context “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”. The Court specifically absorbs the EU definition into the Court’s case law at para. 184 and elsewhere of the Grand Chamber ruling; (ii) the question of the burden of proof, which in an EU law context shifts to the purported violator in a case of *prima facie* discrimination; and (iii) the role of statistics as a method of establishing discrimination before a tribunal.

Statistics as a method of proving racial discrimination, particularly in the context of an allegation of indirect discrimination: “As to whether statistics can constitute evidence, the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory ... However, in more recent cases on the question of discrimination, in which the applicants alleged a difference in the effect of a general measure or *de facto* situation ..., the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations. Thus, ... ‘[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.’” (para. 181)

“... the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.” (para. 188)

Shift of the burden of proof to the respondent in a *prima facie* case of racial discrimination: “Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must



show that the difference in treatment is not discriminatory ... Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case ..., it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.” (para. 189)

“In these circumstances, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. The burden of proof must therefore shift to the Government, which must show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.” (para. 195)

The role of intent in proving racial discrimination: “The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC, such a situation may amount to ‘indirect discrimination’, which does not necessarily require a discriminatory intent.” (para. 184)

“Where it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases concerning employment or the provision of services, it is not necessary in cases in the educational sphere ... to prove any discriminatory intent on the part of the relevant authorities ....” (para. 194)

Non-waiver of right not to suffer discrimination: “As regards parental consent, the Court notes the Government's submission that this was the decisive factor without which the applicants would not have been placed in special schools. In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify an acceptance of the difference in treatment, even if discriminatory, in other words a waiver of the right not to be discriminated against. However, under the Court's case-law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent ...and without constraint ....” (para. 202)

“In view of the fundamental importance of the prohibition of racial discrimination, the Grand Chamber considers that, even assuming the conditions referred to in paragraph above were satisfied, no waiver of the

right not to be subjected to racial discrimination can be accepted ...”. (para. 204)

Affirmation of the principle of informed consent: “The Government themselves admitted that 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 do the domestic authorities appear to have taken 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 also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism and special schools where the majority of the pupils were Roma.” (para. 203)

One problematic area of the decision should be noted here: the Court appears to have endorsed the idea that in certain circumstances, paternalistic measures may be justified. Paragraph 203, cited in part above, begins as follows: “In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent.” This would appear to provide support for the problematic idea that, in certain circumstances, fully capacitated adults may not enjoy full moral and/or legal agency, if they belong to disadvantaged groups.

### **Conclusion: The Court and Economic, Social and Cultural Rights**

The Court's ruling in *D.H. and Others v. the Czech Republic* is important first and foremost because it sets out unequivocally that racial segregation in education is banned in Council of Europe Member States. That must of necessity make quite a few state officials in quite a few countries sit up and take notice. From Galway to Vladivostok, segregated minorities now have a viable tool for pressing fundamental rights claims in the field of education. For Roma in particular, who suffer extensive segregation in a number of Council of Europe Member States, this decision is a great milestone in the struggle for emancipation.

More broadly, the *D.H.* hints at possibilities for the Court in a range of social and economic rights matters. As noted above, the new Protocol 12 to

the European Convention supplements the existing Article 14 ban on discrimination – a prohibition on discrimination in access to any European Convention right – with a comprehensive ban on discrimination in the exercise of any right secured by law.<sup>15</sup> Although D.H. relied on Article 14 – Protocol 12 was not yet in effect when the lawsuit was brought – the ruling, centring as it does on the Convention’s only social right, will provide an important marker for future Protocol 12 jurisprudence in economic and social rights areas, once such claims are brought. With the positive ruling in *D.H. and Others v. Czech Republic*, the Court has established a series of legal norms which will be key for practitioners bringing social and economic rights cases in the coming years. In so doing, it has opened an exciting series of possibilities to bring about social change.

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<sup>15</sup> Protocol 12 entered into effect on 1 April 2005. It has thus far been ratified by 15 states, and signed but not yet ratified by a further 22.