DEVELOPMENTS

D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe

By Morag Goodwin[*]

On 7 February 2006, a chamber of the European Court of Human Rights gave judgment in the much awaited 'Ostrava case', which challenged the placing of disproportionate numbers of Romani children in 'special schools' for the learning impaired in the Czech Republic.[1] This practice, widespread across Central and Eastern Europe, amounts in effect to racial segregation and denies Romani children access to a standard of education comparable to their non-Romani peers. The Ostrava case, taking eight months to assemble and seven years to reach judgment day in Strasbourg, represented the centre-piece of the litigation strategy of the Romani rights movement. The decision of the Strasbourg Court to ignore the evidence of indirect racial discrimination by a 6-1 majority represents not only a setback for those working for the improvement of the situation of the Roma – widely acknowledged as the most disadvantaged, discriminated and marginalised group in Europe – but also for the crystallisation of non-discrimination norms in Europe.

A. The Facts of the Case

Between 1996 and 1999, the eighteen applicants, all Romani children born between 1985 and 1991, were placed in 'special schools' in the eastern Czech town of Ostrava. 'Special schools' are designed, according to the relevant domestic legislation, for children suffering from mental disability and are thus outside the ordinary schooling system.[2] The decision to place a child in a special school is taken

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[1] *D.H. and Others v. the Czech Republic*, Application no. 57325/00, Judgment 7 February 2006, http://www.echr.coe.int/echr

[2] Article 2(4) of Decree No. 127/1997 on specialised schools; this decree was repealed by Decree No. 73/2005, which came into force on 17 February 2005.

by the head teacher on the basis of tests designed to measure the intellectual abilities of that child. The tests are carried out by educational psychologists, who make a recommendation to the school. The decision to place a child in a special school requires, according to the national law, the consent of the parent. Parents are sent letters informing them of the decision to place their child in a special school and of their right to appeal the decision. All the parents of the applicants had consented to the placement of their children in special schools and, in the case of two of the applicants, had specifically requested it. Although none of the parents took up the right of appeal, the parents of four of the children, when notified in 1999 of the possibility of transferring their children back into the normal schooling system, promptly did so.

In order to be eligible for secondary school education in the Czech Republic, until a change of law in 2000, pupils needed to successfully complete a normal primary education. Secondary school education was thus not open to pupils who had attended special schools. The only option for such special school pupils beyond the age of 11 was vocational training.

The applicants lodged an appeal with the Czech Constitutional Court in 1999 alleging de facto racial discrimination in the education system, constituting degrading treatment and depriving them of the right to an education. The applicants alleged severe educational harm resulting from a curriculum vastly inferior to that in normal schools, which itself resulted in the ability in practice to return to the normal schooling system and that denied them access to a normal secondary schooling. As a consequence of being branded 'retarded' and of being forced to learn in a racially segregated environment, they alleged that they had suffered psychological and emotional harm. As remedy, the applicants demanded the de-segregation of the education system in Ostrava within three years. The Constitutional Court dismissed the application, finding that the decision to place these children in special schools had been taken pursuant to statutory provisions and that these provisions are not been interpreted or applied in a unconstitutional manner. While acknowledging the "persuasiveness" of the applicants' arguments, the Constitutional Court ruled that it was not competent to consider evidence purporting to demonstrate a practice or pattern of racial discrimination, but could only consider the circumstances of individual cases.[3]

[3] 'The ERRC legal strategy to challenge racial segregation and discrimination in Czech schools', available at http://www.errc.org/cikk.php?cikk=601 (last visited on 26 March 2006).

The applicants lodged an application with the Strasbourg Court on 18 April 2000, alleging a violation of Article 14 (non-discrimination provision) in conjunction with Article 2 of Protocol No. 1. (the right to education).

B. The parties' submissions

The Czech government argued that it was for the applicants to establish a difference in treatment and, further, to show 'beyond reasonable doubt' that any difference was due to the racial origins of the applicants. According to the government, they had not done so. The decision to place a child in a special school was taken in the best interests of the child, pursuant to a proper procedure and was based upon the assessment by educational professionals.

The applicants made the case that, while the special schooling system had not been established specifically for Romani children and met a legitimate aim in principle, statistical evidence provided a prima facie case of indirect racial discrimination. The data that the European Roma Rights Centre, representing the applicants, had collected concerning the placement of children, both Romani and non-Romani, in Ostrava in 1999 demonstrated that whereas only 1.8% of non-Romani children attended special schools, 50.3% of all Romani children did so, despite only constituting 5% of the school population in the town. A Romani child was therefore 27 times more likely than a non-Romani child to be placed in a school for the mentally disabled. The data had been analysed by Professor Daniel Reschly, Chair of the Department of Special Education at Vanderbilt University, who had concluded that the degree of over-representation of Romani children in special schools constituted prima facie evidence of racial segregation. Accordingly, the applicants argued that, contrary to the government's argument, the burden of proof shifted to the respondent to provide a "satisfactory and convincing explanation"[4] for the disparity.

In the Belgian Linguistic case, the Court established that the principle of equality has been breached if a difference in treatment does not have a "reasonable and objective" justification, which implies that any distinction in treatment must have a legitimate aim and "a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[5] As an insufficient command of the

[4] *Anguelova v. Bulgaria*, Application no. 38361/97, ECHR 2002-IV.

[5] *Case "relating to the certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Belgian Linguistics case)* A6, p.34, para. 10 (1968); these tests were repeated in, *inter alia*, *Marckx v. Belgium*, A31, p. 16, para. 33 (1979) and *Rasmussen v. Denmark*, A87, p. 14, para. 38 (1984), and *Abdulaziz, Cabales and Balkandali v. UK*, A42 (1985).

Czech language[6], socio-economic disadvantage[7], or parental consent could not constitute reasonable and objective justification for the gross disparity demonstrated, the applicants alleged that the Czech government had thus failed to provide a sufficient explanation. Further, the applicants alleged that even were the national authorities to advance a legitimate aim for the practice, under no circumstances could it be understood as proportionate to the achievement of that aim. According to the applicants, no 'racially neutral' explanation could thus be given for the overwhelming disparity in treatment between Romani and non-Romani children.

In response to the government's argument that no child is placed in a special school without parental consent, the applicants argued that the consent given was uninformed and therefore without foundation. As a consequence of the limited educational opportunities offered to Romani adults when they were children, many are illiterate and thus unable to read the letter detailing the decision to place their child in a special school, nor to fully comprehend the implications of such a decision.

C. The reasoning of the Court

The Court began by reaffirming both the definition of discrimination it had recently reiterated in Willis v. U.K.[8], that discrimination means treating differently those in relevantly similar situations without an objective and reasonable justification. It also re-stated the fact that states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.

Three factors were relevant to the Court in reaching its decision. The first is that, in line with the government's argument, the Court found it significant that the system of special schooling was not established solely to cater for Romani children, but was established with the legitimate aim of assisting children with learning disabilities to obtain a basic education (paras. 48-49). Although the Court stated that it did not rule out that a general policy having disproportionately prejudicial effects

[6] No other language groups (e.g. Vietnamese, Polish etc) suffered from the same disparity. Moreover, it would be wholly disproportionate to condemn children with poor knowledge of the Czech language to schools for the mentally impaired. See note 3.

[7] According to the case presented, poor children of non-Romani origin are able to excel in the Czech school system. See note 3

[8] Judgment of 11 June 2002, Application no. 36042/97, 2002-IV, para. 48.

on a particular group could be considered discriminatory, in line with its finding in Hugh Jordan v. UK, it held, however, that statistics are themselves not sufficient to establish this.

Secondly, the tests were administered by professional psychologists. It was not the role of the Court to go beyond the facts of the case and require the government to show that individual psychologists had not adopted a discriminatory approach to these particular children. Furthermore, the applicants had not successfully questioned the experts' findings about the applicants' learning disabilities.

Thirdly, the Court placed considerable weight on the failure of the applicants' parents to lodge appeals to the decisions to place their children in special schools, and on the fact that in a number of the cases the parents had requested that their children be transferred to a special school. The Court held that it was the parents' responsibility, "as part of their natural duty", to ensure that their children receive an education.

Thus, while noting that the situation in the Czech Republic regarding the education of Romani children was "by no means perfect", the Court found no violation of Article 14 in conjunction with Article 2 of Protocol 1 by a 6-1 majority.

D. Analysis: See no evil, hear no evil, speak no evil?

The concept of indirect, or disparate impact, discrimination is usually given its origins in Griggs v. Duke Power Co. before the US Supreme Court in 1971, in which the Supreme Court found that the Civil Rights Act of 1964 prohibited indirect discrimination despite the lack of a specific clause expressly doing so.[9] In summarising the majority's reasoning, Chief Justice Burger explained:

"The objective of Congress … was to achieve equality of employment opportunities and to remove barriers that have operated in the past to favour an identifiable group of white employees over other employees. Under the Act, practices, procedures or tests, neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices."

[9] 401 IS 424. For the argument that the concept emerged in international law in the inter-bellum minorities cases before the P.C.I.J., see CHRISTA TOBLER, INDIRECT DISCRIMINATION (2005).

What the case of Griggs v. Duke Power Co. highlights is the importance of the concept of indirect discrimination for making non-discrimination provisions effective.

The Court's acceptance of the Czech government's assertion that the system of separate special schools was not established solely for the education of Romani children and that the process was administered by qualified professionals appears to dismiss the concept of indirect discrimination entirely, its words to the contrary notwithstanding. The main element of indirect discrimination is, as Griggs suggests, not the intention to discriminate but the actual effect of any given measure or policy. The claim put forward by the applicants was not that the Czech government intended to discriminate against them, but that, as the government itself admitted, the effect of the educational testing it administered was to place an overwhelming number of Romani children in schools for the mentally disabled, thereby denying them the right to an education on an equal footing with non-Romani children. In a report considered by the Court, the Czech government noted in their 1999 report under the Framework Convention for the Protection of Minorities that, "Romany children with average or above-average intellect [are] often placed in such schools on the basis of results of psychological tests … These tests [are] conceived for the majority population and do not take Romany specifics into consideration." The Court considered this report and, with the exception of Judge Cabral Barreto, who made it the centrepiece of his dissenting opinion, they ignored it. While the Czech government appears to accept that their policy of educational testing is racially discriminatory in impact, the Court does not.

Moreover, the Court's focus on intent and its refusal to allow statistical evidence to demonstrate it appears to disregard one of the most important purposes of prohibiting indirect discrimination, that of exposing the entrenchment of discrimination within the structures and institutions of our societies. Taking discrimination seriously means tackling entrenched systemic discrimination, and it is for this reason that indirect discrimination is seen to be an essential part of any non-discrimination regime.[10] To deny those seeking to establish systemic discrimination the use of statistics is to set David before Goliath with his hands tied behind his back: it does not make victory impossible, but it reduces dramatically what were very poor odds to begin with.

[10] In this regard, see Article 2(2) of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the 'Race Directive') expressly prohibiting indirect discrimination, as well as Articles 1 of CERD and CEDAW, which prohibit both "the effect or purpose" of discrimination. [2000] O.J. L180/22.

Furthermore, in failing to recognise the systemic discrimination at play in Ostrava, the Court chose to place the burden of fighting the system's prejudice on the shoulders of Romani parents, whom the Court effectively blamed for failing to exercise the natural duty of parents (paras. 50-51). While clearly the prime responsibility for the welfare of any child belongs to the parents, in requiring that parents stand alone against a system as champions for their children, the Court appears to have given no weight to the applicants' submissions that where consent is uninformed, it should not be considered consent at all. Instead of placing the onus upon the system to explain the implications of its decisions, the Court requires instead that illiterate parents of a very different cultural background must not only ask the right questions, but also use an appeal procedure explained in a letter that they cannot read. Moreover, it gave no weight either to the evidence presented of widespread racial abuse and discrimination of Romani children within the ordinary schooling system as explanation for the decision of parents not to appeal the placement decisions or to transfer their child to a special school. In understanding the alleged violations as simply the request to attend an ordinary school, the Court read the claims being brought very narrowly. The application concerns, rather, the right to equal educational opportunities alongside their non-Romani peers, and not the right to be the only coloured face in a classroom in which both the curriculum and the attitude of staff and children (as well as their parents) are discriminatory. In deciding, however, that questions of curriculum and classroom behaviour fall within the margin of appreciation (para. 47), the Court gave itself little room for a broader understanding of the claims brought before them.

Further, in addition to being counter-intuitive, placing the burden upon parents to face down the effects of a racially discriminatory system on behalf of their child also fails to take into account the rights of the child as being independent from the willingness or ability of the parent to activate them on his or her behalf. To view a child's right to educational opportunity as being subject to the consent of the parent flies in the face not only of the progressive development of children's rights and the wide consensus that underpins them[11], but also of more than fifty years of compulsory education legislation in Europe, regardless of the wishes of the parents.

[11] The Convention on the Rights of the Child (1989) has the highest number of ratifications for any human rights treaty, with 192 states accepting the existence of rights of children separate from their parents' ability to enforce them on their behalf.

Ostrava presented the European Court with an obvious opportunity to expand upon its existing case-law and to take its acceptance of indirect discrimination from mere words to an actual finding.[12] It was an opportunity declined.

E. The implication of the Court's decision

I. The Romani Rights movement: "a sad day".

It is widely acknowledged that Roma constitute the most discriminated and disadvantaged group in Europe today. In efforts to tackle their exclusion from European society and to promote equal rights and respect for Romani populations in Europe, the litigation approach at present dominates. According to the European Roma Rights Centre (ERRC), which is the most prominent pro-Romani NGO, high impact human rights litigation before domestic and international courts is their "core work".[13] The Ostrava case represented the centre piece of this strategy and was arguably perceived by those working on the case to be the Romani movement's equivalent of Brown v. Board of Education.[14] Considerable resources and large amounts of hope were vested in this case. In the words of the ERRC's Executive Director upon hearing of the Court's decision, "This is a sad day for Roma and for the struggle against discrimination".[15]

To understand why Ostrava was so important to the Romani cause, it is necessary to consider the wider circumstances. According to a May 2004 report issued by the ERRC, in Bulgaria, Romani children comprise 80-90% of the remedial school population; in Hungary, that figure is 50%; in Slovakia, estimates put the figure between 80-100%. In the Czech Republic, the situation in Ostrava is abnormal, as the Czech government itself placed the percentage of Romani children in special

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[12] Despite appearing to recognise the possible existence of indirect discrimination in the *Belgian Linguistic* case in 1968, the Court has yet to find a violation of Article 14 on the basis of disparate impact discrimination.

[13] http://errc.org/Archivum_index.php. For a more detailed consideration of the legal strategy of the Romani movement, Morag Goodwin, *White Knights On Chargers: Using the US Approach To Promote Roma Rights in Europe?*, 5 GERMAN LAW JOURNAL 1431 (2005), at http://www.germanlawjournal.com/article.php?id=524.

[14] *Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 493 (1954).

[15] ERRC Press Release, *European Court Fails to Find Czech Romani Children Victims of Racial Discrimination in Education*, 8 February 2006, at http://www.errc.org/cikk.php?cikk=2378 (last visited on 26 March 2006).

schools at 75% in its CERD 2000 report.[16] Romani children right across central and eastern Europe are subjected to racial segregation in education. Unlike the applicant's claim in Brown, the main element of the determination to fight racial segregation of Romani children is less the psychological harm – although that is clear – but that placement in schools for the mentally impaired, in denying access to a decent education, has an enormous implication for the life chances of any child. Roma face multiple and overlapping difficulties in all areas of societal participation in their everyday lives. In addition to segregation in education, they face racially-motivated violence, the denial of access to health care, to work, social benefits, political participation, to public places and housing, as well as the desperate poverty in which the vast majority of Roma live. Attempts to tackle this level and complexity of marginalisation cannot focus on one aspect alone, but at the heart of long-term ambitions for equality for Roma must be educational opportunities.

It is for this reason that tackling the placement of Romani children in special schools has been a priority for the Romani civil rights movement. A victory in Ostrava would, so it was hoped, have fundamental implications right across the region for the education of Romani children, by condemning the practice of segregation and of increasing pressure upon governments to rapidly bring it to an end. Moreover, a favourable Strasbourg Court decision could have had a powerful positive influence upon national courts' willingness to accept the use of statistics as evidence of indirect discrimination. In the event, Strasbourg was no more progressive than the Czech Constitutional Court.

II. The wider context: the European struggle against racial discrimination

If the decision in Ostrava represents a fundamental blow to the Romani rights movement, what are, if any, its wider implications? The claim made in Ostrava was that the practice of placing Romani children in special schools was discriminatory in effect and that this could be demonstrated by the use of statistical evidence. In rejecting both elements of the submission, the Court is out of step with the development of non-discrimination norms internationally, but in particular in Europe.

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[16] *Fourth periodic report of State parties, Addendum Czech Republic*, 26 November 1999, CERD/C/372/Add.1, para. 134. See, ERRC, *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe*, Budapest 2004; at http://www.errc.org/cikk.php?cikk=1892 (last visited on 26 March 2006).

The Strasbourg Court's decision appears all the more reactionary when placed alongside the development of non-discrimination norms in the European Union.[17] Not only has the EU laid down uncompromising definitions of discrimination in recent years, but the European Court of Justice has long accepted the use of statistics to establish the disparate impact of apparently neutral provision.[18] Indeed, so accepted is the use of statistics to establish indirect discrimination in Community law that the UK government in O'Flynn argued that in the absence of statistics, it was impossible to establish the disparate impact alleged.[19] In the light of the substantive norms laid down in EU Directives and case-law, as well as of the widely accepted use of statistics in demonstrating disparate impact discrimination, the European Court of Human Rights is failing to keep pace with a crystallising European consensus. It is possible that the Strasbourg Court's unwillingness to keep pace may slow down the progression of anti-discrimination provisions; for while the EU has made considerable progress in elaborating standards in the area of gender equality, it has yet really to begin implementing its tough standards on racial discrimination.

Nor should the importance of tackling racial discrimination be under-estimated in Europe. While other European institutions are taking the rise of racial and ethnic tensions seriously, the Strasbourg Court's decision shows a failure to provide either moral or legal leadership in this area. The risk is that the Strasbourg Court provides an alternative, much restricted, European vision of non-discrimination norms.

F. Conclusions

In the majority's determination to maintain continuity with existing case-law, they have missed a golden opportunity to allow the Convention to grow in keeping with the development of European non-discrimination norms. In denying the existence

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[17] See the Race Directive, note 7, but also Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (the 'Framework Directive'), [2000] O.J. L303/16; and Directive 2002/73/EC of the European Parliament and the Council amending Directive 76/207, [2002] O.J. L269/15.

[18] For example, see *Bilka* C-170/84 [1986] ECR 1607, in which the ECJ required no finding of intent and accepted the use of statistics to establish that the exclusion of part-time workers from occupational pension schemes could not be explained by factors excluding discrimination on the grounds of sex.

[19] The ECJ rejected in *O'Flynn* the UK government's contention that statistics were necessary to establish any case of indirect discrimination. According to the Luxembourg Court, "It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect." *O'Flynn* C-237/94 [1996] ECR I-02617, para. 21.

of indirect discrimination and in blaming the parents for the systemic racial discrimination destroying their children's life chances, the Court has chosen to leave exposed the most vulnerable victims of a particularly vicious form of racial discrimination, and one that will have lasting effects for a generation. It is a hugely disappointing and flawed decision that is almost certain to be appealed to the Grand Chamber. In refusing to see the evil before it, the Court has not avoided doing evil itself.