



H/Exec(2015)8 – 3 March 2015

D.H. and others against Czech Republic (No. 57325/00)

General measures for the execution of judgment of the European Court

Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights

The opinions expressed in this document are not binding on either the Committee of Ministers or the European Court.

This case concerns discrimination in the enjoyment of the applicants' right to education due to their assignment to special schools (schools for children with special needs including those suffering from a mental or social handicap) between 1996 and 1999 on account of their Roma origin (Violation of Article 14 in conjunction with Article 2 of Protocol No. 1).

The document takes stock of the progress achieved in the execution of the judgment in respect of the general measures taken to prevent similar violations.

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I. The judgment

1. Scope of the problem

Special schools were established in the Czech Republic after the First World War for children with special needs, including those suffering from a mental or social handicap and unable to follow the ordinary school curriculum. Prior to 1989 most Roma children attended special schools. According to a report of 2005 of the Advisory Committee on the Framework Convention for the Protection of National Minorities, Roma represented up to 70% of pupils enrolled in special schools¹.

The D.H. case was brought to the European Court by 18 Czech nationals of Roma origin who between 1996 and 1999 were placed in special schools. The decision to place them in a special school was taken by the head teacher on the basis of the results of tests to measure the child's intellectual capacity. The applicants argued that the tests performed had been unreliable and that their parents had not been sufficiently informed of the consequences of giving consent. In 2007, the Court declared this two-track system of schooling to be in violation of the European Convention of Human Rights.

2. Shortcomings noted by the Court

The European Court considered that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community². It held that there was a violation of Article 14, prohibition of discrimination, in conjunction with Article 2 Protocol No. 1, right to education³.

Referring to the ECRI reports, the European Court stated that the channelling of Roma children to special schools was reportedly often "quasi-automatic" and that "Romany children with average or above-average intellect" were often placed in such schools on the basis of the results of psychological tests which were conceived for the majority population and did not take Roma specifics into consideration. The Court thus concluded that there was a danger that these tests were biased and their results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them⁴.

The Court also noted that even assuming that parents could freely give their fully informed consent, there could be no waiver of the right not to be subjected to racial discrimination, as it would be counter to an important public interest⁵.

II. Developments in the execution of the judgment

1. "NAPIV" – the first action plan

Since 2007, when the judgment became final, the Czech authorities transmitted several information documents and in April 2009 a wide-ranging action plan. The plan referred to measures directly relevant to the execution of the judgment, which were largely set out in the National Action Plan on Inclusive Education (the "NAPIV"). The goal of the NAPIV was to end the persisting practice of segregating Roma pupils⁶.

Despite a number of positive elements aimed at preventing discriminatory treatment of Roma pupils in the primary schooling system, the NAPIV was widely criticized for its lack of impact. Moreover, its

¹ D.H. and Others v. the Czech Republic [GC], no. [57325/00](#), § 18, ECHR 2007 IV

² D.H. and Others v. the Czech Republic [GC], *ibidem*, § 209.

³ D.H. and Others v. the Czech Republic [GC], *ibidem*, § 208.

⁴ D.H. and Others v. the Czech Republic [GC], *ibidem*, § 201.

⁵ D.H. and Others v. the Czech Republic [GC], *ibidem*, §§ 202-203.

⁶ An analysis by the Secretariat of the measures set out in the action plan and in particular in the NAPIV is presented in document [CM/Inf/DH\(2010\)47](#).

status remained unclear for a long period⁷. Statistics submitted by the authorities in June 2011⁸, showed that the presence of factors causing the Court to conclude that there was indirect discrimination appeared to remain⁹.

2. “Equal opportunities” – action plan 2012

Following the repeated demands to explain the status of NAPIV and ensure effective implementation of necessary measures¹⁰, in June 2012, the Committee of Ministers invited the Czech authorities to produce a new Action plan. The Czech authorities then submitted a new consolidated action plan titled “Equal Opportunities”¹¹. Its target indicator is “a gradual falling trend in the number of Roma pupils in special schools or classes until the achievement of a proportion that corresponds to the number of Roma pupils in the population as a whole”¹².

The authorities decided in particular:

- to amend the existing legislation in order to eliminate the possibility to place pupils without a disability, in classes or study groups for pupils with disabilities;
- to revise existing diagnostic tools (used to identify pupils with a “slight mental disability”) in order to remove what the authorities themselves referred to as “well-founded doubts” about their reliability and cultural neutrality;
- to put in place a functioning non-discriminatory supervision of the quality of diagnostics and of decision-making at all levels;
- to perform annual surveys to establish the number of Roma pupils educated in programmes designed for children with a “slight mental disability”.

The action plan sets also long-term measures which include setting up a standing forum of non-governmental organisations on the question of equal opportunities in education and a general overhaul of the Czech education system by a new Education Act.

III. Present situation

As follows from the information submitted by the Czech authorities on 10 February 2015¹³, by the end of 2014 the implementation of the 2012 action plan arrived at a phase in which the short and medium term measures have been put in place, as the legislative framework has been amended¹⁴; and diagnostic tools revised and operational. In their submission of 10 February 2015 the authorities also provided the first comparable statistics obtained from surveys on the education of Roma pupils¹⁵.

1. Schooling arrangements

a. Situation for pupils entering the schooling system

i. Legislative framework

The legal framework now states that pupils with a so-called health disadvantage or social disadvantage (i.e. without a disability) can no longer be educated, in a class/group for pupils with “mild mental disabilities”¹⁶.

⁷ See Communications from the Open Society Justice Initiative and ERRC European Roma Rights Centre of 7 November 2011, [DH-DD\(2011\)1070](#) and of 2 March 2012, [DH-DD\(2012\)334](#).

⁸ See communication from the Czech authorities of 8 June 2011, [DH-DD\(2011\)439](#)

⁹ See decision of the CM at the [1128th CM DH meeting](#), December 2011

¹⁰ See decision at the [1144th CM DH meeting](#).

¹¹ See Action plan of 19 November 2012, [DH-DD\(2012\)1074](#).

¹² NB the Roma population is estimated to be between 1,9% and 3 % of the population of the Czech Republic. See *The European Union and Roma – Factsheet, Czech Republic*, 4 April 2014, <http://ec.europa.eu/justice/roma-integration/czech-republic/> and the submissions of the Public Defender of Rights, [DH-DD\(2012\)248](#).

¹³ See [DH-DD\(2015\)161](#).

¹⁴ As of 1 September 2014.

¹⁵ See [DH-DD\(2015\)161](#), quoted above.

¹⁶ see Decree No. 73/2005. However, it is still possible to place a pupil with “health disadvantages” in a such classes/groups in limited circumstances (see also the Opinion of the Public Defender of Rights [DH-DD\(2012\)248](#), quoted above).

ii. Diagnosis

Pupils entering the schooling system undergo testing by a “counselling centre” where appropriate¹⁷. In line with the 2012 Action plan, these tests are now carried out with new diagnostic tools which guarantee a culturally neutral approach and should be a tool for the integration and inclusive education of pupils¹⁸.

The tests were standardised, published and put into practice in 2013. In order to make them fully operational and properly used, between 2013 and 2014, 484 psychologists were trained¹⁹ and methodological documents issued for the counselling staff. Further methodological guidance takes a form of training programmes and meetings for all pedagogical and psychological counselling facilities and remedial teaching centres.

Application of the new tests and the obligations arising from the legislative changes are monitored by the Ministry of Education and the Czech Schools Inspectorate.

iii. Parental consent

Under the amended legal framework, a pupil can only be included in a school/class/study group for pupils with disabilities where informed consent is given by the legal guardian or the pupil (if of age)²⁰. Such consent is subject to the provision of comprehensible advice to the legal guardian, or the pupil²¹. The legal consent is issued on a form prepared in accordance with the legislation²². If they or their representative disagree with the recommendation, they can request re-testing by a different counselling centre.

b. Situation for pupils already placed in groups/classes for pupils with “mild mental disabilities”

i. Legislative framework

A recommendation by a school counselling facility to place a pupil in a school or curriculum for pupils with disabilities is valid for a period not exceeding one year²³. Therefore, any pupil diagnosed with a “mild mental disability” must be re-tested annually. Also, compensatory/support measures in the education of pupils with special needs have been introduced²⁴. These aim to prepare pupils for attendance at mainstream schools²⁵.

ii. Re-diagnosis

The tests appear to be the same as those used on pupils entering the school system. Before the expiry of an annual recommendation to place a pupil in a school or curriculum for pupils with disabilities, the school counselling facility shall notify the pupil or his legal guardian of the need for a new diagnosis. If the representatives do not respond, the counselling centre can contact the body in charge of social and legal protection of children²⁶.

iii. Parental consent

If transfer to mainstream education is recommended then it is for the pupil's parent (or legal representative) to ask the school to make the transfer. If no such request is made, the state should intercede with the parents to explain the circumstances in light of the obligation to provide fair and equal access to education.

¹⁷ Upon a request of a parent or advice of a school psychologist.

¹⁸ Detailed description of the specific tests and tools used is provided in the documents [DH-DD\(2014\)569](#) and [DH-DD\(2015\)161](#), quoted above.

¹⁹ See [DH-DD\(2015\)161](#), quoted above, Part B Measure 2.

²⁰ Regulation No. 73/2005, Section 9 (1) c)

²¹ Section 9 (1) b) of Decree 73/2005

²² see appendix to the amendment No. 147/2011 of Decree 73/2005

²³ see amended Regulation No. 72/2005 Section 1 (5)

²⁴ Section 1 (2) of the Regulation No. 73/2005

²⁵ According to the submission of the Czech authorities to the Committee of Ministers of June 2011, quoted above.

²⁶ That is the Czech Schools Inspectorate and the Authority for the Social and Legal Protection of Children.

2. Safeguards in relation to procedure

If a pupil or their representative considers the basis for the diagnosis discriminatory, they can bring a legal challenge under the Anti-Discrimination Act²⁷, in force in the Czech Republic since 2009 in line with the EU requirements²⁸. The Act provides in Section 10, paragraph (1) an opportunity for the individual affected by the relevant action to resort to a court for protection against alleged discriminatory treatment or alleged unequal treatment, seeking to prevent its continuation and to obtain just satisfaction. The Act applies to the areas of access to and provision of education.

3. Impact

The 2012 Action Plan envisaged collection of data on Roma pupils in schools by the Czech Schools Inspectorate. In accordance with the Plan, this data collection began in 2013; before then only estimates and selective statistics were available. Data is now collected from all schools which enrol at least 5 pupils diagnosed with a "mild mental disability". The Public Defender of Rights and NGOs have however, criticised the lack of clarity on the data collection methodology, and the fact that the surveys rely on information provided by the schools concerned²⁹.

There were two full surveys undertaken by the Czech Schools Inspectorate in accordance with the 2012 Action Plan so far, providing comparable statistics for school years 2013/2014 and 2014/2015³⁰.

a. Overall percentage of Roma pupils in special classes

According to the surveys, in 2013, there were 14,333 children educated under the program for pupils with a "mild mental disability" and 28.2% of them were Roma. In the school year 2014/2015 the overall number of children in such groups/classes diminished to 10,695, but the proportion of Roma pupils increased to 32.4%. In mainstream classes in 2013/2014, 10.3% of pupils were Roma; and in 2014/2015, 9.5%³¹.

The authorities underline the constant, annual increase in the numbers of pupils transferring from special classes to mainstream education³². However, from 2013 to 2015 only 440 Roma pupils were transferred to education under the mainstream curriculum³³; a small proportion of the 3,638 pupils transferred in total.

b. Re-testing and transfer to mainstream education

In 2013 around half of all counselling centres were surveyed on re-testing of pupils in classes/groups for pupils with a "mild mental disability" with the following outcome: 7,176 pupils were called in for re-diagnosis and 6,713 responded. Of that group, 149 were recommended for transfer to the mainstream (i.e. 2.2%). This data does not identify the percentage of Roma pupils. Noting that the group identified for transfer appeared small and that this implied that the number of Roma pupils transferred was also low, the Committee previously asked the authorities for further explanations of these statistics. In response³⁴ the authorities recalled that no conclusions could be drawn from these statistics which were merely intended to show that movement within the schooling system was possible and ongoing. No comprehensive information has yet been provided on the follow-up given to recommendations

²⁷ The Act No. 198/2009 is available in Czech at: <http://www.sagit.cz/pages/sbirkatxt.asp?zdroj=sb09198&cd=76&typ=r>

²⁸ See also communication from the Czech authorities of [1 December 2010](#) and Report from the Commission to the European Parliament and the Council [COM\(2014\)2 final](#).

²⁹ See Opinion of the Public Defender of Rights DH-DD(2012)248 Section F, and submission from OSJI (and other NGOs) [DH-DD\(2015\)243](#) Section F.

³⁰ In its opinion of 20/02/2015 the Czech Public Defender of Rights pointed to lack of clear methodology for data collection by the Czech School Inspectorate. Concerns were also raised about lack of effective consultation between the Czech School Inspectorate and the Office of the Ombudsperson in this respect.

³¹ See [DH-DD\(2015\)161](#), quoted above, Part F, tables No. 1-4.

³² From 2008 to 2015 overall number of 1,674 pupils was transferred.

³³ That does not necessarily mean that they are educated in mainstream schools.

³⁴ See [DH-DD\(2014\)1145](#).

issued in 2013 and 2014, in particular, if the pupils have been successfully integrated in mainstream classes.

IV. Future plans

1. Legislative framework

The Education Act is currently being debated by the Czech Parliament. Under Article 16 of the Education Act categorisation of pupils (into the existing categories of social disadvantage, health disadvantage and health disability) will be removed. Pupils will instead be classified as needing “special educational needs” and receive support measures in mainstream education. The amendment was submitted to the Parliament in September 2014 and is now before the Senate. It is envisaged to come into force on 1 September 2016³⁵. Practical Schools will continue to educate pupils diagnosed with a disability.

The Decrees 72/2005 and 73/2005 will be further amended to follow up this amendment to the Education Act.

The authorities are also planning to repeal the educational programme for pupils with mild mental disabilities (the FEP BE MMD, known as the Annex). The Action plan indicates that consequent changes in the organisation of the educational programme for pupils with “mild mental disabilities” are being prepared, but there is no clear indication of the next steps in this respect.

2. Tests

It appears that the existing diagnostic tools will be used to assess whether pupils need support measures under the new approach envisaged in the Education Act, and will also continue to be used to assess whether pupils have disabilities³⁶.

Further diagnostic instruments will be put into practice in 2015, followed by workshops for counselling centre staff³⁷.

A supervisory body (the National Institute of Education) will be established under the Education Act to review the activities of school counselling facilities (the facilities that organise and carry out the testing and re-testing of pupils). This body will also be able to review decisions taken about individual pupils, where the pupil (or their representative) disagrees with a diagnosis, or the need for a particular support measure. However, it will only be able to act on request, and will not be entitled to review the results of counselling *ex officio*³⁸.

An amendment to the Education Act is planned which creates a duty on school counselling facilities to submit recommendations not only to statutory representatives but also to schools themselves³⁹. The Czech School Inspectorate will carry out regular annual surveys of the school counselling facilities which as of 2016 shall undergo unified record-keeping and reporting⁴⁰.

3. Impact

Data from the next survey of schools will be available in January 2016. The next survey of school counselling facilities is planned for March 2016.

V. CONCLUSIONS

³⁵ See [DH-DD\(2015\)161](#), quoted above, Part A, Planned measures.

³⁶ See the communication from the authorities [DH-DD\(2015\)178](#), and the Opinion of the Public Defender of Rights (DH-DD(2012)248) Section B, quoted above.

³⁷ See [DH-DD\(2015\)161](#), quoted above, Part B Measure 3 and Planned measures 1-3.

³⁸ See the Opinion of the Public Defender of Rights (DH-DD(2015)243 Section C).

³⁹ See [DH-DD\(2015\)161](#), quoted above, Part F Measure 3.

⁴⁰ See [DH-DD\(2015\)161](#), quoted above, Part B Planned measure 4 and Part C Planned measure 2.

The changes to the legislative framework were a positive development, which the Committee has previously welcomed⁴¹. The work done to revise the diagnostic tools used by counselling centres also appears to be a step in the right direction.

The impact of these measures can be seen in the latest statistics which show that pupils are being transferred into mainstream education. However, the majority of pupils transferred are not Roma⁴². For Roma pupils, transfers to mainstream education do occur, but at a significantly slower pace. In the school year 2014/2015, only 440 Roma pupils were transferred to the mainstream, whereas the total number of pupils transferred was 3,638. Therefore, Roma pupils constituted around 13% of pupils transferred to mainstream schooling. Presumably, as a result of this imbalance, the proportion of Roma children in practical schools and classes increased to 32% in the school year 2014/2015, as more non-Roma pupils left for the mainstream. Therefore, there still appears to be a disproportionate percentage of Roma pupils educated in schools or classes for pupils with a disability.

As highlighted by the European Court, the application of tests and therefore the work of the counselling centres is extremely important in ensuring that the application of legislative measures in practice are not discriminatory. In this respect, it should also be noted that it appears that the diagnostic tools in place now will continue to be used to identify pupils with disabilities, even if the new Articles in the Education Act are adopted.

The Committee has already observed that the overall percentage of children diverted to the mainstream education system appears low and considered that this raises questions about the implementation and effectiveness of new diagnostic tools. However, the tests themselves and questions related to them are highly technical and accordingly it is difficult to make a full assessment of their functioning beyond following their revision and implementation which now appears to be largely completed. Therefore, it appears crucial that an effective monitoring mechanism is put in place to ensure that Roma pupils diagnosed with “mild mental disabilities” are diagnosed and regularly reassessed with neutral, objective tests. In this respect, the establishment of the supervisory body (the National Institute of Education) under the Education Act to supervise counselling centres should be strongly encouraged. It is of utmost importance that such mechanism has all the necessary competences and powers in order to effectively fulfil its role.

Beyond the appropriateness of the tests, it is extremely important that any recommendation for the transfer of a pupil to mainstream education is successfully implemented. The Public Defender of Rights has expressed concerns about the lack of monitoring of pupils who were called for re-testing but did not sit the new test proposed, as well as the lack of follow up for pupils whose transfer to the mainstream educational system was recommended⁴³. She regards these shortcomings as a major weakness in the system of legal safeguards put in place by the authorities following the D.H. judgment⁴⁴.

In response, the authorities have indicated in general terms that the application of the new tests and the obligations arising from the legislative changes are monitored by the Ministry of Education and the Czech Schools Inspectorate. They also refer to the amendment to the Education Act which lays down a duty on school counselling facilities to submit issued recommendations not only to statutory representatives but also to schools themselves. These elements appear positive but are nonetheless presented in very general terms; the revised action plan does not give any concrete information on the follow up given to those pupils recommended for transfer, nor is it clear what assistance is offered to pupils upon their entry in the mainstream system. In addition, given the level of the Public Defender’s concerns, more concrete explanations appear necessary.

As the short and medium term measures adopted in the Action Plan have not significantly affected the disproportionate number of Roma pupils educated outside the mainstream, the future measures planned are central to the execution of the judgment. In this respect, Article 16 of the Education Act would appear to establish an important change to a more inclusive approach, whereby pupils are educated in the mainstream with extra support where possible. It therefore appears crucial to ensure

⁴¹ In June 2014, the Committee welcomed the abolishment of the possibility for short-term placement of “socially disadvantaged” pupils in groups / classes with reduced curriculum.

⁴² See DH-DD(2015)243 Section A. This is also the opinion of the Public Defender of Rights

⁴³ See her submission to the Committee of Ministers from April 2014, DH-DD(2015)248, quoted above.

⁴⁴ See [DH-DD\(2014\)569](#).

that this change is fully implemented. However, no information, such as organisational, practical and budgetary next steps for this measure, is included in the revised Action plan⁴⁵.

One particularly important organisational step in this context would appear to be the planned repeal of the so-called Annex, which currently sets out the educational programme for pupils with “mild mental disabilities” and provides the legal basis for the existence of practical schools⁴⁶. However, there is a lack of clarity as to how this change will be followed up. It therefore appears key to have further information on this measure and on how it will interact with the new approach to be put in place under the Education Act.

Despite the authorities’ efforts, it has been difficult to entrench the profound and wide-ranging changes needed to fully execute this judgment. In this respect, the role of NGOs and NHRIs could be instrumental in ensuring that the planned measures fully address the scope of the problem. Accordingly, the authorities’ ongoing co-operation with civil society should be further expanded, to ensure the effectiveness of the planned measures on the ground.

⁴⁵ See also the Executive Summary in the submission from OSJI (and other NGOs) (DH-DD(2015)243).

⁴⁶ See DH-DD(2015)243 Section E.