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Communication from the Council of Europe Commissioner for Human Rights (22/10/2020) in the case of D.H. AND OTHERS v. the Czech Republic (Application No. 57325/00)

Information made available under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1390^e réunion (1-3 décembre 2020) (DH)

Communication de la Commissaire aux droits de l'homme du Conseil de l'Europe (22/10/2020) relative à l'affaire D.H. ET AUTRES c. République tchèque (requête n° 57325/00) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.4 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Office of the Commissioner
for Human Rights



Mr Christophe POIREL
Director
DGI: Directorate General Human Rights and Rule of Law



Strasbourg, 22 October 2020

Dear Mr Poirel,

I should like to inform you that, pursuant to Rule 9§4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, wishes to exercise the right to submit written observations with regard to the execution of the judgment in the case of ***D.H. and Others v. Czech Republic*** (application no. 57325/00, judgment of 13 November 2007).

I would be grateful if you could bring the Commissioner's submission to the attention of the Czech authorities and circulate it to the Committee of Ministers ahead of its 1390th meeting from 1-3 December 2020, pursuant to the procedure in Rule 9§6 of the above-mentioned rules.

Thank you for your kind co-operation.

Yours sincerely,



Isil Gachet
Director

Rule 9 Submission



Submission by the Council of Europe Commissioner for Human Rights

under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of
judgments and of the terms of friendly settlements

in the case of

***D.H. and Others v. Czech Republic* (application no. 57325/00), judgment of 13 November 2007**



Introduction

1. This submission by the Council of Europe Commissioner for Human Rights (hereinafter, “the Commissioner”) is addressed to the Committee of Ministers of the Council of Europe, in accordance with Rule 9.4 of the Rules of the Committee of Ministers,¹ in the context of the supervision of the execution of the judgment of the European Court of Human Rights (hereinafter, “the Court”) in the case of *D.H. and Others v. Czech Republic* (application no. 57325/00).
2. The case concerns discrimination in the enjoyment of Roma children’s right to education due to their assessment as pupils with “mild mental disabilities” and resulting assignment to special education, where they were provided with a more basic curriculum, in violation of Article 14 in conjunction with Article 2 of Protocol No. 1 of the European Convention on Human Rights (hereinafter, “the Convention”).
3. According to her mandate, the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.²
4. The protection of the human rights of children and of minority groups such as Roma, has been a priority issue for the Commissioner’s Office and have been addressed extensively in both her country visits and her thematic work, such as the Position Paper *Fighting school segregation in Europe through inclusive education* (hereinafter, “the Position Paper”).³ In this context, the Commissioner has devoted particular attention to combating discrimination against Roma children in education, and the promotion of inclusive education more generally.
5. The present submission aims to assist the Committee of Ministers in its examination of the case and to draw attention to the long-standing nature of the problems at issue, the need for broader measures to tackle the deep-rooted causes of these problems, and the importance of securing the sustainability of measures already taken.
6. Section I of the present written submission provides an overview of the relevant observations and recommendations made by successive Commissioners since 2003. Section II will discuss one of the key lessons to be learned from this involvement, namely the importance of looking at broader measures to tackle the deep-rooted inequalities that underlie the problems in the current case. Section III will address another key lesson, namely the importance of securing the sustainability of measures already in place. This is followed by the Commissioner’s conclusions.

I. Overview of the Commissioner’s work on Roma children in the Czech education system

7. Successive Commissioners have stressed the need to combat discrimination against Roma children in the Czech education system. In 2003, it was identified by former Commissioner Gil-Robles⁴ as one of the issues of concern in the first country visit to the Czech Republic and the subsequent report.⁵ The report noted Roma children being “drastically over-represented” in special schools and classes for children suffering mild mental disabilities. It noted a series of measures implemented to address this, in particular the introduction of Roma assistant

¹ [Rules of the Committee of Ministers](#) for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 and [amended](#) on 18 January 2017).

² [Resolution](#) (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

³ Commissioner for Human Rights, *Fighting school segregation in Europe through inclusive education*, [Position Paper](#), September 2017.

⁴ Commissioner for Human Rights from 15 October 1999 to 31 March 2006.

⁵ [Report](#) by Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the Czech Republic from 24 to 26 February 2003, CommDH(2003)10, published 15 October 2003 (hereinafter, “the 2003 report”).

teachers, but found that municipal authorities had not made the matter a priority.⁶ A 2006 follow-up report, which was published shortly after the Chamber judgment in the present case, noted that, in spite of the efforts made, such as increasing the number of preparatory classes and assistant teachers, the situation remained a concern. As a result, he called on the Czech authorities “to pursue their efforts in this direction and make greater resources available for the provision of preschool education, language training and school assistant training in order to ensure the success of efforts to fully integrate Roma pupils into the regular schools system.”⁷

8. A second country visit was carried out by former Commissioner Thomas Hammarberg⁸ in November 2010, with a country report published in 2011. In his end-of-visit statement, former Commissioner Hammarberg noted that, three years after the Grand Chamber’s judgment, there had been “virtually no change on the ground”, that the implementation of this judgment was “worryingly, delayed” and that it was “not clear that this will change in the near future.”⁹ The report noted that several measures had been taken related to the promotion of participation of Roma children in preschool education. The appointment of teaching assistants was also identified as an important measure, although lack of funds and the fact that the decision to request such assistants remained entirely in the hands of school administrators were identified as limiting the efficacy of this measure. The report also identified doubts about the government’s commitment to the inclusive education agenda, in relation to staffing issues in key ministries and delays in introducing legal changes. However, former Commissioner Hammarberg was encouraged by clear assurances from the Czech authorities and the implementation of the National Action Plan of Inclusive Education (NAPIE), which included reviving a steering committee for the Plan’s implementation, as well as the determination to adopt the necessary legal changes. In particular, he expressed the hope that efforts would be made to bring the special school administration and staff genuinely on board with the inclusive education agenda.¹⁰ He further emphasised the need for updated, disaggregated data by ethnic origin, the strengthening of measures to secure participation of Roma children in preschool education and the presence of teaching assistants in all schools where they were genuinely needed.¹¹
9. A third country visit was conducted by former Commissioner Nils Muižnieks¹² in November 2012, with the report published in February 2013.¹³ The report called it “deeply worrying that five years after the Court’s judgment the situation of Roma children remains essentially the same.” It noted that a “significant number of Roma pupils continue to be taught a reduced curriculum either in schools for children with ‘mild mental disabilities’ [...] or in mainstream Roma-only schools or classes, where teaching standards are *de facto* lower.”¹⁴ The report welcomed the Consolidated Action Plan ‘Equal Opportunities’, adopted in November 2012. It included “major measures” with “the potential to bring about important developments”. However, it also noted that the Plan did not clarify how it would achieve effective inclusive education and put an end to segregation in Roma-only schools and classes. In this light, the report called for the Plan to be accompanied by a detailed schedule with clear targets, indicators for monitoring desegregation, and the required funding.¹⁵ The report expressed regret that previous commitments to set up an inclusive education system had not been fulfilled, particularly the halting of the implementation of NAPIE with the resignation of the expert group set up to assist this process in May 2011, citing the government’s lack of political will to develop an inclusive education system.¹⁶ It noted the need for a paradigm shift on testing, noting that

⁶ 2003 report, paragraphs 6-9.

⁷ [Follow-up report](#) on the Czech Republic: Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights 2003-2005, CommDH(2006)15, published 29 March 2006 (hereinafter, “the 2006 follow-up report”), paragraph 27.

⁸ Commissioner for Human Rights from 1 April 2006 to 31 March 2012.

⁹ Commissioner for Human Rights, ‘[Czech Republic: Equal education for Roma children should be guaranteed](#)’, [says Commissioner Hammarberg](#), 22 November 2010.

¹⁰ 2011 report, paragraphs 62-65.

¹¹ 2011 report, paragraphs 68-71.

¹² Commissioner for Human Rights from 1 April 2012 to 31 March 2018.

¹³ Report by Nils Muižnieks, Commissioner for Human Rights, following his visit to the Czech Republic from 12 to 15 November 2012, CommDH(2013)1, published 21 February 2013 (“the 2013 report”).

¹⁴ 2013 report, paragraph 44.

¹⁵ 2013 report, paragraph 54-56.

¹⁶ 2013 report, paragraph 45.

“the perfecting of the testing system should lie at the heart of reforming an education system that, as it now stands, tends to exclude, rather than to include.”¹⁷

10. The 2013 report notably also addressed wider issues related to the full integration of Roma children in mainstream, quality education. It noted, for example, that the segregated system had significant support from the public and a number of education professionals. Other factors included the territorial segregation of Roma, the wish of Roma parents to protect their children from hostility by non-Roma peers and educators, the low number of Roma children attending preschool education, poor co-operation between mainstream schools and Roma parents, and the inability of Roma parents to help and support their children in mainstream schools. In this light, the report particularly noted that “the complexity of this problem demands not only a reform of the education system, but also the implementation of profound, long-term, effective measures aimed at combating institutionalised anti-Gypsyism, poverty and social exclusion, as well as at overcoming the resistance to change by various stakeholders.” In this respect, it also noted the importance of training teachers and school administrators in the relevant human rights standards, including non-discrimination, and of taking measures to combat racism in schools, including violent attacks on Roma children. It also recommended the revision of school textbooks to ensure they reflected Roma history and the contribution of Roma to society.¹⁸
11. The three country visits were followed by letters to the Czech government. In November 2016, former Commissioner Muižnieks noted that the variety of legislative and practical measures in relation to the judgment had “failed to bring about any real, significant change in the education of Roma children,” describing this situation as “not tenable” and constituting a challenge to the Court’s authority and thus to the European human rights protection system as a whole.¹⁹ Nevertheless, he welcomed the legislative changes adopted, in particular the introduction of a mandatory year of preschool education for preparing Roma children for entry into mainstream primary education. He also noted that such reforms needed to be coupled with measures addressing institutional prejudices against Roma in the school system, including teachers’ negative attitude towards Roma children.
12. A subsequent letter by the current Commissioner, in December 2018, focused on proposed amendments to Decree 27/2016 Coll. on the education of pupils with special needs and gifted students.²⁰ She noted that the proposed changes could have a detrimental effect on the right of Roma children and children with disabilities to inclusive education. She advised refraining from any measures that would have the practical effect of diverting more children into special education, and called for the provision of guarantees to ensure that children with education needs received sufficient support in mainstream schools, including through pedagogical assistance. Commenting on resistance to inclusion from some stakeholders and society, she underlined that “it is the responsibility of governments to engage the public in dialogue to address apprehensions, to tackle any underlying prejudices, and to stand firm in promoting the value of inclusive education for children and society alike.” The Commissioner concluded that the process of reform initiated over the previous years had created high expectations among those most affected by school segregation. She accordingly called on the government to “continue to implement the reform resolutely, allocate sufficient resources for it, and publicly highlight the benefits of inclusive education for all children and for social cohesion.”²¹
13. The paragraphs above show the long-standing nature of the issue at stake in the case, including in relation to the non-implementation to the judgment, despite the variety of measures taken. This requires consideration of expanding the scope of measures to tackle this issue.

¹⁷ 2013 report, paragraphs 50-51.

¹⁸ 2013 report, paragraphs 59-66.

¹⁹ [Letter](#) from Nils Muižnieks, Commissioner for Human Rights, to Bohuslav Sobotka, Prime Minister of the Czech Republic, on the human rights of Roma and persons with disabilities, 7 October 2016.

²⁰ [Letter](#) from Dunja Mijatović, Commissioner for Human Rights, to Andrej Babiš, Prime Minister of the Czech Republic, and Robert Plaga, Minister of Education, Youth and Sports of the Czech Republic, on proposed amendments to the Decree on the education of pupils with special education needs, 19 December 2018.

²¹ It should be noted that the proposed amendments referred to in the Commissioner’s letter were not adopted.

II. The need to tackle deep-rooted inequalities leading to discrimination in education

14. The Commissioner notes that the landscape of education in the Czech Republic has gone through many changes. In the light of these changes, it is not always easy to make comparisons with the situation prevailing at the time of the judgment and the years preceding it. The problem is possibly compounded by the fact that, while more comprehensive statistics have been made available in recent years, the indicators used have sometimes varied, making year-by-year monitoring of progress more difficult. Although there is no doubt that many measures have been taken, which have been welcomed by successive Commissioners, the latter have frequently had to conclude that the impact on the ground of such measures, in terms of ensuring equal access of Roma children to mainstream, quality education, has been very limited. Submissions in 2019 by NGOs that have been working closely on this issue, as well as by the Public Defender, support this observation.²² The Commissioner also notes that the latest government report, while suggesting that progress is being achieved in several areas, has acknowledged that “the number of Roma pupils receiving education under the programme with learning outcomes reduced because of MMD [mild mental disabilities] has not declined as significantly as had originally been expected.”²³
15. This no doubt presents all those involved, including government officials, human rights advocates, educators and others, with a frustrating situation. Despite the range of measures adopted, and all the money spent, progress has been slow and sometimes inconsistent. The Commissioner considers it a matter of great concern that, more than thirteen years after the Grand Chamber delivered its judgment, this is still the case. The long-standing and extremely serious issue of discrimination against Roma children in the Czech education system, leading to them being unable to access, on an equal footing with the rest of the population, mainstream, quality education, therefore remains unresolved.
16. The Commissioner acknowledges the efforts made by the Czech government. The issue is extremely complex and involves long-standing, large-scale societal problems. However, she observes that the process has focused primarily on legislative and technical measures related to the organisation and reform of the Czech education system in a somewhat narrow sense, as well as financial and administrative support for that reform. While such steps are welcome, it has also become increasingly clear that such measures have not been sufficient to tackle this complex and socially sensitive topic in such a way as to achieve a decisive breakthrough. Successive Commissioners have therefore emphasised the need for a major rethink of the approach to inclusion as well as the importance of addressing the ongoing issues around discrimination against Roma children in education in a much more holistic fashion.
17. It appears to the Commissioner that these wider aspects have not been sufficiently incorporated into the thinking about, and grappling with, the issues arising out of the *D.H. and Others* judgment. While it is clear that the execution of the judgment cannot address all wider societal issues related to discrimination against Roma, the Commissioner notes that, in its latest decision, the Committee of Ministers also invites consideration whether “the current measures are sufficient to remedy the deep-rooted inequalities underlying the violations found in this case.”²⁴ The Commissioner accordingly feels there is a need to identify further measures, and to tackle wider issues that substantively impact the perpetuation of the problems in question.
18. Some of these have been identified in the Commissioners’ reports outlined above, such as the impact of institutionalised anti-Gypsyism, poverty, social exclusion and territorial segregation; the lack of protection of Roma children from hostility and violence; resistance to inclusion by professionals and the public at large; and the need for further training of teachers on, and the inclusion in the curriculum of, human rights, non-discrimination and knowledge about Roma history and culture. The Position Paper on inclusive education may provide further inspiration to tackle disproportionate enrolment of Roma children in reduced educational programmes. The

²² Communication from an NHRI in the case of *D.H. and Others*, [DH-DD\(2019\)646](#), 7 June 2019, part A; Communication from a NGO (Amnesty International, Forum for Human Rights and Open Society Fund Prague in the case of *D.H. and Others*, [DH-DD\(2019\)871](#), 16 August 2019.

²³ [Report](#) of the Czech government on the execution of the judgment *D.H. and Others v. the Czech Republic*, DH-DD(2020)868, 7 October 2020, p. 12.

²⁴ [CM/Del/Dec\(2019\)1355/H46-7](#), 25 September 2019, paragraph 5.

issues identified in the country reports or the Position Paper do not prejudice any further elements that stakeholders in the Czech Republic may identify as being of relevance.

19. The Commissioner therefore welcomes that, in its latest report, the Czech government acknowledges “that the situation in the field should be subjected to further, more detailed analyses,” especially as regards the root causes of the problems identified in the judgment. She notes that an Expert Forum was set up under the Expert Panel for the execution of the Court’s judgments, with the first meeting held in September 2020 and its work expected to continue in 2021. In the light of the comments above, the Commissioner attaches particular importance to the acknowledgment by the government that it needs to look beyond reforms of the education system itself, and investigate other factors, several of which are listed in the government’s report.
20. However, the Commissioner also notes that, beyond the mention of the setting-up of the Expert Forum, the government’s report does not provide any details about this process. The Commissioner observes that, although it involves a variety of actors, the work of the Expert Forum falls under the Ministry of Justice. This raises questions about the competences of the Forum, and the status of any recommendations that it may produce, vis-à-vis other parts of government, in particular the Ministry of Education, Youth and Sport, as the key actor at central government level when it comes to ensuring Roma children have equal access to mainstream, quality education. The Commissioner also notes that a clear and concrete plan should be in place to ensure that this welcome exercise does not become open-ended, and provides genuine opportunities for further measures to tackle the relevant deep-rooted inequalities. Furthermore, in the light of experience with previous efforts, it should provide clarity about the commitment of key actors, including political leaders, to move this process forward and have an impact on policy. Additionally, it needs to provide safeguards for the genuine and equal participation of all relevant actors, in particular representatives of the Roma community, to ensure that their voices are fully heard and are effectively taken into account in the development of further measures.
21. The Commissioner further observes that the government report does not mention the overall education system as a factor requiring further analysis. This system provides the context in which problems of overrepresentation of Roma children in a reduced curriculum arise. It also provides the context in which the measures taken so far (in relation to testing, support for special education needs, or others) are embedded. The Commissioner accordingly notes that a comprehensive review of legislation, focused on identifying whether the overall legal framework for the Czech education system enables the inclusion of Roma children in mainstream, quality education, including by ensuring the right to inclusive education is fully embedded in that framework, may also be necessary to tackle the issues identified in the Court’s judgment.

III. The need to ensure the sustainability of the inclusion of Roma children in mainstream, quality education

22. In addition to the welcome move towards a more comprehensive analysis, the Commissioner notes that this should run parallel to further action to ensure that the steps taken so far are sustainable. The description in section I shows that progress has often been made in fits and starts, with similar problems arising or remaining unaddressed over a number of years. In some cases, indeed, movement has been backwards. Issues of commitment, by the central government, but also by authorities at lower levels, have often played an important part in this. This, in the view of the Commissioner, has affected not only the practical implementation of necessary measures, but also trust between the different actors, including educational staff and Roma communities, which is crucial when dealing with this complex issue.
23. The Commissioner observes that sustainability requires that the government refrain from adopting legislation or policies liable to undermine the progress achieved, and in particular the notion of inclusive education itself. In this respect, the Commissioner reiterates the concerns raised in the letter of 2018 about amendments to Decree 27/2016. Although these amendments were not implemented, the Commissioner notes that the government continues has pressed

ahead with plans to 'rationalise' the education system, including by putting forward new amendments to the Decree. The latest proposals have concern among of human rights organisations, not least as regards their impact on the availability of support measures to certain categories of children with special education needs,²⁵ which has been identified as a key measure by successive Commissioners.

24. The steps taken so far have required significant budgetary inputs. In this light, the likely negative impact of the Covid-19 pandemic on the public finances of all Council of Europe member states may particularly affect measures aimed at combating discrimination against minority communities and vulnerable groups. It is important that member states ensure that these communities are not disproportionately affected by budgetary cuts and that continued financial support for inclusion is secured.
25. In addition, inclusion of Roma children is not always popular in wider Czech society, raising further questions about sustainability. Attempts by some parties to politicise inclusive education as an election issue have been reported,²⁶ and wider resistance to the inclusion of Roma children remains a major concern. In those circumstances, it may be necessary for the government to take measures to ensure that inclusion in education is consistently promoted at all levels of government in the Czech Republic, including through information campaigns and by tackling discourses that call into question or refute altogether the idea that Roma children must have access to education together with, and in the same way as, all other children.

Conclusions

26. The Commissioner notes that a range of measures have been taken to improve the inclusion of Roma children in mainstream education, but that these do not appear to have provided the major breakthrough necessary to put the Czech Republic on a definitive path towards solving the complex issues identified in the case. She believes it is important to pursue the search for further measures, which should look more widely at the whole range of issues that impact the current situation, while also ensuring the sustainability of positive measures already in place.
27. The Commissioner therefore welcomes the government's stated intention to start a process of further analysis of such wider issues, but recommends:
 - that this process be set out in more concrete terms, including a clear timeline, and clarification regarding the status of the Expert Forum and its recommendations and the follow-up by to be given by key actors such as the Ministry of Education, Youth and Sport;
 - that care be taken to ensure that the identification of additional measures involves genuine and equal participation of relevant actors, in particular representatives of Roma communities;
 - that this analysis include the issues identified in the relevant reports by the Commissioner (such as the impact of institutionalised anti-Gypsyism, poverty, social exclusion and territorial segregation; the protection of Roma children from hostility and violence; resistance to inclusion by professionals and the public at large; and training of teachers on, and inclusion in the school curriculum of, human rights, non-discrimination and awareness of Roma history and culture) and to draw upon the issues set out in the Position Paper, where relevant;
 - that consideration be given to conducting a review of the legislation to assess the extent to which the overall education system in the Czech Republic enables the implementation of the measures needed to address the issues identified in the Court's judgment, in line with international standards and guidance on inclusive education.

²⁵ See the [comments](#) from the Public Defender of Rights, document KVOP-39867/2020/S, 21 September 2020

²⁶ See, for example, [Romea.cz](#), 'Czech bus driver refuses to drive bus with bigoted campaign ad, mayor negotiates its removal,' 2 September 2020.

28. The Commissioner also calls on the government to ensure the sustainability of measures already in place, including by:
- refraining from proposing legislation or policies that would undermine the right to inclusive education;
 - clarifying what impact the latest proposed amendments to Decree 27/2016 may have for addressing the issues identified in the Court's judgment;
 - securing continued funding for inclusion measures, even in the face of possible constraints in public finances due to the Covid-19 pandemic or other factors;
 - consistently and resolutely expressing the authorities' commitment towards the inclusion of Roma children in mainstream, quality education; promoting the importance and benefits of inclusion for the society as a whole and countering narratives that cast doubt on this.
29. Lastly, the Commissioner welcomes that the government has made concerted efforts in recent years to provide statistical data on the proportion of Roma children who are still in programmes with reduced educational outcomes. However, she calls on the government to ensure consistency in the indicators used, to facilitate year-by-year analysis of progress.