

Litigation Briefing – *D.H. v. Czech Republic*
Decision of the Grand Chamber of the ECHR

On November 13, 2007, the Grand Chamber of the European Court of Human Rights found that the Czech Republic had violated the European Convention of Human Rights by segregating Roma children into special schools for the mentally disabled. The case concerned the city of Ostrava, where the evidence demonstrated that in 1999, Roma children were 27 times more likely to be placed in such schools than non-Roma children. The court found that this differential treatment had no justification and amounted to discrimination contrary to Article 14, in conjunction with the Right to Education protected in Article 2 of Protocol 1.

The judgment was significant for a number of reasons. It was the first time the court had found discrimination in education, applying the law to systemic practices rather than just individual cases. The court found a violation for indirect discrimination, that is, a practice couched in neutral terms which nevertheless has a discriminatory effect. The court accepted that there was no need to prove intent, and accepted the use of statistics to demonstrate discrimination. The court stated that segregation of Roma children was a problem in many countries in Europe.

The main findings of the Grand Chamber are as follows:

- *Patterns of Discrimination.* For the first time, the European Court of Human Rights found a violation of Article 14 of the convention in relation to a pattern of racial discrimination in a particular sphere of public life, in this case, public primary schools. As such, the court underscored that the convention addresses not only specific acts of discrimination, but also systemic practices that deny the enjoyment of rights to racial or ethnic groups.
- *Segregation is Discrimination.* The court clarified that racial segregation which disadvantages members of a particular racial or ethnic group amounts to discrimination in breach of Article 14.
- *Equal Access to Education for Roma is a Persistent Problem throughout Europe.* The court went out of its way to note that the Czech Republic is not alone: discriminatory barriers to education for Roma children are present in a number of European countries.
- *Unified Anti-Discrimination Principles for Europe.* This decision brings the European Court of Human Rights' Article 14 jurisprudence in line with principles of antidiscrimination law that prevail within the European Union.

The court further established, clarified or reaffirmed the following principles:

- *Indirect Discrimination.* “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 racial or ethnic group.” Indeed, for the first time the court clarified that such a situation may amount to “indirect discrimination,” in breach of the Convention.
- *Intent Not Required.* A difference in treatment without objective and reasonable justification may violate

Article 14 even absent discriminatory intent. Thus, where it has been shown that legislation produces an unjustified discriminatory effect, it is not necessary to prove any discriminatory intent on the part of the relevant authorities.

- *Facially Neutral Law.* Even where the wording of particular statutory provisions is neutral, their application in a racially disproportionate manner without justification—which places members of a particular racial or ethnic group at a significant disadvantage—may amount to discrimination.
- *Significance of Statistics.* When it comes to assessing the impact of a measure or practice on an individual or group, the use of statistics may be relevant. In particular, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute prima facie evidence of indirect discrimination. The court confirmed, however, that statistics are not a prerequisite for a finding of indirect discrimination.
- *Shifting the Burden of Proof.* In order to guarantee the effective protection of rights of non-discrimination, less strict evidential rules should apply in cases of alleged indirect discrimination. Where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which show that the difference in treatment is not discriminatory.
- *No Waiver of Right to Non-Discrimination.* In view of the fundamental importance of the prohibition of racial discrimination, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest.
- *The Special Situation of Roma.* As a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority who require special protection

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