

Divide and Teach: Educational Inequality and the Roma

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Abstract

This paper will discuss the decision of the Grand Chamber of the European Court of Human Rights in *DH and Others v Czech Republic*¹ which found that the practice of sending Roma pupils to special schools in order to provide remedial education undermined the human rights to education and non-discrimination contrary to the European Convention on Human Rights.

The case highlights the degree of exclusion that Roma children face in the Czech Republic, yet this entrenched inequality is not unique to the region or to the context of education. The decision also clarifies the interpretation of indirect discrimination under Article 14 of the Convention. The EU Equal Treatment Directive² has paved the way for an enlightened approach to the question of indirect discrimination and in particular shifts the burden of proof to the respondent once a *prime facie* case is established. The Grand Chamber’s decision supports this approach and endorses the use of verifiable statistics in order to demonstrate *prime facie* discrimination. It also enables a broader enquiry into the societal context behind the facts.

Keywords: Roma; education; segregation; non-discrimination; exclusion

Introduction: educational exclusion as a European problem

In November 2007 the Grand Chamber of the European Court of Human Rights held by 13 votes to 4 that there had been a violation of Article 14 read in conjunction with Article 2 of Protocol 1 to the Convention. The applicants, all Roma school pupils consigned to special schools, had been victims of indirect discrimination in the provision of education which was not objectively justified by the respondent state. The decision is to be welcomed as it develops the courts enquiry in indirect discrimination cases to consider the broader societal context. The Grand Chamber’s condemnation of segregated education itself indicates a consensus of opinion in regional and international human rights bodies. Yet it remains to be seen whether desegregation strategies will be fully implemented in the absence of specific, positive obligations to address the societal inequality faced by the Roma across Europe.

Policies which segregate the Roma are not unique to the Czech Republic or to the context of education. There are estimated to be around 10 million Roma living in Europe, constituting Europe’s largest ethnic minority diaspora. With a relatively high birth-rate and short life expectancy, they are disproportionately young.³ The percentage of the Roma population below the age of 19 in some regions of Europe doubles the national average.⁴

Despite their number and possibly due to the lack of a definite homeland, the Roma are uniquely marginalised and excluded throughout the continent. The Council of Europe’s Commissioner for Human Rights recently reported that:

In most countries I have visited, the Roma populations face considerable obstacles to the enjoyment of basic rights, notably in the fields of access to health care, housing, education and employment and are often disproportionately affected by poverty. Discrimination and racism, also resulting in violence, remain serious problems throughout the continent, and present a major impediment to the full enjoyment of human rights and fundamental freedoms.⁵

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The UN Committee on the Rights of the Child has similarly described the ‘inequality and gross disadvantages of most Roma children’ as ‘discrimination on a massive scale’.⁶ This inequality transcends into adulthood with typical unemployment rates in Southeast Europe between 44 and 71%.⁷

In terms of educational deprivation, the European Monitoring Centre on Racism and Xenophobia’s annual report of 2005 described the Roma as the ‘most vulnerable group experiencing racism and discrimination in education’.⁸ In 2006 they produced a more detailed overview of Roma education policies in the EU revealing the extent of this vulnerability: ‘The situation of Roma and Travellers in the public education systems of all EU Member States is characterised by severe inequalities in the access to and benefits from education traced in overall poor enrolment, attendance and performance figures’.⁹

Roma children rarely complete secondary level education to gain appropriate qualifications and this has a knock-on effect which higher unemployment rates and poverty¹⁰. When formal education does take place segregation is a recurrent theme, operating in a number of different contexts. The Council of Europe Commissioner for Human Rights found that in almost all the countries visited, Roma children were experiencing degrees of segregation in education, ranging from specialised education units in Finland to segregated classes for the under-privileged in Hungary.¹¹ Educational segregation often results from the geographical isolation of Roma settlements and to discuss education without considering the broader context of exclusion would be flawed. Recent events in Italy where the Interior Ministry have introduced a policy to compulsorily fingerprint all Roma, including an estimated 120,000 children, threaten to undermine any effort to provide equality in access to education.¹² Educational segregation is just one example of the exclusion and discrimination many Roma face on a daily basis.

Whilst Europe’s Roma are mostly sedentary, nomadism is still found amongst the travelling communities of the United Kingdom, with one-third of Gypsy families occupying unauthorised sites and facing constant threats of eviction.¹³ This generates specific problems for educational access.¹⁴ As long ago as 1983, the Department of Education and Science’s Education of Travellers’ Children report suggested that as many as 10,000 Gypsy children were still not getting any educational provision, especially at secondary level. Two years later, the ‘Swann report’ was particularly critical of traveller education provision:

In many ways the situation of Travellers’ children in Britain today throws into stark relief many of the factors which influence the education of children from other ethnic minority groups - racism and discrimination, myths, stereotyping and misinformation, the inappropriateness and inflexibility of the education system and the need for better links between homes and schools and teachers and parents.¹⁵

This pattern has changed little, with recent government reports suggesting that around 12,000 secondary-age traveller children were not registered at any school in England.¹⁶ In addition, Gypsy pupils are proportionately far more likely to be excluded from school – a fact which receives little attention from educators.¹⁷ There have been many arguments advanced suggesting that this level of exclusion for Black pupils could constitute institutional racism¹⁸ but these reports tend to be silent on the issue of Gypsy/Roma traveller exclusion¹⁹ – as if this is somehow inherently understandable without requiring further justification.

The majority of Europe’s Roma are concentrated in the central and eastern European states and this poses particular problems for growing capitalist economies.

Hungary has an estimated population of around 600,000 Roma and there have been notable improvements in educational participation due to increases in school funding based on per capita subsidies. The Hungarian Foreign Ministry has reported Roma secondary attendance levels of 85% compared to a national average of 97%. However, this apparent improvement masks the reality of educational separation and inequality with the majority attending vocational secondary schools. In Slovakia, a similar pattern emerges at secondary level as revealed by a 2005 representative survey of 650 Roma school-leavers. 20.2% had not completed elementary education and only 3.5% had received formal secondary school qualifications. The survey then identified that two-thirds of the sample failed to secure employment.²⁰

Few countries have provided data on Roma enrolment in the higher education sector but where statistics do exist they point to a comparatively high rate of disengagement (0.3% will continue their studies beyond the secondary level in Hungary and Slovakia).²¹ The reports from Austria and Portugal suggest that such attendance by Roma students is extremely rare (1 and 2 students respectively).²²

Barriers to educational equality for Roma children.²

The reasons for this degree of educational disadvantage are numerous with some arising from cultural difference, others from the inefficiencies of the school system and others still, from the discrimination shown in the classroom by teachers and fellow pupils. Overarching all of these obstacles, as recognised by the United Nations Development Programme, is the common theme of poverty.²³

The inferior standard of living of many Roma families, particularly in Spain and Eastern Europe, creates its own difficulties for the child faced with entirely new surroundings. This extends to rudimentary difficulties such as unfamiliarity with writing materials and toilet facilities.²⁴

In many countries funded pre-school education is not available. Poverty inevitably means that parents may not be able to provide the school uniform and books such that many Roma children are ill equipped for their lessons. This in turn causes further alienation for the child at school.²⁵ In other cases parents cannot afford to transport their child to school. This lack of access undoubtedly creates educational inequality. The Council of Europe's Commissioner for Human Rights reported that one Roma community in Spata, Greece was unable to attend school for three years as they were geographically isolated and not provided with any transport.²⁶

Additionally, the value of formal education may not be so obvious to communities living in poverty where the priority is about survival, with greater emphasis being placed on finding pockets of work. Education is traditionally provided through close family networks where children work alongside parents, learning their skills, from an early age.²⁷ Felix Etxeberria identifies the main features of a traditional Roma education including the importance of family life, oral communication, experiential learning and the importance of particular values, notably experience, initiative, solidarity, one's word, respect for one's elders and defence of the family.²⁸ These values often conflict with those offered in mainstream education. Romani academic Tracy Smith argues: 'The conflict which exists between mainstream education and traditional Romani gypsy education is located in the opposing

² I have used the word Roma for the sake of simplicity as this is the preferred label of self-identification for the majority of this heterogeneous community. The issues discussed do not only relate to Roma as an ethnically identifiable community but equally to all persons with a travelling habit or tradition whether they be defined as Roma, Sinti, Gypsy, Gitano or traveller.

structures, values and interests which are used to support and maintain social cohesion in two very different societies'.²⁹

As I have argued elsewhere, mainstream educational curricula provide few additional skills which may be seen as valuable to Roma parents and which mitigate the absence of a young wage earner from the family unit.³⁰ As a consequence, Roma pupils may face indifference from their families in addition to the school system.³¹ This problem is compounded by comparatively high levels of illiteracy in the adult population. The Amman Affirmation on Education for All described parental literacy as the best predictor of learning achievement of children.³² Yet we know that adult literacy rates amongst the Roma population are far below that of the majority population. The lack of confidence that typically accompanies low levels of literacy means that parents feel unable to challenge educationalists when their children are assigned to remedial schools.

Language barriers also present an obvious disadvantage for many minority children. The need for some supplementary mother-tongue instruction at primary level has increasingly been recognised by educationalists³³ but such provision in the Romani language is exceptional due to the lack of competent Romani language teachers. Henrard notes that when one language is used as the main medium of instruction, a seemingly equal starting point can have significant disadvantages for those not taught in their mother tongue.³⁴

The significance of minority language teaching in schools is gradually being realised in national education policies and this reflects the requirements in Articles 12 and 14 of the Council of Europe's Framework Convention on National Minorities (FCNM). The Hague recommendations of the Inter-Ethnic Relations Foundation which assists the High Commissioner on National Minorities also stress that mother-tongue teaching is necessary for minorities to maintain their identity.³⁵ Article 12 emphasises that the primary curriculum should, wherever possible, be delivered in the child's mother tongue and states are required to improve training and facilities so that qualified teachers are available.³⁶ The participation and consultation of minorities at all levels of education policy and delivery is viewed as important to the success of such programmes. Mother tongue teaching has also been specifically endorsed by Council of Europe Recommendation R (2000) 4 of the Committee of Ministers On the Education of Roma/Gypsy children in Europe.³⁷ Skutnabb-Kangas notes that immersion into a foreign language regularly results in poor academic achievement and this will inevitably promote disinterest.³⁸

Education in mainstream schools rarely makes any reference to Romani culture and history. A recent report from the charity Save The Children found: 'There are still almost no references in mainstream curricula to the history of the Roma peoples in Europe and their participation in key historical processes, despite a presence that dates back some 600 years'.³⁹ Studies have also shown negative attitudes towards Roma and travellers amongst many teachers who regard them as a culturally and socially disadvantaged group.⁴⁰ Specialist staff from British Traveller Education express dismay at the lack of cultural awareness and interest exhibited by many teachers. The absence of intercultural teacher-training can be seen in the responses of several British teachers in research by Derrington and Kendall:

one senior teacher expressed the view that traveller children may be better off having their own segregated provision, with specialist teachers, until they were ready to be assimilated into mainstream education. Another was adamant that 'They will behave and act like any other pupil in the school!'.⁴¹

Even in countries with large Romani populations, there are few references to Romani culture in school curricula.⁴² The pupils may thus feel alienated and may be disruptive and unenthusiastic; the teachers are confused and unsympathetic.⁴³ One Spanish Gitano representative explains that the lack of knowledge about Gypsy culture, interests and language leads to ‘methodological, pedagogical and didactic assumptions which place Gypsy students in an inferior position, denigrate them and show contempt for them’.⁴⁴ Conway’s experiences in Czech classrooms over a five-month period found teacher acquiescence in discrimination and bullying.⁴⁵ She concluded with the following pertinent observation: ‘It is fair to say that the basic school teacher does not want to, or does not know how to deal with the Romani child’.⁴⁶

A Council of Europe investigation, culminating in the 1989 *Resolution on School Provision for Gypsy and Traveller Children*, found that discriminatory attitudes in the school environment were common place.⁴⁷ More recent research by the Open Society Institute and the EU Monitoring Programme confirms these findings.⁴⁸

There is also a tendency to equate poverty with inability, with teachers exhibiting low expectations of Roma children. This has led to the widespread diagnoses of special educational needs in the UK⁴⁹ and the use of special schools and separate classes elsewhere.⁵⁰ These low expectations become a self-fulfilling prophecy as students come to view themselves as failures and extricate themselves from the educational process.⁵¹

Parental attitudes are also determinative factors in the segregation approach. In some cases parents have withdrawn their children from mixed-schools and in a few of these examples schools have chosen to retain segregated teaching to placate this racism.⁵² The term ‘white flight’ is used to refer to the process whereby non-Roma parents threaten to remove their children from schools with a high number of Roma pupils. This threat leads to one of two consequences, both of which undermine intercultural education – either the school will take action to separate the Roma pupils or the non-Roma parents will withdraw their children from school. In the latter situation, the schools are perceived as ghetto schools where the quality of education tends to be lower. These schools are typically under-resourced with few or no books, libraries, computer facilities and even a lack of running water reported in some cases.⁵³ ‘White-flight’ has been documented in a number of European countries including France, Hungary, Italy, Greece and Spain.⁵⁴

Even when educators do seek to support the education of Roma pupils, resource allocation has hampered their efforts. Whilst there has been a proliferation of small-scale projects aimed at reducing inequalities, these are rarely scaled up and there is little opportunity for long-term secure project planning. Some successful pilot projects fail to receive financial support from national governments and are forced to rely on support from the Soros Foundation and Open Society Institute. EU membership has brought generous grants from the PHARE programme to many new member states but without commitment from both national governments and local politicians progress is slow and faltering.⁵⁵

The segregation response

The barriers to educational equality are significant and rather than tackle them head-on, many states have either actively endorsed or allowed policies of segregated schooling to develop. The segregation approach takes on several different forms- from separate space in the classroom or canteen to entirely separate schools. Similarly the

rationale for these initiatives varies from the seemingly good intention of addressing educational disadvantage, to outright discrimination which may be actively encouraged by non-Roma parents.

If we are concerned to ensure equality of opportunity within a culture of tolerance and respect, any form of educational segregation must be treated sceptically. According to international law on discrimination it must also be objectively justified.

The use of special schools is the most obvious example of educational segregation. It is typically indirect discrimination arising from the implementation of apparently neutral assessment criteria which results in disproportionately high numbers of Roma pupils attending schools for children with educational disabilities.⁵⁶ In Bulgaria research undertaken by the European Roma Rights Centre and the Bulgarian Helsinki Committee in 2004 covering 46 special schools found that 80-90% of pupils were Roma. The official justification ranges from lack of competence in the majority language, inadequate preparation for primary school or non-attendance in pre-school classes.⁵⁷ This segregation amounts to what UNICEF have described as an 'educational dead-end'.⁵⁸

Culturally insensitive IQ tests are often used to designate Roma pupils as having particular educational needs and in some cases financial incentives are offered to attract Roma pupils away from mainstream schools.⁵⁹ In the Czech Republic one study revealed 12 different tests in operation at 63 testing centres.⁶⁰ The chance of such a pupil progressing to a standard secondary school is minimal. Acton argues that the nature of assessment tests, used throughout Europe, reveals less about the ability of the candidates than the ethnocentric perspectives of the testers.⁶¹ In most cases the quality of education offered at such schools is inferior and the curriculum is reduced.⁶² In an interview with Central Europe On-line, Milan Pospisil, Secretary of the Czech Council of Nationalities, recognised the problem of poor educational achievement in the special schools.⁶³

In Slovakia, the "Osobitna Skola" or special schools, are used in a similar way to segregate Roma children from other pupils. The *Roma Participation Program* found that many of these children come from out- of-town ghettos and that such segregation serves to reinforce prejudice and disadvantage experienced by the Roma pupil.⁶⁴ Special schools have also been used in Hungary to segregate difficult Roma children who are linguistically or otherwise disadvantaged in mainstream education. In 1985, 36% of children in schools for the mentally impaired were Rom and 15.2% of all Rom school children were in such schools.⁶⁵ In certain crisis areas the percentage has been much higher - in the area of Ercsi 90% of pupils were Wlach Roma who speak Romani as their mother tongue.⁶⁶ It has been noted that where integrative efforts were attempted Roma children were ridiculed and despised by the other students and that such initiatives were seldom successful.⁶⁷ An investigation by Human Rights Watch in 1995, found that some children were not examined prior to being placed in remedial classes and that reintegration of these children was rare.⁶⁸ A 2003 amendment to the Law on Education introduced a ban on segregation and efforts have been made to integrate at least 10% of the disadvantaged pupils each year.⁶⁹ These initiatives have been supported by generous grants for schools and community groups from the PHARE programme⁷⁰.

A legal challenge to segregated primary schooling in Hungary was brought by fourteen Roma pupils in the Ferenc Pethe case. The school in question placed 5 of their Roma pupils in integrated classes, 207 in completely separate classes and 38 in classes for pupils with a mental handicap. Over a ten-year period the Roma pupils were not permitted to enter the cafeteria or gymnasium in the main building and

attended separate graduation ceremonies. A reporter for the Hungarian newspaper *Magyar Narancs* found that non-Romani parents requested the exclusion.⁷¹ In 2002, the Hungarian Supreme Court found violations of the Constitution, Civil Code and The Public Education Law 79/1993 and the Law on the Rights of National and Ethnic Minorities 77/1993.⁷² Following the decision the National Integration Plan was established with the aim of achieving complete desegregation by 2008. The plan includes special assistance for Romani education and designated financial support. It also includes guidance to schools and specifically endorses an intercultural approach where all children are taught about the culture of local minorities.⁷³ Yet progress remains slow and in some cases there remains de facto segregation within the mainstream school system.⁷⁴ Lilla Farkas notes that primary schools often persuaded Roma parents to educate their children at home and that a substantial number of Roma children may be virtually excluded from school as a consequence.⁷⁵

Recently the Debrecen Appeal Court found that efforts to integrate seven primary schools by the Miskolc local council without redrawing the catchment areas led to de facto segregation and as such it constituted direct discrimination and violated the Equal Treatment Directive 2000/43/EC.⁷⁶ In 2006 the Committee on the Rights of the Child welcomed measures aimed at desegregated education but continued to express concern about the disadvantage and stigma faced by Romani children, particularly in access to services in Hungarian society.⁷⁷ The Committee recommended, inter alia, additional measures in education to eradicate social exclusion of Roma children.⁷⁸

In Bulgaria, the legal segregation of schooling for Romani children was abolished in 1992. Nevertheless, as Marushiakova and Popov observed, ‘Gypsy-schools’ continued to exist against the wishes of the vast majority of Bulgarian Roma.⁷⁹ Linguistic and socio-economic disadvantage combines to prevent the Rom from attending ‘normal’ schools, with the result that many are thereafter unemployable. This cycle of poverty leads to dependency as many Roma families are then forced to rely on state welfare and social housing.

International criticism and the EU accession process has led some states to express commitment to desegregation but there remain significant problems with implementation.⁸⁰ In many countries the municipal authorities are not legally bound by such commitments, for example in Hungary reports suggest the Ministry of Education and Culture has no effective control over the local implementation of such policies.⁸¹

International criticism

There is no shortage of international legal authority in support of integrated schooling. The Council of Europe’s Recommendation ‘On the legal situation of Roma in Europe’ calls upon all member states to eradicate practices of segregated schooling, particular the routing of Romany children to schools or classes for the mentally disabled⁸². In 2005, the European Parliament similarly called on member states to implement desegregation programmes within a predetermined period to enable access to quality education and to prevent the rise of anti-Romani sentiment amongst school children.⁸³

Article 13 of the UN Covenant on Economic, Social and Cultural Rights defines the purpose of education to include the promotion of “understanding and tolerance among all nations and all racial, ethnic or religious groups”, an objective which cannot be realised in a segregated setting.⁸⁴ Article 29 of the UN Convention on the Rights of the Child expressly recognises the significance of culture and family life. Article 29(1)c provides that the education of the child shall be directed towards:

the development of respect for the child's parents, his or her own culture, identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own.

The specific issue of segregation is dealt with by the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁸⁵ Indeed, Article 5 prohibits segregation and discrimination in education and Article 3 places a positive obligation on states to end and prevent all forms of segregation. CERD accepts special measures of temporary duration in the interests of remedying the disadvantageous positions of some minorities:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.⁸⁶

The Committee on the Elimination of Racial Discrimination has unsurprisingly devoted much energy to condemning educational policies which permit segregation.⁸⁷ It has been critical of the Czech Government's measures in both education and employment with respect to the Roma minority.⁸⁸ Their 1998 report noted that the level of education and vocational skills was comparatively low, whilst unemployment was correspondingly much higher than the average. However, in keeping with their obligations under the Convention, the Czech Ministry of the Interior had instructed every local authority to create a post of 'Roma assistant and advisor'. Roma assistants have been trained to provide a link between teachers and their pupils and also to dispel the distrust of Roma parents⁸⁹. Nevertheless, the Committee expressed concern that only the basics of Roma culture and language were taught at a small number of teacher-training colleges. It added: "To promote the social integration of members of the Roma population, greater importance should be given to education in their mother tongue".⁹⁰ In 2001, the Committee revisited these issues and again expressed concern that segregation of the Roma continued and that it could constitute a violation of article 3 of the CERD.⁹¹

The extent of this concern led the committee to adopt its Recommendation XXVII on Discrimination Against Roma in 2000. In the field of education, the Recommendation requires states to avoid segregation, to raise the quality of education and attainment in schools and to improve retention. States are requested to take urgent measures to train educators, assistants and teachers from among the Roma community and to include Roma culture and history in teaching materials.⁹²

Research by Marcia Rooker examining the reports of the international treaty bodies in the field of education demonstrates a patchy picture of suggestions and recommendations falling short of concrete proposals for action.⁹³ In 2000 the UN Committee on the Rights of the Child reviewed the situation in Slovakia and expressed concern at the provision of segregated education for the Roma. Yet its recommendations, as noted by Rostas and Nicoara, are weakly worded, suggesting that the state party design measures to ensure that Romani children have 'equal access to opportunities to attend regular education and supportive education if necessary'.⁹⁴ It was only when Human Rights Committee reported in July 2003⁹⁵ that the international tone changed to one of condemnation, by which time other European

states were introducing desegregation strategies as a response to perceived EU accession demands.

Segregation in education has been a constant cause for concern for the Advisory Committee to the Framework Convention on National Minorities (FCNM). The Committee has repeatedly criticised the Czech Republic's treatment of Roma, although the recent report praises recent legislative changes aimed at desegregating Roma education.⁹⁶ Yet it is clear from the same report that many Roma are still being educated in special schools and many other are educated in separate classrooms. In the case of Austria, the Committee welcomed the abolition of the special, remedial school regime and it recommended that other states could learn from these measures.⁹⁷ However, in its 2000 opinion on Hungary, the Advisory Committee continued to express deep concern about Roma education, including the use of special schools for mentally disabled children which was considered to be incompatible with Art 12(3).⁹⁸ They also noted *de facto* increasing separation of schools, mainly due to the attitudes of non-Roma parents and the reluctance of Roma parents to send their children to kindergarten which appears to express a lack of confidence in the educational system. The Committee referred the Hungarian authorities to Recommendation No. R (2000) 4 of the Committee of Ministers on the education of Roma/Gypsy children in Europe.⁹⁹ Very similar comments are made in relation to the report from Slovakia¹⁰⁰, yet the Committee seemed satisfied that the Government was improving equal access to regular schools. The Committee, like the CERD, specifically endorses an intercultural approach.¹⁰¹

The Organisation on Security and Co-operation in Europe (OSCE) has a long history of voicing concern over the situation of Roma and other travellers. The *Document of the Copenhagen Meeting* (1990) devoted comprehensive attention to the rights of national minorities, which had, until the recent adoption of the FCNM, been largely been over-looked by the Council of Europe.¹⁰² The importance of 'special measures' are stressed in Article 31 of the Copenhagen document 'for the purposes of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms'. Groups of experts have examined and reported on the human rights of Roma in Bulgaria, Czechoslovakia, Hungary and Romania and Article 40 of the Copenhagen Document refers to the particular problems of the Roma (Gypsies) in the context of racism and xenophobia. In the following conferences in Geneva, Moscow and Helsinki the treatment of Roma and travellers was frequently discussed¹⁰³, culminating in the Human Dimension Seminar on Roma in the CSCE.

Developments in the EU

The European community resolution of the Council of Ministers of Education of 22nd May 1989 *On School Provision for Gypsy and Traveller Children*¹⁰⁴ instructed states to make every effort to give support to educational establishments in providing schooling for these children. Teaching methods suggested include support for distance learning programmes, use of new technological aids, improved teaching materials and 'consideration for the history, culture and language of the Roma and travellers'. Improvements for teacher training were advocated, including using teachers of a traveller origin when possible.

The member states reported on implementation of the resolution at the end of 1993 and eventually, in 1996, the Commission's findings were published. It will come as little surprise, given the history of exclusion and assimilation, that the respondent states had very little information on the number of travellers/Gypsies who fell outside

the education system. Nevertheless, illiteracy levels were considered as high as 90% in Greece and 80% in French speaking Belgium¹⁰⁵. Poor school attendance was a common problem, particularly in relation to secondary school. The UK report bore out the earlier conclusions of Liégeois¹⁰⁶, revealing that 47% of Gypsy children were not enrolled at secondary school¹⁰⁷. The report recognised that poor literacy was a major problem and yet most States had failed to construct a national policy on Roma/Gypsy education.

The EU accession process resulted in greater monitoring of minority policies in the CEE states. Yet these commitments were eventually watered down and states were given membership whilst still retaining discriminatory education policies¹⁰⁸. The PHARE programme has funded a wide range of educational projects in the CEE countries yet it is interesting to note the findings of both the European Commission and the UN Development Programme found that the impact of such projects has been far smaller than expected¹⁰⁹. The Decade of Roma Inclusion, which covers eight CEE states, has recently established a Roma Education fund to monitor and scale up successful pilot projects¹¹⁰.

The Lisbon Summit of 2000 targeted social inclusion for marginalised communities, specifically including the Roma. Various benchmarks and targets have been established pursuant to the objectives of the summit including a benchmark of 85% of 22-year-olds completing secondary education.¹¹¹

The Equal Treatment Directive

Non-discrimination is now firmly at the centre of European Union policy with the adoption of Article 13 of the European Community Treaty (following the Treaty of Amsterdam in 1997). The wording of Article 13 is facilitative in that it provides a platform to develop non-discrimination policies and strategies rather than providing an absolute prohibition on discrimination. The latter is given effect through Directive 2000/43 on equal treatment which prohibits discrimination and harassment on the grounds of race or ethnic origin.¹¹² The directive will be enforced nationally through the principle of direct effect¹¹³ and there is a regular reporting mechanism. However, the transposition progress has been slow with enforcement action being commenced against several states by the Commission.¹¹⁴ The directive clearly applies the concept of indirect discrimination and harassment to education policy. Although a legal complaint against segregated classes in Romania based on the directive failed to lead to widespread reform of the educational system¹¹⁵, the more recent decision of the Debrecen Appeal Court in Hungary, discussed above¹¹⁶, demonstrates that the directive may be having some effect where de facto segregation is maintained. Nevertheless the EU Network of Independent Experts on Fundamental Rights remain sceptical regarding the use of the directive as a mechanism for achieving de facto equality for the Roma. They call for a proactive integrative approach in addition to special measures aimed at ensuring the protection of Roma ethnicity and identity.¹¹⁷

Article 8 of directive 2000/43 provides that the burden of proof should shift to the respondent where there is a prime facie case of discrimination supported by evidence (this does not apply to criminal cases). Article 5 allows for special measures to ensure full equality and to compensate for disadvantage attributed to previous inequality, otherwise known as positive action. However, the directive falls short of requiring positive action in this respect. Indeed the overall approach is cautious and geared towards procedural rather than substantive equality.¹¹⁸ The European Court of Justice has similarly been wary of endorsing positive action measures. In the case of *Kalanke*¹¹⁹, they ruled against a policy aimed at providing priority for women where

they were under-represented in a particular trade. This decision was mitigated by the more recent case of *Badeck* in which a flexible quota system was upheld providing it did not operate as a blanket policy privileging women applicants.¹²⁰ However, in the case of *Abrahamsson*, the ECJ preferred the individualist approach by rejecting a rule favouring female applicants.¹²¹ There has been insufficient case law on race discrimination to enable us to assess whether this apparent individualism in positive action cases will undermine the objective of the directive and may hamper initiatives addressing Roma exclusion. Indeed, Lilla Farkas suggests that special measures for the Roma minority designed to facilitate integration in Hungary could be viewed with suspicion by the ECJ.¹²²

Whilst the European Commission periodically reviews social inclusion plans, few make any specific reference to Roma policies. The EU Network on Fundamental Rights' report, *The Situation of Roma in an Enlarged European Union* observes: "The treatment of Roma is today among the most pressing political, social and human rights issues facing Europe".¹²³ The report advocates the ratification of the non-discrimination provision in Protocol 12 to the European Convention and full implementation of the Equal Treatment directive. It then goes further to suggest the adoption of a specific Roma Integration Directive to complement Directive 2000/43 which could make states accountable for discriminatory and segregationist policies.¹²⁴ Such a directive would require action to improve the economic, social and political disadvantage of Roma. It would enable states to share expertise and identify and develop successful programmes, particularly in areas such as education and housing. However, response to the proposals has been lukewarm and four years later it is apparent that there is no political will to draft such a directive.

Segregation presents a catch-22 situation. Discrimination prevents many Roma from completing school. Yet discrimination cannot be addressed and, more significantly, challenged in a climate of separation and division. UNESCO emphasise four pillars of quality education: learning to know, learning to do, learning to live together and learning to be.¹²⁵ These four pillars necessitate an intercultural education strategy where children can learn about each other from each other. Separate and ethnically homogenous schools are compatible with human rights standards if they are based on free, informed parental choice and if the education is of a high standard. However, as Petrova observes "With respect to the Roma...it is very unlikely that somewhere in Central and Eastern Europe such a primary school exists".¹²⁶

Segregated schooling in the European Court of Human rights

Two petitions concerning de facto segregated schooling for Roma pupils have so far been received by the European Court of Human Rights. One application was made in 2004 against Croatia by 15 Roma children forced to attend racially segregated classes with a reduced curriculum within mainstream schools. Allegations of racial discrimination were rejected by the Croatian courts and the applicants now claim violations of Article 3 (inhuman and degrading treatment), Protocol 1 Article 2 (the right to education), Article 6 (the right to a fair trial), Article 13 (the right to an effective remedy) and Article 14 (non-discrimination).¹²⁷ This case has yet to be heard before the chamber.

In 2006 the European Court of Human Rights issued its judgement in the DH case concerning a group of 18 Czech Roma from Ostrava who had been educated in special schools.¹²⁸ The applicants contended that the practice amounted to racial segregation contrary to Article 14 of the ECHR in conjunction with Article 2 of protocol 1, which states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions

These two provisions were first successfully argued together in the *Belgian Linguistics Case*¹²⁹ where the European Court of Human Rights held that the Belgian school system which effectively denied French language instruction to pupils in certain regions was a breach of both provisions.

The DH case: segregation in the Czech Republic

The eighteen children had been sent to special schools for children with mental deficiencies following advice from the Head Teacher based on the results of intelligence tests undertaken at a local educational psychology centre. Parental consent had been provided in each case.¹³⁰

The statistics revealed that 56% of pupils in the Ostrava special school system were of Roma origin (despite the fact that Roma represented only 2.26% of school pupils in the area). Indeed, the Grand chamber accepted that Roma in Ostrava were 27 times more likely to be sent to special schools than non-Roma pupils.¹³¹ Although the pupils could subsequently be transferred to an ordinary primary school and could then go on to attend either vocational or mainstream secondary education, the reduced curriculum in the special school made this right largely illusory.¹³²

The initial decision of the Chamber recognised that indirect discrimination, which did not specifically target a particular minority, could fall within Article 14 if it had a disproportionately prejudicial effect on that minority. However, they deferred to the views of educational psychologists on the matter of suitability of these pupils to mainstream schooling and seemingly accepted the legitimacy of special schools for these Roma pupils. Whilst acknowledging the concerns regarding the prevalence of special schools for the Roma as raised by a variety of monitoring bodies including the Advisory Committee for the FCNM and Committee on the Elimination of Discrimination¹³³, the Court considered that it was not empowered to look beyond the facts of the present case. The use of culturally insensitive testing methods was not addressed and the disadvantages experienced by Roma entering the education system as a result of factors beyond their control – such as poor housing, high unemployment and inadequate health care, was considered to be beyond the Courts remit. Significant weight was attached to the presence of consent by the parents without any consideration of the possibility of misinformation, financial inducements and the extent of parental illiteracy. The Court were also unable to agree that the obligations in Article 2 Protocol 1 required affirmative action if necessary in order to achieve genuine equality of opportunity for children attending special schools.¹³⁴

Judge Cabral Barreto who has taken a purposive approach to the concept of non-discrimination in similar cases offered the only dissenting opinion. He reasoned that the Czech Governments own recognition of discrimination was obvious from the statistics – namely that 80-90% of special school pupils are of Romany origin.¹³⁵ Furthermore, he considered that the government's differential treatment made matters worse for the pupils and therefore could not be interpreted as a form of beneficial affirmative action designed to redress educational disadvantage.

The decision was subsequently appealed to the Grand Chamber of the ECtHR which delivered its verdict, discussed below, in 2007. Their decision has ramifications for both the interpretation of Article 14 and for the continued use of segregated schooling in all its forms.

The situation of Roma in the Czech Republic

Before analysing the reasoning of the Grand Chamber it is desirable to put the facts into their wider context by providing further information on the situation of Roma in the Czech Republic.

Prior to the dissolution of Czechoslovakia the majority of the Roma population had lived in the Slovak regions. The Communist dispersal policy, which ended in 1989, saw many being relocated from Slovak shantytowns but they continued to experience widespread discrimination and poverty. The average life-span of a Rom born in 1980 was expected to be thirteen years less than that of a non-Roma¹³⁶ and one-fifth of Roma children were born with disabilities as a result of poor pre-natal care.¹³⁷

One policy that provides evidence of the Communist government's attitude to the Roma is that of sterilisation. It is reported that Roma women were offered financial incentives of between 5 and 10 times that offered to other women.¹³⁸ This practice though never officially sanctioned appears to have continued in the new republic and in 2005 an Ostrava District court held that a Roma woman compulsorily sterilised in 2001 had been unlawfully deprived of her dignity¹³⁹. A subsequent report by the Czech Ombudsman found 'The problem of sexual sterilization ... carried out either with unacceptable motivation or illegally...exists, and that Czech society stands before the task of coming to grips with this reality'.¹⁴⁰

The collapse of the Communist regime following the Velvet Revolution of 1989 saw the Roma being afforded official recognition as a minority. The Government issued 'Principles of the governmental policy of the Czech and Slovak Federal Government Toward the Romany Minority'. The first principle states:

Alongside the basic hypothesis of eliminating societal inequality of Romanies in the CSFR is the all-sided respect of the rights and free declaration of the Romany nationality. The Romany national minority is equivalent to other national minorities in the CSFR....

Yet the new Czech Republic was beset with problems of racial violence and much of this was, and continues to be, directed at the Roma.¹⁴¹

There is ample evidence that Czech Roma are uncomfortable with their identity. The number of people officially identifying themselves as Roma decreased between 1991 and 2002 – only 11,716 Roma admitted to their identity in the most recent census (whilst the true figure is officially estimated at 250,000-300,000).¹⁴² Low self-esteem is associated with poverty and dependency. The Czech government has not improved the situation with an indifferent attitude towards the Nazi era in which an estimated 95% of Czech Roma were exterminated. There has yet to be any official memorial to Romani victims and no compensation settlement.¹⁴³ Many Czechs remain unaware that the Roma were systematically targeted.¹⁴⁴ The European parliament recently condemned the official disengagement with the issue following the privatisation of a state-owned pig farm in Lety that had previously been used as a Nazi concentration camp.¹⁴⁵ The Czech citizenship law also deprived many Roma of citizenship in the new republic, serving to widen the gulf between 'true Czechs' and 'Roma Outsiders'.¹⁴⁶ In one well-documented incident the municipal authorities from the town of Usti Nad Ladem built a huge wall to segregate Roma families from the rest of the town.¹⁴⁷ Whilst the wall was eventually dismantled, many Roma across the Czech republic live in segregated accommodation know as 'holobyty' which is characterised by the absence of public services, extreme over-crowding and insanitary conditions.¹⁴⁸

The Czech government's own estimates indicate that 75% of Romani children of primary school age were being educated in remedial special schools and there had been little improvement noted in follow up research in 2003.¹⁴⁹ International and regional human rights bodies, including the Advisory Committee to the FCNM, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, had regularly criticised the Czech education policy.¹⁵⁰ Yet segregated schooling was justified by the Czech authorities until it was condemned by the ECtHRs' Grand Chamber in 2007.

The legal basis for challenging segregated education

Non-discrimination and Article 14

The European Convention on Human Rights requires that an allegation of non-discrimination under Article 14 must be related to a substantive convention article, although it does not require a breach of the substantive article. Previous judicial decisions from the ECtHR have not adopted a particularly broad or flexible approach on the interpretation of discriminatory treatment. In *Anguelova v Bulgaria*¹⁵¹ the court found breaches of Articles 2, 3, 5 and 13 following the death of a seventeen year old Roma in police custody. Yet it was held that there was no violation of the principle of non-discrimination as the applicants failed to establish proof of discriminatory treatment 'beyond all reasonable doubt'. The decision prompted criticism in the dissenting judgement of Judge Bonello, who reasoned that there was ample evidence of Bulgarian police hostility towards the Roma in this and previous cases.¹⁵² He advocated a shifting of the burden of proof once prime facie evidence of discrimination had been established in much the same way as laid down in the EU Equal Treatment directive.¹⁵³

Article 14 is not without its critics with Sandra Fredman describing it as 'woefully inadequate as a constitutional equality guarantee'.¹⁵⁴ A recognition of its limitations led the Council of Europe to adopt Protocol 12 which contains a free-standing non-discrimination provision. Following the requisite ten ratifications Protocol 12 came into force in April 2005.¹⁵⁵ However, progress has since been slow with the majority of Council of Europe states declining ratification. According to the opinion of the United Kingdom government, the protocol contains 'unacceptable uncertainties' and it remains unlikely that ratification will follow without significant qualification.¹⁵⁶ In the meantime, Article 14 must be seen as fundamental to the enforcement of anti-discrimination law in Europe.

The adoption of the EU's Equal Treatment directive may provide the catalyst that Article 14 has needed in order to make it effective. In *Nachova and Others v Bulgaria*, which concerned two Romani men shot dead by Bulgarian police, the ECtHR addressed the standard of proof issue in non-discrimination allegations.¹⁵⁷ Given that the state rather than the individual is liable for discrimination under Article 14, the need to provide proof beyond reasonable doubt as in a criminal proceedings was questioned by the court. The impact of the decision in *Nachova* is significant as it extends the positive obligation on states to investigate every arguable claim of a violation of Article 14 without requiring the applicant to provide proof of discriminatory intent.

Article 14 potentially encompasses both direct and indirect discrimination, although as Wintemute demonstrates, in the past the court has restricted cases of indirect discrimination, considering factors such as resources and cost implications.¹⁵⁸ A wide margin of appreciation has typically been given to states in these cases. As I have argued elsewhere this has constituted a serious qualification on the enforcement

of convention rights as it fails to take into account the subtle ways that a state can discriminate against minorities and the disproportionate and often damaging effects of particular, seemingly neutral, policies on minorities.¹⁵⁹

Direct discrimination does not permit any justification from the state. In a recent report for the EU, Lilla Farkas argues that the widespread discriminatory treatment experienced by Roma pupils amounts to direct discrimination under the Equal Treatment Directive.¹⁶⁰ She draws analogies with the US supreme court decision of *Brown v Board of Education*¹⁶¹ to reason that where Roma pupils are denied access to mainstream education and are relegated to special or segregated schools where they are bound to suffer stigma, this can only amount to direct racial discrimination.¹⁶² Farkas argues that the apparently neutral criteria of intelligence testing is not racially neutral at all. It does not provide an equal starting point from which to assess pupils intellectual ability and therefore it cannot be seen in any way as neutral. Such a view would certainly gain support from the Czech government's own observations regarding the inherent unsuitability of Roma pupils to education.¹⁶³

Yet this may be stretching the definition of direct discrimination too far. It is clear that race was not a determinative factor in the establishment of intelligence tests, rather the consequence of the tests discriminated against members of certain groups – particularly those that did not speak the majority language. Thus the tests were apparently neutral but once operated resulted in discrimination that should have then been remedied by substantial revisions or abolition of the said tests. Following the broader approach taken by the Grand Chamber, discussed below, this distinction is not as damaging as it may appear; the Grand Chamber have refused to accept the Czech government's argument that parental acquiescence can justify the separate education of many Roma pupils thereby narrowing the scope of permissible justification when prime facie evidence of discrimination is demonstrated.

Indirect discrimination following DH

The chamber judgement had noted that the statistical evidence disclosed 'worrying figures' about the degree of discrimination in the education system of the Czech Republic but they declined to place the burden of disproving racial discrimination on the respondent state.

However, noting the approach taken under the EU directive and in the UN treaties as well as in national courts, the Grand chamber endorsed the use of verifiable statistics to establish a prime facie case of indirect discrimination.¹⁶⁴ This enables the burden of disproving discrimination to fall on the respondent state. Reviewing the statistical evidence the court held that there was a 'strong presumption of indirect discrimination' which must then be rebutted by the respondent state.¹⁶⁵

Without this burden-shift applicants would find it almost impossible to prove their case¹⁶⁶. Such an approach follows previous Convention case law including *Zarb Adami v Malta*¹⁶⁷ where statistical evidence was used to demonstrate that women were far less likely than men to perform jury service and *Hoogendijk v Netherlands*¹⁶⁸ where statistics revealed that a law on disability benefits had a disproportionate impact on married women. The use of statistics in order to demonstrate evidence of discrimination has similarly been accepted in the context of sex discrimination by the ECJ in the cases of *Bilka-Kaufhaus*¹⁶⁹ and *R v SS Employment exp Nicole Seymour-smith and Laura Perez*¹⁷⁰.

The reversal of the burden of proof following prime facie evidence of discriminatory treatment constitutes recognition that applicants face great difficulty in

proving indirect discrimination due to its structural nature. This brings the Convention jurisprudence into line with that of the ECJ and is a clear departure from the typically cautious reasoning of the past.

A broader, contextual approach. Initially the chamber rejected consideration of the broader social context and stressed that it was confined to addressing the facts of the individual case. It is submitted that in cases involving discriminatory treatment, a broader approach is fundamental in order for the right to be realisable. The disproportionate effect of an apparently neutral measure cannot be assessed without an understanding of inequality in that society more generally. Judge Borrego Borrego expressed criticism of the courts broad approach describing it as a ‘major deviation from the norm’ which expands the courts judicial role without a full conception of the consequences.¹⁷¹ In his view the court were patronising in their opinion that Roma parents could not waive their right to non-discrimination. Yet to decide, as Judge Borrego Borrego would prefer, that parental consent could waive the right of their children to an equal education would surely require fully informed consent and awareness of the implications of the decision, namely an inferior education and the probability of future unemployment. Forms which had already been pre-completed, presented to parents who knew little of the education system and were disempowered by years of prejudice would seem to require something more than a simple signature. In this climate of inequality within the education system it must be asked whether the parents were really presented with any choice at all. This is precisely why the societal context is so important – if the parents had been fully informed and there was a genuine choice between special schools and a safe, accessible mainstream school, the conclusion of the court may well have been different.

The wide margin of appreciation that Wintemute identified has been narrowed by this decision.¹⁷² The court will be prepared to scrutinise the objective and reasonable justification offered by the state and will now consider the societal context of the difference in treatment. The departure can be seen clearly from the dissenting views of Judge Šikuta. He argued that the special school system was within the state’s margin of appreciation and that there was an objective and reasonable justification for sending a disproportionate number of Roma to these schools, based on the result of psychological testing. On the surface this seems like an entirely plausible argument, particularly if the special school education was designed in order to remedy any educational disadvantage. As Judge Šikuta reasons:

The ...ultimate aim was to reach a satisfactory, or at least an improved educational situation. The introduction of special schooling though not a perfect solution, should be seen as positive action on the part of the State to help children with special educational needs to overcome their different level of preparedness to attend an ordinary school and to follow the ordinary curriculum.¹⁷³

Fortunately however, the broad approach of the court enables us to look at the reality of the special school system where opportunities to progress into mainstream schools were severely limited. This disadvantage was compounded by the reduced curriculum that pupils in special schools followed.

No requirement of intention to discriminate. The initial decision of the court placed emphasis on the reasons for segregation – suggesting that the applicant had to demonstrate that the state intended to discriminate against them. This, the applicants argued, was extremely difficult for the applicant to prove and furthermore it was not required under the courts own case law. It had consistently been established in cases

such as *Hugh Jordan v UK*¹⁷⁴ and *Nachova and Others v Bulgaria*¹⁷⁵ that the applicant did not have to demonstrate that the respondent state intended to discriminate. It must now be accepted that this is the correct interpretation, to suggest otherwise would place an impossible burden on the applicant.

Objective and reasonable justification. The court reiterated that indirect discrimination can be justified if it pursues a legitimate aim and is proportionate to that aim. However, it stressed that where the difference in treatment is based on race, colour or ethnic origin, the justification must be interpreted as strictly as possible.¹⁷⁶ The government sought to rely on two arguments in this respect, both of which had been upheld by the initial chamber decision.

(i) *intelligence testing.* The initial chamber decision declined to consider the suitability of the intelligence tests, which led to the segregation of many Roma pupils. These tests have been strongly criticised for their cultural and linguistic bias by several educational studies, as documented by the written comments of the International Step by Step Association, Roma Education Fund and European Early Childhood Education Research Association.¹⁷⁷

Indeed the Czech governments own observations regarding the suitability of intelligence testing reveal some interesting generalisations. In one paragraph which aims to dismiss allegations that different criteria were used to assess Roma pupils, the government go on to state that the statistical evidence can be explained by the socio-cultural background of the Roma people and of their family and attitude to education.¹⁷⁸ Thus the Roma children are not being assessed on educational ability or potential but rather on socio-cultural factors and stereotypes as to their attitude to education. A footnote explaining the results of research by the Educational and Psychological Counselling Institute confirms this stereotype: ‘Roma pupils easily give up their ideas of education. The research proved great difference between value of majority (non-Roma) and Roma community. While majority community prefers education, travelling and professional career, Roma community prefers family life’ [sic].¹⁷⁹

Whilst it is true that many Roma pupils do give up their education early, the report concludes that this is attributable to particular characteristics of the Roma personality. A more obvious factor in the decision to leave school is the perception that school has little to offer. The evidence suggests that this perception is reasonable in the case of ghetto schools and special schools with the inferior quality of education and resources and the lower expectations for the pupils. Whatever the reason for the Roma pupils’ disengagement with the educational process these generalised observations cannot constitute a legitimate justification that is both objective and reasonable so as to counter the evidence of indirect discrimination.¹⁸⁰ In order for states to fulfil their obligations in the education field they need to accept these barriers and provide the necessary positive measures to enable equal access.

Whilst the Grand Chamber accepted that it could not judge the validity of such tests, it was clear from the results of the tests that they could not constitute objective and reasonable justification¹⁸¹: ‘...at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them’.¹⁸²

(ii) *Parental consent.* The Czech government placed great emphasis on the parents consent to the special schooling¹⁸³ and blames the ‘passivity’ of the applicants “who do not make any effort at changing the situation”.¹⁸⁴ Yet, as Farkas argues there is obviously a great deal of difference between parental choice and consent – the latter

implies a tacit acceptance of the decisions made by educationalists and so-called experts.¹⁸⁵ The Grand Chamber felt that given there was a clear difference in treatment and *prime facie* evidence of discrimination, the presence of parental consent would have to constitute a waiver of the right not to be discriminated against. For such a waiver to be permissible, it had to be on the basis of informed consent and without constraint.¹⁸⁶ In many cases the consent had been given by signing a pre-completed form, the applicants were not given any information on alternative choices and were not informed about the reduced curriculum at the special schools. In addition, the position of disadvantage including a lack of literacy among many parents meant that informed consent in the circumstances was very unlikely.¹⁸⁷ The alleged ‘passivity’ of these parents must be regarded as typical in communities that experience entrenched disadvantage, poverty and low self-esteem.

Ultimately, even if the parents had been fully informed the Grand Chamber held that such a waiver was impermissible given the fundamental importance of the right at stake.¹⁸⁸ The court rejected both the arguments of parental consent and intelligence testing in finding that there was no objective and reasonable justification in this case. The Roma pupils: ‘received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them integrate into the ordinary schools and develop the skills that would facilitate life among the majority population’.¹⁸⁹

A time for positive action?

The Grand Chamber stopped short of advocating specific positive action measures in order for the Roma to achieve *de facto* equality, but it seems clear that when verifiable statistical evidence demonstrates structural inequality there must be some response from the state in order to rectify that situation. The particular disadvantage suffered by Roma throughout Europe was a recurrent theme in the courts reasoning and the state’s failure to recognise and address this disadvantage may be treated sceptically in future: ‘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’.¹⁹⁰

Judge Zupančič’s dissenting opinion expresses concern that the respondent state is being punished for attempting to improve access and attainment for Roma pupils through the special school system: ‘the Czech republic in the only contracting state which has in fact tackled the special educational troubles of Roma children. It then borders on the absurd to find the Czech republic in violation of anti-discrimination principles’. This point is similarly expanded upon in the dissenting opinion of the Czech member, Judge Jungwiert, who reasons that the problem of education for the Roma should be regarded as a European problem and that the criticism placed on the Czech Republic is unreasonable as its policies have led to most Roma children attending school. This comparatively high level of attendance bucks the trend elsewhere – with almost half of all European Roma children not in school.¹⁹¹ He contends that the special school system amounts to ‘positive discrimination in favour of a disadvantaged population’.

Whilst there is ample evidence to suggest that Roma education is a European problem requiring European solutions; this cannot be used as a defence to the evidence of discrimination in the particular context of this case. Positive action measures can only be truly defined as such if they are actively benefiting the community that is disadvantaged, the evidence of inferior educational standards and the degree of stigma that is created by special schools cannot be seen to constitute a

positive benefit. Ad hoc initiatives in some regions, such as Roma teaching assistants, do not suggest a real, genuine effort to eradicate educational disadvantage. The special school system is a compensatory model of education based on deficit theory which regards cultural difference as something to be rectified rather than supported.¹⁹² This approach emphasises educational equality. As the recent report by the EU Monitoring Centre on Racism and Xenophobia recognises:

Such ‘benevolent’ segregation is not preferable to the provision of additional support to the school in the form of specially trained teachers, appropriate teaching material and intercultural mediators. Support measures should be functionally linked to normal school activities facilitating the full integration of pupils into the normal educational process.¹⁹³

The future of the Czech special school system

Special measures designed to improve Roma access to education have been regarded with suspicion by many Czechs who perceived them to be unfair advantages. Whilst amendments have been made to the Civil Code to reverse the burden of proof in cases of racial discrimination¹⁹⁴, the Anti-Discrimination Bill introduced in 2006 as a response to the EU’s Equal Treatment Directives was rejected by the Czech senate in January and May 2006. One of the main issues of contention appeared to be concern over the impact of positive action.¹⁹⁵

The New School Act 561/2004 moves away from the notion of special schooling except in extreme cases of mental disorders. The policy seems somewhat confused however:

Children, pupils and students with disabilities are individually integrated, wherever possible and desirable into conventional schools; however, schools may set up separate classes in which these persons are educated with the help of, in particular, such educational techniques and methods which are adjusted to their needs; or, entire schools specialised in educating these persons may be set up.

Indeed, the only obvious difference here is in the name – all schools providing elementary education will be renamed primary schools.¹⁹⁶ Thus segregation is not expressly prohibited by the new legislation, and may, in practice, be simply relocated from the special school to the classroom.

Conclusion

The decision of the Grand Chamber has ameliorated many of the obstacles encountered by applicants alleging indirect discrimination under Article 14. Statistical evidence can be used to demonstrate a *prima facie* situation of differential treatment which the respondent state can then seek to justify – providing the justification is both objective and reasonable. The margin of appreciation is apparently narrowed in the context of education due to the fundamental importance of this right in securing access to other rights. On this point it is clear that the ECtHR will scrutinise the justification in order to ensure that it does not entrench inequality further. The inferior education offered by the Czech special school system could not be seen to support the pupils and enable them to catch-up with those pupils in mainstream schooling.

Yet the ECtHR stopped short of demanding positive action from states to secure equal access to education. Article 5 of the Equal Treatment Directive may prove more effective in this respect but the limited jurisprudence from the ECJ indicates that such measures may be sceptically received. It is simply not clear how the educational

disadvantage faced by Roma pupils across Europe can be addressed without specific positive measures aimed at both desegregation and integration. The curriculum needs modification to reflect the diverse cultural historical experiences of the student body and minority language teaching must be improved in order to enable access. This is a European problem which requires European initiative and direction; if nothing else this will enable local education authorities to introduce cohesive positive measures without fear of reprisal from parents. There is no shortage of research demonstrating successful positive measures which would benefit Roma pupils. Alexandre and Costel identify the key factors as better pre-school provision, recognition of values and culture and indigenous language, parental involvement and abolition of segregation in all its forms.¹⁹⁷ Specific positive measures which have been demonstrated in many projects include Roma teaching assistants and free pre-school education.

The extent of Roma exclusion in the sphere of education cannot be overstated. The Equal Treatment Directive can be accused of a dramatic failure if it cannot be deployed as a catalyst for securing positive action in order to achieve equality in education for Europe's largest minority group.

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⁵ Office for the Commissioner for Human Rights Final report by Mr Alvaro Gil-Robles *On the Human Rights Situation of the Roma, Sinti and Travellers in Europe* 2006 Comm DH(2006) 1.

⁶ UNICEF *Breaking the Cycle of Exclusion*, 13.

⁷ UNICEF *Breaking the Cycle of Exclusion*, 23.

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¹² Everyone- Group for International Cooperation on Human Rights *Culture Report on the situation of the Rrom Children and Adolescents in Italy* 2008. (Cassina de Pecchi: Everyone, 2008), <http://www.everyonegroup.com/downloads/ReportENG.pdf>. (accessed on 10th Oct 2008).

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- ⁸³ European Parliament *Resolution on the Situation of the Roma in the European Union* (Brussels: European Parliament, 28th April 2005 RC-B6-0272/2005).
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- ⁸⁵ Article 3 provides, inter alia, that state parties undertake to prevent, prohibit and eradicate all practices of racial segregation and apartheid. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.
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