

Case Summary

Horváth and Kiss v Hungary

Application Number: 11146/11

1. Reference Details

Jurisdiction: European Court of Human Rights (ECtHR) – Court (Second Section)

Date of Decision: 29 January 2013

Case Status: will be final according to conditions of article 44 para. 2 ECHR

Link to full case: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116124>

2. Facts of the Case

The case was brought by Mr Horváth and Mr Kiss, Hungarian applicants born in 1994 and 1992 of Roma origin. The case related to the education system in Hungary under which children diagnosed with mental disabilities, including mild mental disabilities, are schooled outside of mainstream schools, in separate “remedial schools”. These remedial schools have a more basic curriculum, offering more limited options to their students, than their mainstream counterparts.

On 19 April 2001, the nursery that Mr Horváth was attending requested a mental examination for him. He was tested on 17 May 2001 by an expert panel. The expert panel told his parents that he would be sent to a remedial school even before the examination. The results for different tests were disparate ranging from IQ 64 to 83. He was diagnosed with a mild mental disability and sent to a remedial school. He was tested again from time to time over the years. In 2007, the expert panel found that he had good results in school but again diagnosed him with a mild mental disability and special educational needs as a result of which he remained in the remedial school. His parents were not invited to participate in the assessments and it is unclear whether they were provided with information regarding their rights, including the right to appeal.

In September 1999, Mr Kiss started at a primary mainstream school and the local pedagogical advisory service concluded that he had learning difficulties "deriving from his disadvantaged social and cultural background." On 14 December 1999, the school requested a diagnosis from an expert panel and on 15 May 2000 the expert panel diagnosed him with a mild mental disability. The results of the tests were disparate ranging from IQ 63 to 83. As a result he was placed in a remedial school despite protests from his parents. His parents were not informed of their right to appeal. He was tested again over the years and despite good results at school the expert panel stated that he should remain at the remedial school.

Although the WHO standard for diagnosing a mental disability is an IQ of 70 or below, the expert panel in each case took the standard to be 86 between mild mental disability and sound intellectual ability and did not give any reasons for the disparate results. In August 2005, both applicants were tested at a summer camp by independent experts who found that they were not mentally disabled and were fit for a mainstream school, though they found evidence of immaturity of the nervous system, dyslexia or behavioural problems. They also noted that the diagnostic methods used should be reviewed as the children could have performed better if the tests had not been designed for the ethnic majority and also observed that education in a remedial school might significantly reduce results of an intelligence test at the age of 13 or 14.

On 13 November 2006, the applicants claimed damages in the first instance court from the expert panel, the county council and the remedial school due to violation of the principle of equal treatment amounting to a violation of their personality rights under section 76 of the Civil Code

and section 77(3) of the PEA. They claimed that they had been discriminated against on the basis of their ethnicity and social and economic background and sent to a remedial school despite having normal abilities because of the flawed diagnostic system which did not take into account the social and cultural background of Roma children. They also claimed that their constitutional right to a remedy had been violated because their parents had not been informed of their right to participate in the proceedings or appeal findings. The court ordered that they be tested by the National Expert and Rehabilitation Committee ("**NERC**"). The NERC found Mr Horváth to have mild mental disabilities. In the case of Mr Kiss the NERC found that he was not mentally disabled but had a learning impairment. In each case the NERC noted that the expert panel should have noted that socio-cultural factors had played a significant role, but that this was not taken into account. It concluded that both had been provided with an education adequate to their abilities and found that the opinion of the independent experts in 2005 was open to doubt. However, the court held that their rights to equal treatment and education had been violated as the expert panel had not individualised their cases to identify (i) their special needs; (ii) specific services that would help the applicants; and (iii) the reasons why they needed a special education.

While the expert panel did not appeal, the appeal of the county council and the school was successful as the court of appeal found that the lack of appropriate diagnostic tools did not have any connection to their ethnic origin and that their personality rights had not been violated.

The applicants approached the Supreme Court for review asking them to establish that the misdiagnosis of Roma children and sending them to remedial schools constituted discrimination based on ethnic, social and economic background and that the appeal had been wrongly decided. In August 2010, the Supreme Court found that there was no violation of the right to equal treatment, but noted that there were systemic errors in the diagnostic system and that the applicants could approach the European Court of Human Rights to enforce the state's duty to correct these. It also found that the expert panel's handling of the parental rights violated Ministerial Decree no.14/1994 (VI.24.) MKM, and found the county council liable for this, along with the expert panel.

3. Law

National laws:

- Ministerial Decree no.14/1994.(VI.24.) MKM on work of expert and rehabilitation committees
- Ministerial Decree no. 4/2010.(I.19.) OKM on work of pedagogical expert services
- Civil Code (Section 76)
- Act no. LXXIX of 1993 on Public Education (Sections 4, 10, 30, 77, 121) ("**the PEA**")
- After 2004, Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (Section 9 (indirect discrimination))

Regional laws:

- Articles 2 of Protocol No.1 read with Article 14 of the European Convention of Human Rights ("**ECHR**")

4. Legal Arguments

Applicants' Arguments

The applicants argued that their education in a remedial school represented ethnic discrimination in the enjoyment of their right to education in breach of Article 2 of Protocol No.1 read with Article 14. This was a result of indirect discrimination which occurs when an apparently neutral provision, criterion or practice would put persons of a specific racial or ethnic origin at a particular

disadvantage compared with others, unless it was objectively justified by a legitimate aim and the means of achieving that aim were appropriate and necessary.

They argued that social deprivation was linked to the concept of familial disability and they argued that the definition of mental disability as comprising social deprivation and/or having a minority culture amounted to bias and prejudice. In addition, the tests had been culturally biased putting Roma children at a particular disadvantage and their socio-cultural disadvantaged background resulting from ethnicity had not been taken into account and that the examination process had not been sufficiently individualised.

Respondent's Arguments

The respondent argued that the applicants had not been treated less favourably or differently from other non-Roma children in a comparable situation; and if their treatment had been different from other non-Roma or Roma children, it had an objective and reasonable justification.

They also argued that the tests administered measured the effect of cultural deprivation on the mental development of children irrespective of ethnic origin, and these factors concerned social development which fell outside the right to education or other rights under the ECHR.

They argued that there were procedural safeguards in place (although they had not been followed in the case of the applicants). They also argued that the purpose of the tests was to see whether the applicants could go to a mainstream school, and therefore could not be regarded as a misdiagnosis simply because WHO standards had not been followed.

5. Decision

Article 2 of Protocol No.1

The court noted that the word "respect" in this provision implies some positive obligation on the state. In the context of members of groups which have suffered past discrimination having continuing effects, the right to education calls for the implementation of positive measures to assist the members with any difficulties they encounter in following the school curriculum, particularly when there is history of direct discrimination.

Article 14

The Court noted that:

- (i) Discrimination means treating differently without an objective and reasonable justification persons in relevantly similar situations.
- (ii) Discrimination on account of ethnic origin is a form of racial discrimination.
- (iii) Difference in treatment may take the form of disproportionately prejudicial effects of a general policy which though couched in neutral terms, discriminates against a group. This is indirect discrimination, and does not require any discriminatory intent.
- (iv) Discrimination potentially contrary to the ECHR may result from a *de facto* situation.

The Court noted that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce (although they are not necessary for proof). When a rebuttable presumption that the effect of a measure or practice is discriminatory has been established where indirect discrimination is alleged, the burden of proof shifts to the state.

The Court noted that the Roma have become a specific type of disadvantaged and vulnerable minority requiring special protection. It found on the figures presented to it that Roma children have been overrepresented at the remedial school attended by the applicants due to systematic misdiagnosis of mental disability and that therefore it can be observed that a general measure

exerted a disproportionately prejudicial effect on the Roma. The Court further noted that this effect was noticeable even if it had a similar effect on other disadvantaged groups as well and concluded that there was prima facie discrimination.

Further, taking into account the past bias in the placement of Roma children in special schools, the court found that the state has a specific positive obligation to avoid the perpetuation of past discrimination in allegedly neutral practices. On the facts, the Court found it troubling that the tests departed from WHO standards and concluded that the tests did not provide for necessary safeguards against misdiagnosis which should follow from the positive obligations on the state. It also found that, at the very least, there was a danger that the tests were culturally biased.

On the facts found by the domestic courts, the Court concluded that the expert panel and the county council had not provided the necessary guarantees against misplacement; that there was legal uncertainty as to the concepts of integrated education in the relevant period and therefore that the tests could not be considered as sufficient justification for the applicants' treatment, even if the tests themselves were not culturally biased.

As regards the question of parental consent, the court accepted the government's position that adequate remedies had been provided in the domestic procedure.

Remedy

The applicants did not claim damages and the court held that the government was to pay the applicants 4,500 Euros (EUR) jointly in respect of their costs and expenses, along with default interest at the rate of three percentage points above the marginal lending rate of the European Central Bank.