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An evolving conception of discrimination in Europe

Simone Abel¹

University of New South Wales Law School.

simoneabelnyc@gmail.com

Abstract

In 2007, the European Court of Human Rights' Grand Chamber handed down its judgment in DH and Others v Czech Republic. The case arose out of the disproportionately high number of Roma children assigned places in segregated schools for children with intellectual disabilities in the Czech Republic. It was alleged that this practice discriminated against Roma children who had normal, or even above normal, intelligence levels. The applicants claimed that they had been discriminated against in the enjoyment of their right to education on account of their race or ethnic origin. The Court made a finding of indirect discrimination against the Czech government. Commentators have hailed this as a landmark judgment that expands the conception of discrimination under the European Convention on Human Rights. This paper will discuss how this finding differs from the First Chamber's judgment and other ECHR caselaw to alter the conception of discrimination under the European Convention on Human Rights.

Key words: Convention, Discrimination, Indirect, Roma, Schooling, Segregated

Introduction

*DH and Others v Czech Republic (DH II)*² signified a new era in the conception of discrimination under the European Convention on Human Rights.³ The case clarified that equality of result is as significant as equality of opportunity;⁴ and that discrimination may occur where evidence of impact of a seemingly neutral measure indicates that its result is disparate for different groups, irrespective of whether or not that is the intention underpinning the measure. The Grand Chamber of the European Court of Human Rights⁵ went further than it had previously in judgments concerning discrimination, by finding that a case for discrimination can be made where a State fails to treat differently persons in dissimilar situations. This is a wider approach than the traditional conception of discrimination, which was narrowly construed to mean treating differently, without objective and reasonable justification,

¹ Simone is currently completing her LLM by Coursework at the University of NSW (specialisation in International Law), and lives in London where she directs a human rights organisation, René Cassin. Simone came to René Cassin from the New York office of Human Rights Watch (HRW). Prior to pursuing her passion for human rights, Simone was an attorney at leading law firms Cravath, Swaine & Moore LLP, New York, and Mallesons Stephen Jaques, Sydney. She also worked as a journalist for the Australian Jewish News and as student editor for the Australian Journal of Human Rights. Simone holds a BA/LLB and is a graduate of the Centro de Estudio del Espanol, Buenos Aires. She has previously lent her skills to JewishCare, the Migrant and Refugee Rights Project, Room to Read, the Downing Center Duty Solicitor Scheme and what is now the Aurora Project.

² *D.H. and Others v. The Czech Republic*, Application no. 57325/00, ECtHR Grand Chamber, 13 November 2007, <<http://emiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=825443&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

³ Hereinafter referred to as 'the Convention.'

⁴ Equality of result is the hallmark of substantive equality, whereas most complaint-based discrimination legislation is concerned only with equality of opportunity: Thornton, Margaret "The Liberal Promise: Anti-Discrimination Legislation in Australia" Oxford University Press, Melbourne. Chapter I 'The Elusiveness of Equality,' pp. 16-17.

⁵ Hereinafter referred to as 'the Court.'

persons in relevantly similar situations.⁶ In *DH II* and subsequent discrimination cases, the Court has also been willing to find violations of Article 14 of the Convention⁷ read in conjunction with Article Two of Protocol Number One,⁸ whereas formerly the Court had avoided examination of complaints for violation of Article 14 in cases where violation of another Convention article was found.⁹ Other key points of differentiation between *DH I*¹⁰ and *DH II* were the Court's decision in the latter case to: evaluate the applicants as a group rather than on an individual basis; and to shift the burden of proof in cases where applicants allege indirect discrimination and establish a rebuttable presumption that the effect of a measure or practice is discriminatory.¹¹ Furthermore, the Court in *DH II* took the view that a person cannot waive their rights to be free from discrimination of the State, irrespective of any alleged act of consent to such a waiver.¹² Consequently, the application of the case is potentially far-reaching and goes well beyond discrimination on the basis of race within the Czech schooling system. Indeed, although the promise inherent in *DH II* insofar as it pertains to Roma children in the Czech Republic remains unfulfilled,¹³ there is great potential for the precedent set by the case to have wider application to discrimination on any of the grounds enumerated in the relevant international instruments.

Indirect discrimination and the need for positive measures

Substantive equality

The Court's caselaw on discrimination prior to *DH II* had not truly addressed the concept of substantive equality, or equality of result, as a necessary by-product of State's measures, rather, it was focused on equality of opportunity. This approach was consistent with complaint-based anti-discrimination legislation¹⁴ and traditional international law.¹⁵ *DH II* finally recognised that the principle of equality will at times require States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.¹⁶ Like the dissenting judgment of Judge Cabral Barreto in the First Chamber, the Grand Chamber found that Article 14 does not prohibit a Member State from treating

⁶ This principle was announced in *Willis v The United Kingdom*, Application no. 36042/97, s 48, ECHR 2002-IV).

⁷ Article 14 of the Convention provides that 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' The Convention is available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/o/ENG_CONV.pdf>, accessed 12 July 2012.

⁸ Article Two of Protocol Number One stipulates that '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.' See <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/o/ENG_CONV.pdf>, accessed 12 July 2012.

⁹ R. Kushen, 'Implementing Judgements: Making Court Victories Stick,' *Roma Rights*, Number 1, 2010.

¹⁰ *D.H. and Others v. The Czech Republic*, Application no. 57325/00, ECtHR First Chamber, 7 February 2006, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=D.H.%20%7C%20OTHERS&sessionId=72612210&skin=hudoc-en>> accessed 12 July 2012.

¹¹ *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraphs 142 and 204.

¹² *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraphs 142 and 204.

¹³ Robert Kushen and Lydia Gall, 'What Happened to the Promise of D.H?,' *Roma Rights*, No. 1, 2010, p. 37.

¹⁴ M. Thornton, 'The Liberal Promise: Anti-Discrimination Legislation in Australia' in *The Elusiveness of Equality*, Melbourne, Oxford University Press, p. 17.

¹⁵ W. McKean, *Equality and Discrimination under International Law*, Oxford, Clarendon Press, 1983, pp. 264 – 284.

¹⁶ Human Rights Committee, General Comment 18 (37)(1989) (equality and non-discrimination), p. 3.

groups differently in order to correct “factual inequalities” between them. It went on to say that in certain circumstances, a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14. As such, the Court was acknowledging that Article 14 covers what Judge Cabral Barreto termed both “negative discrimination” and “positive discrimination,”¹⁷ and going beyond a one-dimensional understanding of discrimination as meaning treating differently, without objective and reasonable justification, persons in relevantly similar situations.¹⁸

The *DH II* conception of discrimination is in line with the trend in later UN human rights instruments to move away from the more general guarantees of equality and non-discrimination towards an increasingly specific and substantive approach to this issue. For instance, the *Covenant on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *UN Convention on the Elimination of All Forms of Racial Discrimination* substantively address inequality facing people on the basis of gender or race respectively by introducing the notion of special measures to address this form of discrimination.¹⁹ Similarly, the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *Convention on the Rights of the Child* (CRoC) attempt to address discrimination in both a formal and substantive sense.²⁰ Substantive equality and a widened concept of discrimination are also addressed in terms of remedies under the UN instruments. General Comment 31 clarifies that these remedies must be tailored to the special vulnerabilities of certain people.²¹

Indirect discrimination

The Court in *DH II* also stated that discrimination potentially contrary to the Convention may result from a de facto situation.²² This decision built on an earlier judgment in *Thlimmenos v Greece*,²³ in which the Court had stated that:

The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.²⁴

In *DH I*, the First Chamber Court heard the observations of third-party interveners, Human Rights Watch and Interights, who aimed to establish that the testing process

¹⁷ Per Cabral Barreto J, *D.H. and Others v. The Czech Republic*, ECtHR First Chamber, 7 February 2006, paragraph 6.

¹⁸ This principle was announced in *Willis v The United Kingdom*, Application no. 36042/97, paragraph 48, ECHR 2002-IV).

¹⁹ Office of the United Nations High Commissioner for Human Rights. An Introduction to the Core Human Rights Treaties and the Treaty Bodies. Fact Sheet No. 30, at p. 5. For example, Article 1(4) states that: ‘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...’

²⁰ Article 12(3) of the CRPD, for instance, substantively addresses discrimination by providing that ‘States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ This is an acknowledgment that sometimes formal equality does not lead to equality of result.

²¹ International Covenant on Civil and Political Rights (1966) (ICCPR) General comment 31, paragraph 15, p. 4.

²² *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 175

²³ *Thlimmenos v. Greece*, 6 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 317, paragraph 44.

²⁴ *Ibid.*, paragraph 44.

for so-called special schools in the Czech Republic was indirectly discriminatory on the basis that it failed to treat Roma children differently in light of their specific circumstances. These organisations explained that the notion of indirect discrimination covers cases where racially neutral statutory provisions or a general policy or measure produces discriminatory or disproportionate results.²⁵ *Hugh Jordan v the United Kingdom* was cited as authority for the proposition that intent was not required in cases of indirect discrimination.²⁶ However, the First Chamber was unable to find that a case for indirect discrimination had been established, as it failed to go beyond inquiring as to the intent underpinning the system in order to adequately assess the outcome. In its view, it more or less sufficed that the special schools could not be shown to have been established with any discriminatory agenda.²⁷

However, in *DH II*, the Court reached a different conclusion. It elaborated on the concept of indirect discrimination by considering ECRI General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination. This recommendation defines ‘indirect discrimination’ to mean:

Cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification.²⁸

The factor would only have an objective and reasonable justification where it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In the circumstances of *DH*, the Grand Chamber concluded that the schooling system indirectly discriminated against Roma children even though it did not appear to at first glance. The basis for the finding of indirect discrimination was that the tests were conceived for the majority population and did not take Roma specifics such as language and culture into consideration.²⁹ Furthermore, the restrictive approach of the tests and their inability to factor in Roma specifics could not be seen as fulfilling a legitimate aim. On the contrary, rather than funnelling those children needing special schooling into the system, the tests’ created a false market for special schools, as Roma children of above average or average intelligence were much more likely than their non Roma counterparts to perform poorly in the tests. This reasoning was buttressed by the findings of the Advisory Committee on the Framework Convention, which noted that while special schools were designed for the mentally handicapped, it appeared that many Roma children who were not mentally handicapped were placed in them owing to real or perceived language and cultural differences between Roma and the majority.³⁰ The net effect was that in some so called ‘special schools’ Roma pupils

²⁵ *D.H. and Others v. The Czech Republic*, ECtHR First Chamber, 7 February 2006, paragraph 43.

²⁶ *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 162.

²⁷ ‘D.H. and Others v. Czech Republic,’ <<http://www.soros.org/initiatives/justice/litigation/czechrepublic>>, accessed 12 July 2012. The Court also took comfort from the parental consent to place the applicants in special schools, and preferred to assess the applicants on an individual basis rather than as a group.

²⁸ Quoted in *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 60.

²⁹ *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 201.

³⁰ *Ibid.*, paragraph 41.

made up between 80% and 90% of the total number of pupils.³¹ Such segregation was clearly self-perpetuating in that in and of itself it branded Roma children as inferior to their mainstream peers. It also precluded Roma and mainstream children from interacting, thereby fuelling negative stereotypes of Roma harboured by the settled community. Moreover, relegating Roma children to academically inferior schools decreased their opportunities for future academic or professional success. This was clear given that there were no measures in place to provide additional education to students who had gone through the special school system to bring them to a level where they would be adequately prepared for regular secondary schools.³² The Court termed this exclusion of Roma children from mainstream society as “tracking” and found that the result of a system of indirect discrimination in education was the creation of a social construction of failure.³³

Since *DH II*, the Court has issued judgments in cases such as *Sampanis and Others v Greece*, which follow the reasoning of the Court in *DH II* with respect to indirect discrimination.³⁴ In this case, the Court unanimously found that there had been a violation of Article 14 of the ECHR in conjunction with Article Two of Protocol Number One on the basis of a State failure to provide adequate and non-segregated schooling for Roma children. The Court concluded that, in spite of the authorities’ stated willingness to educate Roma children, the effective conditions of school enrolment for Roma children and their placement in special preparatory classes amounted to indirect discrimination against them.³⁵ The Court also stated that integration in schools is a fundamental element for integration into society as a whole. In so doing, the Court made clear the link between indirectly discriminatory measures and negative outcomes. Although the enforcement of the Court’s judgments in this area has been disappointing,³⁶ the far-reaching nature of the judgments in adding meaning to the concept of discrimination and reinforcing the need for special measures has been impressive.

Evidence of impact and use of statistics

In *DH II*, the Court departed from the reasoning of the First Chamber with respect to evidence of impact of the allegedly discriminatory measure. At issue was whether a measure can be found to be discriminatory on the basis of evidence of its impact – namely, its disproportionately harmful effects on a particular group – rather than on the basis of its intention to specifically target that group.³⁷ This issue is inextricably connected to that of indirect discrimination, which the Court in *DH II* noted can be difficult to prove without the use of statistical data. The First Chamber determined that the use of statistics was insufficient for the purposes of establishing a discriminatory impact.³⁸ This finding was in line with earlier caselaw including *Hugh*

³¹ Report submitted by the Czech Republic pursuant to Article 25(1) of the Framework Convention for the Protection of National Minorities.

³² European Commission against Racism and Intolerance (ECRI), Report on the Czech Republic, June 2004

³³ *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 52.

³⁴ ECtHR, *Sampanis and Others v Greece*, Application no. 32526/05, 5 June 2008,

<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=836273&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BFO1C1166DEA398649>>, accessed 12 July 2012.

³⁵ D. Panayote, ‘Greece’s Non-Implementation of International (Quasi-)Judicial Decisions on Roma Issues,’ *Roma Rights*, No. 1, 2010, p. 30.

³⁶ *Ibid.*, p. 36.

³⁷ Applicants’ submissions, *D.H. and Others v. The Czech Republic*, ECtHR First Chamber, 7 February 2006, paragraph 37.

³⁸ *D.H. and Others v. The Czech Republic*, ECtHR First Chamber, 7 February 2006, paragraph 46.

*Jordan v. the United Kingdom*³⁹, where the Court had opined that statistics, albeit an important tool, could not, in and of themselves, prove that an activity had resulted in indirect discrimination.

In *DH*, the statistics painted a disturbing picture. Roma comprised 56% of students in special schools in Ostrava but only represented 2.26% of the total primary school pupils in Ostrava. 1.8% of non-Roma pupils were placed in special schools, whereas the proportion of Roma pupils assigned to such schools was 50.3%. Accordingly, a Roma child in Ostrava was 27 times more likely to be placed in a special school than a non-Roma child.⁴⁰ When presented with this evidence, the Court in *DH II* took a different approach to that of the First Chamber and previous judgments. The Court recognised that when a law is facially neutral and discriminatory only in its effect, statistics may sometimes serve as the only way to establish the prejudicial impact of the law. Indeed, where statistics are credible, they may constitute prima facie evidence of discrimination and have the effect of shifting the burden of proof onto the respondent.⁴¹ This reasoning has brought the approach of the Court into line with that of by the bodies responsible for supervising the United Nations treaties and by the Court of Justice of the European Communities, as well as Council Directive 2000/43/EC.⁴²

Reading Article 14 in conjunction with other provisions of the Convention

Another point of differentiation between *DH I* and *DH II* and subsequent discrimination cases such as *Oršuš and Others v Croatia*⁴³, is that in the latter two cases the Court found violations of Article 14 of the Convention read in conjunction with Article Two of Protocol Number One. However,

The general practice of the Court of avoiding the examination of a complaint for violation of the prohibition of discrimination under Article 14 in cases where a violation of another Convention Article is found works as a brake that impedes the protection of minority rights whenever it appears that the violation found could be due to the fact that the victim belonged to a minority group.⁴⁴

The adoption of Protocol 12, Article One of which provides for the prohibition of discrimination as an independent right, unconnected with other rights protected by the Convention, has made the legal protection of minorities more effective.⁴⁵

However, Kushen and Gall argue that it is important that the Court continues to be clear about the link between discriminatory practices and the deprivation of a variety of other rights. As stated in an Amnesty International report, ‘Unlock Their Future’,

³⁹ *Hugh Jordan v the United Kingdom*, Application no. 24746/94, ECtHR Third Section, 4 May 2001, <<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/oad4f5ba6f6a119bc125668f004c455e/7e0193f3af548611c1256a4200377c18?OpenDocument&Highlight=o,hugh>>, accessed 12 July 2012.

⁴⁰ *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 18.

⁴¹ As discussed below.

⁴² *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 136.

⁴³ *Oršuš and Others v Croatia*, Application no. 15766/03, ECtHR Grand Chamber, 16 March 2010, <<http://www.unhcr.org/refworld/pdfid/4ba208fc2.pdf>>, accessed 12 July 2012.

⁴⁴ Kushen and Gall, op. cit., p. 64.

⁴⁵ *Ibid.*, p. 64.

“systemic violations of the right to education exclude Roma in Slovakia from full participation in society and lock them into a cycle of poverty and marginalisation”.⁴⁶ Similarly, in *Sedjic and Finci v Bosnia and Herzegovina* – the first case in which the Court found a violation of Article One of Protocol 12 – the link between the discriminatory provisions in Bosnia and Herzegovina’s constitution and the ensuing political marginalisation and compromise on the right to free elections was explained.⁴⁷ One of the key reasons for making clear the link between equality and other rights is that this will increase the protection of minorities, and in turn, preserve the cultural diversity of value to the whole community.⁴⁸ As such, *DH II* was significant in that the reasoning points to a growing consensus amongst State Parties that discriminatory measures/practices, particularly where they affect minorities, are violations that infringe on the attainment of other rights under the Convention.

Evaluating applicants as a group

DH I and several prior judgments of the Court had approached discrimination as an infringement of individual rights, rather than those of a group for which the applicant constituted a representative. However, in *DH II*, the Grand Chamber rightly opined that the entire Roma community in the Czech Republic had suffered as a consequence of the indirect discrimination taking place in the schooling system, and therefore thought it appropriate to deal with the case as a claim being brought on behalf of the Roma community. In taking this approach, the Court recognised that as the applicants were part of the broader Roma Community, which had been disproportionately affected by the measures in dispute, they clearly would have suffered that effect individually.⁴⁹ This approach differed from that of the First Chamber, which insisted that each applicant receive individualized consideration based on the unique circumstances surrounding their application. The First Chamber Court thought it was necessary to consider why *that* particular applicant was placed in a special school,⁵⁰ thereby distinguishing its reasoning from that used by the Council of Europe (which had stressed its concern with the plight of Czech Gypsies, in the educational sphere, on the whole – not as individual applicants or students). The Grand Chamber’s decision to decline the applicants’ request to consider their applications individually further underscored the fact that the Court addresses not only specific acts of discrimination but also systemic practices that deny the enjoyment of rights to racial or ethnic groups.⁵¹

⁴⁶ ‘Unlock Their Future,’ Amnesty International, EUR 72/004/2010, London, September 2010.

⁴⁷ *Sedjic and Finci v Bosnia and Herzegovina*, (Applications nos. 27996/06 and 34836/06), ECtHR Grand Chamber, 22 December 2009, <<http://strasbourgconsortium.org/document.php?DocumentID=5116>>, accessed 12 July 2012.

⁴⁸ *Chapman v. the United Kingdom*, Application no. 27238/95, ECtHR Grand Chamber, 18 January 2001, paragraphs 93-94, <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtsofhumanrights/nr/471>>, accessed 12 July 2012.

⁴⁹ *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 209.

⁵⁰ *D.H. and Others v. The Czech Republic*, ECtHR First Chamber, 7 February 2006, paragraph 45.

⁵¹ Kushen and Gall, *op.cit.*, pp. 37 and *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 209.

Shifting the burden of proof

DH II also broke ground in terms of the Court's approach to the burden of proof issue. In *DH I*, the applicants had argued that if they adduced prima facie evidence of discrimination, or if, as in the present case, it came from recent reports of international organisations, the burden of proof would shift to the respondent Government, which had to prove that the difference in treatment was justified. Whereas the First Chamber did not agree with this argument, the Grand Chamber found that once the applicant has shown a difference in treatment, it was for the Government to show that it was justified.⁵² Consequently, where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden shifts to the respondent State, which must show that the difference in treatment is not discriminatory.⁵³

Although this approach differs from *DH I*, there is some former case law to support the Grand Chamber in its enunciation of this principle. In *Anguelova v Bulgaria*, the Court had said that, in certain circumstances: "the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."⁵⁴ In addition, the Court was able to refer to Article 4.1 of Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. This provides that:

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.⁵⁵

In the applicants' submission, an insufficient command of the Czech language; a difference in socio-economic status; and/or parental consent would not suffice to constitute reasonable and objective justification,⁵⁶ and therefore the national authorities had not succeeded in furnishing such an explanation. The applicants argued that even if their placements in special schools pursued a legitimate aim (and this, they categorically denied), such a measure could under no circumstances be considered proportionate to that aim.⁵⁷ In the absence of a racially neutral explanation for the measures taken by the Czech Republic, it was therefore legitimate to conclude that the difference in treatment was based on racial grounds. The Court's decision to shift the burden of proof in this case has been followed in subsequent discrimination caselaw, including the judgment of the Court in *Oršuš and Others v Croatia*.⁵⁸ This has drastically reduced the burden on applicants in instances where facts demonstrate a difference in treatment, but the alleged discrimination is indirect or subtle.

⁵² *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, paragraph 177.

⁵³ *Ibid*, paragraph 189.

⁵⁴ *Anguelova v Bulgaria*, Application no. 38361/97, s 111, ECHR 2002-IV.

⁵⁵ Quoted in *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 82.

⁵⁶ *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 138.

⁵⁷ *D.H. and Others v. The Czech Republic*, ECtHR First Chamber, 7 February 2006, paragraph 38.

⁵⁸ *Oršuš and Others v Croatia*, ECtHR Grand Chamber, 16 March 2010.

No waiver of prohibition from discrimination

Shrouded in controversy, the issue of parental consent garnered much debate in the Grand Chamber's opinion and divided the First Chamber and the Grand Chamber in *DH I* and *DH II*. Although both Chambers took a different view with respect to whether or not there had truly been consent by the applicants' parents in the circumstances of the case, the Grand Chamber qualified this discussion with the principle that there could be no waiver of the child's right not to be racially discriminated against in education.⁵⁹ The Court in *DH I* had placed significant emphasis on the fact that the applicants' parents had provided written consent prior to the respondent's administration of the test, thereby voluntarily relinquishing their rights to object to the testing and placement of the applicants in special schools.⁶⁰ The applicants bemoaned the reality that their parents lacked the information necessary to make a meaningful decision; however, the First Chamber insisted that such responsibility lay with the parents and not the Court. The Grand Chamber disagreed. While parents had ostensibly consented to the school placements, the Grand Chamber did not believe that the parents consented voluntarily. The reasoning of the Grand Chamber was that the parents lacked adequate information regarding the potential upshots of their consent and often did not realize the academically inferior nature of the schools. Thus, they were offering their consent without understanding the myriad of devastating consequences that might arise from their decisions. The consent was therefore not informed.⁶¹ Although the State informed parents that they could appeal the placement decision, none of the applicants exercised that right of appeal.⁶² In eroding the significance of the consent provided by the applicants' parents, the Grand Chamber looked to numerous credible reports including ECRI's report on the Czech Republic in March 2000, which observed that Roma parents often favoured the channelling of Roma children to special schools, partly to avoid abuse from non-Roma children in ordinary schools and isolation of the child from other neighbourhood Roma children.⁶³ However, the Grand Chamber went further than simply finding that consent had not been informed. The Court stated that irrespective of whether consent had been provided, a person cannot waive his rights (let alone the rights of someone else) to be free from discrimination by the State. Having the capacity to waive that right would violate public policy. This position marked a significant departure from the reasoning in *DH I* and reflected the Court's increasing willingness to elevate the importance of the prohibition on discrimination, so that it is harder to argue its displacement by factors such as consent.

⁵⁹ *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraphs 142 and 204.

⁶⁰ For instance, the school permitted the transfer of two of the applicants, one in each direction, following parental request. Likewise, when one special school suggested that a student transfer to an ordinary school, the non-consent of that student's parent precluded the transfer.

⁶¹ *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 203.

⁶² Respondent argued that because applicants had not exhausted the possible domestic remedies, the Grand Chamber could not hear this case. The Grand Chamber, on the other hand, found that the applicants had done all they could, irrespective of the fact that they had not absolutely exhausted all domestic remedies.

⁶³ The European Commission against Racism and Intolerance (ECRI) Report on the Czech Republic, March 2000, cited in *D.H. and Others v. The Czech Republic*, ECtHR Grand Chamber, 13 November 2007, paragraph 47.

State discretion

Although the caselaw of the Court points in favour of according States Parties the greatest possible discretion or margin of appreciation in order to determine how to best implement the rights contained in the Convention; *DH II* clarifies that when discrimination results from differences in race or ethnicity, the Court evaluates the law with the most vigorous scrutiny due to its especially odious nature.⁶⁴ Therefore, in defining discrimination and assessing solutions, the Court in *DH II* afforded less deference to State authorities than it had in earlier cases. Previously, the Court had encouraged deference to the State in two arenas: defining discrimination and evaluating the material circumstances of a person's situation. In 2002, for instance, the Court offered a narrower understanding of discrimination in its *Willis v. the United Kingdom* opinion. There, the Court defined discrimination as treating similarly situated people in different ways, absent a reasonable and proportional justification for such differential treatment. The Court did not expand upon what, exactly, constitutes differential treatment. Nor, for that matter, did the Court explain how States Parties should evaluate a person's situation. In *DH II*, the Court addressed both issues, and expanded its previous conception of discrimination to include failure of the State to treat differently persons in dissimilar situations. Lacking substantial precedent in the field of educational discrimination, the Grand Chamber decided to consider the laws that existed in the broader international community in deciding what a state could do, could not do, or had to do, with regard to providing its citizens with opportunities for education.⁶⁵

In *DH I*, the respondents had successfully argued that States Parties must be accorded a great deal of deference with regard to establishing school systems. The Court had stated that it was not within its scope of enquiry to assess the overall social context of the Czech Republic⁶⁶ or to make decisions regarding the best way to set up a school system. It observed that the best solution to the problem of education would not necessarily be one that will be uniform among the States Parties; rather, each State will probably find that a different solution is most suitable for its circumstances. The Court was therefore willing to defer to the testing and counselling centres responsible for administering the placement test, and was also unwilling to pronounce on whether States Parties should set up different schools for different groups of students, including those with disabilities. Pointing to the UN Committee on Economic, Social, and Cultural Rights, the Grand Chamber differed in its approach to the First Chamber, affirming that although it is the responsibility of the States Parties to ensure that schools are accessible and available to all students, the Court can and should intervene where there is an absence of procedural safeguards in place to prevent discrimination. In the case of the Czech Republic, section 16 of the Schools Act 2004 stipulated that special educational needs mean a disability, health problems or a social disadvantage.⁶⁷ This was indirectly discriminatory in that it set up a situation whereby Roma children, who were deemed 'socially disadvantaged,'

⁶⁴ Article 14 distinguishes between two types of discrimination carried out on the basis of race or ethnicity. Direct discrimination involves a law that discriminates on its face. Indirect discrimination, on the other hand, involves facially neutral laws that are nonetheless disparate in their impact.

⁶⁵ The Grand Chamber considered materials from a variety of renowned establishments, including the UN, UNESCO, and the United States Supreme Court.

⁶⁶ *D.H. and Others v. The Czech Republic*, ECtHR First Chamber, 7 February 2006, paragraph 45.

⁶⁷ Section 16 of the Schools Act 2004 (Law no. 561/2004).

were channelled through an inferior schooling system.⁶⁸ For this reason, the Grand Chamber was unwilling to accord deference to State authorities and instead scrutinised the respondent's schooling system extensively, widening the conception of discrimination in the process.

The Grand Chamber also went much further than it had in previous caselaw by pegging the respondent with an affirmative duty to make changes in practice to its educational system in order to eliminate indirect discrimination. The Court stipulated that in order to accomplish that aim, the respondent would need to change its placement test so that it accounted for language and cultural barriers unique to Roma. The Court also demanded that the respondent implement steps to reduce language barriers that would inevitably arise once Roma students entered mainstream schools. In doing so, the Court provided the Czech Republic with examples of both appropriate and inappropriate means by which it could affect this change. The opinion expressly forbade the State from integrating the mainstream schools whilst continuing to foster segregation by separating students based on racial or ethnic status. The Court made it clear that the respondent would continue to violate Article 14 and Article Two of Protocol Number One if it failed to take affirmative steps to ameliorate the inequalities pervading Roma communities.

Conclusion

The judgment in *DH II* differs in several significant ways from the judgments in *DH I* and prior ECHR caselaw, especially in its conception of discrimination. *DH II* lays out a much more results-focused framework for determining whether discrimination has occurred, and places emphasis on the attainment of substantive equality rather than mere formal equality. The decision represents a milestone for minority rights and for the jurisprudence of the Court, being the first finding of a violation of Article 14 of the Convention in relation to a pattern of racial discrimination in public life: in this case, public primary schools.⁶⁹ Although the promise inherent in the judgment of equal educational opportunities for Roma children in the Czech Republic remains unfulfilled,⁷⁰ the case nevertheless marks a turning point in the Court's conception of discrimination which will ultimately have flow-on effects through implementation and ongoing advocacy. As Judge Cabral Barreto of the First Chamber aptly stated in his dissenting opinion in *DH I*, the guiding principle of this widened conception of discrimination is "all different, all equal", meaning that Article 14 of the Convention covers both negative discrimination and positive discrimination.⁷¹ The Court in *DH II* also made it clear that seemingly neutral measures which result in disparate outcomes for different groups will be indirectly discriminatory. Where this is the case, the Court stated that it is willing to find violations of Article 14 of the Convention, read in conjunction with other Convention articles rather than as standalone violations. The Court also departed from prior ECHR caselaw in its

⁶⁸ A similar situation arose in *Oršuš and Others v Croatia*, where although there was no general policy of placing Roma children in Roma-only classes, the reality was that Roma children were placed in such classes but not provided with any special programme to address language difficulties. Furthermore, the Government had failed to demonstrate how the reduction of the curriculum by 30% would address the applicants' lack of Croatian language proficiency.

⁶⁹ Kushen and Gall, *op. cit.*, p. 37. See also paragraph 209 of the *DH II* judgment.

⁷⁰ Kushen and Gall *op. cit.* p. 37.

⁷¹ J. Per Cabral Barreto, *D.H. and Others v. The Czech Republic*, ECtHR First Chamber, 7 February 2006, paragraph 6.

treatment of the applicants as members of a group; its willingness to shift the burden of proof in cases of indirect discrimination; its protection of Article 14 from waiver by parties; and its approach to the margin of appreciation accorded to States Parties in discrimination cases.