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JUDGMENT
IN THE NAME OF THE SLOVAK REPUBLIC[1]

The Prešov Regional Court, in a tribunal presided by Judge Michal Boroň JD and comprising by judges Peter Straka JD and Antónia Kandravá JD, in the case of plaintiff Center for Civil and Human Rights (Poradňa) based in K, Business ID, legally represented by counsel VD, a lawyer practising in K, versus the defendant, ŠM Primary and Nursery school, legally represented by counsel P of T of AK.T Ltd., and in the presence of secondary defendant ("*vedľajší účastník"*), the municipality of ŠM based in ŠM represented by the mayor of the municipality Ing. VL, with regard to the motion to start proceedings on matters relating to the violation of principle of equal treatment, regarding the defendant's appeal against the decision of the Prešov District Court of 5 December 2011, No. 25C 133/10-229 and the defendant's appeal against the amending ruling ("*opravné uznesenie")*taken by the Prešov District Court on 19 April 2012, No. 25C 133/2010-263 has reached the following unanimous

V e r d i c t:

I. to uphold the judgment and the associated amending ruling, except for the ruling obligating the defendant to publish the wording of the judgment and amending it to the effect that the defendant is obliged to rectify the unlawful state of affairs with effect from the first day of the next school year beginning after the present ruling comes into force.

II. to amend the judgment in relation to the ruling obligating the defendant to publish the judgment, by dismissing this part of the claim.

III. to award no compensation to the parties for the cost of the appeal proceedings.

R e a s o n i n g

The contested judgment as well as the associated amending ruling by the Prešov District Court (hereafter also "the court of first instance") ruled that by placing children of Romani ethnic origin in separate classes the defendant violated the principle of equal treatment and therefore discriminated Romani children on the grounds of their ethnic origin. It further obligated the defendant to rectify, within 30 days of its ruling coming into force, the unlawful state of affairs that was the subject of these proceedings, by placing children in years 1 to 7 in integrated classes with other children of non-Romani ethnic origin. It further

[1] The translation of this decision from Slovak language was secured by Amnesty international

obligated the defendant to publish, within 30 days of its ruling coming into force, a paid advertisement in the teachers'
gazette containing the full wording of the ruling, with the personal data anonymized, and ordered the defendant to cover the legal costs in the sum of 1,087.51 euros, by transferring this sum into the bank account of the plaintiff's legal counsel.

The court of first instance reasoned, among other things, that the plaintiff established the court with sufficient facts to allow it to reach the reasonable conclusion that a violation of the principle of equal treatment had occurred. As a result, the burden of proof shifted to the defendant, who was obliged to prove beyond any doubt that the principle of equal treatment had not been violated and that the defendant had not discriminated against.

The court stated that, if a criterion for action is the fact that someone belongs to a certain ethnic group or nationality it need to be regarded as a suspicious criterion. In such cases, the determination of whether discrimination has taken place requires an examination of the justifiability of unequal treatment of the most thorough kind, so-called strict scrutiny, as applied by the European Court for Human Rights. The court stated in its rulings that unequal treatment is discriminatory if it lacks objective and reasonable justification, if it is not carried out in pursuit of a legitimate goal, and if the relation between the means used and the end that is pursued is disproportionate.

In cases where unequal treatment is based on race, colour or ethnic origin, the need for objective and reasonable justification has to be interpreted with the greatest possible strictness. In the present proceedings the defendant contested the plaintiff's legitimacy to initiate court proceeding by claiming that the plaintiff, in his capacity as a civic association, was not authorized to file a lawsuit of this kind. However, Amendment 5 in its Article 3 of the By Laws of organisation P. states that the plaintiff does provide legal counselling and represents parties in court proceedings and in other dealings with state bodies in the field of protection from discrimination; and that the plaintiff can also initiate court proceedings on its own behalf. This amendment to the By Laws was adopted on 30.04.2010 and registered at the Ministry of Interior of the Slovak Republic on 04.06.2010, i.e. prior to the filing this lawsuit.

The court of first instance further stated that it in assessing the admissibility of the evidences presented it considered each individual item of evidence separately and subsequently every item of evidence together in their mutual context. It did not find that any item of written evidence had been obtained unlawfully and could not on such grounds be used in the proceedings as evidence supporting the plaintiff's claims. The court of first instance did not see any reason to dismiss the lawsuit on the grounds that the plaintiff lacked legal legitimacy to act in this case. The plaintiff is authorized to file a lawsuit in line with Articles 9a and 10 of the Anti-Discrimination Act.

The court of first instance further substantiated its ruling by ascertaining that the defendant had created exclusively Romani classes regardless of the educational results attained by individual pupils in these classes. This fact is further evident from the testimonies of witnesses, the defendant's employees. The creation of separate classes for children from socially disadvantaged backgrounds is also evident from the Report on the outcomes and conditions of pedagogical and educational activities at the defendant *['s school]* dated 17.10.2009. The section of the report relating to educational and pedagogical methods states that in the school year 2008/2009 classes for children from socially disadvantaged backgrounds were indeed created. The court of first instance stated that this fact was further proved by the name registers of individual classes presented by the defendant, as well as by the surnames contained therein as well as photographs on the website, which show that in the school year 2008/2009 exclusively Roma classes were created in years 1 to 7, namely classes 1B, 1C, 2B, 3B, 4B, 5B, 5C, 6B, 6C. However, the defendant claimed not to have created classes attended exclusively by ethnic Romani children on racial grounds but rather in order to implement the temporary special measures. The defendant claimed that this aimed to ensure an individual approach to children from socially disadvantaged backgrounds, who have more obvious difficulties coping with schoolwork.

As for the individual approach, the defendant alleged that it consisted in children in these classes being given less homework and being expected to cover a smaller part of the curriculum at a slower pace to enable them to keep up. The defendant had not demonstrated the use of any other special educational and pedagogical methods.

The court of first instance pointed out that in applying specific educational methods and techniques to educate children from socially disadvantaged backgrounds the defendant may not act in a way that violates valid domestic and international human rights legislation. The defendant failed to prove his claim that the creation of exclusively Romani classes constituted lawful implementation of temporary special measures, since the defendant's headmistress was not authorized to take such temporary special measures in line with Article 8a paragraph 1 of the Anti-Discrimination Act and in line with the Act on School Administration. The relevant state school administration bodies have not introduces such measure in relation to the defendant.

The court of first instance pointed out that the pupils register presented by the defendant showed that classes with Romani and classes with non-Romani pupils were approximately equal in size, and in some cases there were more pupils in non-Romani classes, which contradicted the defendants' claim that this enabled the teachers to apply an individual approach to pupils . As it is evident from the defendant's statements, Romani classes were created for children living in the village O in socially disadvantaged environment . These classes were, however, attended exclusively by Romani children, some also from ŠM, regardless of whether they live in socially disadvantaged environment. The main criterion for placing a child in this kind of class has been his or her Roma ethnic background.

Even if the defendant's claim were correct that Romani pupils consented to being placed in Romani classes, and that their parents also agreed with this placement, that is irrelevant for the purposes determining whether the defendant has acted in a discriminatory manner. Equally irrelevant are the defendant's claims to have created segregated classes in order that ethnic Romani children should not feel handicapped during classes as a result of attaining worse educational results than non-Romani children. The consent of the Romani parents or the children themselves, as the case may be, to being educated in segregated classes, cannot in and of itself cancel out or justify the unlawful action on the part of the defendant. Furthermore, as the plaintiff has proved, field study findings have shown that the reason Romani children as well as their parents consent to this kind of education is that they had become used to this situation and were afraid of being bullied or humiliated in mixed classes. The court of first instance agreed with the plaintiff's view that this situation was only indicative of the defendant's inability to take responsibility for dealing with the issue of potential negative relations between Romani and non-Romani children and systematically encouraging them to get closer to each other.

The fact that the defendant claimed that one of the reasons for segregated teaching was to avoid discriminating against non-Romani children only shows that the defendant has absolutely no awareness of the concept of inclusive education, which regards each child as a unique individual, considers differences between children as a natural, and strives to develop the full educational potential of each child in class.

The defendant's statements during the proceedings aimed to convince the court of first instance that segregated education was the only way to ensure equal quality of education for all children. However, the court of first instance did not accept this claim. The court of first instance was of the opinion that the defendant had abrogated his role in the educational process by favouring unlawful segregated education over the development of inclusive education.

Nor was the defendant's claim that the segregation of students was in line with the 2011-2015 National Action Plan for the Integration OF the Roma Population tenable, since this document refers to, among other things, the creation and maintenance of field classes ("*detašované triedy*") in secondary schools, which does not apply in the defendant's case. As for the actual temporary special measures, the court of first instance interprets it as an attempt to level out possible discrepancies between particular [groups of individuals by helping to raise to a higher standard a group of individuals that, for some reason, is lagging behind in a certain area or is failing to attain the desired results. However, written evidence presented by the defendant made it clear that the measures taken was not of a temporary nature and that, rather than helping students to eliminate the deficit potentially arising from their socially disadvantaged background and gradually integrating them in non-Romani classes, it amounted solely to segregating non-Romani children from Romani ones. It is evident that in the long term not a single student had been transferred from a Roma into a non-

Roma class, the fact that the court of first instance found had been further confirmed by testimonies from the defendant's employees as well as a testimony by a representative of the school founder ("*zriad'ovatel*").

The court of first instance pointed out that in the course of the court proceeding the defendant had not tried to hide the fact that one of the reasons for transferring Roma children from mixed classes to segregated ones was the fear that an increasing number of children would transfer to the M primary school, which is not attended by children of Roma ethnic origin. These facts have been confirmed by a copy of an Internet article from the website www.mecem.sk, appended to the case file as File Document n. 40. The claim by the statutory representative of the municipality of ŠM that the action had improved school attendance and the attainment of Romani children was not substantiated in any way.

The defendant objected TO the feasibility of the second and third claim of the lawsuit in light of the wording of Article 155 Paragraph 4 of the Code of Civil Procedure [hereafter CCP]. The court of first instance was of the opinion that the claim were sufficiently specific to be practicable and that the third claim did not involve the imposing of an obligation in line with CCP Article 155 Paragraph 4, but rather an obligation arising from the Anti-Discrimination Act to remedy an unlawful state of affairs.

The lawsuit in question is a so-called public interest claim (actio popularis claim) , filed by the plaintiff in his own capacity, as well as in the interest of protecting the rights of an unspecified number of persons. With regard to this fact the court of first instance was of the opinion that it was also appropriate to satisfy the third claim and obligate the defendant to publish the judgment so that information regarding this unlawful action would also be available to other subjects who might be involved in similar activities, inducing them to refrain from such activities and to rectify the unlawful state of affairs as appropriate.

The court of first instance was of the opinion that the defendant had failed to shoulder the burden of proof and to prove beyond any doubt not to have engaged in discriminatory practices. The defendant did not prove that his actions had complied with relevant legislation and that they were proportionate and essential. Even though, in the defendant's view, the actions taken might have followed a legitimate goal, i.e. the acquisition of the necessary skills and knowledge by children from socially disadvantaged background, the means used to achieve this goal were not proportionate to this goal. In this situation the court of first found the claim fully justified.

In his second claim the plaintiff originally asked that the defendant be obligated to rectify the unlawful state of affairs within 30 days of the judgment coming into force; however, he later amended the deadline. The court of first instance ruled in favour of the second claim as originally submitted, i.e. obligating the defendant to implement the ruling within 30 days of the verdict coming into force. The court of first instance was of the opinion that the ruling was practicable in this

form, and even though the court had agreed to review the part of the contested ruling relating to the deadline for implementation, it was not bound by the claim because in setting the implementation period it has the option of retaining the implementation period prescribed by law, or setting a longer implementation period if this is considered justified. The court of first instance argued that it had satisfied the complaint in line with the plaintiff's original claim.

With regard to legal costs the court of first instance ruled in line with CCP Article 142 Paragraph 1, awarding the successful party compensation FOR all costs necessary to effectively exercise or protect the law against the unsuccessful party, obligating the defendant to compensate the plaintiff FOR HIS legal costs, in the sum of *XX* to be transferred to the bank account of the plaintiff's legal counsel.

In a subsequent amending ruling the court of first instance corrected the first verdict of its judgment of 5.12.2011 No. 25C 133/2010-229, as follows: "By placing children of Roma ethnic origin in separate classes the defendant has violated the principle of equal treatment and discriminated against Romani children on the grounds of their ethnic origin." The reasoning given by the court of first instance was that a mistake had been made when the verdict was being prepared, in that its first part referred to "personal" (*osobné*) classes whereas in fact it should have referred to "separate" (*osobitné*) classes. With reference to CCP Article 164, the court's amending ruling retrospectively removed the typographical and other obvious errors.

The defendant lodged an appeal against this judgment and the amending ruling. He asked that the court of appeal dismiss the contested judgment and amending ruling, and send back the case to the court of first instance for a fresh ruling. In his appeal the appellant pointed out that the contested judgment was based on an incorrect legal assessment of the matter, namely on a determination of facts that were not supported by the evidence presented, hence the court of first instance had assessed the evidence incorrectly. The ruling of the court of first instance was incorrect in the first verdict of the judgment because it did not take into consideration all the evidence presented and it drew wrong conclusions as to the factual state of affairs based on the evidence presented. Moreover, the ruling does not make it clear why the court of first instance failed to take some of the evidence into consideration. In this context he *[the appellant]* referred to the CCP Articles 132 and 157. The appellant further stated that the court of first instance had cited in its ruling only those conclusions of field research that allegedly showed that Romani children and their parents approved of education on the grounds that they had become used to it and because they feared bullying or humiliation. However, the court of first instance did not give reasons for regarding the plaintiff's conclusions as crucial, even though the statement by witness JD suggested the opposite conclusion. The witness stated unambiguously that she was happy with the class her child was in and also that it was only those mothers who did not look after their children who were unhappy. This witness also organized a petition expressing the parents' satisfaction with the school's action. She further confirmed that her daughter's grades while she attended a

mixed class were worse than they are now. In its ruling the court of first instance did not evaluate the statement by this witness in any way. The court of first instance also incorrectly assessed the evidence presented by stating that it had not been proven that the action taken had improved attendance and learning outcomes of children in these classes even though this conclusion could undoubtedly be drawn from the evidence presented. The court of first instance argued that the defendant's tuition in classes for children from socially disadvantaged backgrounds contradicted the valid legislation since no "other special educational and pedagogical methods" had been demonstrated, and it did not regard as sufficient evidence the fact that children in these classes proceed at a slower pace and are given less homework in order to cope with the curriculum. The court of first instance did not take into consideration the defendant's statement dated 18.10.2010, citing Article 107 of Act 245/2008 Coll. of Laws (the Schools Act), that instructs schools to provide individual conditions that will provide education and teaching of children from socially disadvantaged backgrounds, such as, inter alia, adjustments to the education and teaching process as well as specific methods and forms of education and teaching. Such individual conditions include the above mentioned slower pace of tuition as compared to regular classes, which constitutes an adjustment of the teaching process. These classes utilize the method of multiple repetition of information, and also apply the method of algorithmization of tuition content, whereby the total content or a specific mental or teaching operation, as the case may be, is broken up into smaller steps adapted to the students' abilities, as well as the optimal coding method whereby information is presented in accordance with the students' level. All this follows from the statement of witness M. dated 23.5.2011, and while she did not use these technical terms, this fact cannot be to the detriment of the defendant since her statement suggests that such individual conditions were met. To keep the attention of children from a disadvantaged background, which is stimulation-poor, a greater degree of understanding, praise, stronger positive reinforcement, encouragement, support, and a slower pace of tuition are also required. All this clearly shows that the defendant did not in fact create classes to be attended exclusively by children of Romani origin but rather that these classes had been created in line with Article 107 of the Schools Act 245/2008 Coll. of Laws for children from a socially disadvantaged background regardless of their ethnic origin, in order to achieve Goal 2 of the Revised National Action Plan, namely an improvement in the motivation, grades and attendance on the part of children from socially disadvantaged groups in primary education. The evidence further shows that no parent had filed a complaint regarding discrimination or indeed segregation (as the plaintiff repeatedly claims) of children from socially disadvantaged backgrounds, as well as the fact that the parents whose children attend classes for children from disadvantaged backgrounds did not agree with their transfer to a regular class (witness D on 23.5.2011). The court of first instance gave no consideration whatsoever to the parents' wishes, which ought to be decisive in its ruling. If the parents agree with the kind of organizational arrangement provided by the plaintiff, it cannot be regarded as discrimination. In its reasoning the court of first instance completely failed to respond to the objection that failure to carry out this action would result in discrimination against those children who are able

to cope with the curriculum and that their right to education of adequate quality would be violated. They would be deprived of such quality precisely as a result of the slowing down of the tuition process, if the pace of tuition were to be adapted to the pace of children who cannot keep up with standard tuition. The creation of classes in which the pace of tuition is adapted to children's abilities has improved these children's grades, which means that, if any discrimination did take place, it was solely of a positive kind since the action in question has undoubtedly had a positive impact on the children attending these classes. As a result of placing them in "mixed" classes, where tuition progresses in the standard way, either the whole curriculum might not be covered due to the slowing down of the pace of tuition or, if the standard pace were maintained, it would prevent those students who cannot keep up with this pace from completing their school education. However, the second alternative is more likely, given that the statement by witness L dated 20.10.2011 also shows that in the past, when mixed classes still existed, teachers could not devote enough time and pay special attention to those Romani children who were not able to keep up with the pace of tuition, and therefore received lower grades. He further pointed out that during the hearing of 20.10.2011 the defendant's headmistress stated that there were 6 children from socially disadvantaged backgrounds in year 9 and that they were not happy to be placed in a mixed class. The fact that they had been placed in these classes was, in fact, a reason why only 6 had gone on to year 9 because, as earlier stated by the appellant, the teachers were not able to devote enough time to those Romani children who were not able to keep up with the pace of tuition in this kind of class. These children were not able to absorb the year's curriculum and subsequently had to repeat the year. The statement by witness IM also shows that, now that tuition takes place in classes for children from socially disadvantaged backgrounds, their results have improved significantly. Another factor that must not be ignored is that, as stated by several witnesses, Romani children are happier in a class surrounded by "others of their own kind", that the results they achieve in this group are better, that truancy has declined and this kind of tuition also results in an overall improvement in the children's behaviour and skills. In this day and age the goal is precisely to make sure that children from socially disadvantaged backgrounds, too, can attain the highest possible level of education and that they do not drop out of school prematurely precisely because their performance cannot keep up with the pace of tuition, therefore ending up being given the lowest grade, "unsatisfactory". This aspect also needs to be taken into consideration, the appellant stated, referring to one of the key goals of the Revised National Action Plan, which includes, as Goal 2, increasing the number of children that continue their education beyond primary education. The only way this can be achieved is by making sure that children from the Roma community complete their primary school education, and by adapting tuition to their circumstances (lacking teaching aids, homework etc, resulting precisely from the socially disadvantaged background in which these children are growing up) and their abilities. The court of first instance is not of the opinion that segregation is in accordance with the National Action Plan for including the Roma population because this relates to the creation and maintenance of field classes in secondary schools. If separate Romani classes are admissible in secondary schools, why are they not admissible

in primary schools? Without taking into the actual circumstances, the law must not be implemented in respect of students from socially disadvantaged backgrounds in such a way that the right of these students to adequate education is restricted by depriving them of their right by means of implementing the law; furthermore, it must not restrict the right to quality education of students not from such backgrounds. In the opinion of the court of first instance the defendant is incapable of dealing with the issue in a responsible way and lacks awareness of the concept of inclusive education, whereby each child is unique and the goal is to develop to the full the educational potential of every child. In this respect, in the appellant's view, the court of first instance is making the erroneous assumption that the defendant believes that segregated education is the only way of ensuring the same quality of education for every child. On the contrary, the defendant strives to provide quality teaching for every child while at the same time respecting the individual tuition needs of children according not only to their abilities but also to their financial, social and other needs. He endeavours to organize the education provided in such way that the needs of the children are respected, which also enables him to respond to the needs of socially disadvantaged children with whom the teacher works by means of specific methods and techniques. This improves the quality of education (with regard to children from socially disadvantaged backgrounds) while at the same time maintaining (with regard to other children) the quality of education for all children, since the teacher works with the other students in the conventional ways. No child is excluded from mainstream education; on the contrary, by devoting more attention to children in these classes, teachers ensure that these children are more strongly integrated into the tuition process. A court ruling cannot fail to consider the true state of affairs. The appellant further pointed out in his appeal that in the second verdict of the judgment the court of first instance obligated the defendant to rectify the unlawful state of affairs within 30 days of the judgment coming into force. However, this verdict of the judgment contradicts the plaintiff's own claim and goes beyond it. The plaintiff had changed his original claim and in its ruling of 31.1.2011 the court allowed an amendment to the effect that "the defendant is obliged to rectify the unlawful state of affairs with effect from the first day of the school year after the verdict comes into force." The appellant cited the wording of CCP Article 153 Paragraph 2 pointing out that court of first instance stated in its reasoning that the ruling that went beyond the plaintiff's claim concerned the implementation period and that in setting an implementation period the court was authorized either to keep to the period prescribed by law or to extend this deadline. However, the court of first instance did not state which legal provision authorized it to do this. Furthermore, the ruling is based on an incorrect legal interpretation. In accordance with CCP Article 160 Paragraph 1, a court is entitled to set a longer implementation period. However, this particular case cannot possibly be covered by the provision cited earlier, since in respect of the provision cited above the court has such power only in case the plaintiff's claim does not set any period and the court considers the period prescribed by law as inadequate for meeting the obligation. However, in deciding on the implementation period the court is obliged to give proper grounds as to why it regards the period prescribed by law as inadequate. The verdict is thus incontrovertible in this respect. However,

since this case relates to a changed claim, the court is bound by CCP Article 153 Paragraph 2. The court's decision is therefore based on an incorrect legal opinion. The plaintiff had agreed to change his claim on the grounds that it is not practicable to reorganize classes and transfer children to other classes within 30 days, or in the course of a school year, since this would necessitate changes to the timetable and teachers' working hours. The contested second verdict of the judgment, in the wording in which it had been proposed and pronounced, is not practicable since it does not specify the proportion of Romani and non-Romani children to be placed in mixed classes. Based on this wording the ruling will be implemented if any Romani children at all are placed among non-Romani children and vice versa. However, the placing of children depends on the actual number of Romani and non-Romani children and on whether both groups will be enrolled in the school in the following school year, something that is not known at the time the judgment is pronounced. The court of first instance did not deal with the objections regarding the practicability of the second verdict of the judgment at all. It stated only that this verdict was sufficiently specific to be practicable (the court combined this statement with the reasoning for the third verdict which, however, was not contested on the grounds that it lacked specificity and practicability). The reasoning of this part of the verdict lacks any factual basis on the part of the court that would convincingly argue the practicability of this verdict and refute the objection that it is impracticable. The ruling of the court of first instance is also incorrect with regard to its third verdict, since this claim has no support in any legal provision, even though it allegedly imposes an obligation deriving from the Anti-Discrimination Act. However, the court of first instance failed to explain which provision of the act in question provides grounds for, and hence led to, this decision. This contested part of the ruling is therefore beyond scrutiny. Furthermore the appellant cited CCP Article 157 Paragraph 2, stating that the law does not allow the publication of a judgment in the form in which the court has imposed it in the third part of the ruling. As regards this part of the ruling, in addition to being incontrovertible, the judgment is also based on an incorrect legal opinion of the court of first instance. The appellant stated in his appeal against the amending ruling that the judgment was pronounced at the hearing of 5.12.2011 and that the documents issued were consistent with the wording as pronounced, including the passage amended in the contested ruling. The fact that the wording of the judgment as pronounced is consistent with the original wording of the written copy of the judgment is also confirmed by the minutes of the hearing dated 5.12.2011. CCP Article 164 states that a court can correct only errors that occurred during transcribing and calculating, or other errors. However, an error that is to be corrected may involve the written text of the judgment only provided it is not identical with the wording pronounced at the hearing. However, the court cannot amend the wording of a judgment as pronounced.

Having examined the contested judgment in conjunction with the amending ruling and the proceedings that had preceded it in line with provisions laid out in CCP Article 212, the court of appeal concludes that the verdict, including the amended implementation period for carrying out the obligation, is factually

correct. With respect to imposing the obligation to publish the verdict the defendant's appeal is justified.

The court of first instance based its decision on the facts of the case as well as the evidence presented, and arrived at a correct legal assessment of the case. The court of appeal agrees with the reasoning in the judgment of the court of first instance, and with regard to the objections raised by the appeal it adds the following.

Not only has the plaintiff confirmed the fact of discrimination or, citing the letter of the law, "*established the court with the facts that make it reasonable to conclude that the principle of equal treatment has been violated",* (Article 11 paragraph 2 of Antidiscrimination Act), but he has also proven it. On the other hand, not only has the defendant failed to prove the absence of discrimination and the violation of the principle of equal treatment, but he has publicly admitted its existence in his statements. The mayor of the municipality (the secondary defendant) did not help the defendant in any way; ON the contrary, the court of appeal is of the opinion that he has revealed the full extent of segregation at the primary school.

The defending school as well as the secondary defendant cited what they claimed were "practical" reasons for the segregated tuition of Romani children (e.g. the Romani children's parents had given their consent, Romani children get along better by themselves, without conflicts with non-Romani children, the non-Romani children are not "hampered" by more backward Romani children, the Romani children achieve better results, etc.). They have thus listed purely segregationist arguments that are far removed from the sorely needed inclusive approach, as well as arguments that, in the opinion of the court of appeal, evidently favour a highly undesirable status quo, which does not benefit any section of our society and which everyone is striving to change and which has slowly, but with a probability bordering on certainty, led to increasing tensions between the Romani and non-Romani population. Most paradoxically, while the defending school and municipality appear to express an indignant disapproval of the notion of segregation, the victims of segregation, i.e. the Romani children and their parents, have supposedly gleefully accepted the fact that they could be segregated and BE "alone among themselves". It is, therefore, particularly important to be consistent in evaluating the so-called "informed consent" on the part of representatives of the Romani ethnic group (cf. European Court of Human Rights judgment I.G., M.K. and R.H. vs Slovak Republic relating to the sterilization of a Romani woman).

The appeal court accepts that finding a solution will not be easy for the defending school and municipality. It can be said generally that integration of Romani children requires change and that people are afraid of change. Many education professionals are afraid they will be unable to look after a mixed group of this kind. It cannot be excluded that some teachers take a *noli-tangere-circulos-meos*-attitude regarding the teaching methods to which they have become accustomed. By this the court of appeal court does not mean to say that

the defendant's teachers do not meet the most exacting standards. This problem is evidently of much wider concern than the village ŠM.

However, no matter how demanding they are, teaching methods must not discourage the school and the municipality from practising inclusion and from helping to create equal learning conditions for the Romani children at the secondary level.

Given that all views have to be taken into account, the application of inclusive education in practice is not as simple task as it may have appeared initially. In other words, inclusive education requires the teacher to use special and non-standard approaches, and this needs to be appreciated. A teacher who has to master special approaches to more backward children in class without reducing the curriculum requirements for more advanced children undoubtedly deserves to be appreciated. In this respect it is public knowledge that considerable funds have been allocated for the purpose of resolving the Romani issue, and that their effective of use has been questioned.

The court of appeal cannot describe the segregated education practised by the defendant as anything but an undignified simplification of the situation, aimed at helping the school to progress and attempting to create an impression in the public that the education process complies with the law. However, the court of appeal has voiced the critical view that the indicted school demonstrably does not treat Romani children as subjects but rather as objects of law. This means that instead of segregating [children] head lice and dirt, it is children who are segregated. This is particularly lamentable where children are concerned. In the context of actions taken by the indicted school Romani children have almost no chance of being equally prepared for the standard of education adequate to secondary level. Although they may complete primary education with difficulty, they are handicapped compared with non-Romani children, the only difference being that all the Romani children have been (un)prepared for secondary level together, with the label "of socially disadvantaged background" used to avoid the impression of segregation.

The task of the court of appeal was to rule whether the current state of affairs, in the form of Romani classes or, as the case may be, a Romani floor of the school, was normal, or, in legal terms, whether segregation has taken place. The court of appeal regards the segregation of Romani children as evident. A clarification of the term "inclusive education" seems to be in order.

First of all, inclusion has to be understood as the right of each child to quality education. UNESCO defines inclusive education as a process aimed at responding to students' diversity by increasing their attendance and reducing exclusion within and from education. In addition to reducing the number of students excluded and disqualified from education, it aims to create an educational system in which the inclusive approach addresses the individual needs of all students.

This enables every student to thrive. It guarantees every individual the right to have access to high-quality education, based on ethical values, with the school respecting the characteristics of each individual and the diversity of students' learning needs resulting from their social and cultural background. Education should enable each person to fully participate in social, economic and cultural life.

Inclusive education is a system of education that respects and develops the child's personality. It enables children to attend regular educational institutions. In inclusive schools each child is treated individually and teachers make a point of also involving the parents in the tuition process and in various projects aimed at helping the child communicate with others. In institutions of this kind the diversity of children is perceived as an opportunity to develop respect for oneself and for others. The child's sense of empathy, tolerance, consideration and responsibility are fostered.

The court of appeal demonstrates the significance of inclusive education by drawing attention to its advantages.

Advantages for the non-Romani child. An individual teacher-child relationship helps identify unsuspected abilities in each child. The child learns to perceive and respond to changes and diversity in a natural way. Diversity in the classroom provides the child with a genuine picture of diversity in the society in which he or she will one day live as an adult, thus better preparing the child for the future.

Advantages for the Romani child. An individual teacher-child relationship helps identify unsuspected abilities in each child. It provides the child with an opportunity to make friends in a normal [i.e. mixed] group. In this way, the child's social milieu is not limited exclusively to Romani children, as is the case in special classes or a Romani school floor. The child needs to feel that he or she is part of society, which will boost his or her confidence. Diversity in the classroom provides the child with a genuine picture of diversity in the society in which he or she will one day live as an adult, thus better preparing the child for the future. A more backward child that spends more time with more able children and imitates them develops a higher level of social and academic skills than children isolated in exclusively Romani classes.

Advantages for society. A school with a focus on inclusive education helps to resolve taboo problems such as discrimination and segregation as well as racism, while fostering tolerance, empathy and mutual understanding. It reduces the economic burden on society since the more backward children are led encouraged towards greater independence. Their chances of success IN the active labour market are enhanced.

Advantages for the school. Continuous development of teachers' professional skills. The entire teacher body is transformed into a professional team. Inclusive schools emphasize quality cooperation among all teachers, which facilitates the

work of individuals. By acting as a cultural, educational, preventative and family centre, a school plays a key role in the life of the students, and furthermore exerts positive influence on the way parents raise their children.

As mentioned earlier, people are usually afraid of the new and of applying it in practice. This concern may be based on prejudice and lack of information. People might also be concerned that a Romani child will not fit in with the rest of the group, that it will suffer alienation and humiliation, which can reduce his or her confidence and self-respect. Parents of non-Romani children may be concerned that children requiring special attention will hamper the development of healthy individuals or that the latter will not receive a sufficient amount of attention precisely because the teacher may spend more time dealing with a more backward Romani child. To sum up, these issues amount to an overall concern that non-Romani children belong in regular schools while the rest belongs in special schools.

However, the court of appeal points out that those children who have attended inclusive schools from an early age regard the otherness of their classmates as something natural, as opposed to children in non-inclusive schools where they are placed exclusively in Romani groups. In those schools the problem of discrimination by other children may arise. However, that is precisely why inclusive schools must be established, to ensure that this kind of problem is pre-empted and that every disadvantaged individual fits in with his or her peers who do not have the handicap of backwardness. Furthermore, the court of appeal regards as unjustified the preconception that non-Romani children will be unnoticed and neglected by the teacher, since a child with special educational needs has no influence on the amount of curriculum covered. A playful, interactive, explicatory and creative style of teaching enables children to learn more. And by dealing with each child individually, the teacher ensures that each child receives the amount of care they need regardless of whether they are disadvantaged or gifted (inclusion).

At the hearing of 30.10.2012 the defendant drew the attention of the court of appeal to the fact that a change had occurred compared to the situation at the time the contested judgment had been pronounced and that children from disadvantaged backgrounds have now been placed in classes with other children. At the same time the defendant briefly presented the court with a table showing the placement of these students in classes.

The secondary defendant at this hearing pointed out that the school did not practise segregation. The school has no influence over the fact that it has many Romani pupils . The school does not have Romani classes; rather, it has classes for pupils from socially disadvantaged backgrounds, which include non-Romani pupils. He further pointed out that he is lacking statements by the school administration and the School Inspectorate of the Ministry of Education in the proceeding. He also pointed out that decisions regarding the placement of children in classes are taken by the pedagogical council on the basis of recommendations and subsequent parental consent.

The defendant further pointed out that his school has 267 Roma and 158 non-Roma , that is, 425 pupils in total. He stated that inclusive education, which is not envisaged by law, was supposed to ensure integration of children from socially disadvantaged backgrounds. A decision on a child's integration is based on the recommendation of the pedagogical council, which the headmaster takes as his starting point. Once informed parental consent has been obtained the child is transferred to another class. He further pointed out that in the course of nine meetings not a single parent had given their consent to their child being integrated in this way. He further pointed out that out of 15 proposed transfers the parents of four children had eventually given their consent. He denied any segregation in this context, pointing out that he had ordered the integration of AN additional two students last September.

The plaintiff has sufficiently demonstrated the fact of unequal treatment with regard to Romani children. It was up to the defendant to convince the court that the principle of equality has not been violated. Apart from the fact that segregation had been confirmed directly by the school headmaster and the mayor of the municipality, the court of appeal draws attention to witness testimonies. Witness D testified: *„ I teach in classes attended only by Romani children…"* (File document n. 180). Asked whether there were any other classes with only Romani children in the schools she stated: "*Yes, such classes do exist there… There are no non-Romani classes on the ground floor."*

When asked about the reasons for the transfer on 01.09.2009 of Romani children from non-Romani or mixed classes to purely Romani classes, witness M stated: *"The situation demanded it. At the end of the school year, at a parent-teacher meeting we responded to complaints from majority parents who complained about frequent conflicts among students, about* ***head lice*** *in classes and the theft of school lunches, and the parents also complained that they would transfer their children to other schools, which did indeed happen in some cases. So we resolved the situation in this way. "* (File document n. 192).

Witness D (File document n. 193), when asked if her daughter M who is now in year 6 of primary school, has also attended non-Romani classes, stated: *"Yes, she was in a mixed class in year 1 and 2 and then she informed me that the children would be separated, this was also common knowledge in the settlement, meaning [separated] into Romani and non-Romani classes."* Asked whether her daughter M had any non-Romani friends in the mixed class: "*I don't know if she did. I think she did not although my daughter always wears clean clothes to school, none of her clothes are torn, she has acquired all hygienic habits. I think the reason why she had no friends was that she is Roma, because I think that, whether a Roma wears clean clothes or not, he will always be taken for a Roma. I'd like to make a correction, my daughter attended mixed classes for three years, she started a Romani-ONLY class in year 4."* Asked where the witness had attended primary school: *"I attended the special school in O and I was happy there. As far as the curriculum is concerned, I think the children in Romani and non-Romani classes study AN identical curriculum. I can compare because I know a woman who lives*

with a non-Roma, they have a child who attends a non-Romani class and when we chat she tells me they are taught a similar curriculum as my son D."

During a hearing of the court of first instance witness L stated: *"... **I don't see any reason, if a student is capable of being educated, for him not to be transferred to a normal class.** We endeavour for children from a background that is disadvantaged in this way to reach the final years of primary school, to complete them and subsequently to continue their studies at a secondary or technical school. As of now we haven't been able to achieve this goal. I served as mayor in the past, from 1994 to 2002, then I had a break of 8 years and now I've been in office since January 2011. As for Romani classes, as far as I know, they may have existed for as long as 20 years."* (File Document n. 216). The witness also confirmed that no student has as yet been transferred from a class for socially disadvantaged students to a regular class (File Document n.217).

In relation to the appellant's objections presented in the appeal, the court of appeal points out that the fact that Romani classes, or even Romani school floors, had been created was established in the course of the proceedings, and while [the defendant] may have pursued certain legitimate goals by this action, this does not constitute a proportionate way of resolving the problem.

Even though in the given matter courts are not authorized to give instruction to individual schools as to how to resolve the Romani issue in the context of education, the court of appeal points out that it is primarily the parents of these minors who ought to receive guidance on how to take responsibility for the education and upbringing of their underage children before they reach school age. Effective mechanisms ought to be established for dealing with irresponsible parents who do not live up to this responsibility, with the possibility, in extreme cases, of taking into care children of irresponsible parents who have failed to shoulder the burden of responsibility for raising their children. It makes no sense to continue providing children with a disastrously low quality of upbringing if the very low standard of living is the root cause of the child's negative development.

The court of appeal cannot help feeling that the awareness of the majority population is tacitly permeated by the idea that Romani classes constitute a normal solution. Surprisingly, this view can also be found among educated people even though the legal matter at issue is evidently the result of a long-term ineffective approach to Romani children from an early age. If children are left at the mercy of an unfavourable social environment while still at pre-school age, a change in the quality of education for Romani children cannot be expected either. In this context the school's actions are nothing but a makeshift solution of the problem.

The court of appeal admits that the indicted school suffers the negative consequences of the neglect Romani children have suffered at an early, pre-school age, which is the responsibility of other public authorities, social agencies in particular. However, neither does the court of appeal have any reason to

exclude the indicted school from public state structures, because, rather than trying to reverse these developments by integrating Romani children with their peers, it has practised full-fledged segregation. The court of appeal finds the defence of the indicted school and the secondary defendant totally unacceptable and regards it solely as an attempt to give the appearance of seeking a sophisticated solution to the complex Romani issue.

The court of appeal is convinced that every underage child has the right to equal treatment and access to education, which in this case the defendant has failed to provide.

The court of appeal states that the fact cannot be denied that the defendant tried to resolve the serious social consequences of a complex issue by special approaches to Romani children. The defendant is evidently dealing with the consequences of the Roma issue that have not been effectively resolved in the long term.

However much the defendant tried to utilize various educational approaches to give the impression of complying with the constitution, in view of the existence of Romani classes the principle equality has not been safeguarded.

The creation of Romani classes is done at the expense of human dignity (cf. the finding of the Constitutional Court of the Czech Republic, IV. US 412/04 of 7 December 2004, aptly stating: *"At the centre of the constitutional order of the Czech Republic is the individual and his/her rights as guaranteed by the constitutional order of the Czech republic. The individual is* the fons et origo *of the state. The state and all its bodies are constitutionally bound to defend and protect the rights of the individual. At the same time, our concept of constitutionality is not limited to the protection of the basic rights of individuals (such as the right to life, the right to legal subjectivity) and it is human dignity – the ruling out, among other things, that a human being be treated as an object – that has become the basic foundation from which the interpretation of all fundamental rights derives, reflecting the post-war change in the perception of human rights (which has found its expression in documents such as the UN Charter and the Universal Declaration of Human Rights). This concept treats issues of human indignity as part and parcel of the quality of the human being, of his of her humanity. Safeguarding the inviolability of human dignity enables a person to fully enjoy his or her personality. These considerations are confirmed by the preamble of the Constitution of the Czech Republic, which declares human dignity an inviolable value that constitutes the foundation of the constitutional order of the Czech Republic."*

In its finding, file I US 557/09 dated 18 August 2009 (N 188/54 SbNU 325) the [Czech] Constitutional Court stated: *"Human dignity as well as the capacity for rights in the widest sense of the word (material, legal as well as procedural, to use the language of civil law) are the legal attributes of an individual, whom public authority is obliged to respect. Without recognizing this postulate all other fundamental rights and freedoms guaranteed by the constitutional order of the Czech Republic would be reduced to empty clichés. G. Dürig [In: Der*

Grundrechtssatz von der Menschenwürde, Archiv des öffentlichen Rechts 81 (1956), p. 127] formulated the famous object theory that has been adopted by the jurisprudence of the German Federal Constitutional Court in matters relating to issues of human dignity. This theory holds that human dignity is violated whenever state authority places a specific individual in the position of an object, making him/her a mere instrument and reducing him/her to an entity that is interchangeable with others of its species. We can infer that a human being can thus be not only the object of social "circumstances" but that he or she thus also becomes the object of law, if he or she is forced to surrender to the law completely in terms of its interpretation and application, i.e. without his/her own individual interests or fundamental rights being taken into consideration."

The court of appeal can under no circumstances accept a development of this nature and however impractical the court's verdict may sound to the teachers, the court of appeal, concurring with the court of first instance, also confirms the fact of segregation on ethnic grounds in light of the principle of equality and the protection of human dignity.

The purpose of public interest claim is not reduced to resolving the problem of an individual, and that is why, even if there has been a reassessment of the situation on the part of the defendant and even though some Romani pupils have been integrated in other classes as part of the appeals procedure, the purpose of the public interest claim continues at the time the court of appeal took its decision. Otherwise there would be the danger that, in spite of the lawsuit being dismissed, the principle of equal treatment would be violated again.

There is no justification for limiting the obligation imposed on the defendant in connection with the ratio of integrating children from disadvantaged backgrounds, as proposed in the defendant's objection. The court of appeal believes that stating a specific proportion of minors in the mix classes would be an unnatural solution that would, in itself, amount to unequal treatment.

It follows from the aforesaid that the defendant is obliged to ensure a natural integration of children in mixed classes in a manner that does not disrupt the educational process and is beneficial to all underage children. That is why the actual proportion of children from disadvantaged backgrounds in regular classes is irrelevant.

From the legal point of view and based on the principle of equality and human dignity the court of appeal notes the disagreeable fact of segregation in the indicted school. Romani classes and a Romani school floor do not represent a normal state of affairs, and this has to be rectified by the school.

Undoubtedly this is a process that may take several months. Criteria have to be established by the teachers themselves in conjunction with psychologists, with the involvement of the parents of the underage children from disadvantaged backgrounds, undoubtedly necessitating increased funding from the

government. Pedagogy is one of our key social sciences and this is an issue that requires the highest level of expertise.

One might look for inspiration to the school in SH, in which only Romani parents used to enrol their children and where recently an increasing number of non-Romani children has been applying for places. Judging from media coverage the school has been achieving good results and Romani children go on to study at a gymnasium. *"Another practice we ought to be put an end to is the segregation of Romani and non-Romani children. The school in SH provides an interesting example. Half of its students are Romani but an increasing number of non-Romani children have applied for places at the school. The school's headmaster, PS, believes that interest has grown year by year precisely because they do not distinguish between Roma and non-Roma. Cultural anthropologist AM of Prešov University, who has been studying the Roma problem for a long time, points out that the key issue is changing the content of tuition: 'As long as the methods of teaching and a school's approach to education do not change, even the introduction of compulsory pre-school training from age one, metaphorically speaking, would make no difference. We often come across incompetence, lack of good will, ignorance, and even outright denial on the part of certain schools, which couldn't care less about Romani education, while on the other hand there are brilliant schools and teachers who pass on to the Roma every last thing, who seek solutions and, most importantly, achieve good results." (http://www.rozhlas.sk/Vladny-splnomocnenec-pre-romske-komunity-dnes-predstavi-prvu-etapu-romskej-reformy?l=1&c=0&i=49168&p=1).*

Those parts of the judgment confirming segregation and calling for the rectification of the unlawful state of affairs, including correct ruling regarding legal costs on the grounds of only insignificant lack of success on the part of the plaintiff (Article 142 Paragraph 2 of the Code of Civil Procedure) are factually correct, and are therefore upheld by the court of appeal except for the part of the judgment that obligates the defendant to publish the verdict (CCP, Article 219).

The defendant's appeal is found to be well-founded in terms of the implementation period. In light of the complex process of inclusion the court of appeal changes the implementation period from 30 days to a period relating to the new school year (CCP Article 220).

The contested judgment and the claim relating to the obligation to publish the verdict is not practicable since the defendant is not the publisher of the media in question and the option of publishing as he sees fit is not available to him. The court of appeal therefore amends the judgment, dismissing the claim (CCP Article 220).

The decision regarding legal costs was taken in accordance with provisions of CCP Article 224 Paragraph 1, with reference to the provision of CCP Article 150, Paragraph 1. The defendant has begun to rectify the unlawful state of affairs in the course of the appeals proceedings, by placing children from disadvantaged background in other classes. The court of appeal regards this as a cause for

special consideration (CCP Article 150 paragraph 1) and therefore does not award compensation of the cost of the appeals proceedings to the otherwise successful plaintiff.

NOTICE: This verdict cannot be appealed.

Prešov, 30 October 2012

Michal Boroň
Presiding Judge

Verified by:

Pavol Pastirčák