20.05.2013

CASE COMMENT No.1

CASE OF HORVÁTH AND KISS v. HUNGARY

GENERAL INFORMATION

Full case name	Case of Horváth And Kiss v. Hungary
Parties	István Horváth and András Kiss Hungary
Date	29.01.2013
Forum	European Court of Human Rights
Type of delivery	Judgment (Second Chamber)
Articles	Article 14, and Article 2 (Protocol 1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950.
Key words	Discrimination; Roma; segregation; special schools; disability; right to education; accommodation; positive measures; placement test
Link to the case	http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=001-116124

FACTS OF THE CASE

István Horváth and András Kiss (the applicants) were placed in a special school following an assessment of readiness to follow the curricula, on grounds of alleged mental disability, making them unfit to follow regular curriculum in regular schools. Both applicants are of Roma ethnic origin, as were over fifty per cent of the students in the special school where the applicants received their education.

DECISION

The Court found a violation of Article 2 of Protocol 1 in conjunction with Article 14. It ordered the Hungarian government to pay 4,500 Euros jointly to the applicants for costs. The applicants did not claim damages as they recovered these in the domestic proceedings (due to the domestic defendants' failure to comply with the appeal deadline).

ARGUMENTS OF THE APPLICANT

Applicants claimed they have suffered direct, alternatively indirect discrimination as a result of their improper shunting into special schools (§ 90). According to them, Roma were uniquely burdened by the placement system, as no other group was affected by the diagnostic system as much as they were. Horváth and Kiss referred to 'familial disability' as linked to 'social deprivation' and claimed that 'familial disability could not amount to any type or form of mental disability, as it was in essence based on the social deprivation and the non-mainstream, minority cultural background of Roma fami-

lies and children. The definition of mental disability as comprising social deprivation and/or having a minority culture amounted to bias and prejudice' (§ 91).

The applicants also claimed that Roma children suffered particular disadvantage because of culturally biased and knowledge-based placement tests, which did not take into consideration their disadvantaged socio-cultural background resulting from their ethnicity (§ 92). They challenged not just the content and format of the placement tests, but also the testing procedure itself, asserting that the individualisation of the tests was insufficient and the rights of the parents in the procedure were not respected. Not only was the IQ threshold applied distinct from the World Health Organisation's (WHO) standards applicable at the time leading to placement of many Roma children in the special schools, but they were also never re-examined.

ARGUMENTS OF THE STATE

On the merits of the case, the Government claimed that the applicants were not treated less favourably than non-Roma children in a comparable situation, i.e. with similar socio-cultural disadvantages. However, they asserted that inasmuch as their treatment can be considered as different in relation to education, it had an objective and reasonable justification (§ 94). They pinpoint as a reason for the overrepresentation of Roma children in special education their overrepresentation in the group deprived of the 'beneficial effects of modernisation on the mental development of children' (§ 96).

The diagnosis of the applicants was neither made on the basis of a single test, nor on the basis of a single examination session (§ 95). The Government claimed the tests were sufficiently individualised (§ 97) and that procedural safeguards regarding related parents' rights, were provided in the Hungarian law (§ 98).

Moreover, the Government claimed that this is not a case of a medical misdiagnosis, as the tests in question were not carried out for medical purposes, but to determine whether the applicants could be successfully educated in a mainstream school (§ 99).

REASONING OF THE FORUM

The Court reasoned that segregation amounted to indirect discrimination, and the government therefore had to prove that the difference in treatment had no disproportionately prejudicial effects. The Court found that, in a situation of prima facie discrimination, the state 'failed to prove that it has provided guarantees needed to avoid the misdiagnosis and misplacement of the Roma applicants' (§ 128) as the relevant legislation in place 'had a disproportionally prejudicial effect on the Roma community' (§ 128).

Thus, the Court concluded that the applicants suffered discriminatory treatment and that a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 occurred. Moreover, the actions of the Government resulted in the inability of the applicants to pursue education tailored according to the positive obligations of the State 'to undo a history of racial segregation in special schools' (§ 127).

COMMENT

This is a milestone case when it comes to Roma school segregation for several reasons. By far the most important development is the explicit mentioning of positive obligations of the state to address and furthermore 'to undo a history of racial segregation in special schools' (§ 127). Such strong statement on positive obligations is not present in previous case law. Though, it should be noted that, when it comes to positive obligations, there is a line of evolution present in the Court's reasoning, starting from *Thlimmenos*, where the Court established a failure of the state 'to introduce appropriate exceptions' (§ 48, *Thlimmenos v Greece* [2001] 31 EHRR 411) in order 'to treat differently persons

whose situations are significantly different' (§ 44, *Thlimmenos v Greece* [2001] 31 EHRR 411), to *DH*, where it found that 'in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article' (§ 175, *DH and Others v The Czech Republic* [2008] 47 EHRR 3). According to the reasoning of the Court in *Horváth and Kiss*, positive obligations are not to be understood as falling only within the realm of legislative actions.

This opens a possibility for finding racial discrimination in future cases of misdiagnosis where a well documented history of racial discrimination is at stake, such as the misdiagnosis of Roma children. Though in the European context it is difficult to find another group that has suffered a history of racial segregation similar to the one of the Roma, the Court's reasoning in this case makes it very likely that it remains open to the possibility of finding direct racial discrimination if it identifies such a group (cf. § 110, *Horváth and Kiss v. Hungary*, Chamber Judgment, 29.01.2013). This is big advancement in addressing prejudice, as the very source of discrimination. However, the Court's merits are still very mild when it comes to recognising the impact that attitudes and practices stirred by prejudice have in such cases (see also Timmer analysis, cited in the sources bellow). Though the Court did not fully explain how it construes segregation (Lilla Farkas comment), it considers the isolation suffered by these segregated students to mean that not only there were no necessary guarantees set in accordance with the positive obligations of the State to undo a history of racial segregation in special schools, but also that the 'education provided might have compounded their difficulties and compromised their subsequent personal development instead of helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population' (§ 127).

The Court's deliberation on the margin of appreciation is important not only for discrimination on grounds of race and ethnicity but also for discrimination on grounds of disability. When it comes to restrictions on fundamental rights which affect a vulnerable and historically discriminated group, the Court reiterates its findings from *Alajos Kiss* according to which it will demand very weighty reasons for any such restriction (*Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010). Thus, it can be rightfully argued that this opens space for introducing positive obligations for cases of long-lasting discrimination against persons with a disability (see comment by Lilla Farkas in: Timmer, Alexandra. 'Horvath and Kiss v. Hungary: a strong new Roma school segregation case'. Strasbourg Observers. 06.02.2013).

This is the first case in which the votes were unanimous (other than the Greek cases). As Lilla Farkas notes, this is a further indication that *Horváth and Kiss* consolidated the court's case law and approach to Roma education cases.

EXCERPTS FROM THE DELIVERY

'[A]s a result of the arrangements, the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a consequence, they received an education which did not offer the necessary guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special schools. The education provided might have compounded their difficulties and compromised their subsequent personal development instead of helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population.' (§ 127)

'Since it has been established that the relevant legislation, as applied in practice at the material time, had a disproportionately prejudicial effect on the Roma community, and that the State, in a situation of prima facie discrimination, failed to prove that it has provided the guarantees needed to avoid the misdiagnosis and misplacement of the Roma applicants, the Court considers that the applicants necessarily suffered from the discriminatory treatment. In this connection – and with regard to the vulnerability of persons with mental disabilities as such, as well as their past history of discrimination and prejudice – the Court also recalls its considerations pronounced in the case of Alajos Kiss v. Hungary.' (§ 128)

SOURCES

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Additional sources and readings

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