

IN THE NAME OF THE REPUBLIC OF HUNGARY!

The Győr Court of Appeal, in the case initiated by the plaintiff, represented by Dr Lilla Farkas, against the defendant, represented by Dr Zoltán Rákosfalvy, seeking a declaration of a violation of the principle of equal treatment, has rendered the following judgment upon the appeal filed by the defendant under entry no. 37 against the judgment of the Győr-Moson-Sopron County Court, issued on 30 September 2010, under case no. 3.P.20.950/2008/36:

j u d g m e n t :

The Court of Appeal partially modifies the challenged provisions of the county court's judgment, entirely dismisses the claim concerning children with cumulative disadvantages, and annuls the order requiring the defendant to remedy the unlawful situation.

Beyond these modifications, the Court of Appeal affirms the judgment of the county court.

Each party shall bear its own costs incurred in the appellate proceedings.

The appellate court fees recorded shall be borne by the state.

No further appeal lies against this judgment.

R e a s o n i n g :

Since the political transition, the "A" Primary School, maintained by the defendant's municipal government, has had a history spanning more than 130 years. The school is specialised in educating children with special educational needs, children with learning difficulties from the designated district, as well as out-of-district and rural students. Since the 1970s, the ethnic composition of the school's educational district has changed significantly due to various factors, leading to a substantial increase in the proportion of Roma students. By 2004, the majority of the city's Roma population resided within the school's operational area.

The 2003/2004 school year report, the 2004 pedagogical programme, and the 2005 vice-mayoral report on the fulfilment of professional tasks in the defendant's educational institutions all indicated that more than two-thirds of students in the school were of Roma ethnicity. The 2005 vice-mayoral report, the 2007 Equal Opportunity Programme of the County-Ranked City, and the 2008 Equal Opportunity Plan of "A" Primary School

also confirmed that the proportion of students with cumulative disadvantages was exceptionally high compared to the city's average.

In January 2009, the defendant modified the school district boundaries to comply with Section 66(2) of Act LXXIX of 1993 on Public Education (PEA) concerning the enrolment of children with cumulative disadvantages. The public was appropriately informed about these district changes. However, despite the changes—and partly due to the urban rehabilitation of "B" district, where new houses and apartments were built, leading to demographic shifts—the composition of the student body did not change, as parents exercised their right to free school choice.

As of 1 July 2009, the school's primary activities expanded beyond the daytime education of general primary school students with special educational needs to include the education of national and ethnic minority students.

No first-grade classes started at the school in the 2010/2011 academic year.

In its amended statement of claim, the plaintiff sought a declaration that, from 1 February 2004 (the second semester of the academic year), Roma and children with cumulative disadvantages attending the defendant's school had been unlawfully segregated from non-Roma and non-cumulative disadvantaged children, compared to students in other municipal schools. The plaintiff requested that the court order the defendant to cease this unlawful practice and to eliminate the segregation by prohibiting the establishment of classes where Roma and students with cumulative disadvantages are the majority.

The plaintiff invoked its standing to initiate the lawsuit under Section 20(1)(c) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities. It argued that, pursuant to Section 19 of the Equal Treatment Act, it was sufficient to establish a presumption that Roma and students with cumulative disadvantages were segregated in the defendant's school. Consequently, the burden of proof shifted to the defendant, who had to demonstrate that the situation resulted from the informed and voluntary choices of parents exercising their right to free school selection. The plaintiff further argued that the defendant failed to substantiate its claim regarding the extent and integration of Roma ethnic education. Moreover, it contended that ethnic subject matter did not necessitate or justify segregated education. In this respect, the plaintiff referred to Section 39/E of Decree 11/1994 (VI.8.) MKM.

The defendant requested the dismissal of the claim, primarily arguing that the plaintiff lacked standing to initiate proceedings, given that the group of persons allegedly affected by the claimed violation was clearly identifiable, as they corresponded to the students of the educational institution in question. The defendant asserted that it had neither examined nor had the authority to examine the Roma origin of students or the ethnic composition of the student body. It denied the existence of physical segregation and argued that Roma ethnic minority education did not constitute segregation, as it catered to genuine needs. The defendant maintained that the existing situation resulted

from informed parental choice, as demonstrated by parental declarations submitted in the case. It further contended that no segregation existed in relation to children with cumulative disadvantages, since the modification of school district boundaries significantly reduced their proportion within the designated district, thereby ensuring compliance with Section 66(2) of the Public Education Act (PEA).

The first-instance court held that from the second semester of the 2003/2004 academic year, starting from February 2004, the defendant violated the principle of equal treatment by maintaining the unlawful segregation of Roma and children with cumulative disadvantages in a single educational institution, "A" Primary School.

The court ordered the defendant to cease the violation and eliminate the unlawful segregation. The remainder of the claim was dismissed, and the defendant was ordered to pay the plaintiff HUF 60,000 in litigation costs within 15 days, while the recorded court fee was to be borne by the state.

The county court rejected the defendant's argument concerning the plaintiff's standing, noting that the plaintiff qualified as a foundation within the meaning of Section 3(e) of the Equal Treatment Act. It found that the exact number and identities of Roma students in the school could not be determined, as such data constituted sensitive personal information under Section 2(2)(a) of Act LXIII of 1992 on Data Protection. The court emphasised that the plaintiff's claim concerned the school's student community as a whole, i.e., a large and indeterminate group of individuals, thereby confirming the plaintiff's standing to bring the claim. Regarding the defendant's defence under Section 18(1) of the Equal Treatment Act, the court held that it was irrelevant to the present proceedings, as the plaintiff did not act in representation of specific individuals, but rather asserted a public interest claim in its own right.

The court considered Article 249 of the Treaty Establishing the European Community and Council Directive 2000/43/EC, concluding that for the period from 1 February 2004 to 31 December 2006, the provisions of the Equal Treatment Act in force at the time applied, while from 1 January 2007 onwards, the amended Sections 7 and 19 of the Equal Treatment Act, as introduced by Act CIV of 2006, were applicable.

The court found that the plaintiff fulfilled its evidentiary and presumptive burden under the Equal Treatment Act. Documentary evidence and witness testimonies confirmed the claim that during the relevant period, the proportion of Roma and children with cumulative disadvantages in the school was significantly higher than in other schools operated by the defendant. Despite the 2009 modification of school district boundaries, which was explicitly intended to ensure that the proportion of disadvantaged students was approximately equal across all educational institutions, no substantial change occurred in practice.

The court noted that in the absence of ethnicity-based registration, the 2005 statutory definitions of "disadvantaged" and students "having cumulative disadvantages" under the Public Education Act served as a proxy for defining the targeted ethnic group. It

emphasised that the unlawful segregation persisted even without active measures to maintain it, and that the defendant's liability stemmed not from creating segregation, but from its continued existence, as no effective annual review of school district boundaries was conducted. The court established that from 1 February 2004, institutional segregation of Roma and students with cumulative disadvantages was present at "A" Primary School.

The county court rejected the defendant's justification under Section 28(2)(a) of the Equal Treatment Act. It referred to Sections 4/A(1), (2), and (5), Sections 86(1) and (2), Section 90(1), and Sections 85(4) and (7) of the Public Education Act, concluding that the education provided at "A" Primary School did not comply with legal requirements, as compared to other educational institutions. While acknowledging that voluntary separation does not constitute segregation, the court dismissed the defendant's reliance on parental declarations. It noted that the statements were undated, some lacked identifiable parental signatures, and only a portion included the student's name and class. Consequently, the defendant could not rely on these deficient documents as valid evidence. Interpreting Decree 32/1997 (XI.5.) MKM and referring to the decision of the Pécs Court of Appeal (Case No. Pf.I.20.061/2010/7.), as well as an expert opinion obtained in a related proceeding before the Somogy County Court (Case No. 24.P.21.443/2008.), the court concluded that national and ethnic minority education could be conducted within an integrated educational framework. The court reaffirmed that segregation does not require the imposition of additional disadvantages on the segregated group, as unlawful segregation is inherently a violation.

Based on its findings of unlawful segregation, the court ordered the defendant to cease the violation pursuant to Section 84(1)(b) of the Civil Code. The court further ordered the elimination of the unlawful situation under Section 84(1)(b) of the Civil Code, but declined to specify the precise remedial measures, stating that such measures must be determined within the framework of public law.

The court determined litigation costs in accordance with Section 81(1) of the Code of Civil Procedure.

The defendant lodged an appeal against the first-instance judgment, seeking its reversal and the full dismissal of the claim as its primary request, or, alternatively, the annulment of the judgment.

In the appeal, the defendant maintained that the plaintiff lacked standing, as the plaintiff was not authorised under Section 18(1) of the Equal Treatment Act and the group of individuals allegedly affected by the violation was precisely identifiable, in contrast to the requirements of Section 20(1) of the Equal Treatment Act. The defendant reiterated that, based on the parental declarations submitted in the first-instance proceedings regarding school choice, the composition of the student body resulted from parental decisions. Furthermore, the defendant pointed out that Section 66(5) of the Public Education Act (PEA) was only introduced by Section 5 of Act XXXI of 2008 and came into force on 3 July 2008. Consequently, during the relevant period, the defendant-

operated educational institution lacked the legal basis and capacity to restrict free school choice based on the proportion of children with cumulative disadvantages.

Referring to Section 4/A(2) of the Public Education Act, the defendant argued that students of the school in question were not in a disadvantaged position compared to those in other educational institutions. Given that the plaintiff withdrew its claim regarding the quality of education, the defendant contended that the reasoning of the judgment exceeded the scope of the claim.

Additionally, the defendant argued that the first-instance court failed to fully comply with its duty to provide reasons for its decision.

The Court of Appeal reviewed the first-instance judgment within the limits of the appeal and counter-appeal (Section 253(3) of the Code of Civil Procedure), without addressing the part of the first-instance ruling that partially dismissed the plaintiff's claim. It found that the defendant's appeal was partially well-founded.

The first-instance court conducted the necessary and sufficient evidentiary procedure, properly assessed the evidence in accordance with Section 206(1) of the Code of Civil Procedure and established the facts correctly. However, the legal conclusions drawn from the established facts were only partially correct, as detailed below:

The county court correctly concluded that the Equal Treatment Act was applicable in this case, considering the amendments introduced by Act CIV of 2006 to Sections 7 and 19 of the Equal Treatment Act.

The county court also rightly ruled that the plaintiff had standing under Section 20(1)(c) of the Equal Treatment Act to bring an action regarding the segregation of Roma students. The defendant's argument in the appeal—that the students affected by the segregation were identical to the overall student population of the school and that the affected individuals were therefore clearly identifiable—was unfounded. The first-instance court correctly pointed out that, under the Data Protection Act, ethnic origin constitutes sensitive personal data, which neither the defendant nor the educational institution it operated had a precise record of. Furthermore, the defendant's claim that all students at the school belonged to the Roma ethnic group was fundamentally incorrect, as documentary evidence and witness testimonies obtained in the case established that, while the proportion of Roma students was indeed extremely high, it was not 100%.

The first-instance court correctly held that the defendant was liable under the Equal Treatment Act for the existing segregation, not because it actively created it, but because it failed to take effective measures to eliminate the unlawful segregation. The county court also rightly determined that unlawful segregation does not require the presence of additional disadvantages and correctly ruled that the parental declarations submitted by the defendant were insufficient to exempt it under Section 28(2)(a) of the Equal Treatment Act.

The defendant's argument that the judgment's reasoning exceeded the scope of the claim was unfounded. The county court's references to Sections 85(4) and (7), 90(1), 86(1) and (2), and 4/A(1) and (2) of the Public Education Act were not made to compare the quality of education at the school in question with other defendant-operated institutions.

Likewise, the defendant's claim that the first-instance court failed to fulfil its duty to provide adequate reasoning was unsubstantiated. The Court of Appeal noted that the appeal did not challenge the absence of reasoning, but rather its acceptability, specifically regarding the plaintiff's standing, the defendant's failure to provide justification, and the violation of the principle of equal treatment.

Regarding free school choice, the county court rightly identified fundamental deficiencies in the parental declarations submitted by the defendant. The documents did not establish that parents made their school selection with full knowledge of all relevant information.

However, the defendant could have successfully relied on the exemption under Section 28(1)(a) of the Equal Treatment Act only if it could be established beyond doubt from the declarations that the parents chose the educational institution in question with full knowledge of all relevant information. However, the attached documents do not establish that the parents were aware that, pursuant to Section 43(4) of Act LXXVII of 1993 (Minority Education Act), as amended by Section 47(1) of Act CXIV of 2005, they had the right to minority schooling in another educational institution if requested by at least eight parents (Minority Education Act, Section 43(4)). The Court of Appeal further notes that the parental declarations only pertain to children currently enrolled in the school, but they do not clarify whether, for the entire period covered by the claim, the segregation of Roma children in previous years resulted from the parents' free school choice based on adequate information.

The category of children with cumulative disadvantages was introduced by Section 91(21) of Act CXXXV of 2004, which amended Section 121(1)(14) of the Public Education Act. Until 31 December 2004, the legal framework only recognised the category of "disadvantaged children", defined as those who were placed under child protection due to family or social circumstances or received regular child protection benefits. Under Section 121(1)(14) of the Public Education Act, a child with cumulative disadvantages is one who:

- Is entitled to regular child protection benefits due to family or social circumstances; and
- Whose parent or legal guardian (in the case of a child starting kindergarten at age 3 or a student beginning compulsory schooling) did not complete more than eight years of primary education; or
- A child/student who has been placed in long-term foster care.

The first-instance court correctly relied on Section 20(1)(c) of the Equal Treatment Act, which provides that a social or advocacy organisation may bring a personality rights or employment discrimination claim in court if the violation of the principle of equal

treatment or its imminent risk is based on a characteristic that constitutes an essential aspect of an individual's personality, and the violation or its imminent risk affects a large group of people whose identities cannot be precisely determined.

Section 8 of the Equal Treatment Act lists the grounds on which discrimination may be based (from points (a) to (t)). However, not all listed characteristics are considered essential aspects of personality. The Hungarian Constitutional Court's Decision 96/2008 (VII.3.) The Constitutional Court acknowledged that many forms of identity exist, and that their external manifestations and legal relevance may vary. While identity develops through life experiences that an individual can only partially influence, it necessarily becomes an integral part of one's personality. In its jurisprudence, the Constitutional Court has explicitly recognised religious beliefs and minority status as essential aspects of personality.

The legal category of cumulative disadvantages—beyond children and students placed in long-term foster care—is partly related to the financial and income status of the child and the family raising the child and partly to the educational attainment of the parents. Consequently, pursuant to Section 121(1) point 14 of the Public Education Act, cumulative disadvantages do not constitute an essential characteristic of a person's personality, even if family circumstances or social background may, in some way, influence an individual's personality in the long term (Debrecen Court of Appeal Pf.I.20.683/2005/7).

Accordingly, in the opinion of the Court of Appeal, with respect to children with cumulative disadvantages, the right to bring a public interest action under Section 20(1)(c) of the Equal Treatment Act does not belong to the claimant because the group of affected individuals can be precisely determined based on this distinction (as the defendant erroneously argued), but rather because the concept of cumulative disadvantages under the Public Education Act cannot be considered an essential characteristic of personality. In this respect, the claimant had no standing to sue.

The first-instance court correctly ruled when, considering the segregation of Roma students, it ordered the defendant to cease the unlawful practice.

A claim seeking to eliminate the injurious situation based on Section 84(1)(d) of the Civil Code must necessarily contain a condemnatory provision if granted, which complies with the requirements of the Code of Civil Procedure if it is clear and enforceable. The enforcement of the objective sanctions set forth in Section 84(1)(a)-(d) of the Civil Code is permitted to any claimant, including the public interest litigant in this case, subject to the circumstances and limitations of the case. However, the claimant failed to submit a specific claim under Section 84(1)(d) of the Civil Code that could serve as the basis for an enforceable order, considering also Section 13 of the Judicial Enforcement Act. The amended claim, which sought a court order requiring the defendant to refuse the establishment of classes where Roma and children with cumulative disadvantages form the majority, can only be interpreted within the framework of ceasing the unlawful practice, as in relation to existing student

relationships, the cessation of new class formations does not terminate the unlawful situation.

In light of Section 86(1)(d) of the Civil Code and Article 15 of the EC Regulation, as referenced by the first-instance court, the success of a claim seeking to eliminate an injurious situation requires that the claim be enforceable, realistic, feasible, and executable in court (Supreme Court Pfv.IV.21.568/2010/5). However, the claimant did not submit such a claim.

Based on the foregoing, the Court of Appeal, pursuant to Section 253(2) of the Code of Civil Procedure, modified the contested provisions of the county court's judgment and rejected the claim concerning children with cumulative disadvantages due to the claimant's lack of standing. In the absence of a specific claim to this effect, the court omitted an order requiring the defendant to remedy the unlawful situation.

In the appellate proceedings, the defendant was deemed 50% successful in the litigation; accordingly, the Court of Appeal ruled on the litigation costs pursuant to Sections 239 and 81(1) of the Code of Civil Procedure. The recorded appeal fee, in light of the fee exemption granted to both the claimant and the defendant under Section 5(1)(b) and (f) of Act XCIII of 1990 on Duties, shall be borne by the state in accordance with Section 14 of Decree 6/1986 (VI.26.) of the Ministry of Justice.

Győr, 4 October 2011

Dr József Lezsák, Panel Chair
Dr Róbert Szalay, Judge-Rapporteur
Dr Hedvig Menyhárdné Sarmon, Panel Judge

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