DEBRECEN COURT OF APPEAL

Case No.: Pf.I.20.214/2020/10

The Debrecen Court of Appeal, in the lawsuit initiated by the first plaintiff [name] (address), represented by Dr. Erika Muhi, attorney-at-law (address), and the second plaintiff [name] (address) against the first defendant [name] (address), represented by the Őszy Law Office (address, case handler: Dr. Gabriella Mónika Halászíné Dr. Sós, attorney-at-law), the second defendant [name] (address), represented by legal counsel Dr. G. Á., and the third defendant [name] (address), represented by the Őszy Law Office (address, case handler: Dr. Gabriella Mónika Halászíné Dr. Sós, attorney-at-law), for the violation of personality rights, has rendered the following

j u d g m e n t:

The Court of Appeal does not alter the unappealed part of the first-instance judgment but partially modifies the appealed part. It orders the second defendant to examine annually, from January 1, 2021, for a period of five years, the number of school-age children in H. County classified as having special educational needs who are perceived as Roma based on perception. The second defendant shall publish the results of these examinations and the measures taken to eliminate the violation on its website by March 31 of the following calendar year.

The court further orders the defendants to jointly pay within 15 days the amount of HUF 508,000 (five hundred eight thousand) to the plaintiffs as joint creditors and an additional HUF 421,600 (four hundred twenty-one thousand six hundred) to the second plaintiff as first-instance litigation costs. Additionally, the defendants shall pay HUF 34,290 (thirty-four thousand two hundred ninety) to the state for costs advanced by the state, upon a separate notice. The state shall bear HUF 27,000 (twenty-seven thousand) in unpaid court fees.

In all other respects, the Court of Appeal upholds the appealed part of the first-instance judgment.

It further declares that the state shall bear HUF 48,000 (forty-eight thousand) in unpaid appellate court fees.

No appeal is possible against this judgment.

R e a s o n i n g

Established facts relevant considering the appeal

[1] Since the entry into force of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (Equal Treatment Act) on January 27, 2004, the third defendant and its predecessor (hereinafter "third defendant") have been responsible for assessing the learning abilities of school-age children in Heves County. Until December 31, 2012, the maintainer of the third defendant was the Heves County Municipality, from January 1, 2013, to December 31, 2016, it was K.I.K., and since January 1, 2017, the first defendant, as its legal successor, has assumed this role. During this period, the second defendant and its predecessors oversaw sectoral management in education.

[2] In 1993, the last year in which ethnic data was officially collected in public education in Hungary, at least 42% of children in special education were of Roma origin, despite comprising only 8.22% of the total student population. Academic literature attributes this to the systematic misdiagnosis of Roma children as intellectually disabled, which has served as a means of segregation since at least the 1970s. A research summary prepared by the second defendant for the "Last Desk" Program on March 8, 2004, found that even after 1993, the proportion of Roma students in special schools and classes continued to increase, leading to an overrepresentation of disadvantaged children, particularly Roma children, among those classified as disabled.

[3] Research specific to Heves County confirmed these findings. In December 2003, **H.T. Rt.**, commissioned by the first defendant, developed a Strategic Program for the Development of the Roma Community in Heves County, which revealed that, despite legal provisions, some Roma children were placed in special schools and classes without sufficient evidence of intellectual disability. Consequently, during the examined period, Roma students constituted 80% of special school enrollments and 98% of special class enrollments.

[4] To curb the unjustified classification of Roma children as disabled, the second defendant launched the "Last Desk" Program in December 2003, which led to the re-evaluation of 2,099 students classified as having special educational needs in 2004. In Heves County, 71 students were reassessed, and five were recommended for reintegration into mainstream education. Further reviews in 2007 led to the removal of the special needs classification for 61% (1,905 children) of the 3,125 reassessed students in Heves County.

[5] Despite these efforts, the underlying causes of misclassification persisted. The second defendant acknowledged this issue in the "Last Desk" Program’s research summary, emphasizing the need for proper examination protocols, revised testing methodologies, and improved conditions for expert panels.

[6] At that time, assessment guidelines were outlined in the "Transfer Examinations" handbook, which instructed professionals to use culturally neutral tests for children from socioeconomically disadvantaged backgrounds. The handbook also warned against diagnosing intellectual disability based on language deficiencies alone and recommended assessing practical intelligence and non-verbal problem-solving skills.

[7] However, these provisions were not implemented in practice. Until 2008, no standardized test existed in Hungary to measure intelligence independently of cultural influences. The Budapest Binet test, widely used at the time, was standardized on a sample of 500 middle-class children and was therefore unsuitable for assessing the actual learning abilities of disadvantaged Roma children. This contributed to the increasing proportion of Roma students in special education.

[8] The situation in Heves County worsened due to a 2008 reduction in the number of expert panel members, despite an increasing number of children requiring evaluation. As a result, the time allocated per child decreased, hindering the thorough assessments required for Roma students.

[9] To address this, in 2008, the second defendant provided all expert panels, including the third defendant, with the culturally neutral WISC-IV test, standardized in Hungary with 8.6% Roma representation.

[10] A 2010 study by E.N. Kft. found that despite the availability of the WISC-IV test, it was used in only 3% of assessments conducted by the third defendant. The study also revealed significant procedural deficiencies, such as the absence of medical professionals in 98% of evaluations in Heves County, the use of non-standardized tests, and inadequate examination conditions. The study recommended annual government oversight to ensure compliance with professional protocols.

[11] International organizations, including the Advisory Committee on the Framework Convention for the Protection of National Minorities (2000), the Council of Europe's Commissioner for Human Rights (2006), and the European Commission against Racism and Intolerance (2008), urged Hungary to take effective measures to address these issues. Furthermore, in the case of Horváth and Kiss v. Hungary (11146/11), the European Court of Human Rights ruled on January 29, 2013, that the diagnostic practices for special educational needs disproportionately affected Roma students and constituted discrimination.

[12] The System of Pedagogical Professional Services Underwent Significant Changes in 2014. As part of these changes, the Integrated Monitoring System (IMS) was introduced, enabling, among other things, the tracking of services received by assessed children, the monitoring of assessments regarding special educational needs, and the voluntary recording of data concerning nationality and ethnic origin. Additionally, in 2015, the standardization of the WPPSI-IV test was completed, making it suitable for culturally independent intelligence assessment of children aged between 2 years 6 months and 7 years 7 months. The Committee of Ministers of the Council of Europe (CMCE), in its meeting held on December 8-9, 2015, within the framework of implementing the judgment of the European Court of Human Rights (ECtHR), acknowledged these measures but noted that, due to the lack of statistical data, it was impossible to assess their impact on the proportion of Roma students in special education. Consequently, it requested further data provision from the Hungarian State. Since Hungary has not provided such data to the CMCE, the committee adopted Resolution No. 1348/H46-11 at its June 4-6, 2019, meeting, issuing a renewed request for compliance with the data provision obligation. In the present case, no evidence was available to determine whether these measures affected the proportion of Roma students in special education

or the rate of misdiagnosis and, if so, to what extent.

The statement of claim and the defendants' defense

[13] In their amended statement of claim, the plaintiffs requested the court to establish that:

- The third defendant, from January 27, 2004, has directly discriminated against school-age Roma children in the county who possess normal cognitive abilities but have been placed in special schools or programs through the application of assessment tools and procedures influenced by cultural and social class factors. Until August 31, 2012, these children were diagnosed as mildly intellectually disabled (SNIa) or as having other non-organic special educational needs (SNIb), and from September 1, 2012, they have been diagnosed as having special educational needs, in violation of Section 8(e) of the Equal Treatment Act; alternatively,
- The third defendant, from January 27, 2004, has indirectly discriminated against Roma children in the county in violation of Section 9 of the Equal Treatment Act by diagnosing them at disproportionately high rates as having special educational needs using assessment tools designed for majority children without considering the ethnic and social characteristics of Roma children;
- The first defendant, from January 27, 2004, continuously (until December 31, 2012, through its predecessor's unlawful activities), as the maintainer of the third defendant and special education institutions in the county, has perpetuated direct and indirect ethnic discrimination by failing to conduct random on-site inspections of assessment methods and evaluations and by maintaining the county's special education system unchanged despite the decreasing number of children and the professional integration efforts required by educational advancements;
- The second defendant, as the overseeing authority of the education sector, from January 27, 2004, has sustained direct and indirect discrimination against Roma children by failing to oversee the examination of their learning abilities, the assessment methods applied to them, and the targeted supervision of evaluation procedures.

[14] The plaintiffs' amended claim further requested that the court order the defendants to cease the violation and eliminate the unlawful situation by:

- Mandating the second defendant to annually assess the number of children classified as having special educational needs in Heves County who are perceived as Roma, following the recommendations issued in 2009 by the Parliamentary Commissioner for the Rights of National and Ethnic Minorities and the Parliamentary Commissioner for Data Protection. The assessment should be conducted with the involvement of the Heves County Roma Self-Government, and the resulting comparative data and measures should be published annually by December 31 for a period of five years following the final judgment;
- Requiring the first defendant to provide continuing professional training for the expert committee members employed by the third defendant on new diagnostic tools developed

by the second defendant, particularly on procedures to prevent the unjustified classification of Roma children as disabled and on voluntary parental data provision regarding nationality, including methods to encourage responses;
- Ordering the first defendant to immediately ensure the necessary workplace and diagnostic conditions for culturally independent assessments following the final judgment;
- Obliging the first defendant to conduct annual professional supervision of the application of culturally independent diagnostic methods and their impact on Roma children within the special education system, publishing the results annually by December 31 for five years.

[15] The defendants requested the dismissal of the claim, disputing both the alleged violations and the legality of the proposed legal consequences.

The First-Instance Judgment

[16] The first-instance court, in its judgment challenged on appeal, established that from January 27, 2004, the third defendant subjected school-age Roma children with normal cognitive abilities residing in Heves County to indirect discrimination by applying non-culturally neutral diagnostic tools, thereby disproportionately diagnosing them as having special educational needs at an excessive rate. The court further established that from January 27, 2004, to December 31, 2012, the first defendant, as the maintainer of the third defendant and special education institutions in the county, through the omission of measures mandated by legal provisions imposing supervisory obligations, upheld the indirect discrimination implemented by the third defendant due to its predecessor's failure. Additionally, the second defendant, as the overseeing authority of the education sector, by failing to carry out targeted inspections and by omitting supervisory measures required by law, also maintained the indirect discrimination implemented by the third defendant. The court ordered the defendants to cease the unlawful practice but dismissed the remainder of the claim.

[17] In its reasoning, the court referred to Section 70/A(1), Section 67(1), and Section 70/F(1) of the Constitution in force until December 31, 2011; Article E(3), Article Q(3), Article X(3), Article X, Article XI, and Article CV(2) of the Fundamental Law in force from January 1, 2012; Sections 75(1) and 76 of Act IV of 1959 on the Civil Code (in force until March 14, 2014); Section 8(1) of Act V of 2013 on the Civil Code; Sections 7(2), 8, 9, 19(1) and (2), and 23(1) of the Equal Treatment Act; Sections 4/A(1) and (5), 87(1)(g), 102(2), and 104(1)(a) of Act LXXIX of 1993 on Public Education; and Sections 18(2)(c), 77(1), and (3) of Act CXC of 2011 on National Public Education, as well as the case law of the European Court of Human Rights. The court found the claim to be partially substantiated.

[18] It determined that both the first and second plaintiffs had standing to sue under the explicit provisions of the Equal Treatment Act permitting public interest litigation against the third defendant, which was responsible for assessing children with special educational needs, as well as against the first defendant, which maintained the third defendant, and the second defendant, which oversaw the education sector.

[19] The court elaborated that the foundation of children's intellectual development is the provision of free, state-guaranteed primary education accessible to all. It was the constitutional obligation of the state to ensure appropriate intellectual development for Roma children with normal cognitive abilities in Heves County. In this context, the court examined whether the state had provided these students with education commensurate with their actual abilities during the period in question. To fulfill these obligations, Hungary was also bound by positive measures under international law. The pedagogical professional services were likewise required to uphold the principle of equal treatment in operating expert panels in Heves County. The court found that direct discrimination against Roma children with normal cognitive abilities in the county did not occur; therefore, it dismissed that part of the claim.

[20] However, the court did establish indirect discrimination against this protected group. It emphasized that the plaintiffs fulfilled their burden of proof regarding disadvantageous treatment by submitting documentary evidence attached to their statement of claim. As a result, the burden of proving justification rested with the defendants. The evidence unequivocally demonstrated that Roma students in Heves County were enrolled in special schools and special or remedial classes at a rate disproportionately higher than their numerical representation in the general population. Furthermore, only 3% of the students were tested using culturally independent procedures, and only 2% of the assessments were conducted with the presence of a medical professional. To rebut these findings, the third defendant was required to prove that the circumstances asserted by the plaintiffs did not exist, that it complied with the principle of equal treatment, or that it was not obligated to comply. The third defendant failed to meet this burden of proof. Its conduct related to expert evaluations was discriminatory and failed to satisfy the necessity-proportionality test concerning the fundamental rights of Roma students with normal cognitive abilities in Heves County. There was no prohibition under either international or domestic law preventing the use of assessment methods that considered the specific linguistic, social, and cultural background of Roma students. Although there was no explicit intent to discriminate against Roma students, and the regulatory framework was facially neutral, the actual examination methods applied resulted in Roma students being disproportionately placed in a disadvantaged position compared to similarly situated non-Roma students. Consequently, the third defendant committed indirect discrimination.

[21] On the same grounds, the first-instance court also established that the first and second defendants had violated the law. Regarding the first defendant, the court found that by failing to implement supervisory measures mandated by law, it upheld the indirect discrimination committed by the third defendant. As the entity responsible for maintaining the expert and rehabilitation panels that assessed learning abilities, it was required to monitor the legality of the operations of public education institutions and the decision-making of expert and rehabilitation panels. Despite appointing a county minority coordinator and taking other measures, the first defendant failed to address the systemic discrimination. Even though it was undisputed that Roma students in Heves County were disproportionately classified as having special educational needs, the first defendant did not provide evidence to show that it had reviewed the legality of these classifications, thereby committing a violation.

[22] Regarding the second defendant, the court explained that the Minister responsible for education is

tasked with overseeing the public education sector. The law explicitly provides the Minister with the authority to conduct regional professional inspections and to request the maintainer of educational institutions to conduct legality and professional assessments. However, the second defendant failed to provide evidence that it had ordered any professional inspections concerning Heves County or requested the institution maintainer to conduct such inspections. These inspections were particularly necessary given that the second defendant's background institution, **E. N. Kft.**, had specifically recommended that the Education Authority conduct annual reviews of the material and human resources of county expert and rehabilitation panels and assess compliance with diagnostic protocols. By failing to order these targeted inspections, the second defendant also maintained the indirect discrimination perpetrated by the third defendant.

[23] Due to the finding of ongoing indirect discrimination at the time of the first-instance judgment, the court ordered the defendants to cease the violation. However, it did not grant the request for the elimination of the unlawful situation, reasoning that indirect discrimination arose within a public law relationship, making it legally impossible to remedy the infringement through private law means. Nevertheless, the court emphasized that the order to cease the violation required the state to take positive measures to ensure that Roma students in Heves County with normal cognitive abilities received education appropriate to their actual abilities. This obligation included ensuring that the first and second defendants, as maintainers and sectoral supervisors, conducted oversight to guarantee the effective realization of this right.

[24] Pursuant to Section 81(1) of Act III of 1952 on the Code of Civil Procedure, the court ruled that each party should bear its own litigation costs, while HUF 36,000 in registered court fees would remain the responsibility of the state for fee-exempt parties.

The Appeal and the Counter-Appeal

[25] In their appeal, the plaintiffs primarily requested the initiation of a preliminary ruling procedure before the Court of Justice of the European Union and, alternatively, the partial modification of the first-instance judgment and the granting of all their claims even in the absence of such a referral.

[26] They argued that the legal position—disproved by the Curia in its judgment No. Pfv.IV.21.568/2010/5—that segregation in public education cannot be sanctioned beyond declaratory civil law sanctions, which are not enforceable through judicial execution, because discrimination arises in a public law relationship, is incorrect. Instead, they contended that legal persons operating within the public sector also fall within the scope of Act IV of 1959 on the Civil Code, and that the obligation to respect personal rights applies to all, including administrative bodies. The restrictive interpretation appearing in the first-instance judgment creates a legal gap that must be remedied by the civil courts in accordance with Articles 3 and 15 of the Racial Equality Directive (2000/43/EC). If the courts fail to eliminate the unlawful situation affecting Roma children simply because administrative bodies were responsible for it, this effectively removes administrative bodies from the personal scope of the 1959 Civil Code, rendering the right to legal remedy under the Fundamental Law practically inaccessible against such bodies. A preliminary ruling procedure is warranted because the first-instance judgment is incompatible with the

provisions of the Racial Equality Directive regarding personal scope and legal remedies, necessitating a preliminary ruling from the Court of Justice of the European Union to rectify this legal infringement.

[27] The plaintiffs emphasized that the goal of their appeal is to ensure that the courts provide an effective remedy for the indirect discrimination suffered by Roma children in Heves County and compel the defendants to take the specific measures requested to eliminate the discriminatory situation and prevent its recurrence. They argued that an effective remedy against discrimination is ensured only if the courts do not merely declare the violation but also order the defendants to implement specific measures to remedy the unlawful situation. They pointed out that the discrimination had not ceased since the first-instance judgment, and the defendants failed to provide any evidence to demonstrate otherwise. Proving the cessation of discrimination requires statistical data based on perception rather than voluntary declarations to accurately reflect the ethnic affiliation of children classified as having special educational needs. However, despite the European Committee of Ministers' repeated calls in 2019, the Hungarian State has not collected such data, even though this is the only way to verify the elimination of discrimination. The collection of such data could lawfully be conducted with the involvement of the Heves County Roma Self-Government in accordance with the recommendations issued in 2009 by the Parliamentary Commissioner for the Rights of National and Ethnic Minorities and the Parliamentary Commissioner for Data Protection on ethnic data collection.

[28] Although the defendants filed an appeal seeking the complete dismissal of the claim, they later withdrew it during the second-instance proceedings. However, in their response to the appeal, they requested the court to uphold the portions of the first-instance judgment that dismissed parts of the plaintiffs' claims. They agreed with the first-instance court's reasoning that civil law remedies cannot intervene in public law relationships. Additionally, they asserted that the violation had ceased since the 2014 reform, arguing that all expert panels now have culturally independent assessment tools (WISC-IV tests), trained personnel for their application, and that the Integrated Monitoring System (IMS) excludes the use of non-culturally neutral tests. They noted that all affected parents can voluntarily declare their national or ethnic affiliation, though the willingness to do so remains low. They stated that they were examining ways to increase the number of such declarations without discouraging participation in assessments.

The Decision of the Court of Appeal and Its Legal Grounds

[29] The plaintiffs' appeal is partially well-founded for the following reasons.

[30] Since the defendants withdrew their appeal, the provisions of the first-instance judgment establishing the violation and ordering the defendants to cease the unlawful practice became final. Consequently, in the absence of an appeal against these provisions, the court of appeals did not address them. Within the limits of the appeal and response to the appeal (Section 253(3) of the 1952 Code of Civil Procedure), the court only examined whether the plaintiffs, in their refined appeal request, rightfully sought the establishment of direct discrimination by the defendants and

whether they were justified in demanding specific measures to remedy the violation.

I. Examination of the Existence of the Legal Violation

[31] The court of appeals first had to determine whether the violation established by the first-instance court still existed. The defendants, in their response to the appeal, argued that no further measures were necessary as the violation had ceased in the considerable time elapsed since the first-instance judgment. However, determining whether the violation persists requires an examination of the factors that initially caused it, as only this analysis can reveal whether the defendants have since eliminated those factors. The burden of proving that the circumstances causing the violation had ceased since the first-instance judgment rested on the defendants, as indicated in the court of appeals' procedural order No. Pf.6 (Section 3(3) of the 1952 Code of Civil Procedure). Despite this obligation, the defendants failed to meet their burden for the following reasons.

[32] The causes of the violation were comprehensively detailed in the final, uncontested portion of the first-instance judgment based on the Strategic Program of H. T. Rt., the 2008-2013 development plan of the Heves County Municipality, and the 2010 research report of **E. N. Kft.** However, in assessing whether the violation still exists, the court of appeals also considered additional evidence, including factual findings from the European Court of Human Rights' Horváth and Kiss judgment (paragraphs 7, 9, 12, 55-60, 73-75) and the research summary on the "Last Bench" Program submitted as Annex No. 55. Furthermore, it examined the essence of the 2014 reform of pedagogical professional services and the resolutions adopted by the Committee of Ministers of the Council of Europe on December 8-9, 2015, and June 4-6, 2019. Based on these additional findings, the court concluded that the defendants failed to prove that the violation had ceased.

[33] Since the plaintiffs' appeal requested the full granting of their claims, the court of appeals found it necessary to clarify that, similar to the European Court of Human Rights, it concluded that indirect rather than direct discrimination had occurred. This was because the defendants had applied legal and professional rules since January 27, 2004, that appeared neutral but disproportionately disadvantaged the protected group. Consequently, the court confirmed that the violation of the right to equal treatment of school-age Roma children with normal cognitive abilities in Heves County persisted, as the third defendant continued to misdiagnose these children as having special educational needs using non-culturally neutral diagnostic tools at disproportionately high rates. The first and second defendants also remained responsible for failing to fulfil their supervisory and intervention obligations to prevent the third defendant's unlawful activities.

[34] This determination was based on the fact that none of the defendants contested during the proceedings that school-aged children of normal ability and of Roma origin had been systematically misdiagnosed even before the period relevant to the litigation, i.e., prior to January 27, 2004. Consequently, due to erroneous diagnoses, they were declared to be intellectually disabled at a significantly higher rate than school-aged children of normal ability who were not of Roma origin. The defendants could not reasonably have disputed this fact, as it was substantiated not only by point 9 of the ECtHR judgment in Horváth and Kiss but also by the studies attached to

the statement of claim.

[35] It was also undisputed that, for the same reasons, Roma students had already participated in special education at a disproportionately higher rate compared to their population share before the period relevant to the proceedings, i.e., prior to January 27, 2004. The defendants similarly could not reasonably dispute this fact, as it was corroborated not only by point 7 of the ECtHR judgment in Horváth and Kiss but also by the research summary of the "From the Last Desk" Program submitted by the second defendant (Annex to submission No. 55), as well as by the Strategic Program prepared by **H.T. Rt.**, which specifically pertained to Heves County (Annex to the statement of claim).

[36] Based on these facts, it is unequivocally established that school-aged, normally capable Roma children were subjected to indirect discrimination even before the period relevant to the litigation, i.e., prior to January 27, 2004, as they were placed in special education at a significantly higher rate due to erroneous diagnoses compared to school-aged children of normal ability who were not of Roma origin.

[37] On the first day of the period relevant to the litigation, January 27, 2004, not only did the Equal Treatment Act (ETA) come into force, but so did Section 4/A of the Public Education Act (PEA), which explicitly required those involved in the organization, administration, operation, and implementation of public education tasks to observe the principle of equal treatment when making decisions and taking measures regarding children and students. It further mandated that all children and students in public education receive the same level of services under equal conditions as other persons in comparable situations.

[38] Pursuant to these statutory provisions, the Educational Expert Committee of Heves County (the third defendant) was obliged to take action against indirect discrimination affecting Roma children, ensuring that they were not misdiagnosed, with special attention to the fact that professional standards also required such diligence in addition to the legal requirements. During this period, the applicable protocols for assessment methods were outlined in a manual titled "Transfer Examinations," which, according to points 55-59 of the ECtHR judgment in Horváth and Kiss, contained clear instructions that assessments of Roma children, who were predominantly disadvantaged, had to differentiate between cognitive deficits and deficiencies stemming from cultural and socio-economic disadvantages.

[39] The provisions of the Equal Treatment Act and the Public Education Act cited above not only obligated the third defendant but also its maintainer, the first defendant, to act against the systematic misdiagnosis of Roma children. As a maintainer, the first defendant was explicitly required under Section 102(2)(d) of the Public Education Act to regularly monitor the legality, efficiency, and effectiveness of the third defendant's operations, which—according to the final and binding first-instance judgment—undoubtedly included examining whether the expert committee adhered to the legal and professional regulations on equal treatment in cases involving Roma children. The first defendant was especially required to conduct such oversight as it was explicitly aware, based on

the Strategic Program of **H.T. Rt.**, that the proportion of Roma children in special education in Heves County was exceptionally high, a situation caused by their systematic misdiagnosis.

[40] The provisions of the Equal Treatment Act and the Public Education Act that came into force on January 27, 2004, also obligated the second defendant, responsible for the sectoral management of education, to combat indirect discrimination against Roma children. As the sectoral authority in charge of education, the second defendant was authorized under Section 93(2) of the Public Education Act to order national and regional professional inspections, pedagogical-professional assessments, audits, and analyses, and to request the maintainer to conduct a professional inspection, pedagogical-professional assessment, audit, or analysis in its educational institutions and report the results. While Section 93(2) of the Public Education Act did not frame these measures as obligations but rather as discretionary powers of the second defendant, it is nonetheless indisputable—based on the provisions of the Equal Treatment Act, Section 4/A of the Public Education Act, and the final and binding first-instance judgment—that the second defendant was required to take action against discrimination using all available means. This included exercising its oversight and audit powers over the professional practices of the third defendant to ensure the expert committee adhered to legal and professional requirements, thus preventing misdiagnoses. The second defendant's responsibility to take these measures was particularly evident because its own research summary on the "From the Last Desk" Program confirmed that the overrepresentation of Roma students in special education was not only an issue in Heves County but a nationwide problem caused by their systematic misdiagnosis.

[41] It was the defendants' burden, pursuant to Section 19(2) of the Equal Treatment Act, to prove that they had fulfilled their statutory obligations and eliminated the indirect discrimination against Roma students. However, as established by the final and binding first-instance judgment, the defendants failed to meet this burden, as they did not provide evidence that the violation had ceased by the time of the first-instance judgment, nor did they prove during the appellate proceedings that the discriminatory practice had since been rectified.

[42] The 1st defendant argued that, pursuant to the Strategic Programme of the H. T. Rt., its predecessor, the Heves County Municipality, had entrusted a minority coordinator and expert advisors with the task of supporting projects concerning minorities. It further pointed out that it regularly monitored the special education institutions it maintained and attached supporting documents under reference P.20.440/2010/9. However, as established by the final first-instance judgment in this regard, these documents were not sufficient to fulfil the 1st defendant's evidentiary burden. The 1st defendant should not have been required to prove the general measures taken through the appointment of the minority coordinator and expert advisors to facilitate minority-related projects, as this was not relevant for the resolution of the case, nor was it relevant how it monitored the special schools under its management pursuant to Section 102(2)(d) of the PEA Instead, it was specifically required to prove when and with what frequency it monitored the professional activities of the 3rd defendant, but it did not present any evidence in this regard. As a result, under Section 19(2) of the ETA., the 1st defendant could not prove the absence or cessation of the violation presumed by the plaintiffs.

[43] The 2nd defendant argued that it had initiated several projects aimed at reducing the misdiagnosis

of Roma students.

[44] It is an undeniable fact that both the "From the Last Desk" Programme, launched in December 2003, and the mandatory review of children with special educational needs (SEN) in 2007, resulted in the termination of SEN classifications for many students both nationwide and in Heves County. However, as conclusively stated by the final first-instance judgment, this did not address the causes of misdiagnosis, which the 2nd defendant was aware of, as indicated in the research summary of the "From the Last Desk" Programme, where it outlined the measures necessary to prevent the wrongful classification of non-disabled children as disabled. In this context, the 2nd defendant did not consider the mass compulsory reviews but rather emphasised the development of measurement protocols and the monitoring of expert committees' professional work and improvement of their operational conditions.

[45] The development of measurement protocols was necessary because, until 2008, expert committees did not have access to a standardised test in Hungary suitable for measuring children's intelligence in a culture-independent way. The most commonly used Budapest Binet test, standardised on 500 students, was not culture-independent, as confirmed by both studies attached to the claim and a 2010 research report prepared by the 2nd defendant's background institution, E. N. Ltd. This fact was also explicitly acknowledged by the Hungarian Government during proceedings before the ECtHR in the Horváth and Kiss case (paragraphs 95 and 120 of the judgment).

[46] The operational conditions of the expert committees needed to be improved because the Heves County Municipality's 2008-2013 public education development plan specifically noted that the staffing conditions of the 3rd defendant had already been inadequate before 2007 and had deteriorated further in 2007 due to a staff reduction affecting four experts. This further reduced the time available for examining each child, which, according to the 2010 research report by E. N. Ltd., increased the likelihood of misdiagnosing disadvantaged, predominantly Roma students.

[47] Among the three measures mentioned in the research summary of the "From the Last Desk" Programme (the development of measurement protocols, the monitoring of expert committees, and the improvement of their operational conditions), the 2nd defendant took steps in 2008 to develop measurement protocols, providing each expert committee, including those of the 3rd defendant, with a standardised, undisputedly culture-independent test: the WISC-IV. However, as conclusively stated by the final first-instance judgment, this measure was insufficient to eliminate indirect discrimination against Roma students. The 2010 research report by E. N. Ltd., based on the review of 914 SEN-classified children nationwide, including 52 in Heves County, concluded that unjustified disability classifications were still present in the education system, noting that although the number of unjustified classifications decreased after 2008, Roma and multiply disadvantaged students remained overrepresented among those classified as disabled. The report revealed that expert committees used the culture-dependent Budapest Binet test in 97% of cases in Heves County, and that the use of the culture-independent WISC-IV test was only applied in 3% of cases.

[48] These research findings clearly refuted the testimonies of witnesses referred to in the 1st and 3rd

defendants' appeal, who claimed that expert committees predominantly used the WISC-IV test, and that any bias from the Budapest Binet test was counteracted by other examinations. The appellate court disregarded these unsubstantiated testimonies in its review of whether the violation had ceased since the first-instance judgment, especially considering that no witnesses had testified regarding this period.

[49] The 2010 research report by E. N. Ltd. was particularly significant because, like the research summary for the "From the Last Desk" Programme, it clearly and unequivocally recommended that the 2nd defendant, via the Education Authority, should monitor annually whether the expert committees' material and staffing conditions comply with legal requirements and whether the professional protocol is adhered to during child assessments. However, the 2nd defendant did not perform such monitoring either before or after this report, as it did not present any evidence to support such actions, nor did it reference any prior monitoring activities.

[50] It is an undeniable fact that in 2014, as a result of the 2nd defendant's legislative preparation and lawmaking activities, the operation of pedagogical services was restructured under new legal provisions. One of the goals was to reduce unjustified disability classifications, a goal now also promoted by the international organisations referenced in the ECtHR Horváth and Kiss judgment (paragraphs 73-75), and, in light of this judgment, by the Council of Europe.

[51] This reform did not alter the defendants' obligation to ensure compliance with the principle of equal treatment in the exercise of their public education duties (Section 1(2) of the National Law on Public Education), nor did it change the 1st defendant's responsibilities as an educational provider and the 2nd defendant's responsibilities as the director of the education sector, including their monitoring and enforcement powers (Sections 77(3) and 83(2)(e) of the National Law on Public Education). Accordingly, all defendants remained obligated to take every measure within their competence to address indirect discrimination against Roma students through misdiagnosis.

[52] The results of this reform were summarised by the 2nd defendant in the annex to its submission dated 42. According to this document, the plaintiffs did not dispute that, compared to the 2003/2004 school year, the proportion of students classified as mildly mentally disabled decreased from 2.1% to 1.5% in the 2013/2014 school year. However, this data and other information provided by the 2nd defendant did not prove that the reform had eliminated the unjustified classification of school-age, typically non-disabled Roma students as disabled, nor did they demonstrate that these measures had eradicated indirect discrimination against this protected group. As noted by the ETMB in its resolutions of December 8-9, 2015, and again in June 4-6, 2019, in this matter, no conclusion could be reached without statistical data on the proportion of Roma students with SEN. It would only have been possible to conclude that the reform was sufficient to eliminate indirect discrimination if the statistical data—or other evidence—had shown that the proportion of Roma students classified as SEN had decreased to a level proportionate to their population share in Heves County, thereby addressing their overrepresentation as identified in the E. N. Ltd. report. However, the defendants did not present such statistical data or supporting evidence, and thus did not prove that the 2nd defendant's reform had eliminated indirect discrimination against school-age, non-disabled Roma students.

[53] The 3rd defendant, in its attempt to prove the absence or cessation of the violation, argued that it had always acted in accordance with the laws and professional regulations, and therefore had not discriminated against Roma students in Heves County. This assertion, however, is not accurate. As explained by the appellate court, the 3rd defendant was required, both before and after the introduction of the WISC-IV test, to compensate for the distorting effect of the culture-dependent Budapest Binet test on Roma students' assessments through other examinations, in compliance with the provisions of the ETA., the PEA, the National Law on Public Education, and the relevant professional standards requiring special care for Roma students. After the introduction of the WISC-IV test, it was clear that Roma students' learning abilities could not be measured using culture-dependent tests. If the 3rd defendant had complied with this, the proportion of Roma students classified as SEN would not have exceeded their population share in Heves County. However, as detailed in the documents examined, including the E. N. Ltd. research report, the 3rd defendant failed to adhere to these requirements, both before and after the introduction of the WISC-IV test, as Roma students remained overrepresented among those classified as SEN even in 2010. Additionally, after the introduction of the WISC-IV test, the 3rd defendant used it in only 3% of cases, while in 98% of cases, the assessments were made without the involvement of a medical professional, without sufficient time for the necessary additional observations, and without the necessary inter-disciplinary approach for sensitive cases.

[54] For the reasons outlined, the appellate court concluded that the infringement had not ceased, meaning the defendants have continuously violated the right to equal treatment of Roma children of school age with normal abilities living in Heves County since the delivery of the first-instance judgment. This is because these children have been subjected to indirect discrimination based on their ethnicity (Section 9 of the Equal Treatment Act). The third defendant has implemented this by diagnosing these children as having special educational needs at a significantly higher rate than other school-age children with normal abilities in Heves County, who are not Roma, using non-culture-neutral diagnostic tools. The first and second defendants, in turn, have failed to fulfil their obligations to prevent the unlawful activities of the third defendant through adequate supervision and intervention.

[55] The plaintiffs did not contest in their appeal that the first-instance court accepted the claim for indirect discrimination rather than direct discrimination, even though it was presented as an alternative claim. However, in their appeal, since they requested the fulfilment of "all their claims," the appellate court found it necessary to note that, similar to the European Court of Human Rights, it concluded that indirect discrimination had occurred rather than direct discrimination because the defendants, since 27 January 2004, have applied laws and professional standards in a manner that disadvantages the protected group, even though these laws apply equally to everyone, thus seemingly fulfilling the equal treatment requirement.

The necessary measures to eliminate the unlawful situation

[56] In considering the plaintiffs' appeal, the appellate court also had to decide whether the defendants

could be obliged to take the measures required by the plaintiffs in order to eliminate the ongoing unlawful situation. In this regard, it disagreed with the position of the first-instance court. As the Supreme Court pointed out in its decisions Pfv.IV.21.568/2010/5 and Pfv.IV.20.085/2017/9: the fact that indirect discrimination occurred in a legal relationship governed by public law (in this case, public education law) does not preclude the application of any legal consequence of a violation of the right to equal treatment. Therefore, this fact did not prevent the enforcement of the claim for eliminating the unlawful situation. For the appellate court to draw this conclusion, it was unnecessary to interpret the Racial Equality Directive or any other EU legislation, and as a result, the plaintiffs' request for a preliminary ruling was unfounded and was therefore rejected by the appellate court.

[57] One of the fundamental requirements for any claim, including the one for eliminating the unlawful situation, is that the judgment should be enforceable, meaning it must impose an obligation that is clearly and concretely defined.

[58] However, the claim by the plaintiffs that sought to oblige the first defendant to ensure that the third defendant’s experts involved in the expert committee activities receive training on the new diagnostic tools developed by the second defendant did not meet this requirement. The plaintiffs did not specify the exact scope of persons that should be included under "the experts of the third defendant’s expert committee," nor did they define precisely which diagnostic tools developed by the second defendant should be involved or the specific content, methods, and duration of the required training. Due to the lack of these details, such a claim would not lead to an enforceable judgment, and therefore the claim in this regard was not upheld.

[59] Similarly, the claim asking the first defendant to immediately ensure the necessary work and diagnostic conditions for culture-independent measurements after receiving the final judgment also failed to meet the enforceability requirement. The plaintiffs did not specify what exactly they meant by "the necessary work and diagnostic conditions for culture-independent measurements," making it impossible to issue an enforceable judgment on this matter. Hence, this claim was also rejected.

[60] On the other hand, the part of the plaintiffs' amended claim that sought to obligate the second defendant to examine annually for five years the number of school-age children in Heves County who are perceived as Roma and diagnosed with special educational needs, and to make the resulting data and actions publicly available, was both clear and enforceable. This part of the claim was also substantively examined, as the plaintiffs had previously raised it during the first-instance proceedings. It was not considered an impermissible extension of the claim when, during the second-instance proceedings, the plaintiffs specified the exact measures they sought from the second defendant. This part of the claim was legally enforceable because the collection of ethnic data based on perception is necessary and proportional to implement international treaties promulgated into law, such as the European Convention on Human Rights and its Protocol No. 1. Collecting these data in this manner is essential because, as both parties essentially agreed, such data cannot be obtained by voluntary means alone. The second defendant is required to comply with the legal provisions governing data handling, and therefore the appellate court refrained from specifying additional recommendations for the second defendant regarding data processing.

[61] The plaintiffs also requested that the appellate court oblige the first defendant to conduct an annual professional audit starting from the year following the final judgment, concerning the application of culture-independent diagnostic methods and their effects on Roma children within special education, and to share the audit results annually with the plaintiffs by 31 December for the following five years. However, the appellate court found that this obligation was redundant because it essentially duplicated the same examination that the second defendant, in some cases with the first defendant's involvement, was already required to perform. Therefore, it was unnecessary to impose this additional requirement on the first defendant, and the first-instance decision to reject this part of the claim was upheld.

[62] Following the amended first-instance decision, the plaintiffs were largely successful in the first-instance proceedings. Therefore, they were entitled to reimbursement of their first-instance legal representation fees. The appellate court set the amount at 400,000 HUF plus VAT (508,000 HUF) in accordance with the provisions of the Regulation on Legal Costs (32/2003. (VIII.22.) IM) as this was in proportion to the work carried out by the plaintiffs' legal representatives during the five-year first-instance proceedings. Consequently, the defendants were ordered to jointly pay these costs in full.

[63] Furthermore, the second plaintiff pre-paid a litigation expense of 421,600 HUF for the travel costs incurred by the witness J.W. travelling from the USA to Hungary. This amount was also to be reimbursed by the losing defendants jointly (Section 78(1) and Section 82(1) of the 1952 Code of Civil Procedure).

[64] The losing defendants were also ordered to jointly reimburse the state for the 34,290 HUF interpreter fee that the state had advanced for the examination of witness J.W. (Section 13(2) of the 6/1986 (VI.26.) IM Regulation and Sections 78(1) and 82(1) of the 1952 Code of Civil Procedure). However, the state would cover the unpayable court fees on behalf of the exempt defendants, which were not 36,000 HUF but only 27,000 HUF in accordance with the applicable provisions of the Law on Court Fees (1990. XCIII Act).

[65] For the reasons discussed, the appellate court partially amended the first-instance judgment pursuant to Section 253(2) of the 1952 Code of Civil Procedure and upheld the remainder of the judgment.

[66] The plaintiffs' clarified appeal was partially successful in terms of eliminating the unlawful situation, and partially unsuccessful. Therefore, the parties' success ratio was equal, and the costs incurred for the plaintiffs' appeal, including their legal representatives' second-instance fees, were to be borne by the parties themselves (Section 81(1) of the 1952 Code of Civil Procedure).

[67] The unpaid court fee for the appeal would be borne by the state on behalf of the exempt defendants (Section 13(2) and 14 of the 6/1986 (VI.26.) IM Regulation)

Debrecen, 24 September 2020

Dr László Pribula, Panel Chair
Dr Tibor Tamás Molnár, Judge-Rapporteur
Dr Krisztián Árok, Judge

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