DEBRECEN COURT OF APPEALS

Pf. I. No 20.095/2010/6

O N B E H A L F O F T H E R E P U B L I C O F H U N G A R Y !

The Debrecen Court of Appeal of the name (address) of the 1st applicant represented by Dr. Farkas Lilla, lawyer (1097 Budapest, Lónyai u. 34. III/21.) and the name (address) of the 2nd applicant represented by Dr. Farkas Lilla, lawyer (1097 Budapest, Lónyai u. 34.(address of the plaintiff), the name (address) of the defendant I. represented by Dr. Makai Gabriella, lawyer (5055 Jászladány, Erzsébet u. 26.), the name (address) of the defendant I. and the name (address) of the defendant II.in the action brought against the defendants (address of the defendant (II)) for infringement of a right relating to personality, against the judgment of the Jász-Nagykun-Szolnok County Court of 9 December 2009 in Case 16 P. 20.812/2007/70, on the basis of the appeal brought by the applicants under number 71, the Court, in a hearing held on 12 October 2010, has ruled as follows

j u d g m e n t :

The judgment of the Court of First Instance does not affect the part of the judgment of the Court of First Instance not appealed against, and partially modifies the judgment appealed against, and reduces the amount of the costs of the proceedings at first instance to be paid jointly and severally by the applicants to the defendants to HUF 250 000 (two hundred and fifty five thousand).
For the rest, the judgment of the Court of First Instance is upheld.

Orders the applicants in Cases I to II jointly and severally to pay to the defendants in Cases I and II jointly and severally the sum of HUF 125 000 (one hundred and twenty-five thousand) in respect of the costs of the proceedings at first instance within 15 days.

There is no right of appeal against this judgment.

R e a s o n i n g :

According to the facts established by the Court of First Instance, until September 2003, there was a primary school in **X, Primary School Y,** run by the defendant municipality of the first instance. The primary school pupils were educated in the renovated central building on **J.** Street, where grades 1 to 4 were taught, and in the building at 2 **B.** u., which also had a gymnasium, where grades 5 to 8 were taught.

The mayor of the first defendant proposed the operation of a private foundation school at the meeting of the body of representatives of 21 November 2000. At its meeting of 28 November 2000, the Council of Representatives adopted Resolution No 303/2000 (28 November 2000), in which it declared its intention to provide the material conditions and a school complex for the operation of a private foundation school to be established in the future.

Defendant II was created by two individuals and two business entities by articles of incorporation dated September 18, 2001. The purpose of the foundation is: primary education, education, day care, language education, art education, dance, education for a healthy lifestyle, sport, physical education, education of children with mild mental disabilities, education, religious ethics education, information technology. The foundation was registered by the Jász-Nagykun-Szolnok County Court on 19 February 2002.

On 12 March 2002, the body of representatives of the defendant I. adopted a decision No 59/2002 (12.III.) on the request of the defendant II. to lease for a period of 10 years the part of the primary school building complex at No 1-3, **J.** Street X., **J.** Street, with a floor area of 1744.13 m^2 , owned by the municipality, for the operation of the A.M. Foundation Primary School, on the conditions listed in point six of the decision of the body of representatives. In the resolution, the Council of Representatives authorised the Mayor to conclude and sign the detailed lease contract and to 'order the inventory and handover of the fixtures, fittings and equipment and the visual aids'.
The defendant I. also decided to divide the school building at **J.** u. 1-3. between the municipal and the foundation school in the decision of the body of representatives No. 61/2002 (12.III.). According to that decision, 'the main entrance is used by the municipal school, as is the part to the right of the main entrance, the ground floor lobby and the upstairs part to the right of the lobby. The foundation school uses the area to the left of the main entrance and the upstairs lobby and the area to the left of the main entrance'.

On 18 March 2002, the representatives of the defendants concluded a lease contract, pursuant to which, on the basis of the decision of the Board of Representatives No. 59/2002 (12.III.), the defendant I. X., **J.** u. 1-3, with a floor area of 1744.13 m^2 , as precisely defined in the floor plan in Annex 1, is leased to the defendant II exclusively for the purpose of the operation of the primary school for grades 1 to 8 of the **A.M.** Foundation Primary School for a period of 10 years from 1 July 2002. In clause 4 of the contract, the parties agreed that the tenant would pay the landlord in advance a rent of HUF 1 000 000 for 2 years from the date of the entry into force of the contract, within 15 days of signing. The rent of HUF 1 000 000 paid in advance for two years included the overhead costs of the leased property, such as water, electricity and gas.

On the basis of the final operating permit obtained from the notary of the municipality, the defendant in the second instance has been operating the **A.M.** Foundation Primary School (hereinafter "Foundation School") in **X since** 1 August 2003, which started its operation in the school year 2003/2004 with 13 full-time teachers, 5 part-time teachers and 3 technical staff, as well as with a total of 126 pupils in 6 starting classes in the lower school and 76 pupils in 4 classes in the upper school in the school district X, **J.** u. 1-3. From that date, the lower grades 1-3 of the children attending the municipal school will attend the building at 1-3 **J.** u., while grades 4-8 will attend the building at **B.** u.

In a foundation school, you have to pay tuition fees. According to decision 4/2003 (24.II.2003) of the defendant II, the tuition fee cannot be higher than the amount of the child protection allowance. By Decision No 41/2006 (15.II.2006), the Board of Trustees of the defendant II increased the tuition fees at the foundation school to HUF 4,000 from the 2006/2007 school year, with the proviso that parents who already have three children attending the school continue to pay tuition fees of HUF 3,000 per child.
Every year, the first respondent municipality announced a competition for disadvantaged pupils to attend the foundation school.
From the 2009/2010 school year, the defendant in first instance undertook to pay the school fees of 10 children.

The operating costs of the foundation school maintained by the defendant II are financed from four sources. These are: a subsidy from the Hungarian State Treasury, a founders' subsidy, a subsidy from the municipality of the first defendant and other revenue.
The sources of the operating costs of the municipal elementary school maintained by the municipality of the 1st defendant are: the subsidy provided by the Hungarian State Treasury, the subsidy provided by the 1st defendant, municipal developments and investments.

The first defendant granted the foundation school: HUF 2 818 847 in 2005, HUF 6 262 780 in 2006, HUF 7 448 177 in 2007 and HUF 8 125 000 in 2008. In the same years, the amount of the first defendant's subsidies to the municipal school was as follows: 2005:

HUF 49 603 000, 2006: HUF 51 430 000, 2007: HUF 64 037 000, 2008: HUF 73 177 000.

In X, the first defendant municipality operates a day nursery school in two places of maintenance, the R-i Street and the P-i Street places of maintenance. The defendant I has not established the district boundaries described in the nursery school regulations and the parents are free to choose the place of enrolment for their pre-school child.

In their amended application lodged with the Court of First Instance on 23 July 2007, the applicants sought a declaration that the I. By sharing and renting out the school building which it maintains and by taking away the power of the headmaster to classify children into classes, the defendant, in the first instance, unlawfully segregated the Roma and the disadvantaged, i.e. poor, children in the municipal primary schools from the non-Gypsies and the better-off children, from the 2002/2003 school year onwards, first at class level and later at school level, on the basis of their ethnic origin and their social and financial situation, and thus unlawfully segregated them physically; and to provide Roma and multiply disadvantaged children thus segregated with an education of a lower standard, in terms of material conditions and quality, than that provided to pupils in foundation schools, thereby directly discriminating against them.
In their extended action, they also sought a declaration that the defendant I. had unlawfully segregated Roma and severely disadvantaged children from non-Gypsy and non-severely disadvantaged children at the inter-site level in the day nursery school run by it and at the inter-group level in the central nursery school on P-i Road since 27 January 2004. They requested that the defendant in the first instance be ordered to cease the infringements and be prohibited from further infringements. They requested the Court to order the 1st defendant to progressively restore the original situation that existed prior to 1 August 2002, the date of enrolment, and to express regret in a communication from the 1st defendant to **W for the** infringement committed. In their application, they also sought an order that the defendant I pay a fine of HUF 1 000 000 in the public interest and a declaration that the lease agreements between the defendants I and II were in breach of the Civil Code. Article 75(3) and Article 200(2) of the Civil Code. Therefore, they requested that the defendant II be ordered to restore the original situation.

In their action, the applicants claim that, since September 2003, the education of primary school pupils in **X has been** divided between pupils in the foundation school and pupils in the municipal school.
The situation of pupils attending municipal schools is also more disadvantageous than that of pupils attending foundation schools in terms of both material and staffing conditions, as the latter have access to classrooms, a gym and a renovated school building for all grades, children attending municipal schools, on the other hand, had access to a renovated school building only in grades 1 to 3, but in these grades neither classroom facilities nor a gym were provided locally.
Referring to the final report of the OCRI of 27 January 2004, they claimed that, in addition

to the differences in material conditions, there were also differences in personal conditions which had and still have a negative impact on the psychological and moral development of children attending municipal schools. This difference arises from the segregation in the foundation and municipal buildings, since the foundation school (and therefore the part of the building it occupies) is attended predominantly by non-Gypsy and non-semi-presented, 'i.e. better-off' children, whereas the municipal school is attended predominantly by Gypsy and semi-presented, i.e. poor children. The segregation is not based on the free choice of the pupils and their parents, as the vast majority of parents of children who remain in the municipal school are not and have not been in a position to pay the foundation school fees (previously HUF 3,000 per month, now HUF 4,000 per month) and thus choose the foundation school.

According to the applicants, at the initiative and with the active involvement of the mayor, the predominantly gypsy and almost exclusively cumulatively disadvantaged pupils of the municipal school were physically segregated from the majority, better-off pupils on the basis of their ethnicity and social and wealth status. And they were directly discriminated against in terms of the physical conditions of their education, the quality of the service (curricular content) and the local budget support they received. Those conduct of the defendant I (as the de facto creator and maintainer of that situation as the creator and maintainer of the foundation school) is unlawful under Articles 8 and 10(2) of Act CXXV of 2003 on equal treatment and the promotion of equal opportunities ('the Ebtv'), which cause psychological and moral, non-material harm to the persons concerned in terms of segregation.
With regard to the unlawful segregation in the kindergarten, the applicants claimed, on the basis of the situation analysis of the equal opportunities expert **Sz.O.,** that 40.4% of the 274 kindergarten children are cumulatively disadvantaged (HHH.) Compared to the central kindergarten on P-i út, the proportion of disadvantaged (HH.) children is 24% higher, 90% of whom are gypsies.
As a ground for the co-action of the defendant in the second instance with the defendant in the first instance, the Pp. 51(a) of the First Instance, according to which several defendants may be sued together if the decision in the action would extend to the parties to the action even without their participation in the action.

The nullity of the lease contract between the defendants was sought on the grounds, on the one hand, that the defendants had concluded the contracts in circumvention of the right of consent of the C.K.Ö. of X and in violation of the relevant provisions of the Public Education Act and, on the other hand, that they violated the personal rights of the Roma and poor children represented by the plaintiffs. The latter infringement of the right to personality was sought in the special form of violation of the requirement of equal treatment by unlawful segregation in educational institutions, as regulated by Article 27(3)(a) of the Ebtv.

The 1st and 2nd defendants primarily sought the discontinuance of the action, claiming that the right asserted in the plaintiffs' action constituted a matter adjudicated with regard

to the judgments of the Jász-Nagykun-Szolnok County Court in Case No. 12 P. 20.839/2002/10 and Case No. 12 K. 27.142/2005/19. The applicants counterclaim that the action should be dismissed in its entirety and that the applicants should be ordered to pay the costs. In that connection, they submitted that the applicants did not have standing to bring an action for a declaration that the lease agreement between the defendants was null and void or invalid on any other ground. In their view, the right to bring an action for infringement of personality rights on the ground of breach of equal treatment was conferred on the applicants from the entry into force of the Equal Treatment Ordinance on 27 January 2004, and therefore there was no possibility of establishing unlawful segregation or discrimination on the part of the defendants prior to that date. It was submitted that the lease contract between the defendants was concluded before the entry into force of the Ordinance and that the legality of the decisions of the Municipal Council of the 1st defendant, Nos 59/2002 (12.3.2002) and 61/2002 (12.3.2002), which conferred the right to do so, had already been finally and conclusively established by the administrative court.

According to their defence, it cannot be established on the basis of the Ebtv. that the defendant in the first instance infringed the right to equal treatment, the right of personality, which the applicants claimed in their application. In this connection, they submitted that the two schools operating side by side in the municipality of X are independent educational institutions, each with its own independent maintainer. The defendant I is not the maintainer of the defendant II's school. In their view, the two schools are therefore not in a comparable position. It was also submitted that by sharing the school building, by entering into the lease agreement and by providing subsidies for the operation of the foundation school run by the defendant II, the defendant I exercised the fundamental constitutional rights of the municipality and made property decisions and provisions in accordance with the provisions of the Municipal Act. The plaintiffs have no right to control the management of the municipality, only the State Audit Office is entitled to do so.

The defendants disputed that the first respondent would in any way separate the pupils attending the municipal school from those attending the foundation school. In this context, it was submitted that parents may enrol their children in the school of their choice under the Public Education Act. They claim that all primary school pupils **in X attend the** school to which their parents have enrolled them. The defendants stressed that, in addition to the fact that the sharing of the school building and the conclusion of the lease were not unlawful, the first defendant had achieved the objective of ending the exodus of children from the municipality and of primary school children living and studying together in an integrated manner in the municipality where they live.

In opposition to the action for a declaration of segregation in the area of kindergarten education, the defendants stressed that no district boundaries are laid down for kindergarten education and that the children who apply for admission to both places of the municipal kindergarten attend the two places of the kindergarten.

The Court of First Instance, in its judgment number 70, after taking evidence, dismissed the action brought by the applicants in the first and second forms and ordered them to pay the defendants HUF 250 000 each in costs within 15 days. It held that the costs of the proceedings were to be borne by the State.

In the grounds of its decision, the Court held that the applicants did not have standing to bring an action for annulment of the lease agreement between the defendants, in the absence of the probable legal interest required by Article 234(1) of the Civil Code, and that they were not entitled to bring an action for a declaration of breach of the right to equal treatment and the application of legal consequences for the period prior to the entry into force of the Ebtv.
At the same time, the court validly examined and dismissed the plaintiffs' action for a declaration of invalidity of the lease agreement between the defendants on the grounds of lack of consent of **C.K.Ö.** pursuant to Section 215(1) of the Civil Code. In accordance with Article 44/A(1)(b) of the Constitution, Article 9(1) and Article 80(1) of Act LXV of 1990 on Local Governments (hereinafter referred to as the "Act on Local Governments"), Article 9(1) of the Civil Code, Article 80(1) of the Civil Code, and Article 44(1)(b) of the Civil Code, the Court of First Instance is entitled to reject the application for a declaration of nullity. 112 of the Civil Code, and Article 102(10) of Act LXXIX of 1993 on Public Education (hereinafter referred to as the Public Education Act), the legal position was that the municipality of the first defendant exercised its ownership rights when it concluded a lease contract with the second defendant, and therefore the consent of the CKÖ was not required for the validity of that contract. The applicants also unsuccessfully sought a declaration that the lease contract was invalid on the basis of Article 207(6) of the Civil Code on the ground that it was a sham contract and in fact disguised a public education agreement between the parties, because it was clear from the facts of the case that the lease contract expressed the real intention of both parties as regards its conclusion and performance, and the lease contract cannot be considered a public education agreement because of the different legal regulation of the two types of legal transaction.

According to the judgment of the Court of First Instance, the applicants have had the right to bring an action for a declaration of infringement of the right to equal treatment and for the application of legal consequences from the entry into force of the Act on 27 January 2004, on the basis of the authorisation granted by Article 20(1)(c) of the Equal Treatment Act. The applicants have the right to bring an action in the public interest for the protection of the rights of a group of Roma ethnicity on the ground of breach of the requirement of equal treatment under Paragraph 8(e) of the Ebtv. I. 20.683/2005/7 of the Court of First Instance of the Debrecen Region, referred to in the grounds of the pre-trial court's decision, disadvantaged status is not a characteristic which is an essential feature of the personality of an individual and which, as such, is a condition for the right of a social and interest representation organisation to bring proceedings under Article 20(1)(c) of the Ebtv.

In deciding the merits of the plaintiffs' claim for a declaration of ethnic segregation and discrimination and the application of legal consequences, the court examined whether "the parties to the case at hand acted in accordance with the law, and whether the defendants in the first and second instance complied with the relevant legislation in the case". In making this assessment, in determining whether the conduct of the defendant I was unlawful or lawful, the Court applied the provisions of the Civil Code. 76 of the Civil Procedure Act, the provisions of § 10(2) of the Civil Code, § 27(3)(a) of the Civil Procedure Act and § 8 of the Act, and § 19 and § 7(2) of the Civil Code as the applicable rules of evidence. It stated that unlawful segregation under the legislation occurs in an educational institution if persons or a group of persons with the characteristics specified in Section 8 of the Ebtv. are segregated from others on the basis of their protected characteristics, such as belonging to a particular national or ethnic minority, without being expressly permitted by law.
The Court did not examine the physical level of the separation which the applicants were claiming in the action for a period prior to the entry into force of the Ebtv., since, as it had already held, the lease concluded before the entry into force of that law did not affect a right of personality, and, under Article 12(2) of Law XI of 1987 "On Legislation", a law cannot impose an obligation or declare conduct unlawful before its promulgation.
Based on the situation at the time of the entry into force of the Ebtv., the applicants failed to prove the existence of segregation at the factual level. The mere existence and operation of the two schools (the municipal and the foundation school) did not constitute unlawful segregation. (In this context, the Court noted that **in X,** the parents requested the establishment of a private school, which is provided for by Article 13(2) of the Public Education Act. The foundation school, as already established by the Court in several proceedings, was legally established and operates legally, and all children who apply are admitted to it, regardless of their ethnic or national minority affiliation. In refusing to accept the testimony of the applicant's representatives **K.L.** and **M.V. in** the proceedings as a rebuttal, the Court found, on the basis of a decision of the Board of Trustees of the defendant in the second instance, that the Roma children whose enrolment had been unsuccessful, as referred to in the testimony of the witnesses, had not fulfilled the conditions for admission as pupils.
The fact that the foundation school has to pay monthly fees does not in itself constitute segregation, "bearing in mind that no equivalence can be drawn between persons of Roma ethnicity and poverty" (In this context, it was stated as a fact that 30% of the pupils of the foundation school are children of Roma origin or from families in difficulty.)
There is no unlawful separation between the two schools merely by virtue of the conclusion or existence of the lease.

In view of all the above, there is no causal link between the detriment alleged by the applicants and the protected characteristic, and the requirement of equal treatment has therefore been complied with by the defendants in the first and second instance.
According to the judgment of the Court of First Instance, the applicants have failed to

prove that the defendant municipality in first instance, by merely concluding a lease agreement with the defendant in second instance, treats the members of the group represented by the applicants less favourably than the pupils of the foundation school, which is a condition for establishing direct discrimination under Article 8 of the Ebtv. In order to establish less favourable treatment, it was necessary to prove that the quality of the education provided in the municipal school did not reach the level of the professional requirements set out in the professional standards issued or did not comply with the professional rules, pursuant to Article 27(3)(b) of the Ebtv.
In this context, the court held that the transfer of part of the **J.** Street school building by the defendant I to the foundation school established by the defendant II on the basis of the lease agreement did not disadvantage the pupils of the municipal school, because the upper school pupils of the latter had previously attended the **B.** Street building, while the lower school pupils continued to attend the **J.** Street building up to grades 1-3. Contrary to the applicants' assertions, the Court of First Instance, on the basis of the findings of the 1st group of experts of the OCRI investigation carried out on 1 October 2003, which were available at the time of the proceedings, was satisfied that 'the co-location of the two schools in the same building, the use of the premises in the same building, the distribution of the various equipment and facilities did not result in a situation which would lead to discrimination between pupils in the different parts of the building'. The applicants have also failed to prove their claim that the defendant's school, the foundation school, could not function without the defendant's municipal subsidy. Ezzel szemben a bíróság a perben beszerzett adatok - így különösen a felperesek felkérése alapján magánszakértői véleményt készítő **T. T.** tanúvallomása alapján - megállapította, hogy számszakilag önmagában nem jelentős összegű az I. rendű alperes által a II. He concluded that the mere fact that the municipality granted the subsidy (which is lawful under § 1(6), § 80(1)(b) and § 89(3) of the Act) does not make the defendant the maintainer of the foundation school.

In order to prove the plaintiffs' claim that the foundation school could not function without municipal support, the court of first instance did not grant the plaintiffs' request for the appointment of an expert, "since the two schools, given their separate maintenance, are not in a comparable situation in terms of material facilities, equipment and teaching.
The Court of First Instance also refused to hear **Dr. "Z"** (Head of the Office of the Parliamentary Commissioner for National and Ethnic Minorities) and **B-L** as witnesses, as the applicants had requested, in view of the fact that both witnesses were to be heard for the period prior to the entry into force of the Ebtv. The examination of witness **D.J.** was waived because the applicants had submitted the witness's articles and the court had not (could not) take evidence for the period prior to the entry into force of the Ebtv.

In the light of the above, the Court of First Instance did not consider any of the applicants' claims to be well founded and therefore dismissed their action in its entirety.
The perverted plaintiffs are subject to the Pp. Pursuant to § 78 (1) (in accordance with Art. 334 (2) of the Civil Procedure Act) to pay the defendants the amount of the lawyer's fees as costs of the proceedings, as determined pursuant to § 2 (1) a) of IM Decree

32/2003 (VIII. 22).

The applicants appealed against the judgment of the Court of First Instance.
In their appeal, they requested, first, that the judgment of the first instance be altered in accordance with their original application and, second, that the judgment be set aside pursuant to Article 252 (2) of the Civil Code and that the court of first instance be ordered to conduct new proceedings and issue a new decision. In support of their appeal, the appellants submit that the court of first instance erred in its findings of fact in certain respects and made errors of fact in other respects. It drew erroneous conclusions from the facts thus established, as a result of substantive and procedural errors. The Court of First Instance defined segregation by ethnicity and socio-economic status contrary to Article 10(2) of the Ordinance and failed to apply the legal provision governing the apportionment of the burden of proof in the present case, Article 19 of the Ordinance. It also erred in finding that the amount of the legal costs to be paid by the applicants to the defendants was excessive in the absence of a legal representation contract and that the award of legal costs of HUF 250 000 each to each of the defendants was unfounded, since only two of the ten points of the application concerned the second defendant.

The Court of First Instance's finding that the applicants did not have standing to seek a declaration that the lease contract was null and void because they had not demonstrated the legal interest required for that. The applicants had already stated in their application that they had a legal interest in the annulment of the contract, in that the contract, which appeared to regulate property relations, in fact had a fundamental impact on the situation of the children they represented in the public education system and, in that context, on their equal opportunities under the Law on public education. In the grounds of its judgment, the Court of First Instance itself stated that 'the foundation school was able to start operating, subject to the lease agreement between the defendants in the first and second instance and the sharing of the building'. It was this causal relationship which turned what appeared to be a property relationship into a personal relationship (or a public education relationship).

In relation to the right of action, the Court of First Instance also erred in its finding that the applicants were not entitled to bring an action on the basis of a cumulative disadvantage under Article 20(1)(c) of the Ebtv. In support of this position, the applicant submits that the decision of the Debrecen Court of First Instance, referred to in the judgment of the Debrecen Court of Appeal Pf. I. 20.683/2005/7 of the Court of First Instance of the Debrecen District Court of Appeal cannot be applied in the present case, firstly because the Court of First Instance - in the absence of the legal regulation of the time - had not yet examined, and could not have examined, the cumulatively disadvantaged situation, and secondly because the basis of the examination in that case was not the disadvantaged situation regulated by Section 121 of the Public Education Act, which is the subject of the present action, but the disadvantaged situation in general. (According to the plaintiffs' arguments, set out in detail in the appeal, disadvantage and

then cumulative disadvantage have been the basis for measures to create opportunities in the public education sector since 2002, and the government measures to remedy them - in the interests of school success - have been taken, as the plaintiffs have recalled in detail. In Hungary, the package of so-called equalisation measures launched in 2000 to promote integration through methodological and competence-based development is based on the concept of cumulative disadvantage, which corresponds to the protected social and material situation referred to in the Constitution and the Opportunities Act. In view of this, wealth and social status cannot be considered an essential characteristic of non-personhood.)

In their appeal, the applicants consider the legal position of the court of first instance to be erroneous, according to which the conduct of the defendants prior to the entry into force of the Ebtv. on 27 January 2004 could not be taken into account and examined in the assessment of their application for a declaration of infringement of personality rights and the application of the consequences thereof. According to their reasoning on appeal in this regard, since the unlawful situation (unlawful segregation) was the result of a process which began before the entry into force of the law on equal opportunities (during which period, moreover, the defendant in first instance was required to comply with the requirement of equal treatment and the prohibition of discrimination by a number of laws in force at the time, as also indicated by the applicants), without a correct finding and description of the segregation and discrimination alleged by the applicants as a process leading to the consequences, no well-founded decision could have been reached in the case.
According to the appeal, the findings of the judgment of the Court of First Instance that:
- it was not proven that the defendant in first instance decides on the pedagogical work and management of the foundation school;
- there is no separate kindergarten district boundary for the member kindergartens; (because it is contrary to the defendant's preparatory document.)
- there were no complaints about segregation,
- the second respondent school does not discriminate between children at the time of admission.

They complained that the court of first instance had misapplied the rules on the burden of proof and the burden of proof in several places. The rules of Article 19 of the Equal Treatment Ordinance, which differ significantly from the general rules of the Civil Code as regards the apportionment of the burden of proof, had to be applied in the determination of their action for breach of the requirement of equal treatment. Accordingly, the plaintiffs had to establish the level of physical segregation (between foundation and municipal schools) and the ethnic and socio-economic status of the children they represented, and to identify the relevant act of the defendant I in respect of the action for segregation brought solely against it. The applicants have fully complied with this burden of proof. On the basis of the Equal Opportunities Analysis, the newspaper articles submitted, the testimonies of **O.S.**, **Ms S.R. B.** and **Ms M.V. and the** testimony of the legal representative of the second applicant, they established the proportion of Roma and

severely disadvantaged pupils in the municipality and the foundation schools. According to this, the vast majority of pupils in the municipal school are gypsies and 61 % are semi-disadvantaged, whereas in the foundation school the vast majority of pupils are of majority ethnicity and only 14 % are semi-disadvantaged. They criticised the fact that these data on the primary schools were omitted from the facts of the case and that the Court of First Instance had based its finding on the percentage of Roma pupils in the Foundation School solely on the testimony of **Ms S.R. B, despite the fact** that her testimony was contradicted by the testimony of the other witnesses and the legal representative of the applicant in the second instance.
The applicants considered it prejudicial that the content of the documentary evidence submitted by them at first instance was largely excluded from the facts of the judgment without justification. Thus, the reports, statements and letters prepared by **N.E.K.J.** and Jász-Nagykun-Szolnok County Council on their investigations and the presentations of the municipal representatives recorded in the minutes of the meetings of the Council of Representatives were omitted. Documentary evidence relating to the education of the Roma minority and a description of the financial resources allocated by the 1st defendant to the 2nd defendant and the ratio of foundation to self-government support were also annexed. The plaintiffs alleged direct discrimination in physical and educational professional services based on segregation and presented private expert evidence. They invoked the provisions of § 10(2) of the Ebtv. and the court practice developed on the basis of it (cited in support of which they cited the LB. Pfv. IV. 20.936/2008/4), segregation is in itself a disadvantage. Therefore, the applicants were not required to allege any likely disadvantage other than physical segregation. Contrary to the erroneous finding of the Court of First Instance, in order to establish that the defendants had breached the requirement of equal treatment by their impugned conduct, the applicants did not have to prove a causal link between the disadvantage alleged by the applicants and the protected characteristic. Requiring the court of first instance to do so is contrary to the rule of proof laid down in Article 19 of the Regulation.

According to the applicants' appeal, the causal link is also established, since the Court of First Instance itself found in its judgment that the foundation school was able to start operating, in view of the lease agreement between the defendants in the first and second instance and the sharing of the building. According to the appeal, the applicants did not have to prove that the defendant I had an intention to exclude Roma children from education altogether in order to win the case, because the law does not require such an intention. On the contrary, it appears from the grounds of the judgment at first instance that the Court of First Instance assessed the lack of proof of this against the applicants.
In addition to wrongly finding that the applicants had failed to meet their burden of proof, the Court of First Instance also erred in its assessment of the possibility of excusing the defendants under Article 19 of the Ebtv. There is no excuse for ethnic segregation and direct discrimination under § 7 of the Opportunities Act. IV. 20.936/2008/4.)
In addition, the applicants also set out in detail in their appeal why, in the event of a possibility of excuse, the findings of the court of first instance, assessed as such in its judgment, would be unfounded.

In their cross-appeal, the defendants repeated their pleadings and sought to have the judgment of the Court of First Instance upheld, essentially on the correct grounds.

The Court of First Instance, in the absence of an appeal, did not affect the judgment of the Court of First Instance, pursuant to Article 253(3) of the Civil Code, in the part of the judgment dismissing the action of the first defendant against the applicants for violation of the right to equal treatment of Roma and multiply disadvantaged children in the day care centre in the municipality of X. In their appeal, the applicants sought to have the judgment of the court of first instance 'altered pursuant to Article 253(3) of the Civil Code, with the Court of First Instance upholding the original application'. The applicants' original application, lodged on 23 July 2007, did not contain a claim for segregation and discrimination in the kindergarten - a claim which they only raised later in the proceedings, at the hearing on 22 September 2009.

The appeal is well founded in part - as regards the costs of the proceedings - and largely unfounded.

The judgment of the Court of First Instance dismissing the appeal is well founded. However, the reasons for the correct decision on the substance of the case - also in the light of those relied on in the appeal - require in part clarification and in part supplementation.

In their amended action, the applicants brought several claims, including a claim for annulment of the lease between the defendants on the basis of several substantive legal rules.
In view of the defendants' cross-application, the court had to examine the plaintiffs' standing to bring all the actions. The Court of First Instance's position on this point was not entirely shared by the Court of First Instance.

Section 20 (1) (c) of the Labour Code, which is also referred to by the applicants as the legislation authorising them to bring an action, authorises social and interest representation organisations to bring an action under labour law or personal rights law, if the conditions set out therein are met, if a violation of the requirement of equal treatment or an imminent threat thereof can be established.
Any person whose personal rights are infringed may be subject to the Civil Code. 84 (1) of the Civil Code.
According to Article 234 (1) of the Civil Code, a void contract is invalid. The legal consequences of an invalid contract (either on the grounds of nullity or because of a successful challenge) are set out in Section 237 of the Civil Code. Since the nullity (invalidity) of the contract is not the basis for the legal consequences under the Civil Code in the event of a breach of personality rights, the plaintiffs do not have the legal authority

to bring such an action - or to bring such an action - under Article 20(1)(c) of the Civil Code. Therefore, the causes of action for a declaration that the lease contract between the defendants is null and void or invalid for any other reason are governed by the Civil Code. 3(1) of the Civil Procedure Code could only be based on the justification of their legal interest in the dispute.

In order to bring an action for a declaration that the contract at issue is invalid in the absence of the consent of a third party (pursuant to Article 215 (1) and (3) of the Civil Code), the plaintiffs must (pursuant to Art. 3(1)), the Court of First Instance did not find that the applicants had an interest in the dispute which gave rise to the action for annulment of the decision of the Court of First Instance.
The ground of invalidity provided for in Section 215 (1) of the Civil Code is not a ground of nullity, therefore the provision of Section 234 (1) of the Civil Code is not applicable to it either. Consequently, the right to bring an action for a declaration of the invalidity of the lease contract between the defendants under this substantive law is reserved to the plaintiffs - in accordance with Art. (The Court notes that if the contract required the consent or approval of a third party - which it did not examine because of its legal position - the applicants claim that it was not their contract, but that of **C.** For all these reasons, the court of first instance could not have examined the substance of the need for the consent or approval of a third party for the lease contract between the defendants, and its findings in this respect are therefore set aside.

The position of the Court of First Instance also differs somewhat from that of the Court of First Instance as regards the applicants' entitlement to bring an action for annulment of the contract between the defendants.
The applicants' right of action for a declaration of the nullity of the contract between the defendants could not be based on Article 20(1)(c) of the Employment Act, because that Act empowers interest representation and social organisations to bring only actions on the law of personality and employment.
At the same time, the court of first instance was correct in finding that the applicants had the right to bring an action for a declaration of nullity of the contract between the defendants under Article 207(5) of the Civil Code and, as a result, the decision on the merits of the application was also correct. In that regard, and having regard only to the pleas in law raised in the defendants' cross-appeal, the Court merely adds the following to the grounds of the judgment of the Court of First Instance:
It is settled case law that in order to sue a third party not party to the contract for the invalidity of the contract on the basis of a non-statutory power, it is necessary to require the existence of a direct legal interest based on substantive law. Such a direct legal interest may exist in the case of a person who acquires a right, obtains a benefit or is relieved of an obligation in the event of a declaration of invalidity of the contract. In the present case, this had to be assessed on the basis of the applicants' findings of fact and legal reasoning. In this context, the applicants argued, as they reiterated in their appeal, that the contracts, which appeared to regulate property relations, in fact had a fundamental impact on the situation of the group of children they represented in public

education and, in particular, on their equal opportunities in public education. The Court of First Instance agreed with the applicants' reasoning that, if the lease contract between the defendants was a sham contract and in fact disguised a public education agreement, the infringements alleged in the applicants' action on the right to personality could be established.
There was therefore no obstacle to the court examining the merits of whether the lease agreement between the defendants was a sham for the reason alleged by the plaintiffs and therefore invalid.

The court of first instance reached the correct legal conclusion from the facts correctly established by fully exploring the relevant facts necessary for the adjudication and decision of the dispute, the reasons for which were shared by the Court of First Instance in its judgment, and it highlights the following only in relation to the appeal:
At the time of the conclusion of the contract at issue in the case, Section 207 (5) of the Civil Code contained a provision on the sham contract. According to this provision, an implied contract is null and void; if it disguises another contract, the contract is to be judged on the basis of the disguised contract. A sham is a bilateral, knowing conduct where the parties have a common intention not to conclude the contract which would arise under their respective declarations or to conclude instead a contract with a different content and a different legal effect. The purpose of the sham is usually to circumvent the law or the right or legitimate interest of a third party.
According to the consistent case law, the nullity of a pretext can only be established if all the contracting parties pretended to have the intention to conclude the contract and in fact each of them intended to enforce the provisions of another contract (BDT 2007, 1617, BH 1998, 292).
The burden of proving this fact in a lawsuit lies with the party claiming that the contract is null and void.
In the present case, the 1st and 2nd defendants have entered into a lease agreement, as evidenced by a deed signed by their representative. The plaintiffs, on the other hand, claimed that the lease agreement was a sham, but that the real intention was to conclude a public education agreement between the first defendant municipality and the second defendant foundation and to circumvent the interests of the children of the group represented by the plaintiffs by sham leases.

The conclusion, content and conditions of the public education agreement are fully regulated by Article 81 of the Public Education Act. Pursuant to Article 81(1)(e) of the Public Education Act, in force in March 2002, non-municipal or non-state educational institutions may participate in the implementation of the municipal tasks defined in this Act within the framework of a written agreement (public education agreement) concluded between the maintainer and the local authority responsible for the provision of the tasks. Within the framework of the public education agreement, education and training shall become free of charge for children and pupils, and the provisions of point d), according to which admission to kindergarten, school, dormitory and the maintenance of the pupil's legal status and membership of dormitories may be subject to a payment obligation in a

written agreement, shall not apply within the framework of the agreement. According to the Ministerial Explanatory Memorandum to Article 81 of the Public Education Act, participation in school education under a public education agreement becomes free of charge for the child or pupil, as provided for in the agreement.
On the contrary, the plaintiffs themselves claimed (and it was not disputed in the lawsuit) that the foundation school had to pay tuition fees from the beginning. It follows that there was (could be) no public education agreement between the defendants. This, together with the fact that the part of the school complex owned by the defendant I which was shared and defined in the lease agreement was actually transferred by the defendant I to the educational institution maintained by the defendant II for use by the latter (it is still used by the foundation school today), confirms the existence of a genuine purpose under the lease agreement (transfer for rent). The fact that in the lease contract the defendant in first instance also assumed an obligation to compensate the defendant in second instance for the rent does not render the contract invalid on the ground of sham.
Nor can the fact that the first respondent municipality has provided and continues to provide financial support to the foundation school be inferred from the fact that the lease contract is not genuine. This fact does not make the parties' agreement a public education agreement, because, apart from the fact that it cannot be proved that there was in fact no agreement of will between the defendant in the first and second instance to conclude a lease contract, Article 89(3) of Act LXV of 1990 on Local Governments (the Local Government Act) expressly authorises the defendant in the first instance to provide subsidies for the operation of institutions maintained by others.

In its grounds of appeal, the Court of First Instance set out in detail its arguments concerning the unfounded nature of the application for a declaration of lack of substance and reached the same conclusion as the Court of First Instance. Furthermore, the reference in the appeal to the fact that, pursuant to Article 95/C(4) of the Public Education Act, as amended in the meantime, the foundation school is to be regarded as having been involved in the performance of the basic task of the municipality since 3 July 2008, cannot be relevant to the question of whether the lease contract is invalid on the ground of pretense, since the pretense of the contract is a defect in the parties' intention to conclude the contract, which must exist at the time of conclusion of the contract.

On the basis of the foregoing, the court of first instance dismissed the plaintiffs' action for a declaration that the defendants' contract was null and void.

Despite the fact that the applicants' action for a declaration of the nullity (non-existence) of the lease contract did not succeed (or even that they had no right to bring such an action), their action had to be examined on the merits to determine whether the lease contract had resulted in the unlawful segregation (capable of establishing an infringement of personality rights) of the members of the groups represented by the applicants.

Contrary to the claims made in the appeal, the court of first instance also fully explored the facts of the judgment to the extent necessary to resolve the dispute that arose in it,

and the Court of First Instance shared the legal position on the issue of unlawful segregation.
In the light of the appeal, it considered it necessary to highlight the following in this context:

Paragraph (1) of Article 4/A of the Public Education Act stipulates that those involved in the organisation, management and operation of public education and in the implementation of its tasks shall comply with the requirement of equal treatment when making decisions and taking measures. Violation of the requirement of equal treatment is prohibited by the Civil Code. 76 of the Civil Code, constitutes a violation of the right to privacy.

The Public Education Act. Pursuant to § 5 of the Act on the Education Act, the provisions of the Act on Equal Treatment shall also apply in the application of § 4/A of this Act. Section 7(1) of the Ebtv. specifically mentions unlawful segregation among the (exemplary) behaviours that result in a violation of the requirement of equal treatment, the definition of which is given in Section 10(2) of the Act. According to the provision of this place of legislation in force prior to 1 January 2007, unlawful segregation is conduct which, on the basis of the characteristics defined in Section 8 of the Act, segregates certain persons or groups of persons from others without reasonable justification based on an objective assessment. Since 1 January 2007, a provision which, on the basis of the characteristics defined in § 8, separates certain persons or groups of persons from persons or groups of persons in a comparable situation to them, without being expressly permitted by law, is unlawful separation within the meaning of § 7(2) of the EbtvB Act, as amended by Act CIV of 2006.
Specific rules in the field of education and training are contained in Articles 27-30 of the Ebtv. According to Article 27(3)(a) of the Equal Treatment Act, the unlawful segregation of a person or group within an educational institution or within a section, class or group established within it constitutes a breach of the requirement of equal treatment.
With regard to the date of filing of the application, the rule of evidence applicable in the present action was that, according to Article 19 of the Ebtv, the applicants had to prove first of all that the person or group they represented had suffered damage as a result of unlawful segregation, as alleged in the action. Once they had proved that, it was sufficient for them to show that the person or group suffering harm had suffered - or was in imminent danger of suffering - and that the person or group suffering harm had, at the time of the infringement, one of the characteristics defined in Article 8, as they rightly claimed in their appeal.

In their appeal, the applicants complained that the Court of First Instance had failed to find unlawful segregation on the basis of the lease.
By the conclusion of a lease contract based on the authorisation of the body of representatives of the defendant I, a property law relationship was established between the defendants, as a result of which the defendant I transferred parts of the building and tangible assets to the defendant II foundation. In fact, the defendant in first instance

stipulated in the lease that the leased part of the building which it owned was to be used as a primary school for classes 1 to 8. However, the lease does not contain any provision as to the education to be provided by the foundation school which the defendant in the second instance is to operate in the leased property, and thus as to the staffing of that school. The Court of First Instance was therefore correct to find that the members of the group represented by the applicants were not excluded by the lease from the benefit of the education provided by the foundation school. In view of the fact that tuition fees are payable at the foundation school, the defendant in first instance cannot be held to be unlawfully segregated for two reasons under Paragraph 10(2) of the Ebtv. First, because the payment of tuition fees in the foundation school is not the provision of the defendant in first instance, but of the defendant in second instance, and secondly, because the two educational institutions in the building at 1-3 **J.** u. X., X., the foundation school and the municipal school, are legally separate institutions and have different owners. Therefore, pupils attending the municipal school are not in a comparable situation to pupils attending the foundation school, which is a legal condition for unlawful segregation under Article 10(2) of the Ebtv.
It is also clear from the legal separation of municipal and foundation schools (their separate institutional nature) that the violation of the requirement of equal treatment in the field of education and training (Section 27 (3) a) of the Ebtv.) is out of the question in the given case.
On this basis, the court of first instance correctly found, contrary to the arguments of the appeal, that the plaintiff's claim for breach of equal treatment was unfounded in the absence of unlawful segregation. In that regard, the fact that the quality of education in the municipal school was inferior to that in the foundation school was no longer a matter for further consideration in the proceedings, and their appeal on the grounds of irregularity and inadequacy of the evidence in that regard and the fact that the facts were not established was therefore also unfounded. The Court of First Instance dismissed the applicants' evidentiary submissions on this point without any procedural irregularity.

In this connection, the Court of First Instance points out, in the context of the applicants' appeal, solely on a point of fact, that, contrary to the applicants' contention, the Court of First Instance correctly found that the defendant did not set any boundaries for admission to the nursery schools run by it. The Court of First Instance did not infringe any procedural rule by not listing in its judgment all the relevant documents relied on by the applicants in their appeal.
Pursuant to Paragraph (1) of Article 221 of the Civil Procedure Code, the court shall state the facts of the case in its judgment to such extent and shall state the reasons for its decision on the merits to such extent as is relevant for the resolution of the dispute. The facts and legal reasoning established by the first-instance court in its judgment were sufficient to support the correct decision on the merits.

The Court of First Instance found the applicants' appeal against the provisions of the judgment of the Court of First Instance concerning the legal costs to be well-founded in

that, pursuant to Article 2(1)(a) of Decree 32/2003 (VIII. 22.) IM, the lawyers' fees incurred by the defendants as the basis for determining the amount of the legal costs at first instance, which were attached to the pleadings during the proceedings at first instance, were 70. In the 'Lawyer's retainer agreement', dated 1 October 2007, annexed to the documents at first instance under number 70, the parties agreed to pay a total of HUF 200 000 + 20 % VAT to the lawyer representing both defendants in the proceedings, with 50-50 % of the fees being paid. In that regard, the Court of First Instance infringed the law by ordering the applicants to pay the sum of HUF 250 000 in legal costs to the first and second defendants separately, in breach of Article 2(1)(a) of Decree No 32/2003 (22 July 2003).

In view of all the above, the Court of First Instance, without affecting the provision of the judgment of the Court of First Instance not appealed against, altered the judgment of the Court of First Instance in the part concerning the costs of the proceedings pursuant to Article 253 (2) of the Civil Procedure Code, and reduced the amount of the attorney's fees to be paid jointly to the defendants as costs of the proceedings at first instance to HUF 200 000, in accordance with the terms of the contract of engagement between the parties, by applying the provisions of Article 32/2003. (VIII. 22.) IM, the applicants are also liable to pay VAT on the lawyer's fees, at the rate of 25 % from 1 July 2009, as costs of the proceedings, and upheld the remainder.

The applicants' appeal was only marginally successful - half of the costs of the first instance proceedings - and they are therefore obliged to bear their own costs of the second instance proceedings arising from the lawyer's fees, and to pay the costs of the second instance proceedings themselves, in accordance with the provisions of the Civil Code. They are obliged to pay the defendants the costs of the second instance proceedings arising from the lawyer's fees, the amount of which the Court of First Instance fixed, in accordance with Article 2(1)(a) of Decree No 32/2003 (VIII/22) IM, in accordance with the contract of engagement between the parties, at 50 % of the lawyer's fees at first instance plus VAT.

Due to the personal exemption of the parties from paying fees pursuant to Article 5(1)(b) and (f) of Act XCIII of 1990 on Fees, the unpaid appeal procedure fees shall be borne by the State.

D e b r e c e n, 12 October 2010

Dr Csikiné dr. Márta Gyuranecz s.k. President of the Chamber, Dr András Riczu s.k. Judge-Rapporteur, Dr Pál Bakó s.k. Judge

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