Budapest-Capital Regional Court

Case number: 105.K.704.241/2021/11.

Plaintiff: Plaintiff

(adress)

Representative of the plaintiff: dr. Adél Kegye, Attorney

(adress1)

Defendant: Commissioner for Fundamental Rights (1055 Budapest, Falk Miksa utca 9-11.)

Representative of the defendant: dr. Judit Varga, Bar Counsel

Subject of the case: administrative dispute concerning equal treatment (EBF-AJBH-204-2/2021.)

JUDGMENT

The court annuls the defendant's order numbered EBF-AJBH-204-2/2021 and requires the defendant to commence new proceedings.

The court orders the defendant to pay the plaintiff litigation costs of 30,000 (thirty thousand) forints within 15 days.

The 30.000 (thirty thousand) forints legal fee shall be borne by the State.

The judgment is not subject to appeal.

R e a s o n i n g

The facts of the case

[1] On December 16, 2020, the plaintiff filed a complaint (hereinafter “complaint1”) with the Equal Treatment Authority (hereinafter “predecessor in title of the defendant”) seeking a determination

whether the complained organization2, the complained organization, and the complained organization1 (hereinafter “complained organizations”), starting from the 2020/2021 school year by allowing or failing to prevent school security officers from being assigned to elementary schools that predominantly or only educate Roma children, indirectly discriminated against Roma children or pose a direct risk of doing so. Referring to Sections 9, 10(1), 8(e), and 17/A(1)(a)-(b) of Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (hereinafter “Equal Treatment Act” or “ETA”), the plaintiff requested that the complained organizations be ordered to end this discriminatory practice, to immediately withdraw the school security officers from these schools, and to be prohibited from enabling the employment of school security officers in the future. The plaintiff also requested that the complained organizations be required to develop an action plan to reduce bullying in schools. The plaintiff asserted that the introduction of school security officers was explicitly justified by the behavior of Roma children and was predominantly implemented in schools attended primarily by Roma students. Based on this, the plaintiff argued that the school security program clearly places Roma children at a disadvantage.

[2] By its order EBF-AJBH-24-2/2021 (hereinafter "order1"), the defendant rejected the complaint1. The reasoning cited Section 46(1)(a) of Act CL of 2016 on the Code of General Administrative Procedure (hereinafter “CoGAP”), Section 14(1)(a) of the Equal Treatment Act, and Section 19(1) of the same Act.

[3] The defendant found that the school security is regulated by Section 1 (4) of Act CXC of 2011 on National Public Education (hereinafter “NPE”) and Sections 10/A, B, C of Act XXXIV of 1994 on the Police (hereinafter “Police Act”). The plaintiff is essentially challenging the legality of the institution of school security established and regulated by law, meaning that substantive examination of the complaint would equate to a review of the legislation itself. In its complaint the plaintiff argues that school security is disadvantageous, creating fear in all pupils. However, the defendant stressed that the operation of the school guard in a given educational establishment could not be examined or assessed as a disadvantage, since it cannot be established that an institution established and regulated by law is ab ovo disadvantageous and unlawful for the persons concerned, such a finding would be a prerequisite for examining the indirect disadvantage and discrimination against Roma children. Consequently, considering Section 14(3) of the Equal Treatment Act, the defendant lacked jurisdiction to address the complaint.

[4] The plaintiff did not file an action against the order, but in its application of 12 April 2021 to the defendant it filed a new complaint against the complained organizations (hereinafter"complaint2"), which, like the complaint1, was filed on the basis of Sections 9, 10 (1) and 8 (e) of the ETA. In addition to the content of the complaint1, the complainant requested a declaration that the complained organizations, by the conduct described in the previous complaint, had created a degrading and humiliating environment for Roma children in schools predominantly or exclusively attended by Roma students, constituting harassment based on ethnic origin. The plaintiff emphasized that school security officers were assigned mainly to schools where Roma students form the majority, and where also the unlawful segregation of Roma children is established. The introduction of school security effectively legitimizes segregation, as it was originally justified by the assertion that the aggressive behavior of Roma children caused non-Roma families to withdraw from these schools, leading to the formation of segregated educational environments.

Order of the defendant

[5] The defendant rejected the application by order No EBF-AJBH-204-2/2021 (hereinafter "order2"), (which is challenged in the present action), referring to the fact that it had also rejected the complaint1. Referring to Section 46(1) (a) - (b) of the CoGAP, the defendant pointed out that the content of the two complaints was identical: under the “application” subheading, the plaintiff summarized their request, with complaint2 repeating almost verbatim the text of complaint1, with only minor differences. The sole distinction in complaint2 is that it specifically requests an investigation into harassment under the both times referenced Section 10(1) of the Equal Treatment Act (ETA). However, the defendant noted that this does not introduce any new element, as the plaintiff already asked for the same conduct to be considered harassment within the scope of indirect discrimination. As complaint2 and complaint1 sought to enforce the same right, which had previously been adjudicated, and the content of the application and the relevant legal framework had not changed, the defendant rejected the application under Section 46(1)(b) of the CoGAP as res judicata. The defendant also emphasized that, based on the reasoning set out in order1, there is an additional ground for rejection under Section 46(1)(a) of the CoGAP, as the defendant lacks jurisdiction to examine the application, given the provisions of Section 14(3) of the Equal Treatment Act.

The claim, the defense

[6] In its claim against the defendant's order, the plaintiff sought annulment of the defendant’s order and a mandate that the defendant be required to commence new proceedings, as well as an award for litigation costs. The plaintiff referred to the fact that he had brought the complaints as a public interest action. The plaintiff argued that the defendant had wrongly invoked Section 46(1)(b) of the CoGAP, since three of the four conjunctive conditions laid down in the statutory provision had not been fulfilled at the time the application was lodged, with the exception of the unchanged legal background. The plaintiff claimed that the new complaint was not entirely filed for the enforcement of same right, as it explicitly cited harassment under Section 10(1) of the Equal Treatment Act (ETA), in addition to indirect discrimination, which was absent from the earlier complaint. In paragraph 48 of complaint2, the plaintiff treated indirect discrimination and harassment as distinct issues, presenting legal arguments different from those in complaint1. Thus, the two complaints involve a substantive difference, addressing not exactly the same legal basis or right.

[7] The defendant has not yet substantively examined the application. Section 46(1)(b) of the CoGAP expressly refers to substantive decisions, and Section 80(1) of the CoGAP requires that substantive decisions be issued in the form of an order. The two complaints are not identical in content. The latter no longer included an argument that the school guard would be disadvantageous or unlawful for all children in general, as the claim is not aimed at condemning the school guard as a legal institution in general, but at condemning the procedure as discriminatory which resulted in the selection of the institutions receiving the school guard. In complaint2, the request to establish harassment appeared as a separate claim, which modified the legal consequences compared to complaint1 and supplemented the factual basis. Therefore, the two complaints cannot be considered identical in any respect.

[8] In connection with the defendant's jurisdiction, the plaintiff pointed out that in principle the defendant would not have had the possibility to indicate a further right of refusal beyond the grounds for refusal under Section 46 (1) (b) of the CoGAP. The defendant's argument concerning the lack of jurisdiction is also unfounded, since the jurisdiction of the defendant is defined by the Equal Treatment Act. The complaint clearly established the conduct complained of that prompted its submission. It is clear from the complaint2 that it is not the adoption of legislation on the establishment of school guards which is discriminatory, but the procedures which led to the posting of guards in certain schools rather than in all schools, which is the reason for the complaint, and thus challenges the practical application of a legal institution which falls within the competence of the defendant to examine. Referring to the proceedings pending before the defendant's predecessor in title, the plaintiff points out that the defendant's predecessor in title has already established its jurisdiction in a number of similar proceedings.

[9] In his defense, the defendant asked for the action to be dismissed. According to the defendant, the rejection of the application does not violate the provisions of the CoGAP, and the Equal Treatment Act invoked by the plaintiff. The plaintiff's references to substantive legal infringement were incorrect, since the contested order does not contain any substantive legal references. While according to the plaintiff, the application rejected by the contested order was not "entirely" aimed at enforcing the same right, but the defendant maintained that the plaintiff sought to enforce the same right as that which it had asserted in its previous complaint. The 'case', the factual basis of the application, were the same: school guards were predominantly employed in elementary schools attended by exclusively or predominantly Roma children, and the three complained organizations involved in the infringement were the same. In the present case, the facts of the application and the violation of the requirement of equal treatment are sufficient to establish the identity of the right to be enforced, and the other legal grounds invoked were the same in both complaints. The plaintiff has only changed the emphasis by that in complaint1 it only indicated the legislation for defining harassment, whereas in complaint 2 it also explicitly elaborated on harassment, in addition to its request for the determination of indirect discrimination. The defendant found the plaintiff's claim that he had only mistakenly identified the legal basis for the definition of harassment in the earlier application and the reference to the substantiation of the case were not well founded. The defendant noted that its earlier decision had already established the lack of jurisdiction, which was not altered by the submission of complaint2. It asserted that the matter had already been substantively decided.

[10] The defendant reiterated that the original grounds for refusal were also invoked in the order, as the plaintiff continued to consider the mere existence of the school police as a disadvantage. Although the plaintiff stressed that it no longer alleged in the complaint2 that the school police were universally unlawful and disadvantageous to all children, the application continued to do so on pages 8-9. Both complaints stemmed from the same fundamental premise and reasoning, asserting that the institution of school security inherently disadvantaged students. However, the defendant did not base its findings on this premise under Section 14(3) of the ETA. It considered both applications to be essentially identical in content, despite the fact that the plaintiff had added some parts to complaint2 and omitted or amended certain parts. In view of the above, the defendant maintained that the existence of a school police force established by the Act cannot be considered disadvantageous without a review of the legislation and therefore it has no jurisdiction to make such a finding. The defendant also argued that the case cited by the plaintiff as analogous was not comparable.

The court's decision and legal reasoning

[11] The claim is well-founded.

[12] The court reviewed the legality of the defendant's administrative act in accordance with Section 85 (1) - (2) of Act I of 2017 on the Code of Administrative Court Procedure (hereinafter "Administrative Court Procedure Act" or "CACP"), based on the facts existing at the time of its implementation, taking into account Section 2 (4) of the CACP, and within the limits of the claim. The subject-matter of the administrative dispute is the application of the provisions of Art. Under Sections 4(1) and 4(3)(a) of the CACP, the subject of the administrative dispute is the legality of the defendant's contested decision as an administrative act. The burden of presenting the necessary facts, along with the data and evidence supporting them—unless otherwise provided by law—rested with the parties.

[13] Pursuant to Section 124(5) of the CACP, the court adjudicated the case without holding a hearing.

[14] The court had to decide, as stated above, whether the defendant had made its order in compliance with the procedural law applicable to it and whether it had lawfully rejected the plaintiff's application. In the present case, the plaintiff relied on both substantive and procedural legal infringements. Therefore, the court examined the defendant's decision first and foremost in the context of the procedural violations invoked by the plaintiff. An order may be annulled for procedural infringements, only if it is considered to have a significant impact on the merits of the case. However, if this can be established, the court is not required to examine the substantive legal violations.

[15] Under Section 2(8) of Act CXI of 2011 on the Commissioner for Fundamental Rights (hereinafter "Commissioner for Fundamental Rights Act" or "CFRA"), the Commissioner for Fundamental Rights shall perform the duties specified in the Equal Treatment Act.

[16] Section 13(1) of the ETA states that the Commissioner for Fundamental Rights shall act in the framework of administrative authority proceedings in the cases specified in this Act. Section 14 of the ETA details the rules of procedure of the Commissioner for Fundamental Rights in relation to the enforcement of the requirement of equal treatment, and subsection (3) of the same section states that the authority may not investigate decisions and measures of public authority of the Parliament, the President of the Republic, the Constitutional Court, the State Audit Office, the courts or the prosecution service.

[17] Section 46 (1) (a) of the CoGAP provides that an authority must reject an application if the statutory condition for initiating proceedings is missing and if no alternative legal consequences are specified by law. Furthermore, under Section 46 (1) (b) of the CoGAP, *an* application must also be rejected if the same right sought to be enforced has already been adjudicated substantively by a court or authority, and neither the content of the application nor the relevant legal framework has changed.

[18] Section 80 (1) of the CoGAP establishes that the decision is either a decision or an order. The authority shall - with the exception provided for in Section 80 (4) - issue a decision on the merits of the case, other decisions taken in the course of the proceedings shall be orders.

[19] As stated in the CoGAP In the case of the ground for refusal set out in Section 46(1)(a), the law lays down an open-ended situation, i.e. several separate legal conditions may form the basis for refusal under this provision. Thus, for example, in the case where the authority has no competence to act, the authority cannot act on the merits because of procedural obstacles and must therefore reject the client's application. By contrast, the legal conditions for refusal under point Section 46(1) (b) are specifically defined by the legislator: under this point, an application may be refused if it seeks to enforce the same right as that which has already been raised, has already been examined on the merits by the authority and the specific content of the application has not changed, nor has the relevant legal context changed since the previous application. In this case, therefore, the essential and indispensable condition is that the case must have been previously decided, i.e. that there must be a previous decision on the merits of the case which is final and cannot be challenged by ordinary appeal, and thus that there must be a shared identity of case between the previous procedure and the procedure sought to be initiated. In a strict interpretation of the concept of shared identity of the case, judicial practice requires that the four legal conditions must be met in full.

[20] In the present case, the order of the defendant under appeal - by which the defendant rejected the plaintiff's complaint in the second instance - first invoked Section 46(1)(b) of the CoGAP referring to the fact that the shared identity of the case exists between the proceedings initiated on the basis of the complaint1 and the proceedings initiated on the basis of the complaint2, and that the plaintiff's application is therefore a matter adjudicated. The Court notes that, as explained above, it is clear that there is no shared identity of cause of action between the complaint2 and the proceedings under complaint1. No decision has been taken on the merits of the case by the defendant, by any other authority or by the court. The plaintiff's complaint has been rejected in the form of an order on the question to be decided – in accordance with the provisions of the CoGAP – and the rejection pursuant to the CoGAP and consistent judicial practice, does not qualify as a decision on the merits of the case.

[21] The court also points out that although the plaintiff had identified the same legal background for the infringement in both complaint1 and complaint2, i.e. Section 9, Section 10 (1) and Section 8 (e) of the Equal Treatment Act, but not in complaint1, only in complaint2 did he explicitly request the establishment of the facts of harassment under Section 10 (1) of the ETA. In view of this, it cannot therefore be said that the specific content of the application has not changed, but it was unnecessary for the defendant to make such a comparison, given that a finding of lack of competence does not constitute a decision on the merits of the case. In the light of the foregoing, the defendant could not have rejected the plaintiff's complaint on the basis of Section 46(1)(b) of the CoGAP.

[22] The order further refers to Section 46 (1) (a) of the CoGAP, according to which the plaintiff's complaint had to be rejected in light of this legal provision, given that pursuant to Section 14 (3) of the

ETA the authority does not have the power to review the decisions and measures of Parliament, including the laws and acts of public power. In this connection, the court points out the following. It is not disputed by the parties that if, in the absence of competence, a given authority lacks the authority to take a decision, it cannot act by operation of law, cannot take a decision on the client's application, and must reject it without any examination of the merits. The lack of competence must be taken into account ex officio by the authority. In the present case, the defendant argues that an examination of the merits of the plaintiff's complaint would essentially mean a review of the provisions of two pieces of legislation, the NPE and the Police Act which establish and regulate the school police, and it has no jurisdiction to do so under Section 14(3) of the ETA. The defendant is right to argue that it has no power to carry out a general review of a legislative provision and cannot carry out an abstract review of a particular provision. However, the plaintiff's request was not directed at the defendant authority's exercise of abstract review of the laws establishing and regulating school police forces, but rather at the concrete implementation and practical application of those laws, since the plaintiff complained about the way in which the schools in which the school police forces are set up are selected based on the composition of the pupils in those schools. It is within the defendant's remit and competence to examine this, in the light of the fundamental criteria of the rule of law and the possible violation of the principle of equal treatment by direct or indirect discrimination, harassment, segregation and retaliation. In the light of the above, the defendant could not lawfully reject the plaintiff's complaint on the grounds of lack of competence.

[23] Given that the procedural violations alleged in the claim were found to be well-founded and relevant to the merits of the case, the court did not need to further examine the substantive arguments and assess the parties' statements on the merits of the case.

[24] On the basis of the above and Section 89 (1) (b) of the CACP the court annulled the defendant's order and ordered the defendant to commence new proceedings.

[25] In the new procedure, the defendant must examine the merits of the complaint2, in particular regarding the setting up of the school police and the possible discriminatory application of the law.

[26] The court based on Section 83 (1) of the Code of Civil Procedure ordered the defendant to bear the plaintiff’s litigation costs. In the absence of a cost statement form as outlined in Decree 31/2017 (XII.27.) of the Ministry of Justice (hereinafter “MoJ”), the court determined the amount based on Sections 3(2)-(6) of the MoJ Decree 32/2003 (VIII.22.) on attorney fees assessable in judicial proceedings. In making its determination, the court took into account the scope and labor-intensiveness of the action and the fact that no hearing was held in the proceedings.

[27] Pursuant to Section 62(1)(h) of Act XCIII of 1990 on Fees (hereinafter: Itv.), the filing fee recorded under Section 45/A(1) of the Itv. remains the responsibility of the state due to the personal exemption from fees granted to the defendant under Section 5(1)(c) of the Itv.

[28] The possibility of an appeal against this judgment is excluded pursuant to Section 99(2) of the CACP.

Closing section

Budapest, November 9, 2021.

Dr. Bea Barsi-Fodor s.k.	Dr. Péter Nagy s.k.	Dr. Gábor Huber s.k.
Presiding Judge	Judge-Rapporteur	Judge