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FLASH REPORT

Country:	Bulgaria
Title:	Supreme Administrative Courts endorses attack against positive measures for Roma students (scholarships)
Date:	31 January 2020
Expert:	Margarita S. Ilieva
<u>Context</u>	
Issue at stake:	Ethnicity-based preferential treatment for Roma in school
Grounds of discrimination:	Racial or ethnic origin
Field of application:	Education
Source:	National court decision
Applicable law:	Protection Against Discrimination Act, Article 7 (1.14)

Content

Case development: On 13 January 2020, the Supreme Administrative Court (SAC) confirmed a 2018 decision by the Sofia City Administrative Court (SCAC) that had struck down positive measures for Roma school students (exclusive scholarships).¹ The SCAC had repealed a decision by the Protection Against Discrimination Commission (PADC), which had upheld the measures in a case brought by a civil society organisation (CSO) against the Minister of Education. The CSO had alleged that non-Roma students were discriminated against as the impugned scholarships were only available to Roma students. The grants were provided under a targeted project aimed at preventing school dropout by Roma students.

The SCAC considered the measure to be directly discriminatory against non-Roma students. The court compared the impugned scholarships to generally available scholarships for academic achievement and noted that the latter were only awarded to excellent or very good students, while Roma scholarships were not dependent on a high-achieving academic record, a minimum achievement being sufficient. In addition, for the purposes of general scholarships for high academic achievement, very good students were required to demonstrate socio-economic need in order to become recipients, whereas Roma scholarship recipients were not required to show economic hardship. Moreover, the amounts awarded with the general academic achievement scholarships, even for the best students, were several times lower than the levels of Roma scholarships awarded even to the poorest achievers. The court concluded that students should indeed be encouraged to continue their studies but not on the basis of ethnicity. Ethnic-based scholarships were not the only means to achieve the legitimate aim pursued and they disproportionately disadvantaged non-Roma students. Lack of funds was not the only reason for Roma school dropout (there was also a lack of motivation) and there were also indigent non-Roma students; Roma students should be encouraged to make more of an academic effort before being awarded financial stimuli.

¹ SCAC, Decision No. 7471 of 10 December 2018 in case No. 9628/2018.

Decision of the court: On appeal by the Centre for Educational Integration of Ethnic Minority Children and Students within the Ministry of Education, and by the PADC, the SAC confirmed this judgment on 13 January 2020, explicitly endorsing all of the SCAC's above-mentioned reasons.²

The SAC referred to Directive 2000/43/EC (Article 1, Article 2 (1-2) and Article 3) and the 16 July 2015 CJEU decision in case C-83/14 to endorse the SCAC's findings of less favourable treatment of non-Roma students. The court concluded that (positive) measures should not help foster a mentality that certain students have more rights and are subject to more favourable treatment and are therefore entitled to working less hard in school.

Importantly, the SAC recognised the CSO's standing to bring an appeal against the PADC's decision, reversing its own settled case law that CSOs filing *actio popularis* motions alleging discrimination did not have standing to appeal against the PADC's decisions as such CSOs did not have a legal interest of their own. Showing clear anti-Roma bias by allowing the challenge in this case, the SAC reasoned, in conflict with its own case law under the PADA, that the CSO in question had an affected legal interest because of its statutory goals and activities, i.e. affirming civil society values, including non-discrimination and inclusion.

Key points of analysis: The SAC's decision is not in line with the directive as it overlooks the fact of disproportionate Roma exclusion and marginalisation in schooling, among other relevant facts, such as overwhelming Roma poverty and social disadvantage, not comparable to the economic and educational opportunities generally enjoyed by majority families and children. In particular, the SCAC's decision does not take into consideration Article 5 of Directive 2000/43/EC, which clarifies that the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin. In contravention to Article 5 of the Directive, the SCAC used the principle of equal treatment as a reason to invalidate positive action. The SCAC did not, in its reasoning, refer to the limitations to positive action drawn up by the CJEU in its judgment in case C-193/17 of 22 January 2019 (the *Cresco* judgment).

While this is as yet an isolated case, no similar legal attacks on positive action being on record, the SAC's ruling, which has received neutral to positive media coverage, has the potential to energize regressive actors and trends, as well as to curb the PADC's equality-promotion stance. By opening the gates for anti-equality campaigners, it could influence policymakers, providing a disincentive to future positive action programming.

Internet link source:

<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/6cddcda4a76dce8fc22584e40036cb9d?OpenDocument> (in BG).

² Decision No. 458 of 13 January 2020 in case No. 5375/2019.