Knocking at the Gate: The ECHR and Hungarian Roma

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There is near consensus among practising lawyers that discrimination against Roma is the most serious human rights concern in Hungary. But so far these cases are rarely admitted to the Court in Strasbourg.

Abuses against Roma feature in the greater part of Hungarian domestic human rights litigation and reporting since 1989. Concentrating in the early nineties on police violence, legal activities have gradually evolved to confront also the widespread discrimination in employment, housing and education. Arguably, some of these cases involve violations under the European Convention on Human Rights and its Protocols. [1] But, although the European Court of Human Rights in Strasbourg has examined a number of factually strong applications relating to police ill-treatment of Hungarian Roma, no violations have yet been found. In fact, cases of this kind are rarely if ever admitted to the court, and are all but invisible in the court records. The result is that Hungary's Strasbourg case law profile bears little resemblance to the human rights situation on the ground, and human rights lawyers are uncertain of the likelihood of ever achieving the support at the European level for the changes needed at home.

The view from the case law database

Although the Court can provide public access to all registered applications, mandatory publication is restricted to final judgments alone, the President of the Court having discretion over the publication of "official reports of selected judgements and decisions". [2] Ten years after Hungary acceded to the European Convention, thus allowing individual petitions to the Court, a search on the Court's online database finds 67 decisions, including six final judgments (and three violations) involving Hungary. [3] The word "Roma" appears in none of these, the word "Gypsy" in one, and six cases refer to Article 14, often, however, without information about the grounds of the alleged discrimination. Complaints brought by Roma generally concern torture and ill-treatment (Art. 3), arrest and detention (Art. 5) the right to effective domestic remedy (Art. 13), and discrimination (Art. 14). These articles barely register in the Court's published records. The great majority of Hungarian cases (42) relate instead to Article 6 of the Convention (right to a fair trial).

Indeed, setting aside the single "Gypsy" case in the database (which concerned a non-Roma applicant's "freedom" to make racist remarks [4]), one case appears representative of the many filed applications on police ill-treatment of Roma - *Betlen*. [5] The case, concerning police abuse in the town of Hajdúhadháza, notorious in the nineties for its violently racist police force, was ruled inadmissible, having been filed too late after the relevant domestic judgment.

As any Hungarian human rights NGO will attest, many more applications against Hungary have been registered with the Court. Indeed, one official of the former European Commission of Human Rights expressed surprise in 1998 at the great number of cases of police abuse against Roma filed with the Strasbourg organs. [6] So why do so few show up in the Court records? One reason may be that, as the vast majority of the hundreds of applications registered each year are deemed inadmissible,

they simply stand little chance of publication. Another reason is the great length of Court proceedings. A number of "Roma" applications are in the pipeline; at least two have been communicated to the government recently. [7] And in certain instances it happens that, regardless of the gravity of the complaints, the Court sidesteps the issues raised and offers summarily argued decisions of inadmissibility. It is perhaps not surprising that these decisions are not published.

Two lost opportunities: Farkas and Bensidine

Two complaints brought by Hungarian NGOs on behalf of Roma clients demonstrate the problem of admissibility. The first, that of Géza Farkas, was brought by the Hungarian Helsinki Committee (HHC) and concerned police ill-treatment, on the basis of Articles 3, 6, 13 and 14. [8] Although the Court found the case to be within the ambit of Article 3 - on the basis of its previous case law regarding serious physical injury - it refused to consider that the State might be liable, judging that it had "no reason to depart from the conclusions reached by the national authorities, as they were better situated to evaluate the applicant's complaints". The case was thus found inadmissible. However, the Court ignored the fact that a domestic court had already found that certain of the injuries could not have occurred in the manner alleged by the police. In doing so, the Court in effect refused to follow its own approach established in *Ribitsch* - that disagreements in domestic courts regarding the facts call for their re-examination. [9] With regard to Articles 6 and 13, the Court noted that the case had indeed been investigated by the public prosecutor, although no charges were pressed against the officers in question, and that Farkas had not availed of his legal access to other remedies (private prosecution for light bodily injury and an action for damages caused in an official capacity).

The second case, known to Hungarian NGOs as *Bensidine*, has all the hallmarks of a summary ruling of inadmissibility. The case was reported by the Legal Defence Bureau for National and Ethnic Minorities (NEKI) in 1996 and filed with the Court a year later. [10] The case related to a police action following the robbery and subsequent murder of an elderly lady in a village. The police picked up four Roma men and a Roma woman and, without formerly arresting or charging them, tested their arms and hands with "Bensidine", a chemical believed to show up the presence of human blood. The chemical was known to be carcinogenic and painful, and its use in other police departments had been limited to testing objects. In addition, apart from blood, Bensidine also reacts to detergents, Kiwi fruits and numerous other substances. A police station video-recording shows the application by police officers of Bensidine to the genitals of one of the applicants, apparently with the man's consent. The victims were then held for 19 hours without charge, beyond the time limit set by law.

Although the prosecution conducted an investigation following the report by NEKI, lawyers were prevented from participating and were given no opportunity to comment on vital evidence - including the video recording of the chemical test. The victims complained to the Court under Articles 3, 5, 6, 13 and 14. Three years later the application was declared inadmissible because, in the Court's view, the chemical test "did not reach the level of severity that would make it incompatible with Article 3". [11] Holding the applicants for 19 hours was also considered lawful - the Court

claimed that "even assuming that it restricted their personal liberty, the action was aimed at ensuring that [the victims] fulfil their duties prescribed by law", i.e. to give testimonies as witnesses to the crime.

This line of reasoning appears to give considerable latitude to state actions. Notably, the Hungarian member of the Court's panel of judges, commenting on this case in an interview with the Hungarian human rights journal *Fundamentum* propounded its inadmissibility while failing to mention that the denial in the domestic proceedings of counsels' access to the video formed an integral part of the application itself. [12] It therefore seems possible that decisions such as this may have something to do with the differing legal backgrounds of the various judges, particularly in the last decade since the accession of post-iron curtain judges to the panel. This would also appear to have been a relevant factor in a recent ruling in another important case, *Chapman v. UK*, against a British Gypsy woman who wished to park her caravan on her own land. [13] One commentator notes that, in that ruling, "Of the seven [judges] from Central and Eastern Europe, all but one voted against a violation, whereas the majority of the West Europeans considered that Mrs Chapman's rights had been violated."[14]

Concluding remarks

The widespread belief among Hungarian human rights defenders that Roma cases are the most pressing human rights issue in the country has not yet been supported by the Court. On the other hand, elsewhere in the region some victories have been notched up. These include the Bulgarian cases *Assenov* and *Velikova*, [15] both relating to police abuse of Roma and the failure to investigate on the part of the Bulgarian authorities. And most recently, *Conka*, where the Court found that Belgium had violated a range of rights of Slovakian Roma who were peremptorily ejected from the country in 1999. [16] A number of similar applications are still awaiting decisions in Strasbourg. [17] In addition, as Luke Clements argues, it appears from the *Chapman* ruling that the Court's attitude towards Roma under Article 8 is becoming more favourable to "the special needs of minorities". [18] This should inevitably have an impact on other "Roma" cases. Hungarian Roma applicants can benefit from these developments both before the Court as well as in domestic proceedings, where human rights lawyers are ready to invoke ECHR case law.

Finally, a word about the role Protocol No 12, signed but not yet ratified by Hungary, may play in the changing agenda of Roma rights defenders once it enters into force. Responding partially to the "real problems" Roma face, litigation against discrimination in education, housing and employment has gained increasing significance in Hungary in recent years. NEKI has conducted a study on possible discrimination in Labour Centres. The HHC is researching the discriminatory practices of criminal justice authorities. Litigation is likely to follow from their findings and this will receive further impetus at the European level from the free-standing Protocol 12, prohibiting discrimination by any public authority. This Protocol, according to its Explanatory Report, covers "not only administrative authorities but also the courts and legislative bodies" and the scope of protection concerns, *inter alia*, the exercise of discretionary power and any act or omission by a public authority, e.g. law enforcement officers.

Human rights defenders in Hungary rightly perceive the Convention mechanism as a last resort: cases must be fought domestically, drawing upon ECHR case law when possible. However, when domestic courts fail, the availability of the individual complaint procedure will remain an intrinsic part of their strategy in seeking remedies for rights violations. Unfortunately, in view of the Court's approach towards Hungarian Roma cases to date, it is difficult to be optimistic of success anytime soon.

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Footnotes

[1] These include cases of police violence against Roma, and might possibly extend - with imaginative litigation - to areas such as education. See the application of 18 Roma children from Ostrava against the Czech Republic as reported by the European Roma Rights Center on 18 April 2000. Online here.

[2] Rule 33(3) of the Rules of the Court on the "public character of proceedings", and Rule 78.

[3] As of April 2002. Online here: http://www.echr.coe.int/Hudoc.htm . It should be noted that cases that went beyond the admissibility stage feature twice in these statistics.

[4] Rékási, App. No. 31506/96.

[5] App. No. 26692/95.

[6] Public remark at a 1998 Seminar organised by the Friedrich Neumann Stiftung in Strasbourg about the implementation of the ECHR.

[7] App. Nos. 47940/99 and 56558/99.

[8] Géza Farkas, App. No. 31561/96.

[9] In *Ribitsch*, the Court decided to re-examine the facts in a case of police ill-treatment where an Austrian appeal court had overturned a verdict against the police found by the first instance court.

[10] App. No. 37382/97.

[11] Article 3 specifically prohibits, "torture" and "inhuman and degrading treatment". The Court's jurisprudence on what exactly constitutes the latter has been an area of some controversy.

[12] See *Fundamentum*, 4/2000.

[13] App. No. 27238/95.

[14] Clements, *ibid.* He continues: "The implication being that from a West European perspective, the UK had fallen below 'acceptable standards'." Ten of the seventeen judges in the case ruled against Ms. Chapman.

[15] App. Nos. 24760/94 and 41488/98.

[16] App. No. 51564/99.

[17] *Moldovan and Others* and *Rostas and Others v Romania*, Nos. 41138/98 and 64320/01 - both cases were declared admissible under Articles 6 and 14.

[18] Clements, L., "An emerging consensus on the special needs of minorities: the lessons of *Chapman v. UK*", *Roma Rights*, No.2-3, 2001. Online at here: http://www.errc.org/rr.nr2-3_2001/legal_defence.shtml .