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International Convention on the Elimination of All Forms of Racial Discrimination

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Committee on the Elimination of Racial Discrimination

Communication No. 49/2011

Opinion adopted by the Committee at its eighty-fifth session, 11–29 August 2014

Submitted by:	L.A. et al. (represented by counsel Vanda Durbáková of the Center for Civil and Human Rights)
Alleged victim:	The petitioners
State party:	Slovakia
Date of the communication:	23 August 2011 (initial submission)
Date of the present decision:	15 August 2014

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Annex

Opinion of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (eighty-fifth session)

concerning

Communication No. 49/2011*

Submitted by:	L.A. et al (represented by counsel Vanda Durbáková of the Center for Civil and Human Rights)
Alleged victim:	The petitioners
State party:	Slovakia
Date of the communication:	23 August 2011 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 15 August 2014,

Having concluded its consideration of communication No. 49/2011, submitted to the Committee on the Elimination of Racial Discrimination by L. A. et al. under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into account all information made available to it by the petitioners of the communication, their counsel and the State party,

Adopts the following:

Opinion

1. The petitioners of the communication dated 23 August 2011 are L. A., a teaching assistant, born on 31 July 1985, T. K., a field social worker, born on 28 February 1983, and L. P., born on 17 April 1983, who was on parental leave at the time of the complaint. They are all Slovak nationals of Roma origin. They claim to be victims of a violation by Slovakia of articles 5 and 6, read in conjunction with article 2, of the International Convention on the Elimination of All Forms of Racial Discrimination. They are represented by counsel Vanda Durbáková of the Center for Civil and Human Rights.

* The following members of the Committee participated in the examination of the present communication: Alexei S. Avtonomov, Marc Bossuyt, José Francisco Calí Tzay, Anastasia Crickley, Fatimata-Binta Victoire Dah, Ion Diaconu, Afiwa-Kindena Hohoueto, Yong'an Huang, Patricia Nozipho January-Bardill, Anwar Kemal, Melhem Khalaf, Gun Kut, Dilip Lahiri, José A. Lindgren Alves, Pastor Elías Murillo Martínez, Carlos Manuel Vázquez and Yeung Kam John Yeung Sik Yuen.

Facts as submitted by the petitioners

2.1 On 14 April 2005, around 11 p.m., the three petitioners undertook a "discrimination testing"[1] in the town of Michalovce, Slovakia, which entailed trying to enter the discotheque inside the coffee house "Idea". They were aware that, in the past, people of Roma origin had been denied entrance to the discotheque. The petitioners were neatly dressed, well behaved, not under the influence of alcohol, and had enough money to cover the entrance fees. They carried a recording device to record the entire sequence of events. The petitioners went to the coffee house entrance with two additional persons of Roma origin. The employee selling the entrance tickets asked them if they had a club membership card, and refused to sell them tickets informing them that such a card was required in order to enter the discotheque. The employee stated that the discotheque was a private club and that its services could only be used by its members. The petitioners could not see any indication of the private nature of the club at its entrance. Human rights activists from the Center for Civil and Human Rights observed the whole scene from a distance. Fifteen minutes later, a group of human rights activists of non-Roma origin approached the same staff and were allowed to purchase tickets to enter the discotheque without being asked for any kind of club membership card.

2.2 Later the same evening, the petitioners and the human rights activists who accompanied them went to the police station in Michalovce to submit a criminal complaint for racial discrimination under the penal code, which prohibits defamation and incitement to national, racial and ethnic hatred. The police considered that the reported facts constituted an offence and referred the case to the District Authority of Michalovce for further proceedings. These proceedings were directed against the employee who had denied entry to the petitioners, in his personal capacity, and not against the company that owns and manages the coffee house. The petitioners were heard as witnesses. On 20 June 2005, their lawyer discovered fortuitously, without having been officially notified, that a decision had been taken to discontinue the proceedings, because the District Authority considered that no offence had occurred.

2.3 In parallel to the criminal complaint, on 9 June 2005 the petitioners initiated a civil lawsuit before the District Court of Michalovce against the company that owns the coffee house.[2] They claimed that they had been subjected to racial discrimination because of their Roma origin and asked that the owner of the coffee house send them individual letters to apologize for the discriminatory treatment they had suffered. They also requested that financial compensation of 50,000 Slovak korunas be awarded to each of them for non-pecuniary damage. During the court proceedings, the defendant (the owner of the coffee house company) claimed that the place was indeed a private club and that, while its services may be used by anyone, club members had priority whenever the club is full. But he failed to explain why the human rights activists were allowed to enter just 15 minutes after the petitioners were denied entry. In its judgement dated 31 August 2006, the District Court stated that the company had breached the principle of equal treatment and should therefore send the petitioners a written apology. However, according to the Court, it was not proven

[1] The petitioners note that a "testing experiment" method is used by the Center for Civil and Human Rights to collect evidence to prove discrimination in courts. Since the 1950s, United States courts have recognized such testing as an effective means of proving discrimination. The Slovak courts also recognize such evidence as relevant. The petitioners add that the Committee has also considered such evidence to be relevant, see communication No. 29/2003, *Durmic* v. *Serbia*, opinion dated 6 March 2006, para. 9.6.

[2] Civil lawsuit based on article IX of Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (Anti-Discrimination Act).

that the discriminatory treatment was due to their ethnic origin, and the Court did not specify on which grounds it could have been based. The Court did not award any financial compensation to the petitioners as the discriminatory treatment had not taken place in front of the public and it had happened in the context of a "testing" experiment, meaning that the petitioners had been prepared to be discriminated against and had not suffered any kind of damage. The Court did not require that the letter of apology should include a part about the impact of the discrimination on the petitioners' human dignity.

2.4 Both the owner of the coffee house and the petitioners lodged an appeal against that decision. On 25 October 2007, the Regional Court of Košice decided to annul the decision of the District Court and ordered the District Court to reconsider the case. On 29 January 2008, the District Court ruled that the company had breached the principle of equal treatment by discriminating against the petitioners on the grounds of their ethnic origin. The Court ordered the company to send a letter of apology to the petitioners, but again, without demanding that a part be included about the impact of the discrimination on the petitioners' human dignity. It also dismissed the petitioners' claim for financial compensation.

2.5 On 26 March 2008, the petitioners appealed that decision, arguing that the Court did not consider the precautionary and vindicatory function of the compensation for non-pecuniary damage, and that it used the wrong criteria to evaluate the damage suffered by the petitioners. The defendant also appealed the decision. On 15 July 2010, the Regional Court of Košice, acting as a court of appeal, found that the petitioners had been discriminated against on the grounds of their ethnic origin and that, as a result, their human dignity had been affected. It ordered the company to send a letter of apology, including a part on the impact of the discrimination suffered on the authors' human dignity. However, it refused to award them financial compensation for non-pecuniary damage, considering that they had not provided the necessary evidence to demonstrate that they had complied with the criteria established by law to be awarded such compensation,[3] i.e. that they had endured a real and grave diminution of their human dignity, with considerable consequences on their social status and social functioning. The Court added that the petitioners had failed to prove that the damage they had allegedly suffered was real (i.e. factual and objective) but had merely claimed that such damage could have existed. The Court also noted that the employee of the coffee house had behaved in a polite manner when he asked the petitioners for their club cards and that he had not explicitly referred to their ethnic origin.

2.6 On 28 October 2010, the petitioners filed a complaint with the Constitutional Court, claiming that their fundamental rights[4] under the Constitution and international treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination, had been violated by the decision of the Regional Court of Košice, which they regarded as arbitrary. The petitioners requested that the part of this decision relating to the requested financial compensation be cancelled, and that the Regional Court be ordered to revise its decision and award a financial compensation of 5,000 euros to each petitioner for non-pecuniary damage. On 3 February 2011, the Court dismissed the petitioners' complaint, considering that the decision of the Regional Court had been properly reasoned

[3] Article IX (para. 3) of Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination.

[4] Namely, the right to equal treatment under article 12 (para. 2) of the Slovak Constitution and article 5 (f) of the International Convention on the Elimination of All Forms of Racial Discrimination; the right to a fair trial under article 46 (para. 1) and 47 (para. 3) of the Slovak Constitution, as well as article 6 (para. 1), in conjunction with article 14 of the European Convention on Human Rights, and article 6 of the International Convention.

and did not breach any of the petitioners' rights guaranteed by the Constitution and other international treaties.

2.7 The petitioners claim that they have exhausted all relevant domestic remedies.

The complaint

3.1 The petitioners claim to be victims of a violation of article 2, read in conjunction with article 5, of the Convention. They maintain that the State party failed to eliminate racial discrimination in all its forms and to guarantee the right of everyone to access to any place or service intended to be used by the public, without any distinction.

3.2 The authors further contend that they are victims of a violation of article 6 of the Convention because the State party has not provided them with effective protection and remedy for the discrimination they were subjected to owing to their ethnic origin, and because it failed to implement the existing legal means of protection to make sure that such discrimination would not occur again. Thus, even though the courts stated that the authors had been subjected to racial discrimination and had ordered the coffee house company to apologize in writing, they refused to award any compensation for non-pecuniary damage. According to the petitioners, the sanctions imposed by the courts are not effective for securing protection from racial discrimination. They consider that the courts failed to recognize the preventive and deterrent function of the compensation for non-pecuniary damage that would discourage the coffee house company from committing acts of racial discrimination in the future and lead to the elimination of racial discrimination in Slovak society.

3.3 The petitioners further submit that the civil courts failed to recognize that racial discrimination impairs human dignity and constitutes prima facie damage. They consider that it is unjustified to limit the assessment of non-pecuniary damage caused by racial discrimination to the objective damage suffered by the victims. They explain that racial discrimination is an implicit affront to human dignity and causes damage. This damage, which is perceived subjectively by the injured person psychologically or emotionally, cannot necessarily be objectified as damage that can be proved and measured. In this regard, the petitioners refer to the Committee's observation that "the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation is often underestimated".[5]

3.4 The petitioners also claim that, because the civil proceedings lasted so long, they did not constitute an effective means of protection from racial discrimination, stressing that in their case it took five years for the domestic courts to issue a final decision. They submit that a remedy that is delayed for too long cannot be considered to be an effective remedy.

3.5 Finally, the petitioners submit that, as recognized by the Committee,[6] even if the State party outlawed discrimination in access to public places in 2004 and currently provides a comprehensive legal framework on protection against racial discrimination, it has failed to implement the existing legislation effectively. The petitioners consider that the State party does not ensure effective protection from discrimination, sanctioning of perpetrators or adequate remedies for damage suffered as a result of discrimination. They conclude that the violation of their rights in the present case and the necessity to sanction such acts of racial discrimination ought to be considered against the background of the existing racial discrimination against the Roma minority in the State party.

[5] General recommendation No. 26, para. 1.

[6] The petitioners refer to the concluding observations in the report presented by the State party (CERD/C/SVK/CO/6-8, p. 11).

State party's observations on admissibility and merits

4.1 On 27 March 2012, the State party submitted its observations on the admissibility and merits of the communication. First, the State party says that it considers the communication to be admissible, as it complies with the formal conditions required by article 14 of the Convention.

4.2 The State party recalls that the Anti-Discrimination Act[7] bans any discrimination based on sex, religion or belief, race, nationality or ethnicity, disability, age, sexual orientation, marital and family status, skin colour, language, political or other affiliation, national or social origin, property, descent or other grounds, and also provides for legal remedies and the possibility of having the right not to be discriminated against protected by domestic courts in cases of violation.

4.3 With regard to the alleged violation of article 5 of the Convention, the State party notes that the domestic courts, in their rulings, expressly acknowledged that the petitioners had been discriminated against on the basis of their ethnicity. It further observes that the petitioners were provided with legal satisfaction for the violation of their rights, as the courts ordered the owner of the coffee house to apologize individually to each petitioner in the form of written letters that included a specific statement on the impact on the human dignity of the petitioners, as they had requested.

4.4 The State party notes that the courts in their rulings dealt adequately with the rejection of the financial compensation for non-pecuniary damage requested by the petitioners, taking into account the relevant legal provisions[8] for awarding such compensation and the specific circumstances of the case. The State party submits that the courts found that the petitioners had not proved a considerable diminishment of their dignity, social status or social functioning and that there had been no proven intent of the defendant to deeply discredit them. Therefore, the discrimination suffered by the petitioners did not fulfil the strict criteria provided by the law that allowed a court to grant financial compensation for moral damage.

4.5 The State party further submits that the petitioners' claim — namely, that State authorities had failed to ensure the elimination of discrimination in general, and in the present case in particular — was unfounded; otherwise the petitioners could not have obtained the statement of violation of the equal treatment principle and obtained an apology from the coffee house owner. The domestic courts correctly applied the Anti-Discrimination Act, as they denounced the discrimination suffered by the petitioners and provided them with legal satisfaction in the form of individual letters of apology. The State party considers that, it complied with its obligations under article 2 combined with articles 5 and 6 of the Convention by enacting the Anti-Discrimination Act and having the national courts implement it.

Petitioners' comments on the State party's observations on admissibility and merits

5.1 On 24 May 2012, in the comments they provided on the State party's observations, the petitioners reiterated their claim that by refusing to award financial compensation, the domestic courts had failed to recognize the preventive and deterrent function of compensation for non-pecuniary damage, and had also failed to recognize that racial discrimination impaired human dignity and constituted prima facie damage. According to the petitioners, such failure by the domestic courts in implementing the Anti-Discrimination Act constitutes a violation of the rights they are guaranteed under the Convention.

[7] Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination.

[8] Ibid., article IX (para. 3).

5.2 The petitioners recall their argument that a delay of five years in obtaining a final decision from the domestic courts should be considered as a failure of the State party to provide effective protection and remedies to victims of racial discrimination as required under the Convention.

5.3 Finally, the petitioners submit that the moral satisfaction obtained in the form of letters of apology was not sufficient compensation and demonstrates that the State party diminishes the seriousness of such human rights violations and their impact on human dignity and that such decisions could discourage other victims of discrimination from bringing a claim of discrimination before the courts.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee on the Elimination of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a), of the Convention, whether or not the communication is admissible.

6.2 The Committee notes that the State party has raised no objections to the admissibility of the communication, as the petitioners have met the requirements of article 14 of the Convention.

6.3 The Committee declares the present communication admissible.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the submissions and documentary evidence produced by the parties, as required under article 14, paragraph 7 (a), of the Convention and rule 95 of its rules of procedure.

7.2 The Committee notes the petitioners' argument, according to which the State party did not fulfil its obligation to guarantee their right of access to any place or service intended for the use of the general public because it did not provide effective protection and remedy through its national courts when their right, guaranteed by the domestic legislation, was violated. The Committee considers that it is not its task to review the interpretation of national law made by national courts, unless the decisions were manifestly arbitrary or otherwise amounted to a denial of justice.[9] In the light of the text of the judgements of the District Court of Michalovce, the Regional Court of Košice and the Constitutional Court, the Committee notes that the petitioners' claims were examined in accordance with the Anti-Discrimination Act, which specifically regulates and penalizes acts of racial or ethnic discrimination. The Committee further notes that all the judicial decisions taken by the domestic courts in the present case — which concluded that an act of racial discrimination had occurred and awarded the petitioners with a remedy — had been reasoned and based on the Anti-Discrimination Act. The Committee considers, therefore, that the facts before it do not show that the courts' decisions were manifestly arbitrary or amounted to a denial of justice and it is of the opinion that the facts as submitted do not disclose a violation by the State party of article 2 combined with article 5 of the Convention.

7.3 The Committee observes that the petitioners further claim that their right to obtain protection and an effective remedy in the present case was breached by the State party. The Committee notes the petitioners' allegation that acts of racial discrimination necessarily

[9] See communications No. 48/2010, *TBB-Turkish Union in Berlin/Brandenburg* v. *Germany*, opinion adopted on 26 February 2013, para. 12.5; and No. 40/2007, *Er* v. *Denmark*, opinion adopted on 8 August 2007, para. 7.2.

cause moral damage to the victim, who should be awarded financial compensation. The State party, on the other hand, stresses that the petitioners did not prove that they had suffered non-pecuniary damage (i.e. real and actual harm) that reached the level required by domestic law[10] to obtain financial compensation.

7.4 The Committee considers the question to be whether the remedy awarded by the State party — moral satisfaction in the form of individual letters of apology — is in accordance with the right to an effective remedy provided for under article 6 of the Convention. The Committee recalls the United Nations basic principles on the right to remedy and reparation, which provide that "reparation should be proportional to the gravity of the violations and the harm suffered"[11] and list financial compensation as one form of remedy and reparation, along with restitution, satisfaction and guarantee of non-repetition. The Committee recalls that it is not its role to decide what remedy should be awarded to the petitioners by the State party or to assess whether the remedy awarded by the domestic courts was the most adequate or proportional to the harm suffered. Its role is to assess whether this remedy can be seen as an effective remedy in accordance with international principles and that it is not manifestly arbitrary or does not otherwise amount to a denial of justice. It appears that the courts' decisions to grant satisfaction to the petitioners while denying them financial compensation, in the light of the specific circumstances of the case, are not contrary to the United Nations basic principles on the right to remedy and reparation and are based on the domestic provisions regulating the award of financial compensation for non-pecuniary damage.[12] The Committee considers that denial of financial compensation in the specific circumstances of the case is not baseless or arbitrary and cannot, in itself, be regarded as constituting a violation of article 6 of the Convention. The Committee nevertheless regrets that the Anti-discrimination Act does not provide for sanctions to be imposed on the authors of acts of discrimination, since sanctions — including financial fines — can have an effective preventive and deterrent effect.

7.5 The Committee notes the petitioners' allegation that the five years' judicial procedure to obtain a final decision on the alleged violation was too lengthy and could not be considered as offering an effective remedy. The Committee observes that during the five-year period, five judicial decisions were taken by different jurisdictions on the case itself, most of them in response to the appeals made by the petitioners. The Committee is of the view that the judicial procedure cannot be considered to have been unduly delayed to the extent that it would amount to a violation of article 6 of the Convention.

8. In the circumstances of the case, the Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, considers that the facts before it do not disclose a violation of the Convention by the State party.

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[10] Article IX (para. 3) of Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination.

[11] General Assembly resolution 60/147 of 16 December 2005.

[12] Article IX (para. 3) of Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination.