Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

School-Family Relations at the Centre of the Solutions for School Absenteeism among Roma Children

Question(s) at stake:

Whether placement in a foster home is a proportionate measure to remedy school absenteeism among Roma children.

Outcome of the ruling:

Appeal was granted. The decision by the lower court to place two Roma children in a foster home was found to be disproportionate.

Topic(s):

- Education

Keywords:

- Compulsory education
- Minority rights
- Proportionality
- Best interests of the child

Tag(s):

- School absenteeism
- school-family relations
- child protection

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Country:

Portugal

Official citation:

Court of Appeal Évora, Judgment of 9 September 2021, Proc. No. 1674/18.1T8TMR.E1 (Tribunal da Relação de Évora, Acórdão de 9 de setembro de 2021, Processo n.º 1674/18.1T8TMR.E1)

Link to the decision:

http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/9e21d508ccf5c07b8025877c003fb22b?OpenDocument&Highlight=0,1674%2F18.1T8TMR.E1

ECLI:

ECLI:PT:TRE:2021:1674.18.1T8TMR.E1.EB

Date:

09 September 2021

Jurisdiction / Court / Chamber:

Court of Appeal Évora

Remedy / Procedural stage:

Appeal (final)

Previous stages:

- Judicial Court Santarém

Subsequent stages:

None

Branches / Areas of law:

Private law, Family law

Facts:

Two Roma half-siblings (an 11-year-old boy and an eight-year-old girl) were flagged as being at risk due to their school absenteeism. The Public Prosecutor initiated a child protection procedure for both children on 31 October 2018.

On 19 February 2019, a child protection agreement was reached with the children's mother and homologated by the court. As a child protection measure, the agreement stipulated the provision of support to the children at home with their mother (*medida de apoio junto da mãe*) for a period of two months. As part of the agreement, the children promised to be punctual and assiduous at school, to make an effort to pass, by studying and doing their homework, to respect school rules, and to comply with their mother's guidance and with all recommendations made by the social services. The children's mother, for her part, promised to ensure her children's basic needs (namely, food, health, safety, hygiene, education, and general wellbeing); to ensure that her children attended school, respected the school's rules and made an effort to pass; and to comply with the recommendations made by the social services. Also as part of the agreement, the social worker assigned to the case was required to follow up on the implementation of the measure and report back to the court.

On 14 October 2020, separate child protection agreements were reached for the two children, with clauses similar to those in the previous agreement but with the difference that, for the boy, the child protection measure adopted was the provision of support to the child at home with his parents (*medida de apoio junto dos pais*), since the boy's father had re-joined the household after a period of imprisonment, whereas for the girl the measure continued to be that of support at home with her mother. The measure was established for a four-month period. The new agreements specified that the boy's parents and the girl's mother were required to take the children to school at the start of the school day.

During the 2020/2021 school year, both children attended the first year of primary school. The girl had 62 justified absences and 10 unjustified absences, while the boy had 102 justified absences and 152 unjustified absences. The parents argued that none of the children should have more than 10 unjustified absences, since they had missed school for good reason, namely their mother's

illness and hospital stay, the COVID-19 pandemic, and a four-month relocation to a different city due a family dispute.

Both children had special assistance at school and, in the 2020/2021 school year, were offered a two-day recovery plan to be able to pass to the second year. The girl attended both days of the recovery plan and was able to pass, while the boy missed one of the days and failed.

At an unspecified date in early 2021, the parties failed to reach an agreement on the renewal of the child protection measures, and the procedure was moved to court in April 2021. The Public Prosecutor advocated a protection measure consisting of the placement of the children in a foster home (*medida de acolhimento residencial*), while the children's defender (*defensora da criança*) argued against it and in favour of a measure of support at home with the parents combined along with psychological and pedagogical supervision.

The lower court decided to apply the measure of placement of the children in a foster home, close to the parents' place of residence, combined with adequate psychological and pedagogical supervision. The measure was set for a period of one year, with reassessment at the end of the first semester. The court authorized the parents and other family members to visit the children at the foster home, with respect for the house rules as to visits and in compliance with public health restrictions. The court ordered the social services to submit social information on the viability of the children visiting the parents at their place of residence, as well as on the way the children had integrated into the foster home.

As summarized in the appeal brief, cited in the Évora Court of Appeal judgment, the lower court concluded that there was a situation of danger for the children due to their repeated school absenteeism, failure to pass, and lack of interest in training and education; the absence of adequate parental guidance for their compliance with school obligations; and the parental incapacity to positively change the course of their children's lives and to provide them with a set of rules that would allow them to internalize the need to change their behaviour towards school in order to fulfil their need for education and training.

Before the Évora Court of Appeal, the children's defender argued that the children were not at risk and that, if a situation of risk were to be found, the Court should at most apply a protection measure in their natural living environment (*medida em meio natural de vida*), namely, a measure of support to the children together with a different family member. The children's defender made ample use of cultural arguments, noting that the children's Roma ethnicity was decisive in their lives and way of thinking, and that it should not be ignored when deciding the case at hand. She noted in particular that the children's family followed the rules, traditions and cultural principles of the Roma community, among whom school attendance is neither valued nor common, largely due to the community's history of persecution and exclusion. She also argued that the attempt to "normalize" Roma children, by imposing a standard of behaviour and a different culture on them, disrespected their right to have their own cultural identity. While stressing the importance of the children's Roma ethnic/cultural background, the children's defender also pointed out that they nevertheless departed from the Roma tendency to discourage school attendance, since they had been enrolled at school every year, and had attended school and acquired some competencies, albeit with meagre results, which showed their effort to keep on attending school. She concluded, in any case, that their situation had no connection with any risk factors, being instead the result of the diversity of values that characterizes their family and community.

Ruling:

The Évora Court of Appeal granted the appeal, reversing the lower court ruling and restoring the initial measure of support to the children at home with the parents, adding that the measure was to be redefined in line with the desirable increase in the involvement of the children's school, under terms to be set after hearing the school's board.

The Évora Court of Appeal found the lower court decision to be unjust and disproportionate. It held that the placement of the children in a foster home was extremely violent for the children, since it separated them from their family and their community, making them feel punished for a behaviour – school

absenteeism – which was not viewed as harmful in their culture. It held furthermore that the lower court had failed to demonstrate that the children's placement in a foster home would have the effect of making them like school.

The Évora Court of Appeal alluded to the existence of many published studies on the problems of school absenteeism among Roma children, noting that what these studies recommended was the strengthening of the relations between the school and the family, mainly through the use of mediators at school, with a view to raise awareness and engage the community in the schooling of their children.

The Évora Court of Appeal held that, before making any intervention to promote the children's education, it was crucial to understand the family's roots and culture, noting that Article 67(2)(c) of the Constitution required that the state cooperate with the parents on the education of their children. According to the Court, it followed that the unquestionable need to promote the children's education inevitably had to involve interaction with their family, at the risk of causing revolt, sadness and anguish in the children, which in no way would contribute to their education, training, and full development, but, on the contrary, would have a negative influence on the development of their personality and increase the potential for deviant behaviour. The Court noted in particular that it should not be forgotten that the children were adolescents who needed to understand decisions in order to adhere to them.

The Évora Court of Appeal recalled the guiding principles framing state intervention for the protection of children at risk, as listed in Article 4 of Law No. 147/99, of 1 September 1999, underlining the principles of proportionality and of prevalence (*prevalência*) of the family. It noted that, by legal imperative, the intervention must be necessary and adequate to the risk faced by the child at the time when the decision is taken and must only interfere with the child's and his or her family's life to the extent that is strictly necessary to address that risk. The Court also cited Article 9(1) of the Convention on the Rights of the Child, according to which a child must not be separated from his or her parents against their will, except when such separation is necessary for the best interests of the child.

The Évora Court of Appeal found that the mother's omissions were to be excused due to her illness, and deemed it relevant that the children had an affectionate relationship between themselves and with the parents, as well as the fact that the girl had managed to pass in the 2020/2021 school year. It concluded therefore that there were sufficient reasons to continue to invest in a protection measure involving the children's family and the school. It noted in this connection that there had been a recent publication of guidelines for schools designed to promote the inclusion and educational attainment of Roma communities.

Main quotations on cultural or religious diversity:

"We can already advance our belief that the measure applied is extremely violent for these two youths who, if it is to be put into effect, will be separated from their community and, in particular, their family and will feel, above all, punished for a behavior – school absenteeism – which in their culture is not harmful."

"In the face of Roma children's school attendance problems, what should be promoted, in order to alleviate them, is to strengthen the relations between the school and the family, which is achieved mostly through the existence of mediators in the schools in order to improve the sensibility and engagement of this community in the learning process of their children."

"Understanding the family roots and cultures is crucial before making any intervention with children and youths to promote their education, and it is most relevant, as required by the Constitution [Article 67(2)(c)], to promote cooperation of the state with the parents in their children's education."

"It is unjust and disproportionate to apply a measure of placement in a foster home to Roma children, at 11 and 14 years of age, for the sole reason that they show problems of school attendance."

"Therefore, the unquestionable need to promote the education of these children inevitably has to rely on the family interaction, at the risk of instigating, as well pointed out in the appeal brief, their anger, sadness and anguish, which will contribute in no way to their education, training and full development, and which will negatively influence the development of their personality, enhancing the risk

of deviant behavior.”

Main legal texts quoted in the decision:

Domestic law

- Article 67(2)(c) of the Constitution
- Article 4 of the Law on the Protection of Children and Youths at Risk, approved by Law No. 147/99, of 1 September 1999
- Articles 608(2), 609, 635(4), 639, and 663(2) of the Code of Civil Procedure

International law

- Article 9(1) of the UN Convention on the Rights of the Child

Cases cited in the decision:

None

Commentary

School-Family Relations at the Centre of the Solutions for School Absenteeism among Roma Children

This judgment concerns a recurring subject in the practice of Portuguese courts – school absenteeism of Roma children – but sets itself apart from most judgments issued on the topic at appellate level by explicitly stating the need to consider the child’s cultural background before adopting child protection measures, and by drawing attention to the importance of strengthening school-family relations, including through the use of intercultural mediators at school. The judgment also stands out in its mention of academic studies on the challenges of Roma children’s schooling, and by directly referencing the 2019 Guidelines for Schools issued by the Ministry of Education for the promotion of Roma communities’ inclusion and educational attainment (*Promover a Inclusão e o Sucesso Educativo das Comunidades Ciganas – Guião para as Escolas*). While the judgment does not cite specific academic studies besides the Guidelines, it seems clear that the Court was careful to consult academic publications on the subject and that it kept the recommendations made in these publications in mind when it decided the

instant case, something which is not very common in judgments by Portuguese courts.

The schooling of Roma children has long been a topic of concern in Portugal and figures prominently in the country's National Roma Integration Strategy (2013–2023). Initiatives towards inclusive education range from the "Choices" Programme (*Programa Escolhas*), launched in 2001 to promote social inclusion among children from disadvantaged backgrounds, to the development in 2017, under the umbrella of the Support Fund for the National Roma Integration Strategy, of a pedagogical kit for educators (*Romano Atmo*), with information on Roma culture(s), language(s), and history that teachers may use in their courses. The 2019 Guidelines for Schools referenced by the Évora Court of Appeal detail examples of best practices on how schools can work to be more welcoming and inclusive, through e.g. the revision of the curriculum and pedagogical practices, the training of teachers and other staff, the engagement of the children's families, and the use of intercultural mediators. Respect for difference and interculturality are among the Guidelines' underlying principles.

The Roma population in Portugal is estimated at approximately 40,000–60,000 (0.5% of the overall population). According to the 2021 Roma Survey by the European Union Agency for Fundamental Rights, Portugal is one of the countries with the largest differences between Roma and the general population when it comes to early childhood education (29% versus 92%) and to the rate of 20- to 24-year-old Roma youths who have attained at least upper secondary education (10% versus 85%). While the share of Roma children in segregated education is low (2%), Portugal is by far the country where the highest percentage of Roma parents, guardians, or students have felt discriminated against because of being Roma when in contact with school authorities (34%). While the rates of early school leaving are similar for both sexes, Roma girls tend to drop out of school earlier, among other reasons due to early marriages and pregnancies, their parents' concern for their purity, and/or their family's need for their assistance at home.

Over the years, Portuguese courts have been called upon to address the issue of Roma schooling and compliance with compulsory education requirements as part of the judicial adjudication of child protection measures. Oftentimes, the risk assessment and the choice of measures best suited to safeguard the best interest of the child involve consideration of cultural arguments put forward by the parents, such as the need to preserve the girl's purity and the importance of respecting Roma values and traditions in their disregard for formal standardized public schooling. The courts' reactions to this line of argument vary considerably, with lower courts seemingly being more open to it than appellate courts (Jerónimo and Friedrich 2022).

In the judgment under review, the Évora Court of Appeal was remarkably open to cultural arguments, without however fully endorsing a "culture defence". It accepted as a given that school absenteeism is not perceived by the Roma to be harmful behaviour, but did so in the context of explaining why the separation of the children from their family would be so hard and difficult to understand for them. The wording of the judgment could have certainly been more careful in indicating that it was referring to the Roma's view on schooling and not making a statement to the effect that school absenteeism is not harmful when Roma children are involved. The Court could also have referenced the sources on which it relied to make the remark about the prevalence among Roma of the understanding that school absenteeism is not harmful. Nevertheless, the Court is clear in its statement that the need to promote the children's education is unquestionable.

The Court goes further than many of its counterparts in the acknowledgment of the importance of the children's cultural background when choosing the measures best suited to promote their school attendance. It should be noted, however, that the Court does not mention a "right to be different", a "right to cultural identity", or a "right to have one's own cultural life", nor does it address the question – raised in the appeal brief – of the tension between respect for these rights and the attempts at "normalization" of Roma children through public education and compulsory schooling. The Court manages, in any case, a good

balance between the interests and the rights in tension by recognizing the importance of understanding the roots and culture of the children's family, and by recommending a stronger involvement of the school and the use of intercultural mediators (often recruited among the Roma) to raise awareness in the Roma community about the benefits of an education for Roma children and youths.

The facts of the case had some non-negligible specificities – the children were well behaved at school and some of their problems of attendance were partly due to the COVID-19 pandemic – but this judgment is a good example of best practice on how to balance attention to cultural arguments with respect for the general law, with a view to promoting equality and social inclusion.

Literature related to the main issue(s) at stake:

Specific legal publications/comments addressing the case

- Jerónimo, Patrícia and Nicole Friedrich. 2022. "O direito à educação e a escolarização das crianças ciganas na prática dos tribunais". *Scientia Ivridica* , LXXI (359): 17–57.
- Jerónimo, Patrícia and Nicole Friedrich. 2022. "[Annotation to the judgment of] Évora Court of Appeal, proc. 1674/18.1T8TMR.E1, 09.09.2021", available at <https://inclusivecourts.pt/en/jurisprudencia2/> accessed 29 August 2024.

General legal literature on the topic

- Ringelheim, Julie. 2013. "Between Identity Transmission and Equal Opportunities. The Multiple Dimensions of Minorities' Right to Education". In Kristin Henrard (ed.). *The Interrelation between the Right to Identity of Minorities and their Socio-Economic Participation*, 91–114. Leiden: Martinus Nijhoff.

General literature on the topic from other disciplines

- Araújo, Marta. 2016. “A Very ‘Prudent Integration’: White Flight, School Segregation and the Depoliticization of (Anti-)Racism”. *Race Ethnicity and Education* 19 (2): 300–323.
- Casa-Nova, Maria José. 2015. “A escolarização de crianças e jovens ciganos: entre a inclusão-excludente e a integração subordinada”. In AAVV. *Intervenção em Sede de Promoção e Proteção de Crianças e Jovens*, 69–109. Lisbon: Centro de Estudos Judiciários.
- Danaher, Patrick Alan, Máirín Kenny, and Judith Remy Leder (eds). 2009. *Traveller, Nomadic and Migrant Education*. New York: Routledge.
- Mendes, Maria Manuela et al. (eds). 2021. *Social and Economic Vulnerability of Roma People: Key Factors for the Success and Continuity of Schooling Levels*. Cham: Springer.
- Montero-Sieburth, Martha and Domiziana Turcatti. 2022. “Preventing Disengagement Leading to Early School Leaving: Pro-Active Practices for Schools, Teachers and Families”. *Intercultural Education* 33 (2): 139–155.
- Moreira, Paulo A. S., Helena Bilimória, and Sandra Lopes. 2022. “Engagement with School in Gypsy Students Attending School in Portugal”. *Intercultural Education* 33 (2): 173–192.
- Moreira, Tânia et al. 2022. “Living on a Double-Edged Sword: Intergenerational Perspectives of Women from Gypsy Groups about the Influence of Education on Cultural Identity”. *International Journal of Educational Research* 111: 1–12.
- OECD. 2022. *Review of Inclusive Education in Portugal, Reviews of National Policies for Education*. Paris: OECD Publishing, available at <https://doi.org/10.1787/a9c95902-en> accessed 29 August 2024.
- Rutigliano, Alexandre. 2020. “Inclusion of Roma Students in Europe: A Literature Review and Examples of Policy Initiatives”. *OECD Education Working Paper No. 228*, available at <https://www.oecd-

ilibrary.org/education/inclusion-of-roma-students-in-europe_8ce7d6eb-en> accessed 29 August 2024.

- Zachos, Dimitris T. and Antigoni Panagiotidou. 2019. “Roma Parents’ Perceptions on Education”. *Journal of Advances in Education Research* 4 (1): 13–23.

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