Are Exams Really a Celebration for the Diligent Student?

Analysis of the ECtHR Judgment in Ádám and Others versus Romania

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Abstract

On 13 October 2020, the ECtHR ruled on the compatibility of the Romanian national minority education and school-leaving exams with the ECHR in the case of Ádám and others v Romania. The ECtHR ruled that the system of school-leaving exams for national minorities in Romania (including Hungarians) does not violate the prohibition of discrimination, taking into account the results of Romanian and Hungarian pupils in the school-leaving exams. The present study argues that the ECtHR judgment, in fact, took a much more nuanced approach to the issue than the judgment at first sight suggests. This is because the ECtHR dismissed the applicants' complaint only on the basis of the results of the school-leaving exams (in which respect no significant difference between the results of Romanian and Hungarian pupils could be found) and did not take a position on the question whether the fact that pupils belonging to national minorities have to sit two additional exams in the same school-leaving period violates the prohibition of discrimination.

Keywords: non-discrimination, right to education, Ádám and others, school-leaving exam, ECtHR.

1. The Legal Background of the Case Ádám and others

In January 2011, the Romanian legislator adopted the Romanian National Education Act, according to which the state "grants equal rights of access to all levels and forms of pre-university and higher education, as well as lifelong learning, for all nationals of Romania, without any form of discrimination."[1] The law establishes as a fundamental principle "the recognition and the guarantee of rights of persons belonging to national minorities, the right to preserve, develop and express ethnic, cultural, linguistic and religious identity" and the principle of

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1 *See* Article 2(8) of Law No. 1/2011 on National Education (National Education Act).

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"ensuring equal opportunities".[2] The act stipulates that in primary and secondary education, where teaching is carried out in a minority language, all subjects must be taught in that language, except for Romanian language and literature, which must be taught from a textbook specifically designed for that national minority.[3] The act also provides that pupils in primary and secondary education may take entrance and final exams in the language in which the relevant subjects were taught, in accordance with the law.[4] The act also regulates in detail the requirements for the school-leaving exam, stating that

> "The content of the exam curriculum is set by the Ministry of Education […] and publicly announced to pupils at the beginning of the first year of secondary school, in accordance with the law. The timetable, methodology and organization of the baccalaureate exam are set by the Ministry of Education […] and are publicly announced for each year group at the beginning of the last year of secondary school."[5]

The Romanian Constitutional Court, in its Decision No. 2/2011, concluded that the above-mentioned provisions of the Romanian National Education Act are in accordance with the Romanian Constitution. The decision stated that

> "The fact that the law provides for a special school curriculum for learning the Romanian language designed for members of a national minority means that the specific situation of these persons has been taken into account, notably the fact that they have a different mother tongue than Romanian. In other words, the different situation in which members of a national minority find themselves evidently calls for different treatment by law, in order to ensure effective equality and access to quality education for all. Consequently, the legislature must take this fact into account and adapt the requirements of learning the Romanian language and literature to the specific situation of persons belonging to national minorities."[6]

On the basis of the enabling provisions of the NEA, the Romanian Ministry of Education established the order of the school-leaving exams for each school year.[7] According to the Act and the Ministerial Order, the applicants of the *Ádám and others* case (who were all pupils belonging Hungarian minority) had to take two additional exams (oral and written in their mother tongue) during the same

2 *See* Article 3 of the National Education Act.
3 *See* Article 46(1) and (2) of the National Education Act.
4 *See* Article 46(12) of the National Education Act.
5 *See* Article 77(5) of the National Education Act.
6 *Ádám and others v Romania*, Nos. 81114/17, 49716/18, 50913/18, 52370/18, 54444/18, 54475/18, 13 October 2020, para. 17.
7 *See* Appendix II to the judgment. Ministerial Order No. 4923/2013 for the school year 2013/2014; Ministerial Order No. 4420/2014 for the school year 2014/2015; Ministerial Order No. 5070/2016 for the school year 2016/2017; and Ministerial Order No. 4792/2018 for the school year 2017/2018. The complainants were not affected by the Ministerial Order concerning the 2015/2016 school year.

graduation period, thus leaving these pupils less time to prepare for a subject and rest between exams than their Romanian peers.[8] The specific grievance raised by the applicants (and clearly confirmed by the dates in the ministerial orders) was that Romanian pupils have an extra day of rest between the written exam in Romanian and the written exam in the chosen subject. By contrast, Hungarian pupils (and all other nationalities) were allowed to take their written exam in the national language on that day of rest.[9] According to official data provided by the Romanian government, the pass rates for the 2013-2018 period were essentially the same for all students, including students studying in Hungarian (58.1-73.9% for all students and 58.4-70% for students studying in Hungarian), but the pass rates for the Romanian language and literature baccalaureate exams were 17-18% lower for Hungarian-speaking students than for native Romanian speakers.[10]

The applicants (all of them Hungarian pupils) claimed, without exception, a violation of Article 1 of Protocol No. 12 to the ECHR, *i.e.* that they had been discriminated against in Romania because of the way in which the school-leaving examination was organized. This was because they had to take two additional school-leaving exams in the same short period, compared to the Romanian students, and the exam in Romanian language and literature was extremely difficult for them.[11]

2. On the Legal Nature of Protocol No. 12

Article 14 ECHR defines the prohibition of discrimination as an ancillary right, *i.e.* the prohibition of discrimination could only be invoked before the ECtHR in conjunction with another right mentioned in the ECHR or its Protocols.[12] This ancillary nature of the prohibition of discrimination was changed by Protocol No. 12, which, from 1 April 2005 (its date of entry into force), allowed applicants to bring complaints against States which had ratified the Protocol in respect of violations solely on the ground of a breach of the prohibition of discrimination. Protocol No. 12 has been ratified by less than half of the Member States of the Council of Europe, but Romania is one of these few States.[13] In the present case, although the violation alleged by the applicants can be directly linked to a right enshrined in Protocol No. 1 (the right to education), it is more convenient from a practical point of view for the applicants to be able to invoke directly the prohibition

8 Id. para. 1.
9 For details, *see* Appendix III to the judgment for the dates of the examinations for each year.
10 Id. para. 8.
11 Id. para. 30.
12 *See e.g.* Sándor Szemesi, *A diszkrimináció tilalma az Emberi Jogok Európai Bírósága gyakorlatában*, Complex, Budapest, 2009.
13 At the time of finalizing the manuscript of this case note, there were only 20 States Parties to the Protocol, *see* at www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177.

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of discrimination when their main grievance is, in fact, the alleged discrimination.[14] This is true even though, according to the ECtHR's settled case law, the term 'discrimination' is identical in relation to both Article 14 ECHR and Article 1 of Protocol No. 12.[15]

According to the Explanatory Report to Protocol No. 12, the general prohibition of discrimination may be invoked where the person is discriminated against in the enjoyment of any right specifically granted to an individual under national law; in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law; by a public authority in the exercise of discretionary power (for example, granting certain subsidies); by any other act or omission by a public authority (*e.g.* the behavior of law enforcement officers when controlling a riot).[16] In the present case, the ECtHR concluded that, since Romanian law guarantees all students the right to education in their mother tongue and the applicants had alleged a violation of the prohibition of discrimination in relation to this right under Romanian law, the complaint was, therefore manifestly covered by Protocol No. 12.[17] However, the ECtHR's approach appears to be fraught with risk: it follows from a purely grammatical interpretation of the judgment that if Romania had not granted the right to mother tongue education at all, there would not conceptually have been any possibility of a violation of the prohibition of discrimination under Romanian law (and, under the ECHR). Indeed, the right to mother-tongue education cannot be directly derived from the ECHR – it derives only by implication from other international treaties (mostly Council of Europe treaties).[18] However, a possible progressive interpretation of the ECHR undoubtedly implies that when a state undertakes to guarantee the fundamental rights of minorities in an international treaty (or, more precisely, in this case, in two international conventions, this international convention already imposes a legislative obligation on the State in question which also justifies the invocation of Article 1 of Protocol No. 12.

3. On the Obligation to Exhaust Domestic Remedies

One of the key questions in *Ádám and others* was whether the applicants could have applied directly to the ECtHR, or whether they should have exhausted domestic remedies first. In the event of an individual administrative decision in the applicants' case, it is almost invariably necessary for the applicants to exhaust the

14 According to the case law of the ECtHR, it is not a prerequisite for the Strasbourg court to find a violation of the right primarily invoked in order for the prohibition of discrimination to be infringed. *See Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Council of Europe*, Strasbourg, 2022, 6-7.

15 *Sejdic and Finci v Bosnia and Herzegovina*, Nos. 27996/06, 34836/06, 22 December 2009, para. 54.

16 Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 22.

17 *Ádám and others v Romania*, para. 35-36.

18 In particular, the European Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages can be mentioned here. It is not by chance that the ECtHR refers to these documents specifically.

domestic remedies available to them first, and only then to initiate proceedings before the ECtHR. However, the legal picture is not so clear-cut where the legal situation adversely affecting the applicants is not the result of an individual administrative or judicial decision, but is caused directly by a provision of law. In such a case, it can always be established on a case-by-case basis whether the national law of the State complained against provided the applicants with domestic remedies which they may have had to exhaust before initiating ECtHR proceedings.

In the present case, the ECtHR itself referred to the fact that a Hungarian pupil had previously filed a complaint with the Romanian National Council for Combatting Discrimination (NCCD), alleging that the 2012 Ministerial Order on Education was discriminatory because it required pupils belonging to a national minority to take two additional exams in the same period. The NCCD, in its Decision 148/2014 of 5 March 2014, concluded that the Order of the Minister of Education does not discriminate against pupils who study in their mother tongue. It reasoned that although such students must to make additional efforts during the school-leaving examination, they receive a certificate that Romanian students do not, moreover, learning in a language other than Romanian is merely an option for students and not a subjective right automatically granted by the State to all pupils. Indeed, and individual pupils have made the choice in which they wish to fulfil the requirements of the school-leaving exam in the light of the legislative context (in this case, the conditions for the school-leaving exam).[19]

The Hungarian pupil concerned appealed against the decision of the NCCD, and the Bucharest Court of Appeal initiated proceedings before the Romanian Constitutional Court. The Romanian Constitutional Court in its decision No. 670/2015 concluded that the use of the mother tongue of persons belonging to a national minority does not exempt them from the obligation to integrate into society in general, and the fact that students belonging to a national minority have to take more exams in the same amount of time is not a constitutional issue.[20] Following the decision of the Romanian Constitutional Court, the Bucharest Court of Appeal also dismissed the action with final effect, and the applicant's appeal was subsequently dismissed on the merits (for lack of reasoning) by the Bucharest High Court of Cassation and Justice.

At the very least, it is an interesting question whether, in view of such a history, it was necessary for the applicants in *Ádám and others* to initiate proceedings in a Romanian forum (above all the NCCD). From a purely formal point of view, the fact that in a similar case a student belonging to a national minority had previously initiated proceedings before the NCCD, which examined the merits of the complaint, is in itself evidence that there was an effective remedy available in the Romanian national legal system which the applicants should have exhausted. This approach is supported by the fact that the NCCD, in its proceedings, examined the discriminatory nature of the Ministerial Order for the 2012/2013 school year graduation period, and the applicants had no effective remedy before the Romanian courts for the 2014/2015, 2015/2016, 2017/2018 and 2018/2019 school years.

19 *Ádám and others v Romania*, para. 19.

20 Id. paras. 23-24.

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Therefore, the examination of the discriminatory nature of the Ministerial Order for the school year 2012/2013 does not allow conclusions to be drawn as to the constitutionality of the regulations for the subsequent years, *i.e.* there is no *res iudicata*. This approach, however, only examines the question of the formal availability of domestic remedies and assumes that the fact that a given forum (in this case, the NCCD, then the Romanian courts and the Constitutional Court) rejected a student's complaint in one case does not allow a legal conclusion to be drawn as to the constitutionality of the more recent ministerial decrees for subsequent years.[21] In my view, the only argument in favor of a formal approach to the exhaustion of internal remedies is that in the judicial proceedings against the decision of the NCCD, following the decision of the Romanian Constitutional Court, the petitioner's appeal was dismissed by the High Court of Cassation and Justice because the appeal did not contain any admissible legal reasoning,[22] thus leaving the question of "what if" open.

In substance, however, the obligation to exhaust domestic remedies always applies to 'effective' remedies, *i.e.*, those which the applicant can realistically expect to result in a favorable decision, which also remedies the disadvantage they claim to have suffered. In the present case, the ECtHR held that, since the NCCD had examined the merits of the 2012 Ministerial Order on Education for non-discrimination and the Romanian Constitutional Court had examined the constitutionality of the Order in the course of the judicial review of the NCCD's decision, it was reasonable to assume that the authorities and courts (including the Constitutional Court) examining the formally different but substantively identical Ministerial Orders on Education would reach the same decision as before.[23] This is particularly true given that the Romanian Constitutional Court ultimately concluded that the number of school-leaving exams for students belonging to national minorities was not a constitutional issue.

This means that in the present case, the ECtHR had to weigh the failure of the High Court of Cassation and Justice to rule on the merits of the case against the fact that the case had already been decided by the NCCD, and the Romanian Constitutional Court had ruled on the merits. Consequently, in my view, the ECtHR was right to conclude that the initiation of proceedings by the NCCD against the Minister for Education's order was only a formal and not a substantive remedy available to the applicants. The function of the obligation to exhaust effective remedies is not to help the ECtHR to dispose of more and more cases on formal grounds, but to ensure that only cases are brought before it where the national fora have been unable or unwilling to remedy applicants' grievances.

However, the Romanian Government also raised a further argument in the case concerning the non-exhaustion of remedies, namely that the applicants could have directly challenged the Minister of Education's order by means of an action under Law No. 554/2004 on administrative procedure. However, in the present case, the Romanian Government has not demonstrated in any way (*e.g.* by providing

21 Id. Joint partly dissenting opinion of Judges Kjolbro, Ranzoni and Schukking, paras. 10-12.
22 Id. para. 25.
23 Id. paras. 51-52.

data on actions brought against other ministerial decrees) that the remedy claimed was indeed an effective remedy available to the applicants under Romanian law.[24] It is worth noting that the Romanian Government's argument also appears to be dogmatically unsound, since the institution of an administrative action is conceptually available against individual acts of the public administration of a non-normative nature, and not against legislation. The uniform national timetable for the organization of school-leaving exams can hardly be regarded as an individual decision against which the applicants could have brought an administrative action. The only possible exception to this would have been if the order of the Minister for Education had allowed pupils to submit individual applications for the organization of the school-leaving examinations – against the assessment of which, or the failure to assess them (as a failure to act), an administrative action could indeed be brought.

4. About the Six (Four) Month Rule

According to the rules of the ECHR, applicants had six months to initiate proceedings before the ECtHR at the time *Ádám and others* was launched (today, the deadline is four months). This time limit is more or less indisputable in the case of individual court proceedings: it is calculated from the date of receipt of the decision of the last judicial forum providing an (effective) remedy on the merits, in which case the only issue is whether a particular judicial forum provides an effective remedy for the purposes of the ECtHR proceedings and whether the applicants are therefore obliged to use it. The situation is different, however, where the disadvantage to the applicants results directly from the application of a piece of legislation without the availability of an individual administrative or judicial procedure. In such cases, both the entry into force of the legislation and the actual occurrence of the disadvantage may be relevant for the purposes of the six (four) month time limit.

In the present case, the ECtHR had to decide whether the applicants had made a timely application to the ECtHR by examining two different temporal situations. For the purposes of assessing compliance with the six-month rule one possible starting date was the entry into force of the Minister of Education's order (which created the risk of the prejudice alleged by the applicants),[25] while the other possible date was the receipt of the results of the final examinations for that year, i.e. the date on which the prejudice alleged by the applicants actually occurred. The ECtHR adopted the latter approach, concluding that the concrete violation of the rights of each of the applicants occurred when they learned of their own graduation results.[26] There is no doubt that the ECtHR never examines the abstract unlawfulness of a State's legislation (or case law), but always examines whether the particular legislative provision or judicial decision in the individual case giving rise

24 Id. para. 50.

25 Id. para. 54. Needless to say, the Romanian government invoked this argument to claim that the applicants missed the submission deadline.

26 Id. para. 59.

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to the ECtHR proceedings has led to a result contrary to the ECHR.[27] This clearly shows that the six (four) month time-limit should not be examined in general terms, from the entry into force of a piece of legislation, but always on an individual basis, in relation to the date on which the breach of rights occurred for the particular applicant. In the present case, however, as will be described below, this approach necessarily entailed the rejection of the complaints.

5. Merit of the Case – the System of School-Leaving Exams for Minority Students in Romania

The applicants challenged the system of the Romanian baccalaureate examinations on two main grounds: the difficulty of the examination and the lack of rest periods between subjects (*i.e.* the fact that the ministerial decree required minority pupils to take two further examinations in the same time period). In this context, the Romanian Government explicitly argued that all pupils were free to choose between Romanian or minority language education and the respective baccalaureate, having been informed about the requirements for the baccalaureate. It further argued, that in the case of the nationality baccalaureate, there were additional advantages (notably the language certificate) linked to the additional subjects.[28]

In the ECtHR's view, the Hungarian pupils had to take two additional exams (to test their knowledge of Hungarian language and literature) in the same baccalaureate exam period. The timing of the baccalaureate exams put them at a disadvantage, as they were otherwise treated in the same way (in relation to the other exams) as Romanian students taking the baccalaureate exams.[29] Indeed, a breach of the prohibition of discrimination can be established not only where persons in the same legal situation are treated differently by the legislation or practice of States, but also where persons in different legal situations are treated in the same way, without taking into account their differences.[30] In this respect, it should be welcomed that the ECtHR considers that the situation of students belonging to a national minority and ethnic Romanian pupils cannot be compared when it comes to the taking of the school-leaving exam.

The ECtHR, however, while finding that students in different situations were treated in the same way, concluded that there were a number of "extenuating circumstances" behind the action of the Romanian state complaint. On the one hand, the ECtHR took the view that the determination of the date and order of the school-leaving examinations was primarily a matter of expediency, which was outside the competence of the ECtHR to examine.[31] This assertion is itself debatable: while it is undoubtedly true in general and in principle that review of the manner in which an academic obligation is fulfilled falls outside the jurisdiction of the ECtHR, this is true only so long as the State's measure in question falls within

27 Id. paras. 64-66.
28 Id. paras. 80-81.
29 Id. para. 92.
30 *See*, in particular, *Thlimmenos v Greece*, No. 34369/97, 6 April 2000, para. 44.
31 *Ádám and others v Romania*, para. 93.

a reasonable margin of appreciation. And a review of whether the measure in question has exceeded a reasonable margin of appreciation under the ECHR becomes impossible if the ECtHR automatically excludes the possibility of such a review. On a permissible interpretation, the ECtHR has, in fact, concluded in this case that the Romanian Ministry of Education's order on the organization of the school-leaving exams in Romania has not yet resulted in extreme arbitrariness that would justify a referral to the ECtHR. Even in this sense, however, it is questionable what criteria an applicant can use in a case of indirect discrimination (where the distinction cannot be conceptually 'open') to establish that the disadvantage suffered by them has reached a level of arbitrariness that justifies a referral to the ECtHR.

On the other hand, the ECtHR also found that the requirements for the subject of Romanian language and literature were high not only for Hungarian pupils but for all pupils. It is a matter of fact that in 2016 the Romanian authorities took steps to bring the school curriculum for national minorities in line with the legal requirements, and, together with representatives of the Hungarian community, have developed Romanian language and literature textbooks specifically for Hungarian students. In addition, the Romanian NCCD itself has raised the possibility of reorganizing the school-leaving exams in its decision.[32] It is at the very least, unusual that the ECtHR actually assessed these facts against the applicants (and in favor of the Romanian State complained against). In other words, it considered that that the legal disadvantage suffered by the applicants prior to these measures, by allowing the Romanian State to reorganize the order of the school-leaving examinations in a different way and to provide Hungarian students with their own textbooks in Romanian language and literature in the future, was not a serious violation. In fact, it should have followed from the ECtHR's settled case law that, in a situation where applicants in different situations were treated in the same way as members of the majority society, and the legal environment at least in principle allowed for different ways of organizing the school-leaving examination, and the textbooks required for Hungarian pupils were only produced afterwards, then at least in the individual case of the applicants, a violation of the prohibition of discrimination could be established. This is so, even if such violation could not be justified in future cases.

In its judgment, the ECtHR also spectacularly ignored the doctrine of the chilling effect, so often referred to in other cases: it held that the applicants had made a conscious and voluntary choice to learn another language, which the Romanian state had offered them as an option.[33] In this respect, owing to its earlier jurisprudence the ECtHR should have assessed whether, in the light of the regulatory context and practice concerning the minority baccalaureate, the Romanian rules governing the baccalaureate offered the applicants (and minority students in a similar situation) a real choice. From this perspective, the statistical data provided by the Romanian government on the results of Hungarian and Romanian students in the baccalaureate examinations, were not, in fact, relevant.

32 Id. paras. 96-97.
33 Id. para. 101.

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This is because owing to the disadvantage following from the regulation for students belonging to a national minority it is reasonable to assume that not all students belonging to a national minority choose to take the baccalaureate examination in the national language. As such, the initial statistics are necessarily biased. It is, of course, a separate question of how the applicants in such cases can substantiate the disadvantage they have suffered. However, in the context of indirect discrimination, the burden of proof should not be on the applicants, but on the State complained against.

In light of all these considerations, the ECtHR concluded that the circumstances of the organization of education in a minority language and the organization of the school-leaving examinations did not place the applicants in a different situation to be of sufficient importance within the meaning of Article 1 of Protocol No. 12.[34] In such circumstances, it is no longer necessary, according to the ECtHR, for the Romanian State complained of to justify the lawfulness of the distinction.

6. What Next?

In the famous TV miniseries Chernobyl, following the explosion at the nuclear power plant, it was said that radiation levels measured were "not great, not terrible". In my view, the ECtHR's judgment in the case of *Ádám and others* should be seen in a similar way.

On the one hand, we cannot ignore the fact that the ECtHR considered the applications to be timely because it linked the grievances alleged by the applicants to the results of the examinations (and not to the entry into force of the Ministerial Orders). This approach necessarily implies that the results of the examinations (and not the fact of the extra two exams) could have caused the discrimination in the ECtHR's view. Indeed, as the judgment states, according to the statistics provided by the Romanian Government, the pass rate in the school-leaving exam for all students (*i.e.* for both Romanian and nationality pupils) was similar between 2013 and 2018.[35] If the possible violation of the prohibition of discrimination is assessed purely from the output side (the results of the exams), without taking into account the path leading up to it, then in this sense, the judgment of the ECtHR is formally correct. However, if the violation of the prohibition of discrimination is determined by the result of the exams, it is also clear that the failure of some pupils in the examinations can hardly be in itself a result of a violation of the prohibition of discrimination. In this sense, the ECtHR can indeed arrive at the conclusion that the similar school-leaving results of minority and ethnic Romanian pupils are in themselves evidence that the applicants could not have suffered systemic disadvantages due to the Romanian school-leaving examination regulations.

On the other hand, it must also be noted that the applicants also objected to the fact that they had to take two extra examinations (and, in this context, they

34 Id. para. 107.
35 Id. para. 105.

objected to the short rest period and preparation time available to them). As far as the two additional examinations are concerned, I consider the Romanian Government's argument (namely that the extra examination generates an extra benefit, *i.e.*, a language exam) is also relevant for the purposes of the assessment of the ECHR violation. This is because it amounts to "treating different situations differently", which is a violation from the point of view of the prohibition of discrimination. However, the shortness of the available rest period, *i.e.*, the fact that pupils belonging to a national minority have to take two more examinations within exactly the same amount of time as ethnic Romanian pupils, raises the possibility of a violation of the prohibition of discrimination because of the extra examination itself (irrespective of the result). However, the timetable for the final examinations was always set by ministerial order, so the ECtHR should have looked at the timeliness of the complaints against this date – and concluded that the complaints were, in fact, late. In this sense, on a positive reading of the judgment in *Ádám and others*, the ECtHR did not in fact, take a position on whether the timing of the school-leaving examinations for minority students was contrary to the ECHR. All in all, the judgment in *Ádám and others* is while "not great, not terrible" either.

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