

Stourzh, Gerald. Die Gleichberechtigung der Nationalitäten in der Verfassung und Verwaltung Österreichs, 1848-1918. [The Equal Rights of Nationalities in the Constitution and Administration of Austria, 1848-1918.] Vienna: Österreichische Akademie der Wissenschaften, 1985. Appendix 8, pp. 311-16. Translated by Jeremy King, 2004. Explanatory remarks and original German phrasing provided in brackets []].

Appeal of Johann Lehar in Hohenstadt (Zábřeh [the Czech name]) (Moravia) [a crownland of imperial Austria, inhabited by 2.5 million persons speaking the Czech language, the German language, or both] to the Administrative Judicial Court against the Ministry of Religion and Education, May 11, 1912. State Central Archive in Prague, *Fonds Verwaltungsgerichtshof in Wien 1898-1918 (1919), Karton 89, Konvolut II/84 aus 1912 (miterledigt bei II/114 aus 1912)*.

Facts of the case. Before the beginning of the 1911/12 school year, the school-age daughter Anna of greengrocer Johann Lehar was admitted to the German elementary school in Hohenstadt, on the basis of her father's declaration of belonging to the German nation or race [*Volksstamm*]. At the beginning of the school year, the Czech Municipal School Council of Hohenstadt then laid claim to [reklamierete] Anna Lehár (written by Czechs with an accent) for the Czech school, together with 20 other children admitted to the German elementary school. An inquiry by the District Captainship into the national belonging of the father had led to the conclusion that he belonged to the Czech nationality, whereupon the removal of Anna Lehár from the German elementary school was ordered. That order was eventually confirmed on appeal by the Ministry of Education in Vienna. It is of interest that the name Lehar is written without accent in the appeal, as well as in the minutes of the Administrative Judicial Court, but with accent in the published decision. Lehar re-appealed the Ministry of Education's decision, to the Administrative Judicial Court; the interesting appeal, composed by attorney Emil Fleischmann, is published here. Regarding the deliberations and the outcome of the proceedings, see note 5 below.

Esteemed imperial royal Administrative Judicial Court!

I feel myself much aggrieved by the decision, Exhibit A,¹ of the i.r. Ministry of Religion and Education of April 8, 1912, Against that ruling, I submit the following APPEAL:

In the contested ruling, the exclusion of my daughter Anna from the German elementary school in Hohenstadt is justified with the argument that the investigation undertaken by the District Captainship in Hohenstadt seems to confirm that I must be regarded as belonging to the Czech nation, and thus am not entitled to demand the admission of my child to the German elementary school on the basis of national belonging. This determination of my belonging to the Czech nation is justified with the argument that I explicitly designated myself as an adherent of the Czech nation during an official hearing, that I claimed Czech as my language of daily use in the most recent census, and that I am registered in the Czech electoral registry.

For the following reasons, however, the contested ruling violates the law:

1. First, I dispute most decidedly that I should belong to the Czech nation, and that the determination made of my nationality should be correct.

The principal question is whether the admission of my daughter Anna Lehar to the German elementary school was legally justified or not. It is self-evident that in this regard only those facts may be taken into consideration which were determined at the time of the admission of my daughter Anna Lehar to the German elementary school, and that the only permissible course of action is to verify whether or not the admission of my daughter was justified, on the basis of the facts determined *at that time*.

When I requested the admission of my daughter to the German elementary school, I made an explicit and official declaration to the

¹ The letters A through D denote appendices to the appeal (not reproduced here).

effect that I professed myself to belong to the German nation, that I thought and felt in German, that I belonged to the German volunteer fire department in Hohenstadt, and that I would have myself registered in the German registry for the next elections. Please refer in this connection to the official minutes of the meeting with me on September 14, 1911, recorded by the directorship of the German elementary and secondary school in Hohenstadt.

On the basis of that declaration, which I made to the school directorship, it was entitled and obliged to admit my daughter to the German elementary school in Hohenstadt. Subsequent determinations have no bearing on the case.

To be sure, I was subsequently summoned to the i.r. District Captainship and given an official hearing. I note, however, that in the course of that hearing, I was not informed of its object. I note furthermore that the hearing was influenced by the fact that the chairman of the Czech Municipal School Council was present in the waiting room, and stated there that nothing would be of any use: we had to send our children to the Czech school. Because I have a Czech clientele, the presence of the chairman of the Czech Municipal School Council influenced the manner in which I responded to questions. He made me fear that my statements would become known to all my customers the next day.

To the best of my recollection, I emphasized explicitly that I was of Czech descent, but professed myself to belong to the German nation; that I had entered "German" as my language of daily use in the most recent census; and that I belonged to German associations. The correctness of my answer regarding the most recent census can be ascertained from the census questionnaire that I filled out. I am a member of the German volunteer fire department in Hohenstadt, as well as of the local chapter of the Federation of Germans in Northern Moravia, and provide proof in the form of the attached certificates, Exhibits B and C, from the presidents of those associations.

At an earlier time, out of consideration for my Czech clientele and because I was pressed hard by agitators, I had myself registered in the

Czech registry. During the most recent elections, however, I requested my transfer to the German registry. I made an official statement of all these circumstances when I was subjected to a hearing by the German Municipal School Council in Hohenstadt, for the purpose of determining my nation. I also professed myself explicitly to be German, and noted that I wished to direct my child toward a particular profession, in which knowledge of the German language was required. Thus I would not allow myself to be deprived of my right to send my child to a German school and to have her educated there for her profession....

The question of whether a person belongs to one nation or another is decided solely by feeling. And feeling cannot be determined through court procedures. Along the language frontier, it is common for many families of purely German descent to have become Czech, and for many families of purely Czech descent to have become German over time, and to have joined the German nation. It is completely impossible to determine whether my ancestors were of Germanic or Slavic origins. The various professions of nationality made by my ancestors, however, as well as their various linguistic competencies, must in any case have been different at different points in time. Whether or not a person belongs to a nation is not decided by the electoral registry in which he is registered, the language of daily use that he claims, or even by the language which he generally uses and the associations to which he belongs, because such matters by and large are not always a question of free will.

The language that one uses often depends on how and where one grew up and the company one keeps. Electoral registration, how one answers questions in the census, and which associations one joins are often determined by economic considerations. Often one acts not out of national feeling but out of fear of the consequences of the boycott to which one might otherwise be exposed. As a greengrocer, I have felt that fear repeatedly. At every school registration and election I suffer, and am avoided for a time by Czech customers. Thus the inquiries of the i.r. District Captainship in the present case are not decisive, and cannot form the basis for a determination of my nationality. I profess myself to be a German. Uninfluenced by external

factors, I professed myself to be a German on the occasion of my daughter's admission to the German elementary school in Hohenstadt, and requested her admission on the basis of belonging to the German nation. The conditions ascertained by the i.r. District Captainship, which, as has been shown, do not agree with the facts, have no bearing.

2. I contest the decision of the i.r. Ministry of Religion and Education also because I claim it as my unrestricted right to determine entirely on my own how my child is to be brought up, and in particular to determine to which school I will send her. As a taxpaying citizen, I must have the right to send my child to a school whose costs I am obliged to cover in proportion to my tax payments. According to Article 18 of the Constitution,² every citizen has the right to have himself educated for an occupation however and wherever he will. In accordance with Clause 139 of the General Civil Code, I have the obligation to raise my child and, through instruction in religion and other useful knowledge, to lay the ground for my child's future well-being. According to Clause 148 of the General Civil Code, I must raise my child for the station in life that I see appropriate.³ I act as the father and legal representative of my child, who has not reached legal majority, and thus have the right to determine how and where I have her educated for her occupation.

Under all circumstances, my child must have the opportunity to seek employment in German regions, where better wages are paid. For that, however, my child will need a certificate from a German school. The exclusion of my child from the German elementary school that I had chosen for her deprived me of my right to determine how to raise my child, and my child of the possibility of gaining an education for

² The reference is to Fundamental Law 142 of 1867, regarding the General Rights of Citizens.

³ Clause 139 of the General Civil Code codified the obligation of parents to raise their legitimate children, "and to lay the ground for their future well-being through instruction in religion and other useful knowledge." Clause 148 read in part that "The father may raise his underage child for the station in life that he deems appropriate...."

her occupation how and where I wish. Thus there has been a violation of the fatherly rights and obligations accorded me in the Civil Code, and furthermore a violation of the rights guaranteed me as a citizen by the Constitution.

Clause 20 of the law of November 27, 1905, Section 2 of the Moravian Crownland Legal Gazette, No. 4 [the "lex Perek"], has no bearing on the case. Aside from the fact that this crownland law cannot override the relevant imperial laws, Clause 20 of the crownland law in question determines solely that "as a rule," children should be admitted only to schools in whose language of instruction they are proficient. The legislature used the expression "as a rule" intentionally, because it was conscious that exceptions would be needed, and even required, in light of Article 18 of the Constitution. [E]ven were my child not to be proficient in the language of instruction, which in the present case is not true, and even were I not to profess myself as of the German nationality, my child's enrollment in a German elementary school would still have to be permitted, on the legal grounds given here.

If Clause 20 of the Moravian crownland law in question were to be interpreted otherwise, then the lex Perek would stand in direct contradiction to the imperial laws that I have cited, and could never have been submitted [to the Emperor] for sanction. The law surely gained sanction only by virtue of containing the expression "as a rule," because through this addition the rights of the father guaranteed by the Constitution and the Civil Code were protected.⁴

3. To be sure, at the time of her admission to the German elementary school in Hohenstadt, my daughter did not speak German fluently. But she had mastered the language to such an extent that she could easily follow instruction, and thus was in full compliance with the legal requirements. The testing of my child took place in completely unlawful fashion. It was unlawful already by virtue of the fact that the appeal of the Czech Municipal School Council was submitted directly to the District School Council, rather than taking the prescribed path,

⁴ Regarding the restriction of parental rights by the "lex Perek," see above, page 221....

through the [German] Municipal School Council.

The testing of my child took place without any statement first being obtained from the German Municipal School Council regarding its own reading of the facts of the case, and without any other attempt at ascertaining whether a testing was necessary. Testings, furthermore, are founded nowhere in the law, and I protest against them for that reason. I also protest against the fashion in which the testing was undertaken. I was not even informed about the testing, although objectively, I count as a party to the matter more than does the Czech Municipal School Council—which was informed as a party.

It is self-evident that a child only just beginning school will lose her unselfconsciousness before a commission consisting of a number of completely alien persons, and thus will not be able to answer the questions posed. From a pedagogical perspective, such tests of the language knowledge of small children in front of large commissions are completely impermissible, and can yield no correct assessment. It follows that the results of such a test are not decisive with regard to the language knowledge of my daughter, either. Preliminary inquiries in all these regards were also completely deficient. I thus request through my attorney, whose authorization to act on my behalf is attested in Exhibit D, that the esteemed i.r. Administrative Judicial Court see fit to overrule the decision of the i.r. Ministry of Religion and Education....

Hohenstadt, May 11, 1912.

Johann Lehar⁵

⁵ The Administrative Judicial Court rejected the appeal. It declared the appeal impermissible insofar as it claimed a violation of Article 18 of the Constitution regarding the General Rights of Citizens, because for such appeals jurisdiction fell to the Supreme Court. The Administrative Judicial Court also declared the appeal unfounded, in two regards. First, the Administrative Judicial Court accepted the evaluation by lower administrative courts of the evidence regarding Johann Lehar's national belonging: during his official hearing on October 8, 1911 (before the District School Council), Lehar had declared that he professed himself as of the Czech nationality. He had also given Czech as his language of daily use in the census, and was registered in

the Czech electoral registry. None of this had been contested in the course of administrative adjudication. Second, regarding the right to free choice among schools on the basis of Clauses 139 and 148 of the General Civil Code, the Administrative Judicial Court pronounced that this right, through Clause 20 of the Moravian School Founding Law of 1905, section II (the "lex Perek"), "indeed has experienced a restriction." From the deliberations...it is clear that the judge encharged with presenting the case, Rudolf von Herrnritt, at first had favored granting the appeal. He had defended again his oft stated thesis...that language was the sole criterion of national belonging. After lengthy deliberations, however, Herrnritt joined the majority in its ruling that if necessary, nationality could be determined in other ways as well. The chair of the court panel...summarized the basic idea of the Administrative Judicial Court's ruling as being "that nationality can be determined as a rule by the language of the child, but in exceptional cases in other ways as well."