

Legal Appeal Regarding the National Categorization of Schoolchildren in Moravia, 1912
Translated by Jeremy King (Mt. Holyoke College)

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. 311-316. 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) to the Supreme Administrative 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 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. After 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, 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 Supreme Administrative Court, but with accent in the published decision. Lehar re-appealed the Ministry of Education's decision, to the Supreme Administrative Court; the interesting appeal, composed by attorney Emil Fleischmann, is published here. Regarding the deliberations [of the Supreme Administrative Court] and the outcome of the proceedings, see note 5 below. The decision of April 19, 1913, is in Budwinski No. 9549/A. See regarding this case Wolfgang Steinacker, Der Begriff der Volkszugehörigkeit und die Praxis der Volkszugehörigkeitsbestimmung im altösterreichischen Nationalitätenrecht (Innsbruck 1932) 55-57. See also page 228 above, note 112.

Esteemed imperial royal Supreme Administrative 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, No. 7818, which was delivered together with a letter of the i.r. District School Council in Hohenstadt dated April 30, 1912, No. 417, to my friend at law Emil Fleischmann, whom I had authorized to act on my behalf, in Hohenstadt on May 1, 1912. The objection of the Czech Municipal School Council in Hohenstadt to the decision of the i.r. Moravian Provincial School Council of January 9, 1912, Nos. 36288 and 36902, was sustained, and the exclusion of my daughter Anna Lehar from the German elementary school in Hohenstadt was ordered. Against that ruling, I submit the following

APPEAL:

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

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 cadastre.

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 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 cadastre 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. Should those minutes not form a part of the record in this case, I request that they be obtained.

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. Should that questionnaire not form a part of the record in this case, I request that it be obtained. 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 [stark bearbeitet] by agitators, I had myself registered in the Czech cadastre. During the most recent elections, however, I requested my transfer to the German cadastre. 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. Please refer in this connection to the official minutes of the meeting with me on November 23, 1911. Should those minutes not form a part of the record in this case, I request that they be obtained.

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 [gerichtsordnungs-mäßig]. 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 cadastre 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. Cadastral 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 [zeitweise] 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. Thus the exclusion of my daughter Anna from the German elementary school in Hohenstadt by the Ministry of Religion and Education is unfounded in law.

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 Clause 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

² The reference is to the constitutional law regarding the general rights of citizens.

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 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 Provincial Legal Gazette, No. 4 [the "lex Perek"], has no bearing on the case. Aside from the fact that this provincial law cannot override the relevant imperial laws, Clause 20 of the provincial 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 Clause 18 of the Constitution. When the father wishes to have his child educated for an occupation in an elementary school with a particular language of instruction, the will of the father must be considered. An exception to the "rule" must be made. Children may even attend schools in whose language of instruction they are not proficient. Thus even 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 provincial 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

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...."

⁴ Regarding the restriction of parental rights by the "lex Perek," see above, page 221. The government had been aware of the weightiness [*Bedenklichkeit*] of that restriction. The report of the Minister of Education to His Royal Highness for the purposes of gaining imperial sanction had read that "In and of itself, this measure is not entirely beyond question, for it reduces the parental right to free self-determination in this matter. Yet I do not believe myself obliged to object, given the circumstance that this proposal was made by agreement of both nations of the crownland." Certified copy with imperial sanction in *Allgemeines Verwaltungsarchiv Wien, Bestand Unterrichts, 18a Mähren in genere, Zl. 44.156/Dep. XII* November 27, 1905. In the draft of the report preserved in the Archive of the Cabinet Office, the content of the "lex Perek" is stated, but an indication of its weightiness is lacking. *Haus- Hof- und Staatsarchiv, Bestand Kabinettskanzlei, Zl. 3411/1905*. In confidential deliberations by the Supreme Administrative Court in an earlier case concerning the "lex Perek," Friedrich Tezner reproached the government, saying that "it is almost a game of hide-and-seek by the government. For before it recommended imperial sanction of the lex Perek, the government must have known what the consequences would be." *Beratungsprotokoll zur causa "Ungarisch Hradisch,"* October 14, 1910 (the deliberations took place from June until December 1910). State Central Archive in Prague, *Verwaltungsgerichtshof in Wien, Karton 82, Konvolut II/150* of 1908.

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, through the [German] Municipal School Council. For this reason, the objection submitted directly to the i.r. District School Council by the Czech Municipal School Council should not have been adjudicated.

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 [sachliche Berechtigung], 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 friend at law, whose authorization to act on my behalf is attested in Exhibit D, that

the esteemed i.r. Supreme Administrative Court see fit to overrule the decision of the i.r. Ministry of Religion and Education dated April 8, 1912, No. 7818, insofar as that decision concerns my daughter Anna Lehar and orders her exclusion from the German elementary school in Hohenstadt, and see fit to overrule that decision as unfounded in the law or incorrectly adjudicated.

Hohenstadt, May 11, 1912.

Johann Lehar⁵

⁵ The Supreme Administrative 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 Imperial Court. The Supreme Administrative Court also declared the appeal unfounded, in two regards. First, the Supreme Administrative 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 cadastre. 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 Supreme Administrative 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 (preserved in the State Central Archive in Prague) it is clear that the judge encharged with presenting the case, Rudolf von Herrnritt, at first had favored granting the appeal. He had stood up again for his oft stated thesis—which he had defended already in his book *Nationality and Law* (1899), as well as in multiple deliberations of the Supreme Administrative Court regarding Moravian school cases—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 (an enlarged [erweiterte] panel consisting of seven members), Baron Erwin von Schwartzenu, summarized the basic idea of the Supreme Administrative 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."