



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

**CASE OF ENVER ŞAHİN v. TURKEY**

*(Application no. 23065/12)*

JUDGMENT

STRASBOURG

30 January 2018

**FINAL**

**02/07/2018**

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Enver Şahin v. Turkey,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Robert Spano, *President*,

Julia Laffranque,

Işıl Karakaş,

Nebojša Vučinić,

Paul Lemmens,

Jon Fridrik Kjølbro,

Stéphanie Mourou-Vikström, *judges*,

and Hasan Bakırcı, *Section Deputy Registrar*,

Having deliberated in private on 19 December,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 23065/12) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Enver Şahin (“the applicant”), on 14 March 2012.

2. The applicant was represented by Mr S. Elban, Mr H.K. Elban and Mr F. Erbek, lawyers practising in Antalya. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged that he had been the victim of discriminatory interference with his right to respect of private life (Article 8 of the Convention read in conjunction with Article 14), and complained of a discriminatory infringement of his right to education (Article 2 of Protocol No. 1 read in conjunction with Article 14 of the Convention).

4. On 5 March 2014 notice of the application was given to the Government.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1988 and lives in Diyarbakır.

6. In 2005, while he was a first-year mechanics student in the technical faculty of Firat University (“the faculty”), the applicant was seriously injured in an accident which left his lower limbs paralysed. He had to

suspend his studies until he had recovered sufficiently to return to university.

7. On 17 March 2007 the applicant requested the faculty to adapt the university premises in order to enable him to resume his studies for the 2007-2008 academic year.

8. The faculty replied to that request by letter of 25 May 2007. It pointed out that the faculty building had been designed and built with several floors in order to accommodate 3,000 students and that its architecture could not be adapted. It stated that the administration had been asked for leave to conduct redevelopment work on the doors to the building, but that that work could not be carried out in the short term. It added that the mechanics course required the applicant to participate in practical workshops, considering that as things stood such participation would cause problems. The faculty concluded that if the applicant wished to continue his studies it would help him as far as possible.

9. On 16 August 2007 the applicant sent, through a notary, formal notice to the administration of Fırat University and the faculty dean inviting them to carry out the redevelopment work requested. Relying on Article 42 of the Constitution, section 15 of Law no. 5378 on persons with disabilities and Article 2 of Protocol No. 1 to the Convention, he affirmed that it was the State's duty to guarantee the citizens' right to education, in line with the principle of equal opportunities. He further alleged that the faculty's reply to his request (see paragraph 8 above) had been intended solely to induce him to abandon his studies.

10. The administration replied to that formal notice by letter of 10 September 2007. The latter stated that the redevelopment works mentioned should be considered in the light of compliance with the regulations on public property, which could take some time. Furthermore, any problems encountered by the applicant in attending the theoretical classes administered in a three-storey building could be resolved with the help of a companion.

The Administration pointed out that the practical workshops were held on the ground floor of the building and posed no problems with regard to access, and that the applicant would consequently have no difficulty in attending the courses administered in the framework of those workshops. It explained that the only reason why the applicant's participation in the practical workshops had previously been described as problematic (see paragraph 8 above) was that such workshops necessitated a considerable physical effort and that his particular situation required some thought regarding the type of assistance with which he could be provided. Furthermore, all the parties involved were anxious to help students in difficulty, and there was no question of deterring the applicant from continuing his studies. Finally, the Administration pointed out that since, in its view, the budget allocated by the State was limited, the redevelopment

work necessitated by the applicant's situation was subject to unavoidable budgetary and time constraints.

11. On 15 November 2007 the applicant filed with the Elazığ Administrative Court an action for annulment of the university's replies of 25 May and 10 September 2007 and to provide compensation for the pecuniary and non-pecuniary damage which he claimed he had sustained. He complained that the authorities had not removed the physical obstacles preventing him from exercising his right to education. He claimed 25,000 Turkish liras (TRY) in respect of non-pecuniary damage and TRY 30,000 in respect of pecuniary damage.

12. The Administration of Fırat University replied in a defence memorial of 24 March 2008. That document stated that the university had not been responsible for the applicant's accident. It criticised the applicant for having opted for judicial channels, and alleged that he was acting in bad faith, adding, in that connection, that he had been informed that he would be provided with support should he decide to return to university. Furthermore, the relevant agencies had been contacted with a view to redeveloping the faculty building and a proposal had been made to include the works in an investment programme complying with the relevant regulations governing public property. The Administration further argued that it had offered the applicant the services of an assistant, but that he had not submitted any request for such help. The office added that access to the workshops posed no problems for persons with disabilities, but that the courses administered at the workshops demanded a physical effort from participants. Lastly, it pointed out that the applicant had never been barred from any course.

13. The applicant replied, refuting the arguments put forward by the Administration. He submitted that his right to education was guaranteed by domestic law and by Article 2 of Protocol No. 1 to the Convention, and that it was incumbent on the domestic authorities to take steps to enable him to exercise that right, with respect for the principle of equal opportunities. Moreover, he argued that the redevelopment work requested was such as should already have been conducted in any case, in line with the requirements of section 1*bis* of Law no. 3194 on urban planning (see paragraph 23 above). Furthermore, he considered that the authorities' offer of an assistant illustrated their ignorance of his personal situation and the implications of that situation. He added that it would be degrading for him to be placed in a situation of dependence on a third person because of his disability, citing the example of how the constant presence and assistance of a third person would invade his privacy. He also pointed out that the fact of being carried upstairs by another individual comprised a definite risk of his falling.

14. On 13 October 2008 the faculty terminated its contracts with a number of students, including the applicant, on the grounds that they had not re-registered at the start of two successive academic years.

15. 2 November 2009 saw the enactment of Legislative Decree no. 2009/15546, published in the Official Gazette (“the OG”) on 13 November 2009, closing down certain categories of institutions of higher education, including technical faculties, one of which was the technical faculty of Fırat University, which was replaced by a new faculty of technology. Under the legislative decree students who were already registered could continue their studies in the new faculties.

16. On 9 April 2010 the Elazığ Administrative Court dismissed the applicant’s appeal. In the reasoning of its judgment it stated, in particular, that the buildings in question had been erected in accordance with the regulations in force in 1988. The court took the view that although it was incumbent on the authorities to apply the technical guidelines set out in the legislation subsequently enacted for persons with disabilities, it could not be contended that the respondent authority had not followed those guidelines during the construction of a building erected in 1988, before the guidelines had come into force. Lastly, the judgment mentioned that the authorities had informed the complainant that architectural measures would be adopted, depending on the available budget, and that a person would be appointed to assist him in attending the courses.

17. The applicant lodged an appeal on points of law with the Supreme Administrative Court against that judgment.

18. On 18 January 2011 the Supreme Administrative Court delivered a judgment dismissing that appeal on points of law and upholding the first-instance judgment as being in conformity with the procedure and laws.

19. The applicant lodged an application for rectification of that judgment with the Supreme Administrative Court, complaining of an infringement of his right to education and the equality principle.

20. On 28 September 2011 the Supreme Administrative Court dismissed the applicant’s application, holding that there were no grounds for rectification.

## II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

### A. Relevant domestic law

21. The domestic law relevant to the present case was partly described in the judgment *Çam v. Turkey* (no. 51500/08, §§ 34-36, 23 February 2016).

22. Furthermore, section 3 (f) of Law no. 5378 on persons with disabilities of 1 July 2005 (“Law no. 5378”), published in the OG on 7 July 2005, defines accessibility as follows:

“(f) Accessibility: secure and independent access to and use of buildings, outside areas, transport and information services and information and communication technologies.”<sup>1</sup>

Article 2 (provisional) of that Law as in force at the material time read as follows:

“Existing official buildings belonging to public bodies and institutions, all [existing] roads and highways, pavements, pedestrian crossings, open spaces and parks, sports areas and other similar social and cultural infrastructures, as well as all constructions built by natural or legal persons providing public services shall be made compatible with the accessibility of ‘invalids’<sup>2</sup> ‘within seven years’<sup>3</sup> of the entry into force of [the present] law”

23. On 30 May 1997 an additional section was added to Law no. 3194 on Urban Planning of 3 May 1985, published in the OG on 9 May 1985. That section provides for an obligation to comply with the standards of the Turkish Standards Institute in urban planning projects, in urban and social construction areas and in technical infrastructures in order to ensure that the physical environment is accessible and adapted to persons with disabilities.

24. Law no. 6111 of 13 February 2011, published in the OG on 25 February 2011, added section 58 (provisional) to Law no. 2547 on Higher Education of 4 November 1981 (the so-called “student amnesty law”), published in the OG on 6 November 1981. That section provides, in particular, that certain students who, before the entry into force of the section, had terminated their relations with their institutions of higher education can:

- resume their studies during the 2011-2012 academic year, subject to applying to do so within five months of the entry into force of the said section;
- begin attending courses at the spring term of the 2010-2011 academic year, subject to applying to do so within ten days of the entry into force of that section and provided that that application is accepted by the institution in question.

Section 11 of Law no. 6353 of 4 July 2012, published in the OG on 12 July 2012, added section 63 (provisional) to Law no. 2547, providing as follows:

“Anyone who is ineligible under section 58 (provisional) [of Law no. 2547] because he or she has failed to lodge an application within the prescribed time-limit ... may, as from the entry into force of that section, begin [a course of study] during the subsequent [academic] year pursuant to the principles set out in section 58

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<sup>1</sup>. Apart from paragraph (f), all the provisions of this article were amended under Law no. 6518 of 6 February 2014.

<sup>2</sup>. Amended under section 1 (69) (n) of Law no. 6462 of 25 April 2013. The word “invalids” was replaced by the term “persons with disabilities”.

<sup>3</sup>. Amended under section 34 of Law no. 6353 of 4 July 2012, extending this period to eight years. In 2014 a maximum additional period of two years was granted.

(provisional), by applying to the institution of higher education with which they have broken off relations.”

## **B. International law**

25. The texts of international law relevant to the instant case are described in the *Çam* judgment (cited above, §§ 37-38 – see, additionally, *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V; *Mólka v. Poland* (dec.), no. 56550/00, ECHR 2006-IV; and *Farcaş v. Romania* (dec.), no. 2596/04, §§ 68-70, 14 September 2010).

Regard should also be had to the following passages from the United Nations Convention on the Rights of People with Disabilities (“CRPD”), adopted on 13 December 2006 by the United Nations General Assembly and signed on 30 March 2007, and then ratified by Turkey on 28 September 2009.

### **Article 2**

“Definitions

For the purposes of the present Convention:

...

‘Discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms

...”

### **Article 3**

“General principles

The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;

...”

### **Article 9**

“Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment,



to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

(a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

(b) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

...

(e) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

(f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

...”

## Article 20

“Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

(a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;

(b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;

(c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;

(d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.”

## Article 24

“Education

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

(a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

...

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities

...”

26. Reference should also be made to Article 13 of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations on 19 December 1966 and ratified by Turkey on 23 September 2003. That provision lays down that the States Parties must recognise the right of everyone to education and, with a view to achieving the full realisation of that right, that higher education must be made equally accessible to all, on the basis of capacity, by every appropriate means.

27. Within the Council of Europe, Recommendation No. R (98) 3 on access to higher education, adopted on 17 March 1998 by the Committee des Ministres, acknowledges that higher education has a key role to play in the promotion of human rights and fundamental freedoms.

Furthermore, in its Recommendation No. R (92) 6 of 9 April 1992 on a coherent policy for persons with disabilities, the Committee of Ministers invited member States to “guarantee the right of people with disabilities to an independent life and full integration into society” and to “recognise society’s duty to make this possible”, in order to give persons with disabilities proper “equality of opportunity” with others. Public authority action must be geared, inter alia, to give persons with disabilities “as much mobility as possible, and access to buildings and means of transport”, and to enable them to “play a full role in society” and “take part in economic, social, leisure, recreational and cultural activities”.

For its part, the Parliamentary Assembly of the Council of Europe dealt with these matters in its Recommendation No. 1185 (1992) of 7 May 1992 on rehabilitation policies for the disabled. That text emphasised that “society has a duty to adapt its standards to the specific needs of disabled people in order to ensure that they can lead independent lives”. To that end, Governments and the competent authorities were called upon to “strive for and encourage genuine active participation by disabled people in ... the community and society” and accordingly, to guarantee “ease of access to buildings”.

## THE LAW

### I. ALLEGED VIOLATIONS OF ARTICLE 2 OF PROTOCOL No. 1 TO THE CONVENTION AND OF ARTICLE 14 OF THE CONVENTION

#### A. Subject matter of the dispute

28. The applicant complained of a discriminatory infringement of his right to education. He submitted that in order to be able to continue his university studies at the faculty, redevelopment work had to be carried out in the faculty building. He alleged that the rejection of his request for works had forced him to abandon his studies. Thus he complained that the State had failed to take the positive action which he claimed was incumbent on it and would have enabled him to continue his university course.

He relied on Article 2 of Protocol No. 1 to the Convention read alone or in conjunction with Article 14 of the Convention, which provide:

#### Article 2 of Protocol No. 1 to the Convention

“No person shall be denied the right to education. ...”

#### Article 14 of the Convention

“The enjoyment of the rights and freedoms set for in [this] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status.”

29. The Government contested that argument.

30. The Court observes that the applicant’s allegation of discriminatory treatment on grounds of his locomotor disability is central to the complaint before it. In that connection it reiterates from the outset that Article 14 of the Convention only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions (regarding the principles, see, for example, *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), 23 July 1968, § 9, Series A no. 6; *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 39 et 40, ECHR 2005-X; *E.B. v. France* [GC], no. 43546/02, § 48, 22 January 2008; and *Sejdić and Finci v. Bosnia-Herzegovina* [GC], nos. 27996/06 and 34836/06, § 39, ECHR 2009).

31. That being the case, the Court has already had occasion to point out that in a democratic society the right to education is indispensable to the furtherance of human rights and plays a fundamental role (see *Velyo Velez v. Bulgaria*, no. 16032/07, § 33, ECHR 2014 (extracts), and *Çam*, cited above, § 52). Article 2 of Protocol No. 1 to the Convention applies to higher

education and, in that context, require any State which has set up institutions of higher education to ensure that they are effectively accessible (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, §§ 136 and 137, ECHR 2005 XI). In other words, access to any institution of higher education existing at a given time is an inherent part of the right set out in the first sentence of Article 2 of Protocol No. 1 (see, *inter alia*, *Mürsel Eren v. Turkey*, no. 60856/00, § 41, ECHR 2006-II, and *İrfan Temel and Others v. Turkey*, no. 36458/02, § 39, 3 March 2009).

In the present case, since the applicant's alleged inability to benefit from his right to university education concerned an existing faculty, which had become inaccessible to the applicant following an accident which had left him with a locomotor disability, it can only be concluded that the complaint in question falls within the ambit of Article 2 of Protocol No. 1 and that therefore Article 14 of the Convention is applicable.

32. Accordingly, the Court considers that the case should be examined first of all from the standpoint of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 (see, for a similar approach, *Oršuš and Others v. Croatia* [GC], no. 15766/03, §§ 143-45, ECHR 2010, and *Ponomaryovi v. Bulgaria*, no. 5335/05, § 45, ECHR 2011), it being understood that the scope of application of Article 14 of the Convention includes not only the prohibition of discrimination based on disability (see, for example, *Glor v. Switzerland*, no. 13444/04, § 80, ECHR 2009), but also an obligation for States to ensure "reasonable accommodation" to correct *de facto* inequalities which are unjustified and therefore amount to discrimination (see paragraph 72 below). The Court will return to these points later.

## **B. Admissibility**

### *1. The Government's submissions*

33. The Government pointed out that Law no. 5378 had imposed an eight-year time-limit (see paragraph 22 above) on rendering public buildings, roads, pavements, pedestrian crossings, open spaces and parks, sports areas and other similar social and cultural infrastructures, as well as all buildings providing public services, accessible to persons with disabilities. They explained that during this procedure the authorities in charge of the university in question had stated that the applicant could continue his studies. Ever since 2010 the buildings of the faculty of technology set up under Legislative Decree no. 2009/15546 of 2 November 2009 (see paragraph 15 above), in which the engineering classes were now being held, had been in conformity with the provisions on access for students with disabilities.

34. The Government added that the applicant had neither reregistered at the faculty nor had recourse to the Student Amnesty Law (see paragraph 24 above) in order to return to the university and resume his studies. They affirmed that he could have continued his studies if he had taken up the opportunities offered to reregister. The regulations set out in Law no. 6353 (ibid.) did not lay down any time-limit, and there was currently no obstacle to the resumption of his studies, provided that he submitted the relevant request. In that regard the Government submitted that the requisite redevelopment work had already been carried out in the new faculty buildings.

35. Therefore, the Government took the view that, having regard to the redevelopment work carried out and the opportunities offered by the Student Amnesty Law, the applicant had lost his victim status under Article 34 of the Convention and his application had to be rejected.

## *2. The applicant's submissions*

36. The applicant replied that the university authorities' dismissal of his request for measures geared to enabling him, as a person with a disability, to continue his studies had amounted to a violation of his right to education, as well as of his right to personal autonomy and self-fulfilment – which he described as aspects of his private life. He submitted that that violation had, furthermore, persisted until the authorities had taken the requisite action in the institution in question to remove the obstacles to his access to education, that is to say, as contended by the Government, until 2010-2011. The applicant considered, in that connection, that from the 2007-2008 academic year until the 2010-2011 academic year he had found it physically impossible to resume his studies because he had had no means of accessing the rooms in which the classes were being held.

37. In the applicant's view, even though he could have had recourse to the Student Amnesty Law in order to reregister with the faculty as from the 2010-2011 academic year – when the physical accessibility of the classrooms would have been guaranteed – the damage which he claimed to have suffered during the period when, in his view, he had been deprived of education had not been redressed, and indeed the respondent Government had made no effort to redress it. The applicant added that the dismissal of his appeals by the administrative courts was a fact which could not be overlooked. He took the view that, in the final analysis, the national authorities had neither acknowledged nor provided redress for the violations of which he was complaining.

## *3. The Court's assessment*

38. In the instant case, the Court observes that on 17 March 2007 the applicant lodged with the relevant university authorities a request for

redevelopment work on their premises in order to ensure his access to them (see paragraph 7 above). When the authorities replied that such work could not be carried out in the short term, the applicant applied, in vain, to the administrative courts (see paragraphs 11 to 20 above).

It transpires from the case file and the Government's observations (see paragraphs 15 and 33 above) that the faculty in which the applicant had been registered had been closed and replaced by a faculty of technology, whose buildings are reportedly being tailored to the needs of persons with disabilities. Moreover, according to the Government, the applicant is eligible for the provisions of the Student Amnesty Law enabling him to request reregistration at the university at any time (see paragraphs 34 and 35 above), which is not disputed by the applicant (see paragraph 37 above).

39. In order to determine whether the applicant can continue to claim to be the victim of the alleged violations, account should be taken of all the circumstances of the case in question, including any developments prior to the date of the examination of the case by the Court (see *Tănase v. Moldova* [GC], no. 7/08, § 105, ECHR 2010). In the present case, the redevelopment work carried out to accommodate persons with disabilities, as mentioned by the Government, is surely relevant here. However, the fact is that those improvements were not made until 2010 (see paragraph 33 above), apparently owing to budgetary and/or administrative constraints which had prevailed up to that date (see paragraphs 8 and 10 above).

The applicant can therefore legitimately claim to be the victim of a discriminatory infringement of his right to education during the period prior to the said work, as, in the circumstances of the present case, the subsequent setting up of a new faculty accessible to persons with disabilities cannot be interpreted as recognition of and redress for the alleged violation *vis-à-vis* the 2007-2008, 2008-2009 and 2009-2010 academic years (regarding the principles, see, for example, *Eckle v. Germany*, 15 July 1982, §§ 69 et seq., Series A no. 51; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Gäfgen v. Germany* [GC], no. 22978/05, §§ 115 and 116, ECHR 2010).

The same applies to the university registration facilities offered to the applicant, inasmuch as the material conditions prevailing in the building in question remained the same throughout the period in question.

40. The Government's preliminary objection must therefore be rejected.

41. Noting, moreover, that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds, the Court declares it admissible.

## C. Merits

### 1. *The applicant's submissions*

42. Referring to the case-law of the Court (see *Leyla Şahin*, cited above, § 137), the applicant submitted that the right to higher education fell within the scope of Article 2 of Protocol no. 1 to the Convention.

43. He explained that in the present case the impugned discrimination arose from the failure to take account of his physical disability *vis-à-vis* his access to education. He argued that he had been treated in the same way as healthy students. He affirmed that under the Court's relevant case-law discrimination could originate from a *de facto* situation (see *Zarb Adami v. Malta*, no. 17209/02, § 76, ECHR 2006-VIII).

44. Citing Article 10 of the Constitution, he submitted that positive discrimination towards persons with disabilities was not contrary to the prohibition of discrimination. He added that under section 15 of Law no. 5378 the right to education of persons with disabilities could not be impeded under any circumstances, and complained that the domestic authorities had not acted in conformity with that provision.

45. Moreover, the applicant rejected the Government's argument concerning the time required to carry out the redevelopment work in order to implement the relevant legislative provisions *vis-à-vis* the faculty buildings (see paragraph 33 above). He submitted that that argument could not be used to justify the attitude of which he claimed to have been the victim. He argued that in that context the legitimate aim pursued was disproportionate to the practical situation.

46. As regards the time-limit for complying with the requirement to bring existing buildings into conformity, he pointed out that that limit had at first been seven years and then, in 2012, had been increased to eight years following a legislative amendment. Lastly, in 2014, following a further legislative amendment, an additional two-year period was granted for institutions which had not yet carried out the requisite work. The applicant submitted that in view of the aforementioned changes, he had been unable to rely on the fact that the law was final, especially as the public authorities showed insufficient awareness of the issues involved – as allegedly shown by the Prime Minister's circulars.

47. The applicant added that the only valid argument which the Government could advance was the margin of appreciation available to States in enabling persons with disabilities to integrate into society, and that that meant adapting the physical environment within the limits of societal capacities. He submitted that the State's margin of appreciation in the educational sphere could not be interpreted as broadly as the national authorities had done in the present case.

48. Moreover, the applicant maintained that the redevelopment work which he had requested did not fit into a category liable to place an

excessive burden on the university's budget: the work involved installing an access ramp on the ground floor of the building, adopting administrative measures to ensure that his courses could be administered on the ground floor or, failing that, installing a lift to the upper floors, and, lastly, installing toilets for persons with disabilities. The applicant estimated the cost of that redevelopment work at some TRY 60,000 (approximately 14,620 euros (EUR)), which sum he considered eminently affordable for the authorities. He explained that the works would certainly be useful not only for himself but also for other persons with disabilities in the future. He held that the refusal to carry out the work had amounted to an unfair and disproportionate interference with his right to education.

## *2. The Government's submissions*

49. Referring to their previous submissions (see paragraph 33 above), the Government began by supplying factual information concerning the current situation of the buildings erected in 2009 for the new faculty of technology (see paragraph 15 above). They pointed out that following alterations to the ground floors of the buildings, new classrooms and laboratories had been constructed and new departments organised to enable students with disabilities to attend the courses. In that way any disabled student who was registered for a given course could now attend classes on the ground floor and, where necessary, in the classrooms of the different departments, which were readily accessible to persons with disabilities. Moreover, most of the workshops and laboratories were on the ground floor. The Government enclosed with its observations a CD containing photographs and video recordings of ground-floor classrooms and toilets for persons with disabilities, in order to show that the premises in question were easily accessible to students with disabilities.

50. Furthermore, the Government denied any infringement of the applicant's right to education, reiterating that it was the applicant who had failed to re-register at the university (see paragraph 34 above). They reiterated the facilities provided by law in that connection (see paragraph 24 above), and emphasised once again that the applicant could have continued his studies, and in fact still could continue them, provided that he applied to do so, which the applicant had so far failed to do.

51. The Government acknowledged that the ability of persons with disabilities to benefit from the services of public institutions and bodies on an equal footing with other persons was a fundamental human right and that disabled persons should have guaranteed access to public places so that they could live their day-to-day lives without the help of third persons. They submitted that Turkey had many laws and statutory texts, including the Constitution, guaranteeing full and effective participation in society for persons with disabilities, on a non-discriminatory basis.



52. The Government further stated that accessibility was one of the principles underpinning the United Nations Convention on the Rights of Persons with Disabilities, as ratified by the Turkish Grand National Assembly on 3 December 2008, of which they quoted Article 9 § 1 (see paragraph 25 above). By the same token, referring to the provisions of Law no. 3194 on Urban Planning (see paragraph 23 above), they affirmed that the institutions and authorities, which had a duty and responsibility *vis-à-vis* the built environment, complied with the accessibility requirement. Therefore, according to the Government, all institutions and authorities were required to carry out the necessary redevelopment work, in line with the relevant standards of the Turkish Standards Institute, in order to render buildings, open spaces (roads, car parks, pedestrian areas, parks and pavements), transport and communications accessible.

53. The Government further cited the provisions of Law no. 5378 (see paragraph 22 above) concerning the accessibility of public buildings and spaces for persons with disabilities. They explained that the redevelopment work required for such accessibility had to be ordered within eight years of the entry into force of the Law, with the possibility of an additional maximum period of two years. They added that the Law laid down an administrative fine for failure to carry out the requisite redevelopment work within the legal time-limits.

54. The Government also pointed out that regulations on the supervision and inspection of accessibility had come into force. In that context, inspections had been carried out and administrative fines imposed on persons and entities having failed in their obligations.

55. Moreover, the Government submitted that Turkey had been endeavouring, and was continuing to endeavour, to take the requisite action to implement Law no. 5378 in order effectively to ensure the rights of persons with disabilities. They argued that the action to be taken within the time-limits laid down in the Law and the supervision of that action took time and entailed significant expenditure.

56. Furthermore, in the present case the redevelopment work needed on the buildings likely to be used by the applicant in continuing his studies had been carried out pursuant to domestic law. The Government were convinced that thanks to the physical alterations made by the authorities and the opportunities provided under the Student Amnesty Law there was no longer any obstacle to the applicant's continuation of his studies.

57. Finally, the Government pointed out that there was no specific legislation on accessibility to university premises for persons with disabilities. Nor were there any provisions specific to Fırat University, because since its premises had the status of public buildings they were governed by Law no. 5378.

58. Relying on the legislative provisions relating to persons with disabilities and the redevelopment work which the authorities had

performed, the Government invited the Court to find that there had been no violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention.

### 3. *The Court's assessment*

#### (a) **General principles**

59. The Court reiterates that in interpreting and applying Article 2 of Protocol No. 1 it must bear in mind that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others*, decision cited above, § 42, and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, § 54, ECHR 2012). Article 2 of Protocol No. 1 must therefore be read in the light of Article 8 of the Convention, which safeguards the right of everyone to respect for private and family life, *inter alia* (see *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, §§ 136 and 143, ECHR 2012 (extracts)).

60. In the same context, account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, and therefore the provisions on the right to education set out in such instruments as the European Social Charter and the United Nations Convention on the Rights of Persons with Disabilities should be taken into consideration (see *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 64, ECHR 2005-XII; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, § 136, ECHR 2012; and *Çam*, cited above, § 53).

61. As regards Article 14 of the Convention, the Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations, and that a difference of treatment is devoid of any “objective and reasonable justification” where it does not pursue a “legitimate aim” or there is no “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see *Stec and Others*, decision cited above, § 51; *Zarb Adami*, cited above, § 72; *Sejdić and Finci*, cited above, § 42; and *Çam*, cited above, § 54). However, Article 14 of the Convention does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (see, *inter alia*, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV). States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify

a different treatment (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013), and a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI).

62. Also under Article 14 of the Convention, the Court must have regard to the changing conditions of international and European law and respond, for example, to any emerging consensus as to the standards to be achieved. In that connection, the Court notes the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education, which are enshrined in many international texts. It further emphasises that those international instruments have recognised inclusive education as the most appropriate means of guaranteeing the aforementioned fundamental principles, as such education is geared to promoting equal opportunities for all, including persons with disabilities (see *Çam*, cited above, § 64, and the references therein). Inclusive education indubitably forms part of the States' international responsibility in this sphere.

#### **b) Application of those principles to the present case**

##### *I. Establishing the framework of the assessment*

63. The Court notes from the outset the Government's emphasis on the redevelopment work completed in 2010 (see paragraphs 49, 53 and 54 to 58 above), as well as on the appropriateness of the domestic legislation which states access to public places by persons with disabilities to be a fundamental right (see paragraph 51 above).

In the present case, however, there is no need to assess the current situation in Turkey as regards the accessibility of educational premises for persons with disabilities, since the Court has already concluded (see paragraph 39 above) that such developments, however positive, are not such as to redress the violations which had allegedly occurred prior to 2010 (see, *mutatis mutandis*, *Christian Democratic People's Party v. Moldova*, no. 28793/02, § 78, ECHR 2006-II; *Norbert Sikorski v. Poland*, no. 17599/05, § 157, 22 October 2009; and *V.C. v. Slovakia*, no. 18968/07, § 153, ECHR 2011). Nor is the existence of legislation which is, *a priori*, conducive to protecting the rights of persons with disabilities of any relevance, because the important question in this case is whether Turkey effectively honoured its obligations under Article 14 Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention with respect to the applicant.

Accordingly, the Court's task is to assess the diligence of the university authorities, and later of the courts', reaction to the situation brought to their attention.

*ii. The stance taken by the university authorities*

64. In the instant case, in explaining to Mr Şahin that the adjustments he sought (see paragraph 48 above) could not be carried out in the short term, the university authorities – like the Government (see paragraphs 53 and 58 above) – had cited first and foremost a lack of financial resources to be made available at short notice for that purpose (see paragraphs 8 and 10 above).

The Court accepts that, as regards the matter of providing persons with disabilities with adequate access to educational institutions, the national authorities have a margin of appreciation and are best placed to assess that margin depending on the funds available (see, *mutatis mutandis*, *O'Reilly and Others v. Ireland* (dec.), no. 54725/00, 28 February 2002; *Sentges v. the Netherlands* (dec.), no. 27677/02, 8 July 2003; *Mółka*, decision cited above; and *Ponomaryovi*, cited above, § 56).

65. Nonetheless, the Court cannot accept the shelving of the question of the accessibility of the faculty premises for the applicant pending the availability of all the funds required to complete all the major development work laid down in legislation.

What is at stake here is the principle that where the execution of a commitment made under the Convention calls for positive measures from the State, the latter must not merely remain passive (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31).

66. In that connection, noting that the Convention is intended to safeguard concrete and effective rights, the Court reiterates that in the context of the present case it must take account of developments in international and European law and respond, for example, to any consensus emerging at those levels as to the standards to be achieved in the sphere concerned by the present case (see paragraphs 60 and 62 above).

67. The Court therefore agrees with the Government (see paragraph 52 above) that Article 14 of the Convention must indeed be read in the light of the requirements of the aforementioned texts, particularly the CRPD, with respect to the “reasonable accommodation – necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case” – which persons with disabilities are entitled to expect in order to secure their “enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” (Article 2 CRPD – see paragraph 25 above). Such accommodation is geared to correcting factual inequalities (see paragraph 61 above), and discrimination on grounds of disability “includes all forms of discrimination, including denial of reasonable accommodation” (see paragraph 25 above; and see, *mutatis mutandis*, *Çam*, cited above, §§ 65 and 67, and *Şanlısoy v. Turkey* (dec.), no. 77023/12, § 60, 8 November 2016).

68. Clearly, it is not the Court's task to define the "reasonable accommodation" – which can take on different material and non-material forms – to be implemented in the educational sphere in response to the educational needs of persons with disabilities; the national authorities are much better placed than it to do so (see, for example, *Çam*, cited above, § 66).

It is, however, important that those authorities take great care with the choices they make in this sphere, in view of the impact of those choices on persons with disabilities, whose particular vulnerability cannot be ignored.

69. Coming back to the facts of the case, the Court notes that the faculty did not reject outright (cf. *Çam*, cited above, § 58) the applicant's requests (see paragraphs 8, 10 and 12 above). In that regard, the Court will not dwell on the abstract promise of assistance which the faculty claimed to be able to provide to the applicant, as far as possible, or on the expression of concern about the demanding nature of the courses administered in the workshops; the statements comprise no practical, assessable proposal.

There thus remains the offer of support for the applicant (see paragraph 10 above). Although the Government did not provide details on the exact purpose and nature of the support to be provided, it seems obvious that it could only refer to helping the applicant, a paraplegic, to move around the three-storey faculty building.

70. In that regard, the Court reiterates that the ability of persons with disabilities to live autonomously with a fully-developed sense of dignity and self-respect is of cardinal importance and is central to the CRPD (Articles 3 (a), 9 § 1, 20 *in limine* and 24 § 1 (a) – paragraph 25 above), and is also one of the considerations highlighted in the recommendations adopted by the Council of Europe. Similarly, the Court itself has ruled that the very essence of the Convention is respect for human dignity and human freedom, which necessarily includes a person's freedom to make his or her own choices (see *Pretty*, cited above, §§ 61 and 65; *Mólka*, decision cited above; and *McDonald*, cited above, § 47).

71. It is true that the instruments of international law recognise the provision of forms of human aid as one measure to ensure the personal mobility of persons with disabilities and to facilitate access to buildings (Articles 9 § 2 (e) and 20 (b) CRPD – see paragraph 25 above). However, the solution offered by the administration does not fit into this framework because there is nothing in the case-file to convince the Court that the support in question was offered after a genuine assessment of the applicant's needs and sincere consideration of its potential effects on his security, dignity and autonomy.

72. Although the applicant has not in fact suffered any such effects, nonetheless, given that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 of the Convention (see *Pretty*, cited above; *Mólka*, decision cited above; and

*McDonald*, cited above, *ibid.*) – which is akin to Article 2 of Protocol No. 1 (see paragraph 59 above) – the Court observes that such a measure, that is to say the offer of assistance to be provided by a support person, which was proposed by the faculty without any individualised assessment of the applicant’s actual situation could not have been deemed reasonable under Article 8 because it disregarded the applicant’s need to live as independently and autonomously as possible.

*iii. The judicial response in the present case*

73. It was precisely the combination of all these aspects which the applicant had prayed in aid, while also relying on Article 2 of Protocol No. 1 (see paragraph 13 above), before the Elazığ Administrative Court, which had thus had to adjudicate substantially the same complaints as those brought before the Court. Pursuant to the principle of subsidiarity, it had been primarily incumbent on that court to enforce the rights in issue, verifying, in particular, whether the applicant’s educational needs and the authorities’ limited capacity for meeting them had been weighed against each other, that is to say whether a fair balance had been struck between the competing interests of the individual and of the community as a whole (see, among many other authorities, *mutatis mutandis*, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII: *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70-72, 25 March 2014; and *Pentikäinen v. Finland* [GC], no. 11882/10, § 114, ECHR 2015).

74. However, the 9 April 2010 judgment of the Elazığ Administrative Court (see paragraph 16 above) is silent on those aspects. Essentially, the administrative judges, while vaguely acknowledging that the authorities ought to have applied the guidelines on persons with disabilities, quite simply exempted the respondent faculty from its duty to cater for the applicant, on the sole grounds that its building had been erected in 1988, before the guidelines had come into force.

For the remainder, relying on the assumption that “architectural measures would be adopted depending on the available budget” – even though there had been no concrete proposal to that effect (see paragraphs 8 and 69 above) – the court considered it sufficient to point out that a person would be appointed to assist the applicant, without explaining how such a solution would prove adequate. In so doing the court also refrained (see paragraph 71 *in fine* above) from seeking to identify the applicant’s real needs and the ways and means of meeting them, with a view to enabling Mr Enver Şahin to resume his studies under conditions as similar as possible to those provided for able-bodied students, without imposing a disproportionate or undue burden on the authorities.

The Court takes the view that that response lacked any consideration of the fair balance to be struck between the applicant’s interest in exercising

his rights secured under Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention and any other competing interests to which the Elazığ Administrative Court might have been giving precedence.

*iv. Conclusions of the Court*

75. Having regard to all the foregoing considerations, the Court concludes that in the present case the Government have failed to demonstrate that the national authorities, including, in particular, the academic and judicial authorities, reacted with the requisite diligence to ensure that the applicant could continue to exercise his right to education on an equal footing with other students and, consequently, to strike a fair balance between the competing interests at stake.

Accordingly, there has been a violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention.

76. Having regard to that finding, the Court considers it unnecessary to assess separately the complaint under Article 2 of Protocol No. 1 to the Convention taken alone (see, *mutatis mutandis*, *Darby v. Sweden*, 23 October 1990, § 35, Series A no. 187; *Pla and Puncernau v. Andorra*, no. 69498/01, § 64, ECHR 2004-VIII; *Oršuš and Others*, cited above, § 186; and *Çam*, cited above, § 70).

## II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 14

77. The applicant also complained of a discriminatory interference with his right to respect for his private life on the grounds that the potential assistance by a third person would have had the effect of making him dependent on that person and depriving him of his privacy, in breach of Article 8 of the Convention read in conjunction with Article 14.

78. The Government submitted that there was no need to examine that complaint separately.

79. The Court considers that the complaint is closely linked to that examined previously and that it should therefore also be declared admissible.

However, having regard to the observations set out in paragraphs 69 to 72 and the finding made by the Court in paragraph 74 above, it agrees with the Government that no separate assessment is required of those matters.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### **A. Damage**

81. The applicant claimed 32,000 euros (EUR) in respect of the non-pecuniary damage which he alleged he had sustained owing to the circumstances, which in his view had amounted to a violation of his rights to education and to respect for his private life.

82. The Government submitted that there was no causal link between the violation found and the damage alleged, and argued that the applicant had been unable to demonstrate that he had really suffered under the aforementioned circumstances.

83. The Court considers that the applicant sustained, owing to the violation as found, non-pecuniary damage which cannot be redressed by the mere finding of a violation. However, it considers the amount claimed excessive (cf. *Çam*, cited above, § 74). Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 10,000 under this head.

### **B. Costs and expenses**

84. The applicant claimed 13,475 Turkish liras (TRY) in respect of legal fees. He presented an hourly breakdown showing forty-four hours of work performed in representing him in the present case, as well as a legal fees agreement signed on 31 January 2012.

85. The Government did not contest that claim.

86. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers the amount claimed, approximately equivalent to EUR 2,952, reasonable and awards it to the applicant.

### **C. Default interest**

87. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.



## FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible as regards the complaint under Article 2 of Protocol No. 1 to the Convention, both alone and in conjunction with Article 14 of the Convention;
2. *Declares*, by a majority, the application admissible as regards the complaint under Article 8 of the Convention, both alone and in conjunction with Article 14 of the Convention;
3. *Holds*, by six votes to one, that there has been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 to the Convention;
4. *Holds*, by six votes to one, that there is no need to examine separately the merits of the complaints under Article 2 of Protocol No. 1 to the Convention and under Article 8 of the Convention taken in conjunction with Article 14 of the Convention;
5. *Holds*, by six votes to one,
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
    - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;
    - (ii) EUR 2,952 (two thousand nine hundred and fifty-two euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 30 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı  
Registrar

Robert Spano  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

R.S.

H.B.

## DISSENTING OPINION OF JUDGE LEMMENS

### 1. I regret that I cannot agree with my colleagues' conclusions.

In short, I consider that the present case does not primarily concern reasonable accommodation. It follows that the applicant's main complaint should have been assessed primarily under Article 2 of Protocol No. 1 rather than under Article 14 of the Convention. Furthermore, in assessing the merits of the complaint, the majority would not appear to pay sufficient attention to certain facts in the case file, which lead me to a different conclusion on the merits.

Finally, as regards the complaint under Article 8 of the Convention, in my view it should be declared inadmissible.

### **Reasonable accommodation or accessibility? Article 14 of the Convention or Article 2 of Protocol No. 1 to the Convention?**

2. Before the Court, the applicant complained of a discriminatory interference with his right to education. He alleged that the national authorities had failed to take action – consisting in redeveloping the building where he was to attend courses – such as to enable him to continue his studies after an accident which had left his lower limbs paralysed (see paragraph 28 of the judgment). According to the majority, “the applicant's allegation of discriminatory treatment on grounds of his locomotor disability is central to the complaint before it [the Court]” (see paragraph 30 of the judgment). That is the reason why the majority held that the case should be considered primarily under Article 14 of the Convention (see paragraph 32 of the judgment). Later on, having regard to its conclusion on that provision, it considered it unnecessary to examine separately the complaint under Article 2 of Protocol No. 1 taken alone (see paragraph 75 of the judgment).

I take the view that the issue raised by the complaint is not (only) one of discrimination: it affects the very right to education, and in particular the right of access to education. What is central to the complaint, as the majority put it, is the applicant's inability to gain access to the education offered, because of an alleged failure to adopt measures to enable him to attend lectures and partial workshops. I therefore consider that the complaint should be assessed primarily under Article 2 of Protocol No. 1.

3. The majority's approach has consequences in terms of the reasoning to be followed. Assessment under Article 14 of the Convention leads the majority to consider the question of the State's positive obligations *vis-à-vis*

the reasonable accommodation to be made, particularly in the educational sphere (see paragraph 67 of the judgment). Reasoning based on Article 2 of Protocol No. 1 would shift the emphasis on to the accessibility of education.

4. Although they are linked, the concepts of reasonable accommodation and accessibility cover two different realities.

The majority rightly attach special importance to the United Nations Convention on the Rights of Persons with Disabilities (the “Disability Convention”). The European Convention on Human Rights should, as far as possible, be interpreted in the light of the provisions of the Disability Convention, which reflects an international consensus on the rights of persons with disabilities.

In the latter convention, reasonable accommodation and accessibility are governed by different provisions. Reasonable accommodation is defined as “necessary and appropriate modification and adjustments ... where needed in a particular case”, and a refusal to make reasonable accommodation amounts to discrimination on grounds of disability (Article 2 of the Disability Convention). Accessibility, particularly in terms of access to the physical environment, is a broader concept. It must be guaranteed in order to “enable persons with disabilities to live independently and participate fully in all aspects of life” (Article 9 § 1 of the same convention). As regards education, and in particular higher education, the States Parties must “ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others; “[t]o this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities” (Article 24 § 5 of the same convention).

The difference between the two concepts is highlighted by the Committee on the Rights of Persons with Disabilities. That committee, in its General Comment no. 2 (2014) on Article 9 of the Disability Convention (accessibility) adopted on 11 April 2014, analyses that matter at length, emphasising the various legal ramifications of the concepts:

“24. A clear distinction should be drawn between the obligation to ensure access to all newly designed, built or produced objects, infrastructure, goods, products and services and the obligation to remove barriers and ensure access to the existing physical environment and existing transportation, information and communication, and services open to the general public. Another of the States parties’ general obligations is to ‘undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and

guidelines' (art. 4, para. 1 (f)). All new objects, infrastructure, facilities, goods, products and services have to be designed in a way that makes them fully accessible for persons with disabilities, in accordance with the principles of universal design. States parties are obliged to ensure that persons with disabilities have access to the existing physical environment, transportation, information and communication and services open to the general public. However, as this obligation is to be implemented gradually, States parties should establish definite time frames and allocate adequate resources for the removal of existing barriers. Furthermore, States parties should clearly prescribe the duties of the different authorities (including regional and local authorities) and entities (including private entities) that should be carried out in order to ensure accessibility. States parties should also prescribe effective monitoring mechanisms to ensure accessibility and monitor sanctions against anyone who fails to implement accessibility standards.

25. Accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an *ex ante* duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service. States parties need to set accessibility standards, which must be adopted in consultation with organizations of persons with disabilities, and they need to be specified for service-providers, builders and other relevant stakeholders. Accessibility standards must be broad and standardized. In the case of individuals who have rare impairments that were not taken into account when the accessibility standards were developed or who do not use the modes, methods or means offered to achieve accessibility (not reading Braille, for example), even the application of accessibility standards may not be sufficient to ensure them access. In such cases, reasonable accommodation may apply. In accordance with the Convention, States parties are not allowed to use austerity measures as an excuse to avoid ensuring gradual accessibility for persons with disabilities. The obligation to implement accessibility is *unconditional*, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities. The duty of reasonable accommodation, contrarily, exists only if implementation constitutes no undue burden on the entity.

26. The duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context. Here, accessibility standards can be an indicator, but may not be taken as prescriptive. Reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account. Thus, a person with a rare impairment might ask for accommodation that falls outside the scope of any accessibility standard" (CRPD/C/GC/2).

The Committee on the Rights of Persons with Disabilities reiterated this distinction in its General Comment No. 4 (2016) on the right to inclusive education, adopted on 26 August 2016:

"The Committee reiterates the distinction between the general accessibility duty and the obligation to provide reasonable accommodation. Accessibility benefits groups of the population and is based on a set of standards that are implemented gradually.

Disproportionality or undue burden cannot be claimed to defend the failure to provide accessibility. Reasonable accommodation relates to an individual and is complementary to the accessibility duty. An individual can legitimately request reasonable accommodation measures even if the State party has fulfilled its accessibility duty” (CRPD/C/GC/4).

It is quite possible that not every position adopted by the Committee on the Rights of Persons with Disabilities concerning the Disability Convention applies, as such, to the European Convention on Human Rights. For instance, I do not think that our Convention can be interpreted as imposing an “unconditional” obligation to ensure accessibility without considering the fair balance between individual rights and general interests characterising the whole Convention. On that point, the Disability Convention expands the obligations which States accept on becoming Parties to the European Convention on Human Rights.

5. However, the essential point is that accessibility benefits all persons with disabilities, whereas reasonable accommodation concerns a specific individual in a specific situation. A State must first of all honour its general obligation to ensure accessibility; subsequently it may be required to make reasonable accommodation in individual cases.

In the instant case, however the applicant complained of the absence of facilities liable to “be useful not only for himself but also for other persons with disabilities in the future” (see paragraph 48 of the judgment). What he claims to have requested is not (reasonable) accommodation in view of his specific situation, but, more generally, (architectural) adaptation which would render the building in question accessible to all students with locomotor disabilities.

The majority make several references to the right of access to education and the accessibility of the buildings in which education is provided. However, they broach the applicant’s complaint from the angle of Article 14 of the Convention, and refer to the provisions of the Disability Convention laying down that denial of reasonable accommodation amounts to discrimination (see paragraph 67 of the judgment). In my view, by doing so the majority have reduced the scope of the applicant’s complaint. At the same time, I feel that they have also misread the philosophy of the law concerning persons with disabilities.

As stated above, the complaint should first of all have been assessed under Article 2 of Protocol No. 1 (accessibility), and then, if necessary, under Article 14 of the Convention (reasonable accommodation).

#### **Access to education (Article 2 of Protocol No. 1 to the Convention)**

6. Access to educational institutions existing at any given time is an integral part of the right set forth in the first sentence of Article 2 of Protocol No. 1 (see *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), 23 July 1968, pp. 7-8, §§ 3-4, Series A no. 6, and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 137, ECHR 2012). The right of access to education imposes an obligation on States to ensure that the buildings in which classes are given are accessible to all, therefore including persons with disabilities.

This obligation has applied to Turkey since the entry into force of Protocol No. 1 in respect of that country, that is to say since 1954. Nonetheless, the Court does not have to consider *in abstracto* whether Turkey is in compliance with the obligation. In the present case, the only question arising is whether Turkey fulfilled its obligation *vis-à-vis* the applicant. The building in respect of which he submitted his request to the university authorities was built in 1988. The applicant’s complaint therefore relates to an existing building.

7. As stated by the Committee on the Rights of Persons with Disabilities, the obligation on States to guarantee access by persons with disabilities to the physical environment is, where existing buildings are concerned, an obligation which must be honoured gradually. In order to achieve the desired result, States must set precise deadlines and earmark adequate resources for the removal of existing obstacles (General Comment No. 2 (2014), § 24, quoted in paragraph 4 above).

Turkish law included provisions which, at the material time, laid down an obligation to bring existing official buildings into line with accessibility for persons with disabilities within seven years as of July 2005 (see section 2 [provisional] of Law no. 5378 of 1 July 2005 on persons with disabilities, quoted in paragraph 22 of the judgment). That time-limit was subsequently extended by one year, and then by two years for those buildings which were not yet in conformity (see footnote on page 3 of the judgment). However, those developments lie outside the framework of the case before the Court.

8. Careful attention must be paid to the tenor of the applicant’s request to the university authorities and their reactions.

On 17 March 2007 the applicant asked the faculty, apparently in fairly broad terms, to ensure that the university premises were adapted in such a way as to enable him to resume his studies *during the 2007-2008 academic year* (see paragraph 7 of the judgment; *my italics*). He was therefore leaving

the university authorities very little time, although they were still within the legal time-limits for carrying out the requisite work. In his reply of 16 August 2007 the applicant referred, in particular, to section 15 of Law no. 5378 on persons with disabilities (see paragraph 9 of the judgment), which laid down the general obligation of access to education for persons with disabilities (for the text of that section, see *Çam v. Turkey*, no. 51500/08, § 36, 23 February 2016).

In their replies of 25 May and 10 September 2007, the university authorities acknowledged that alterations were required to the buildings, but they also drew the applicant's attention to the fact that carrying out the adaptation work could take some time (see paragraphs 8 and 10 of the judgment).

Having been unable to access the building for the 2007-2008 academic year, the applicant lodged with the administrative court an application for annulment and an action for damages. He complained that the authorities had not removed the physical obstacles which he submitted had impeded the exercise of his right to education (see paragraph 11 of the judgment). In that connection, let me emphasise that that appeal still concerned the accessibility of the building during the 2007-2008 academic year: the accessibility of the building during the ensuing academic years could not have been covered by the appeal, because it only concerned the university authorities' replies to the applicant's requests.

The administrative court dismissed the applicant's appeal by judgment of 9 April 2010. The court held that the university could not be reproached with failing to observe the technical guidelines on building accessibility, as they had been enacted after the construction of the building in issue. As regards the adaptation of that existing building, the court noted that the authorities had informed the applicant that architectural measures would be adopted in accordance with the available budget (see paragraph 16 of the judgment). In short, the court held that in omitting to carry out the redevelopment work on the building in question before the beginning of the 2007-2008 academic year, the university had not failed to honour its obligations.

9. The majority consider that it has not been demonstrated that the domestic authorities, in particular the university and judicial authorities, reacted with the requisite diligence (see paragraph 74 of the judgment).

I do not agree. We do not know what measures the applicant requested. It would appear that it was only before the Court that he provided details of the kind of redevelopment work he considered necessary (see paragraph 48



of the judgment). On the other hand, the applicant's request to the university authorities was apparently couched in very broad terms, and was understood by the latter and the administrative court as necessitating redevelopment work on the doors to the building, as well as more extensive works inside the latter.

Can it be said that in failing to carry out the redevelopment work immediately, in particular by omitting immediately to secure the requisite funding, the competent authorities failed to honour their positive obligation under Article 2 of Protocol No. 1? I consider that we have insufficient information at our disposal to reach such a conclusion. The existence and scope of a positive obligation in any given situation depend on the requisite fair balance to be struck between the competing interests of the individual in question and of society as a whole (see paragraph 72 of the judgment, which, strangely enough, mentions a principle which applies in the context of Article 2 of Protocol No. 1, and not under Article 14 of the Convention). In the instant case, the competent authorities had undertaken to carry out the necessary work in accordance with the available budget, and the law required them to do so within a very specific time-limit. That being the case, how can it be claimed that a few months after the applicant's request, those authorities were in a situation of flouting the latter's rights?

10. The university authorities did not confine themselves to making commitments for the future. In order to enable the applicant to continue his studies immediately, the faculty assured him that it would provide him with assistance as far as possible (see paragraph 8 of the judgment). The administration was more specific, proposing the help of a support person (see paragraph 10 of the judgment). The applicant did not react well to that proposal, and later explained that it pointed to a lack of understanding of his personal situation, that accepting it would have placed him in a situation of dependency on a third person, and that the implementation of such a proposal would have led to a risk of his falling in the staircases (memorial in reply before the administrative court; see paragraph 13 of the judgment).

The proposal by the administration might indeed not have been very appropriate. However, was it its last offer? The applicant could have had re-contacted that office to explain why the proposal did not suit him. There is nothing to suggest that the administration would not then have sought another immediate solution. However, the applicant preferred to respond by bringing legal proceedings. It is therefore understandable that the defence pleadings submitted by the administration accused the applicant of acting in bad faith: at that time the administration still considered that the provision of a support person was an appropriate proposal (see paragraph 12 of the judgment). The fact that it was still of that opinion shows that the applicant

had not re-contacted it to explain that its offer was not sufficient, or even that it was unacceptable. Only in his memorial in reply did the applicant state why he had not accepted the proposal (see paragraph 13 of the judgment).

11. The majority accuse the university and judicial authorities of having failed to identify the applicant's real needs and find solutions capable of meeting those needs (see paragraphs 71 and 73 of the judgment).

Having regard to the course of events at the national level, I consider this criticism unjustified. The contents of the case file would suggest to me that the university authorities were determined to enable the applicant to continue his studies, even though they saw no possibility of performing the requisite redevelopment work in the immediate future. The possibility of specific alterations for the applicant ("reasonable accommodation", within the meaning of the Disability Convention) was there, but the applicant seems to have presented the university authorities with a *fait accompli* by breaking off discussions with them and bringing legal proceedings. In my view, one of the reasons why there was no proper assessment of the applicant's needs and of the consequences of the proposed assistance by a "support person" (see paragraph 71 of the judgment) was the attitude adopted by the applicant.

12. In conclusion, while it is regrettable that the applicant was unable to continue his studies during the 2007-2008 academic year because of his lack of access to the courses administered in the building at issue, I cannot conclude that the respondent State failed to honour its obligations under Article 2 of Protocol No. 1.

#### **Denial of reasonable accommodation (Article 14 of the Convention)**

13. Given that I find no violation of Article 2 of Protocol No. 1, I must further explain why I did not vote for a finding of a violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1.

The question whether Article 14 was breached in the instant case means asking whether reasonable accommodation was denied, having regard to the specific situation of the applicant.

For the same reasons as I gave in my arguments under Article 2 of Protocol No. 1, and in particular for the reasons concerning the specific proposal made to the applicant and his reaction to that proposal (see paragraph 11 above), I cannot find that there was a violation of Article 14 in the present case.

I should stress that if the applicant had continued discussions with the university authorities and if they had then shown little or no willingness to seek other solutions, the situation might have been very different. I cannot, however, speculate on that point.

**Proposed assistance by a support person (Article 8 of the Convention, read separately and in conjunction with Article 14)**

14. The applicant further complained of a discriminatory interference with his right to respect for his private life on the grounds that the possible assistance of a third person would have had the effect of rendering him dependent on that person and of depriving him of his privacy (see paragraph 76 of the judgment).

The majority consider this complaint admissible, adding that it is unnecessary to examine it separately on the merits (see paragraph 78 of the judgment).

15. The subject matter of the complaint is an offer which, moreover, was made in order to help the applicant, which was never implemented and which was rejected by the applicant. I regret that I cannot agree with the majority's decision to declare that complaint admissible. In my view an applicant who complains of a mere intention on the part of a public authority, which intention was not put into practice, cannot claim to be the victim of a violation of his rights within the meaning of Article 34 of the Convention.

That complaint ought therefore to have been declared incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) thereof.