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

# THIRD SECTION

# DECISION

Application no. 40477/13
Marc GLAISEN
against Switzerland

The European Court of Human Rights (Third Section), sitting on 25 June 2019 as a Chamber composed of:

Georgios A. Serghides, *President*,
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Alena Poláčková,
María Elósegui,
Erik Wennerström, judges,

and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 19 June 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Mr Marc Glaisen, is a Swiss national, who was born in 1968 and lives in Geneva. He was represented before the Court by Mr C. Mizrahi, a lawyer practising in Carouge.

2. The Swiss Government ("the Government") were represented by their former Agent, F. Schürmann, of the Federal Justice Department.

### A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. The applicant was born in 1968 and lives in Geneva.

5. The applicant, a psychologist, has been paraplegic since 1987. On 4 October 2008 he went, on his own, to the Pathé Rialto cinema in Geneva to watch a film ("Vinyan") which was not being shown in any other cinema in the city. The building housing the cinema, operated by Pathé Romandie Sàrl, was not adapted to wheelchair users; they could neither enter nor leave the auditoria without help from another person. The applicant was refused access on the basis of the operating company's internal safety instructions, and was turned away before he could ask if other members of the public were willing to help him, and before he could even buy a ticket. He complained, unsuccessfully, to Pathé Romandie Sàrl.

6. On 28 September 2009 the applicant brought an action for damages against X. Sàrl, seeking damages of 5,000 Swiss francs (CHF; about 4,000 euros (EUR)), plus interest. He considered that he had been discriminated against in being denied access to the cinema.

7. An on-site inspection was carried out as part of the investigation. On that occasion, the applicant (who weighs 80 kg) demonstrated that, with the assistance of two people, he could enter the auditorium in a wheelchair (weighing approximately 15 kg) and leave by the emergency exit.

8. By a judgment of 15 September 2011, the Canton of Geneva Court of First Instance dismissed the applicant's action.

9. The applicant lodged an appeal, which was dismissed by the Civil Division of the Court of Justice of the Canton of Geneva in a judgment of 11 May 2012.

10. The applicant lodged a civil-law appeal and, in the alternative, a constitutional appeal, requesting that Pathé Romandie Sàrl be ordered to pay him CHF 5,000, plus 5% interest, backdated to 4 October 2008.

11. By a judgment of 10 October 2012, notified to the applicant on 20 December 2012 (and received by him on 21 December 2012), the Federal Supreme Court dismissed the appeal on, *inter alia*, the grounds set out below:

> "2.2 In the Cantonal Court's findings, it 'does not seem easy to manipulate the wheelchair occupied by A. [the applicant], weighing 100 kg in total, especially when several steps must be climbed on the staircase.' The appellant criticises this conclusion, referring to the reports drawn up at first instance. In his view, the manoeuvre can be carried out by any person capable of following his instructions; as evidence, he cites the demonstration given during the on-site visit, when a man of normal strength and a woman suffering from a herniated disk succeeded in carrying him up the stairs.
>
> The appellant is, to a certain extent, playing on words. The Civil Division did not find that the manoeuvre was impossible or particularly difficult, but only that it was not easy. However, there is nothing unreasonable in noting that it is not an easy task to carry an individual in a wheelchair, weighing 100 kg in total, up a flight of stairs, at least not for persons who are unaccustomed to this task.
>
> As will be seen below, however, this matter is not decisive for the outcome of the dispute, so that a correction of the factual findings is in any event beside the point.

3. Secondly, the appellant complains of a violation of section 6 of the Disability Act [Federal Law of 13 December 2002 on the Elimination of Inequalities affecting Persons with Disabilities].

3.1. Rightly, he does not criticise the fact that the cinema building itself is constructed in such a way that access to the auditoria is impossible or difficult for persons in wheelchairs. The Disability Act does not apply to this building, which was erected and renovated prior to the entry into force of the Law of 1 January 2004 (section 3(a) of the Disability Act). Nor does the appellant challenge the fact that no members of staff were present with responsibility for assisting wheelchair users to enter the auditorium, since the Disability Act does not create any such obligation for private service providers (section 6 of the Disability Act; see, *a contrario*, the memorandum of 11 December 2000 on the federal popular initiative "Equal rights for Disabled Persons" and the draft federal law on the elimination of inequalities affecting disabled persons, FF 2001 1698 chapter 5.4.4).

However, the appellant does contest the grounds put forward by the respondent for refusing him access to the auditorium. He notes that the specific risks in the event of evacuation are intrinsic to the condition of a wheelchair user and typical of numerous situations in the daily life of the individuals concerned; by way of example, he refers to the fact that lifts are not supposed to be used in the event of a fire, a possibility which clearly could not justify a ban on entry to all premises that are accessible solely by staircase or lift, unless disabled persons are to be excluded from them. In addition, the appellant considers that the absence of staff capable of assisting a disabled person is not decisive if third parties are willing to help, third parties that he was in this instance willing to find himself from among audience members. Lastly, he argues that, contrary to what is claimed by the respondent, the liability of the cinema operator would not have been incurred if he or the above-mentioned third parties had sustained an injury. The appellant concludes that there were no valid reasons for refusing him access to the cinema and that he suffered discrimination within the meaning of section 6 of the Disability Act.

3.2 The appellant's objections are not completely without foundation. Nevertheless, they do not invalidate the grounds put forward by the respondent to justify the refusal to sell him an admission ticket.

Admittedly, the emergency evacuation of any building or premises entails particular risks for a wheelchair user, especially if he or she is unaccompanied. However, these risks are even greater with regard to the emergency evacuation of an entertainment venue, given the large number of people potentially present and the attendant risk of crushing. Furthermore, even if the cinema operator's legal liability were not to be engaged in the event of death or injury to a disabled person or a third party providing assistance, it is understandable that the operator is wary of the possible criticisms that could be levelled against it by the victim's relatives or by other parties for failing to have regard to a disabled person to whom they had nonetheless sold an admission ticket to the auditorium.

That being stated, it is necessary to examine whether, in refusing the appellant entry to the cinema on the above-mentioned grounds, the respondent subjected him to discrimination that is prohibited by law.

3.3 In accordance with section 6 of the Disability Act, private persons who provide services to the public must not treat disabled persons in a discriminatory manner on account of their disability. The concept of discrimination within the meaning of this provision must be interpreted with specific reference to the will of the legislature as

reflected, in particular, in the drafting history (compare Official Reports ("ATF") 135 III 20 at 4.4 p. 23, 112 at 3.3.2 p. 116).

3.3.1 Apart from replacing the term "*personnes privées*" [that is, private individuals] by "*particuliers*" [translated hereafter as "private persons", that is, private-sector legal entities and also private individuals], section 6 of the Disability Act corresponds to the wording of section 6 in the draft law put before the Federal Council. The Federal Parliament enacted this provision without discussion (see BO 2001 CE 619 and BO 2002 CN 944). In the above-cited memorandum, the prohibited discrimination is defined as follows: 'Discrimination is qualified inequality, that is, a manifest or particularly shocking difference in treatment which may have a disparaging connotation. Applied to a private person, the principle of non-discrimination does not however entail for that person an obligation to take particular (positive) measures to eliminate *de facto* inequalities. Nor does it oblige him/her to engage in egalitarian conduct and does not prohibit him/her from differentiating services on the basis of his/her clients. In other words, this provision is intended to prevent serious practices of segregation which might exclude disabled persons from certain activities from fear that their very presence would disturb the peace or social habits of the usual customers. Thus, a restaurant owner cannot refuse a person with mental disabilities access to his or her premises simply from fear that the presence of this disabled person would dissuade his/her usual clientele from coming and without there being sufficient grounds for considering that this person would compromise the atmosphere and calm of the premises. In so far as the disabled person does not disrupt order and decorum in the premises and his or her conduct is unlikely to disturb the other clients, it would be discriminatory to refuse to grant access. This provision thus targets conduct that is particularly shocking and contrary to the mutual tolerance that the different members of the same society owe to each other' (FF 2001 1671, chapter 4.3.2 on section 6).

The Federal Council echoed those principles in the implementing ordinance; the latter defines discrimination for the purposes of sections 6 and 8(3) of the Disability Act as any difference in treatment which is particularly marked and entailing serious inequality, with the intention or consequence of degrading or marginalising a disabled person (Article 2(d) of the Ordinance on the elimination of inequalities affecting disabled people ["the Disability Ordinance"; RS 151.31]).

In the present case, the impugned refusal to provide a service cannot be classified in this way. Based on safety considerations that were at least understandable, the operating company's conduct in respect of the appellant cannot be considered particularly shocking; it does not reflect either a lack of tolerance or a wish to exclude wheelchairs users. Indeed, the respondent provides unrestricted access to the latter group in its other cinemas in Geneva, in that they are accessible for people with restricted mobility.

3.3.2 On the basis of a recent opinion by two authors, the appellant defends a wider concept of discrimination and alleges that section 6 of the Disability Act must be interpreted in accordance with the Constitution. Without further demonstration, the authors in question state that discrimination does not need to be particularly crass; it is sufficient that there is unequal treatment that cannot be sufficiently justified (Markus Schefer/Caroline Hess-Klein, "Die Gleichstellung von Menschen mit Behinderung bei Dienstleistungen, in der Bildung und in Arbeitsverhältnissen", *Jusletter* of 19 September 2011, B/II/2 p. 6).

This raises the issue of the application of the constitutional prohibition of discrimination (Article 8 § 2 of the Federal Constitution) to relations between private

persons, or, more generally, the horizontal effect of fundamental rights. Under Article 35 of the Constitution, fundamental rights must be upheld throughout the legal system (§ 1), and the authorities must ensure that these rights are also applied, in so far as possible, in relations between private persons (§ 3). While it is accepted that fundamental rights are not only a defence against violations imputable to the State, but are also the basis for the State's duty to protect against breaches by third parties, it remains the case that the constitutional rights of these third parties must also be protected; the various interests involved must be weighed up. It is primarily the task of specific legislation to determine which acts are permissible and which are not, and to delimit the rights of the private persons involved. The issue of the extent of the duty to protect fundamental rights thus merges with the question of the correct application of the specific legislation (Federal Supreme Court judgment 126 II 300, point 5, pp. 314 FF; see also Federal Supreme Court judgment 137 I 305, point 2.4, pp. 315).

In the present case, section 6 of the Disability Act establishes the principle that the prohibition of discrimination within the meaning of Article 8 § 2 of the Federal Constitution applies not only to relations between the State and private persons, but also to relations between private persons (FF 2001 1671 chapter 4.3.2 on section 6). This provision was thus specifically adopted with the aim of establishing the horizontal effect of the constitutional prohibition of discrimination. Regard must therefore be had to the concept of discrimination intended by the legislature, as set out above (see point 3.3.1).

3.4 In conclusion, the ground of appeal alleging a violation of section 6 of the Disability Act is ill-founded.

4. Lastly, the appellant alleges that there has been a violation of international law. He relies on Article 14 [of the European Convention on Human Rights] on the prohibition of discrimination, taken together, firstly, with Article 10 [of the Convention], guaranteeing freedom of expression, and, secondly, with Article 8 [of the Convention], guaranteeing the right to respect for private and family life. He argues that the right to access a cinema, a quintessential venue for the dissemination of cultural productions, is covered by Article 10 taken together with Article 14, and that this right was denied to him without any relevant justification from the perspective of the Convention. Equally, the refusal to grant him access, in so far as it seriously affected his psychological integrity, amounted, in the absence of any objective justification, to a violation of Article 8 taken together with Article 14 of the Convention.

4.1 The obligation to respect the fundamental rights arising from the [Convention] is directed at States (Article 1 of the Convention). In order to guarantee the effectiveness of these rights, it may nevertheless be necessary to protect them in relations between private persons. If it is not to violate Convention rights, a State may be obliged to take sufficient measures to protect these rights against breaches by private persons (see Federal Supreme Court judgment 136 I 167, point 2.2 p. 170; Franz Werro/Irène Schmidlin, "La protection de la personnalité et les médias : une illustration de la rencontre du droit civil et du droit constitutionnel", in *Droit civil et Convention européenne des droits de l'homme*, 2006, p. 184).

4.2 In the present case, Switzerland adopted the Disability Act with the purpose of preventing, reducing or eliminating the inequalities which affect people with disabilities (section 1 of the Disability Act). In this context, the federal legislature provided, *inter alia*, that buildings and facilities which are open to the public and for which authorisation to build or renovate was granted after the entry into force of the Disability Act had to be easily accessible to persons with disabilities (section 2(3) and

section 3(a) of the Disability Act); it imposed a prohibition of discrimination on private persons who provide services to the public (section 6 of the Disability Act); it also gave people with disabilities and certain organisations working to support them the right to take legal action if necessary (section 7(1), section 8(3), section 9(3)(a) and (b) of the Disability Act). The question is whether these legislative measures are sufficient under the Convention and, in particular, whether the Convention requires Switzerland to adopt a broader concept of discrimination than that contained in section 6 of the Disability Act (see points 3.3.1 and 3.3.2 above).

The appellant makes the above allegation on the basis of general considerations. However, he does not cite any judgment in which the European Court of Human Rights has held that a comparable obligation exists. The *Botta v. Italy* judgment relied on by him (24 February 1998, Reports 1998-I) concerns the case of a disabled individual who criticised the authorities for failing to react to his complaints about beaches not being equipped with facilities for disabled persons, although these were required by law and their absence could result in withdrawal of a beach's license. The Court found that there had been no violation of Articles 8 and 14 [of the Convention], on the grounds that the right asserted by the applicant, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life (§ 35). That judgment is admittedly quite old, but the appellant has not shown that the Court has explicitly or implicitly departed from this case-law in recent years.

On the contrary, in a later judgment concerning persons with reduced mobility who could not enter buildings open to the public (*Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V), the Court held that the sphere of State intervention and the evolutive concept of private life do not always coincide with the more limited scope of the State's positive obligations. It considered that Article 8 [of the Convention] could not be taken to be generally applicable each time the everyday life of persons with disabilities is disrupted; it applies only in exceptional cases where their lack of access to public buildings and buildings open to the public affects their life in such a way as to interfere with their right to personal development and their right to establish and develop relationships with other human beings and the outside world; it further observed, without attaching decisive importance to the matter, that the national authorities had not remained inactive (p. 332).

The appellant also refers to the *Glor v. Switzerland* judgment of 30 April 2009 (in ASA (Swiss Tax Archives Review) 80, p. 693), in which the Court held that a person suffering from diabetes had been treated in a discriminatory manner, in breach of Article 14 taken together with Article 8 [of the Convention]. As that case concerned imposition of the military service exemption tax, that is, a State tax, the above-mentioned judgment is at once irrelevant when, as in this case, the horizontal effect of fundamental rights between private persons are being assessed.

In these circumstances, it does not appear that the [Court] obliges Switzerland to adopt, in its legislation aimed at eliminating the inequalities which affect people with disabilities, a broader concept of discrimination than that described above, or that it obliges the courts to interpret in a broader manner discrimination for the purposes of section 6 of the Disability Act."

## B. Relevant domestic law and practice

### *1. Domestic law*

12. The relevant provisions of the Federal Law of 13 December 2002 on the elimination of inequalities affecting disabled persons (*Recueil systématique* - Compendium of Federal Law, RS 151.3; hereafter, "the Disability Act") are worded as follows:

**Section 1: Purpose**

"The purpose of this Act shall be to prevent, reduce or eliminate the inequalities affecting people with disabilities.

It shall create conditions to facilitate the participation of persons with disabilities in the life of society, in particular by helping them to be autonomous in establishing social contacts, in completing training and in exercising a professional activity."

**Section 2: Definitions**

"For the purposes of the present Act a person with disabilities shall be considered to be any person whose physical, mental or psychological impairment, presumed to be long-term, prevents him or her from carrying out everyday activities, maintaining social contacts, moving about, following a training course, improving his or her skills or exercising a professional activity, or impedes him or her in carrying out these activities.

Inequality shall be considered to exist when persons with disabilities are subject to a *de jure* or *de facto* difference in treatment compared to non-disabled persons, placing them at a disadvantage without objective justification, or when a difference in treatment that is necessary to restore *de facto* equality between those two groups of persons is lacking.

Inequality in access to a building, facility, residential building or public transport facility or vehicle shall be considered to exist when such access is impossible or difficult for persons with disabilities for architectural reasons or on account of the design of the vehicle.

Inequity in access to a benefit shall be considered to exist when such access is impossible or difficult for persons with disabilities.

Inequity in access to training or continuing education shall be considered to exist, in particular, when:

(a) persons with disabilities are not granted the specific additional measures or personal assistance required by them;

(b) the duration and organisation of the training courses offered and the examinations required are not adapted to the specific needs of persons with disabilities."

**Section 5: Measures to be taken by the Confederation and the cantons**

"The Confederation and the cantons shall take the measures required to prevent, reduce or eliminate inequalities; they shall take account of the specific needs of women with disabilities.

Appropriate measures to counterbalance the inequalities affecting persons with disabilities shall not be considered contrary to Article 8 § 1 of the Constitution."

**Section 6: Services provided by private persons**

"Private persons who provide services to the public shall not treat a person with a disability in a discriminatory manner on account of his or her disability."

**Section 7: Subjective rights in relation to buildings, facilities or vehicles**

"Any person who is subjected to unequal treatment within the meaning of section 2(3) may, in the event of the construction or renovation of a building or facility within the meaning of section 3(a), (c) or (d):

(a) request the competent authority, within the procedure for granting a building permit, to ensure that inequality is refrained from;

(b) at the close of the building permit procedure, request the civil courts, on an exceptional basis, to ensure elimination of the inequality, if it had been impossible to ascertain the absence of the legally required measures during the procedure to obtain the building permit.

Any person who is subjected to unequal treatment within the meaning of section 2(3), where this concerns a public-transport facility or vehicle as referred to in section 3(b), shall be entitled to request the competent authority to ensure that the company operating the transport service eliminate the inequality or refrain from acting in the unlawful manner."

**Section 8: Subjective rights in relation to services**

"Any person who is subjected to unequal treatment within the meaning of section 2(4) as a result of actions by a company to which a license has been granted or by a public authority shall be entitled to request a court or an administrative authority to order that the service-provider eliminate the inequality or refrain from acting in an unlawful manner.

Any person who is subjected to unequal treatment within the meaning of section 2(5) as a result of actions by a public authority shall be entitled to request a court or an administrative authority to order that the service-provider eliminate the inequality or refrain from acting in an unlawful manner.

Any person who is subjected to discrimination within the meaning of section 6 shall be entitled to apply to a court for compensation."

**Part 3: Proportionality**

**Section 11: Principles**

"The court or the administrative authority shall not order the elimination of the inequality where the benefit that would be provided to persons with disabilities is disproportionate, *inter alia*, to:

(a) the expenditure incurred;

(b) the harm that would be done to the environment, nature or heritage;

(c) the potential harm to traffic or operational safety.

The court shall determine the compensation provided for in section 8(3), having regard to the circumstances, the gravity of the discrimination and the value of the relevant service.

The maximum amount of compensation shall be 5,000 Swiss francs."

13. The Ordinance of 19 November 2003 on the elimination of inequalities affecting disabled people ("the Disability Ordinance") defined the concept of disability:

**Article 2: Definitions**

"... (d) discrimination (sections 6 and 8(3) of the Disability Act) is understood to mean: any difference in treatment which is particularly marked and entailing serious inequality, with the intention or consequence of degrading or marginalising a person with disabilities."

*2. Domestic practice*

14. A report by the Federal Council entitled "The right to protection against discrimination" of 25 May 2016, in response to the non-binding motion by Mr Naef (12.3543) of 14 June 2012, states that federal law protects persons with disabilities from discrimination by private persons to only a marginal extent. People with disabilities who are discriminated against by private persons must therefore rely on the general provisions on the protection of personality rights. They are entitled only to claim compensation in such instances, whereas if the discrimination is caused by the State they can take steps to ensure that it is brought to an end. According to the same report, there is not currently a strong enough awareness of this problem. At the same time, the relevant stakeholders often lack the experience, skills and knowledge necessary to be in a position to guarantee that their services are accessible in practice at a reasonable investment cost.

15. These conclusions were confirmed by the Evaluation report on the Federal Law on the Elimination of Inequalities Affecting Persons with Disabilities (Disability Act), prepared in August 2015 on behalf of the Secretariat General of the Federal Department of the Interior/Federal Office for Equality for Persons with Disabilities; the relevant parts of its general conclusions read as follows (abridged version):

"With regard to the services provided by State bodies, there has been some improvement in accessibility since the entry into force of the Disability Act, but the situation still cannot be said to be straightforward. With regard to services provided by private persons, the Disability Act merely prohibits any particularly marked difference in treatment, which, according to the current case-law (a single case), presupposes intentionality. It is most often the sectors that are also required to meet architectural requirements, such as stores and restaurants, which are aware of these issues. The evaluation suggests that the situation has hardly changed with regard to services provided by private persons ...

In sum, it can be seen that the Disability Act has had a very positive impact in areas that are important to people with disabilities – physical access to buildings, facilities

and public transport – although equality has not yet been achieved and there are still problems to be solved here and there. In other spheres, the Disability Act has given a signal that has been well received and whose echo continues to reverberate, such as in the area of post-compulsory education. In other spheres, however, which are just as important for people with disabilities, it has not brought about much tangible change. This is the case with regard to stigmatisation, which has barely diminished in society, and to the largely unregulated area of services provided by private persons... ”

### *3. Relevant international law*

16. The United Nations Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006 at the United Nations Headquarters in New York and was opened for signature on 30 March 2007. It entered into force on 3 May 2008 and has to date been ratified by 177 States. It was approved by the Federal Assembly on 13 December 2013 and the Confederation acceded to it on 15 April 2014. The introductory provisions are worded as follows:

**Article 1 – Purpose**

“The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

**Article 3 – General principles**

“The principles of the present Convention shall be:

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

2. Non-discrimination;

3. Full and effective participation and inclusion in society;

4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

5. Equality of opportunity;

6. Accessibility;

7. Equality between men and women;

8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.”

**Article 5 – Equality and non-discrimination**

“1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention."

**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:

(a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

(b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

(c) To provide training for stakeholders on accessibility issues facing persons with disabilities;

(d) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

(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;

(g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

(h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost."

# COMPLAINT

17. The applicant, who is paraplegic, complained before the Court that the domestic courts had failed to categorise as discrimination the refusal by the Pathé Rialto cinema in Geneva, operated by a private company, to grant him access. He relied on Article 14, taken together with Articles 8 and 10 of the Convention.

# THE LAW

18. The applicant alleged that the judgment by the Federal Supreme Court, finding that the decision to deny him access to the cinema on account of his disability did not amount to discrimination, had been in breach of Article 14 of the Convention, taken together with Articles 8 and 10. These provisions are worded as follows:

**Article 14**

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

**Article 8**

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

**Article 10**

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

19. The Government contested this argument. They contended that the subject matter of the application fell outside the scope of Article 14, taken

together with Articles 8 or 10 of the Convention. It ought therefore to be declared incompatible *ratione materiae* with the Convention.

### *1. The parties' submissions*

#### (a) The Government

20. The Government reiterated that, in order for Article 8 § 1 of the Convention to be applicable, a direct link had to exist between the measures sought by an applicant and the latter's private life. This link had been recognised where it concerned the layout of areas used on a daily basis (home, workplace) or the possibility of access to a polling station, as the only means of exercising his civic rights. In contrast, such a link had not been recognised as regards access to buildings that were not used on a daily basis (they referred to *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V) and access to a leisure facility (citing *Botta v. Italy*, 24 February 1998, *Reports of Judgments and Decisions* 1998-I).

21. In the Government's submission, the present case was comparable to the *Botta* case, in that it concerned access to a recreational facility. The principles set out in that judgment were therefore applicable in the present case and the existence of a direct and immediate link had to be ruled out.

22. The Government considered that this conclusion was all the more valid in that, unlike the owners of private beaches in the *Botta* case, the operators of the Pathé Rialto cinema were not required by law to make improvements to the cinema building in order to render it accessible to persons with disabilities. The possibility of access requested by the applicant was thus not incorporated in the domestic law, as it had been in the *Botta* case.

23. The Government also submitted that, since the applicant had gone to the cinema alone, his access to the auditorium in question had required that the cinema staff or third parties assist him in reaching it. In the Government's view, however, the applicable legislation did not require private service providers to adapt their services to the particular needs of persons with disabilities, apart from the obligations which arose in the event of construction or renovation of buildings, which were not applicable in the present case. The Government added that, according to the domestic authorities' findings, the applicant weighed 80 kilos, to which should be added the weight of the wheelchair (15 kg). However, access to the auditorium where the film "Vinyan" was being screened implied going down eight steps; leaving the cinema also implied climbing at least six steps. Moreover, it appeared from the arguments presented by the cinema, and confirmed by the domestic court decisions, that only female members of staff were working on the evening in question.

24. The Government also submitted that in the present case, given that the cinema staff had been unable to assist the applicant in climbing the

stairs, access to the cinema auditorium was possible only with the help of third parties, that is, other cinemagoers. They pointed out that the applicant had argued in the domestic proceedings that he ought not to have been denied access since he could have asked third parties to help him. However, he did not claim that he had already identified people willing to take responsibility for doing so at the point that he was attempting to buy his ticket.

25. In the Government's view, it was also necessary to bear in mind that, in addition to the practical difficulties described, the applicant's access also raised the question of the cinema's liability. That liability could be incurred in the event of injury to the applicant himself, a member of staff or a third party. Even without a legal obligation to adapt the building or its services to the needs of people with disabilities, the cinema's various forms of liability – contractual liability, liability as the building owner, employer's liability for employees – came into play as soon as the cinema granted access to the applicant.

26. As to the effects of the refusal of access on the applicant, the Government pointed out that he claimed to be a film buff who devoted a substantial proportion of his time to cinema. This was an important aspect of his personal development. In that connection, the Government submitted that other cinemas operated by Pathé Romandie Sàrl, specifically the Pathé Balexert and Pathé Rex, were adapted to the needs of wheelchair users and were therefore freely accessible to the applicant. Furthermore, it appeared from the domestic court decisions that, according to Pathé Romandie Sàrl's statistics, the percentage of films shown only at the Pathé Rialto cinema in Geneva was approximately 10% in 2009 and approximately 12% between January and July 2010.

27. For all these reasons, the Government considered that there was not a sufficient link in the present case between the measure requested by the applicant and his private life within the meaning of the Convention, so that Article 8 of the Convention was not applicable.

28. The Government considered that, in a case such as the present one, the scope of Article 10 did not extend beyond that of Article 8. They submitted that Article 10 could not oblige States to require private persons to take specific measures or to rely on customers present at a given venue to take such measures whenever a cultural service was not accessible as such to a disabled person.

**(b) The applicant**

29. With regard to the application of Article 8 to the present case, the applicant argued that the Swiss Government had not taken sufficient account of the social contacts that could be formed during a visit to the cinema. In particular, by comparing the present dispute to the above-cited

*Botta* case, they had reduced it to a problem of access to a recreational facility.

30. The applicant considered that a series of acts in everyday life could be considered essential for the conduct of an independent life under Article 8 of the Convention. Recognition of this principle was particularly important when the autonomous participation in society of disabled persons was at stake.

31. Furthermore, over and above the restriction of his rights sustained by the applicant as a result of the refusal of access to the cinema, it was necessary when ruling on the application of Article 8 of the Convention to take account in this case of the harmful nature of the Federal Supreme Court's case-law with regard to disabled persons' autonomous conduct of their lives. He submitted that by failing to qualify as discrimination the cinema's practice of denying access to a person on the basis of his or her disability without special grounds, the Federal Supreme Court had created a precedent applicable to all private-sector providers of services to individuals. On the basis of this case-law, restaurants, shops, supermarkets, theatres, sports halls or even banks could now refuse access to wheelchair users without any further justification, provided that the architecture of the premises was not adapted to the needs of persons with disabilities and the service provider referred to its fear of being blamed should an accident occur. This case-law thus had an impact on many acts of daily life and resulted in a breach, in respect of the applicant and of disabled persons in general, of their right, enshrined in Article 8, to choose their social contacts and consequently resulted in a restriction of their autonomy.

32. In the light of the foregoing, the applicant considered that there was thus indeed a direct and immediate link between the measure that he was urging the State to take in the present dispute, namely a prohibition on refusing to permit individuals to access services on account of a disability where that refusal could not be justified on specific grounds, and the right to lead an independent life under Article 8 of the Convention.

33. The applicant considered that the Government had erred in comparing the present case with the above-cited *Botta* case, arguing that he had in fact never claimed that the architecture of the cinema building should be adapted. Nor had he requested any change to the service provided by the cinema, such as, for example, assistance from its staff. Instead, the applicant merely required that Switzerland interpret the provisions of the domestic legislation on equality for persons with disabilities in a manner that was compatible with Article 14, by asking that the State ensure that the cinema refrain from refusing access to a person on the basis of his or her disability without valid reason. However, contrary to the Government's submissions, this right to request compliance with non-discriminatory access to a service offered to the public by a private person had clearly been confirmed by Swiss law in section 6 of the Disability Act.

34. The applicant argued that, independently of the Disability Act, private law prohibited the operator of a cinema from denying a disabled person access to a cinema. On the basis of the prohibition of immoral conduct, the Federal Supreme Court had recognised an obligation to contract under four conditions: the entrepreneur must offer the services or goods publicly; the service or goods must cover ordinary needs; because of the position of strength of the service or goods provider, there must be no other reasonable possibility of obtaining the desired goods or services; and the provider is unable to produce relevant reasons justifying a refusal to contract (Federal Supreme Court decision, ATF 129 III 35, point 6.3). Since these conditions had been met in this case, the service provider was also obliged, on the sole basis of Swiss private law, to contract with the disabled person.

35. With regard to the cinema operator's civil liability "in the event of injury to the applicant himself, a member of staff or a third party", he submitted that, unless they acted in a clearly inattentive and dangerous manner, individuals (members of staff or customers) who attempted to assist a person with disabilities in gaining access to a building that was unsuited to his or her needs in terms of safety could not be held liable for any physical injuries that the disabled person might sustain in this process.

36. With regard to the application of Article 10 to the present case, the applicant pointed out that the scope of this provision was not limited to restrictions on the right to receive information on account of its content. It also protected against restrictions on the right to access information which, as in the present case, resulted from unequal treatment based on disability. In his view, section 6 of the Disability Act imposed an obligation on the private provider to enable wheelchair users to access buildings that were not adapted to their needs. In other words, it required the respondent State, in accordance with the Court's case-law on Article 14, to prohibit inequality in access to information on the basis of disability that could not be justified on specific grounds.

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

#### (a) Applicable principles

37. As regards protection against discrimination, it should be remembered that Article 14 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 (see, among many other authorities, *Sahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII). Its application does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary and sufficient that the facts of the case fall within the ambit of one

or more of the provisions of the Convention or of its Protocols (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 72, ECHR 2013 (extracts)).

38. As regards the "private life" aspect of Article 8, the Court has already had occasion to observe that it is a broad term which is not susceptible to exhaustive definition. It can therefore embrace multiple aspects of a person's physical and social identity (see *Glor v. Switzerland*, no. 13444/04, § 52, ECHR 2009; *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I; and *Otgon v. the Republic of Moldova*, no. 22743/07, 25 October 2016).

39. The "private life" concept also covers the right to personal development and to establish and develop relationships with other human beings and the outside world (see, for example, *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007‑I). Albeit in a different context, the Court has also found that "living together" is an important element in modern society and, accordingly, is covered by Articles 8 and 9 of the Convention (see *S.A.S.* v. *France* [GC], no. 43835/11, §§ 121 and 157, ECHR 2014 (extracts)).

40. The Court has held that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 (see *Pretty v. the United Kingdom,* no. 2346/02, § 61, ECHR 2002−III; *Haas v. Switzerland*, no, 31322/07, § 51, ECHR 2011; and *Neagu v. Romania* ((dec.), no. 49651/16, 29 January 2019). In a recent case against Switzerland, the Court considered Article 8 applicable under its "private" aspect, in so far as that provision guarantees the right to personal development and personal autonomy (see *Di Trizio*, cited above, § 64).

41. The Court also reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, among many other authorities, *Kimlya and Others v. Russia*, nos. 76836/01 and 32782/03, § 86, ECHR 2009, and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). In other words, regard must be had to the particular features of the case under consideration and, in particular, of the social and family situations in which applicants find themselves.

42. Lastly, the Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (see, among many other authorities, *Bayatyan v. Armenia* [GC], no. 23459/03, § 102, ECHR 2011; *Tyrer v. the United Kingdom,* 25 April 1978, § 31, Series A no. 26; and *Kress v. France* [GC], no. 39594/98, § 70, ECHR 2001-VI).

**(b) Cases similar to the present one**

43. The Court considers that there are certain similarities between the present case, in which the applicant complains about the fact that he was refused access to a cinema on account of his disability, and the following cases already ruled on by the Court. In the above-cited *Botta* case, decided in 1998, the applicant complained about the State's failure to take appropriate measures to remedy the omissions imputable to private bathing establishments, preventing access to the beach and the sea for disabled people. The Court found in that case that the right asserted by Mr Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life (§ 35). It followed that Article 8 was not applicable.

44. In the case of *Zehnalová and Zehnal* (cited above), which was decided in 2002, the first applicant complained that a large number of public buildings and buildings open to the public in her home town were not equipped with access facilities for people with disabilities, which adversely affected her private life. The Court held that "Article 8 of the Convention cannot be taken to be generally applicable each time the first applicant's everyday life is disrupted; it applies only in exceptional cases where her lack of access to public buildings and buildings open to the public affects her life in such a way as to interfere with her right to personal development and her right to establish and develop relationships with other human beings and the outside world" (see also the above-cited *Pretty* case). In the case of *Zehnalová and Zehnal*, the Court considered that the rights relied on were too broad and indeterminate, as the applicants had failed to give precise details of the alleged obstacles and had not adduced persuasive evidence of any interference with their private life. In the Court's view, the first applicant had not demonstrated the existence of a special link between the lack of access to the buildings in question and the particular needs of her private life. In view of the large number of buildings complained of, doubts remained as to whether the first applicant needed to use them on a daily basis and whether there was a direct and immediate link between the measures the State was being urged to take and the applicants' private life; the applicants had done nothing to dispel those doubts. In consequence, a majority of judges found that Article 8 was not applicable.

45. In *Mółka v. Poland* (dec.), no. 56550/00, ECHR 2006-IV, the applicant alleged, *inter alia* under Article 8, that he had been deprived of his right to vote on account of the lack of appropriate access, adapted to his disability, to a polling station. The Court did not rule out the possibility that, in circumstances such as those before it, a sufficient link would exist to

attract the protection of Article 8. However, it did not ultimately find it necessary to determine the applicability of that provision in the *Mółka* case, since the application was in any event inadmissible on other grounds.

46. Lastly, in the above-cited *Neagu* case, the applicant, who moves around with the help of a wheelchair, complained under Articles 8 and 14 of the Convention that she was unable to exercise her right to a private life because the main entrance to her residential building was not accessible for her. The Court left open the question whether the applicant's situation fell within the scope of Article 8, in so far as it declared this complaint inadmissible on other grounds.

**(c) Application of the above-mentioned principles to the present case in the light of the above-cited case-law**

47. With regard to the present case, the Court reiterates that, admittedly, one of the principles of the 2006 UN Convention on the Rights of Persons with Disabilities is that of "full and effective participation and inclusion in society" (Article 3(c); see paragraph 16 above). However, it also emphasises that Article 8 of the Convention comes into play in such circumstances only in exceptional cases, where the applicant's lack of access to public buildings and buildings open to the public affects his or her life in such a way as to interfere with his or her right to personal development and her right to establish and develop relationships with other human beings and the outside world (see *Zehnalová and Zehnal*, cited above).

48. The applicant submitted that the Swiss courts and the Government had taken insufficient account of the social contacts that were created during a visit to the cinema. Noting that it is necessary to take account of the specific features of the case at hand, particularly the applicant's social and family situation, the Court does not rule out the possibility that for the applicant, who is paraplegic, the importance of going to the cinema is not confined merely to seeing a film that he might be able to watch at home instead, but also involves exchanges with other people. Moreover, the applicant, who has had to forego many other leisure activities because of his physical disability, considers himself a film buff, a fact which the Government have not called into question.

49. Nonetheless, the Court considers that Article 8 cannot be construed as conferring a right of access to a particular cinema to watch a specific film, provided that there is general access to other cinemas in the vicinity. The Court considers relevant the Government's argument, undisputed by the applicant, to the effect that other cinemas operated by Pathé Romandie Sàrl, in particular the Pathé Balexert and Pathé Rex, were adapted to the applicant's needs. The Court also notes the statistics provided in the domestic courts' decisions, and referred to by the Government (see paragraph 26 above), showing that the percentage of films shown solely at the cinema at issue in the present case (the Pathé Rialto), amounted to only

around 10-12% in 2009 and 2010. It follows that, in the present case, the applicant generally had access to local cinemas.

50. In other words, the Court considers that the refusal to allow the applicant to enter the Pathé Rialto cinema to see a specific film ("Vinyan"), did not affect his life in such a way as to interfere with his right to personal development or to establish and develop relationships with other human beings and the outside world, within the meaning of the above-cited case-law.

51. The Court also reiterates that States are afforded a broad margin of appreciation in situations where they must strike a balance between competing private and public interests or between different Convention rights (see *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011). At the same time, the domestic courts must provide sufficiently detailed reasons for their decisions, not least to enable the Court to carry out the European supervision entrusted to it (see, *mutatis mutandis*, *X v. Latvia* [GC], no. 27853/09, § 107, ECHR 2013, and *El Ghatet v. Switzerland*, no. 56971/10, § 47, 8 November 2016).

52. As regards, firstly, the domestic legislation put in place, the Court observes that one of the purposes of the Disability Act is to create appropriate conditions to facilitate the participation of persons with disabilities in the life of society, in particular by helping them to be self-sufficient in establishing social contacts (section 1(2); see paragraph 12 above). On the other hand, it appears from the preparatory work for the Disability Act that the scope of its section 6, concerning services provided by private persons, is limited. In particular, it appears from the Federal Supreme Court's judgment that this provision is intended to prevent serious practices of isolation, whereby people with disabilities are excluded from certain activities from fear that their mere presence will trouble the calm atmosphere and social habits of the usual clientele (see the Federal Supreme Court's judgment, point 3.3.1, paragraph 11 above). Furthermore, this restrictive interpretation is confirmed by the definition of discrimination found in Article 2 of the Disability Ordinance, according to which discrimination is any difference in treatment "which is particularly marked and entailing serious inequality, with the intention or consequence of degrading or marginalising a person with disabilities" (see paragraph 13 above).

53. Further, with regard to the application of this Act in the present case, the Court considers that the Federal Supreme Court set out sufficient grounds explaining why the situation faced by the applicant was not serious enough to fall within the concept of discrimination. In consequence, it sees no reason to depart from the conclusions of the Swiss courts, particularly those of the Federal Supreme Court, which, in a clearly delimited judgment and with reference to the Court's relevant case-law, held that the

Convention does not oblige Switzerland to adopt in its domestic legislation a concept of discrimination such as that requested by the applicant.

54. It follows that the applicant cannot rely on Article 8 of the Convention. With regard to the applicability of Article 10 of the Convention, the Court agrees with the Government that the scope of this provision does not, in the present case, extend beyond that of Article 8 of the Convention. In other words, the Court considers that Article 10 of the Convention, and more specifically the right to receive information, does not go so far as to enable the applicant to gain access to the cinema in which a film he wishes to watch is being shown.

55. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, by a majority,

*Declares* the application inadmissible.

Done in French and notified in writing on 18 July 2019.

Fatoş Aracı
Deputy Registrar

Georgios A. Serghides
President