

– Article A6-2017 –

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## **Review Çam v. Turkey<sup>1</sup>**

### **Annotations to EGMR 23.02.2016 – 51500/08**

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#### **I. Theses**

- The judgment of the European Court of Human Rights is an important step in interpreting the European Convention on Human Rights (ECHR) provision of prohibition of discrimination in the light of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD).
- The court should have criticized an offense against Art. 4 UN CRPD which states obligations by the state party to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

#### **II. Essential statements of the judgment**

In the case of Çam v. Turkey, the European Court of Human Rights (hereinafter referred to as ECtHR) treated the case of a visually impaired young woman who was denied access to education at the Music Academy.

The ECtHR examines the issue of discrimination (Article 14 ECHR) in several dimensions. Apart from the prohibition of discrimination, the ECtHR also stresses the importance of positive measures for ensuring that students with disabilities have access to education without discrimination.

It, furthermore, states that the refusal to enrol the applicant in the Music Academy was based solely on the fact that she was blind and that the domestic authorities had at no stage considered the possibility that reasonable accommodation might have enabled her to be educated in that establishment. That being the case, the Court considers that the

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applicant was denied, without any objective and reasonable justification, an opportunity to study in the Music Academy, solely on account of her visual disability.

### III. Factual background

The blind claimant, born in 1989, passed the entrance examination in stringed musical instruments „Baglama” for the 2004/05 school year in 2004 at the Turkish National Music Academy attached to the Istanbul Technical University (hereinafter referred to as Music Academy).

On 16 September 2004, the higher medical committee of the Bakirköy Research and Training Hospital considered the claimant's case with an aim of assessing, whether the claimant met the additional requirement for the successful completion of the admission examination, according to which the claimant had to submit a document confirming that there was no medical condition impeding her enrolment at the Music Academy. A week later, the medical committee delivered a report stating that the claimant could be educated and instructed in the departments of the Music Academy, where the eyesight is not required.

As a result, the directorate of the Music Academy turned to the head of the Medical Committee and informed him, that in all seven departments of the Music Academy, the ability to see was imperative. He was then asked to deliver a new report on whether the claimant was able at all to complete her education at the Music Academy.

In response to the enrolment refusal, on 24 September 2004, the claimant's parents, acting in her name and on her behalf, brought an action to the Istanbul Administrative Court against the directorate of the Music Academy by requiring the annulment of the negative decision of the Music Academy. In response to claimant's complaint, the defendant maintained that the Article 4 of the Music Academy guidelines made the admission to the Music Academy dependent on the „non-existence of a disability”. In this case, the defendant stated that the enrolment rejection was not based on claimant's blindness, but rather on the fact that the claimant did not submit all the necessary documents for the successful enrolment within the stipulated time-limit. Moreover, there was not a single department at the Music Academy that would make an exception to the visual requirement. Besides, the Music Academy would not be in a position to provide training for blind or otherwise disabled persons due to lack of the appropriate facilities or trained staff. Soon after its founding in 1976, the Music Academy had actually tried to implement a similar case, which, however, was unsuccessful due to the teachers' lack of Braille knowledge.

On 29 November 2004, the head of the medical committee of the Public Hospital Bakirköy informed the directorate of the Music Academy that in his report of 16 September 2004 the original passage „could be educated in the departments of the Music Academy, where the eyesight is not required“ could be replaced by „could not be educated”.

On 14 October 2005, the Administrative Court dismissed the claimant's father's action as ungrounded. After going through the Administrative Court channels, the appeal filed

by the claimant's parent against the decision was finally dismissed by the Turkish Council of State.

#### IV. Principal case details

The claimant's complaint against the Republic of Turkey lodged with the ECtHR on 22 October 2008 was successful. The claimant alleged that her right to education under the Article 2 of Protocol No. 1 to the ECHR<sup>2</sup> had been infringed and that she had suffered discriminatory treatment on account of her blindness in line with the Article 14 of the ECHR.<sup>3</sup> The ECtHR took the view that the denial to enrol the claimant in the Music Academy was based solely on the fact that she was blind and that the domestic authorities had at no stage considered the possibility that reasonable accommodation could remedy the situation. Accordingly, the ECtHR considered that the claimant was denied, without any objective and reasonable justification, an opportunity to study in the Music Academy, solely on the basis of her visual disability. It therefore held that there had been a violation of the Article 14 of the ECHR, taken in conjunction with the Article 2 of Protocol No. 1 and thus ruled that Turkey was to pay the claimant EUR 10,000 in respect of non-pecuniary damage and EUR 3,000 in respect of costs and expenses.

##### 1. The circumstances of the case

The ECtHR in quoting its judgment „Glor v. Switzerland” of April 2009<sup>4</sup> recalled that the scope of application of Art. 14 of the ECHR also extends to the prohibition of discrimination on grounds of disability.<sup>5</sup> Moreover, in considering the claimant's allegation that the refusal of enrolment by the directorate of the Music Academy constituted discrimination on the bases of her blindness, the ECtHR noted that at the time of the claimant's application for enrolment, various domestic legal measures, such as the Article 42 of the Constitution, Articles 4, 7, 8 and 27 of Basic Law No. 1739 on national education („Act No. 1739”) and Article 9 of Legislative Decree No. 573 on specialised education<sup>6</sup>, were in place to ensure the right to education for children with a disability without any discrimination.<sup>7</sup> The ECtHR underlined further the fact that, notwithstanding these legal measures, one of the several prerequisites for the enrolment was the submission of a medical report attesting applicant's „physical capacity” to attend the Music Academy.

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<sup>2</sup> „No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by the Protocol No. 11.

<sup>3</sup> „The enjoyment of the rights and freedoms set forth in this 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.” Art. 14 of the ECHR.

<sup>4</sup> GLOR v. SWITZERLAND Case No. 13444/04, Para. 80.

<sup>5</sup> Çam v. Turkey, Case No. 51500/08, Para. 55.

<sup>6</sup> Ibid., Para. 16.

<sup>7</sup> Ibid., Para. 56.

Therefore, the ECtHR found that Ms Çam's exclusion had been based not on the state laws but on the Music Academy's rules of procedure.<sup>8</sup> In view of this, the ECtHR pointed out the defendant's statement that it is not in the position to accommodate persons with any kind of disabilities.<sup>9</sup>

Although the ECtHR admitted the statement of the Government that the rules governing enrolment procedure in the Music Academy did not contain provisions excluding persons who are blind and that the medical report attesting applicants' „physical capacity” to attend the Music Academy was a mandatory admission prerequisite for all applicants<sup>10</sup>, it nevertheless, could not ignore the effects of such a requirement on persons with a physical disability, as it was in the present case, especially taking into account the interpretation of this measure by the institution concerned.<sup>11</sup> The ECtHR observed that the claimant had provided the directorate of the Music Academy with a medical report attesting her „physical capacity” that contained a reservation regarding her eyesight.<sup>12</sup> The Music Academy, however, refused the claimant's admission and went so far as to ask the head of the medical committee to amend his original report.<sup>13</sup> Consequently, even if the Music Academy sought to justify its enrolment refusal by applicant's failure to comply with the requisite administrative formalities, particularly the failure to provide a medical report drawn up by a fully equipped hospital,<sup>14</sup> there would remain no doubt that the claimant's eyesight had been the only ground for the enrolment refusal.<sup>15</sup> Furthermore, noting the ease with which the Music Academy secured the amendment of the initial report, the ECtHR considered that in any event Ms Çam could never have fulfilled the physical fitness requirement, the definition of which had been left to the Music Academy's discretion.<sup>16</sup> With regard to the argument of the Government that the enrolment rules of the Music Academy were to insure that only students with specific talents would be given a chance of studying at the Music Academy, the ECtHR considered that by passing the entrance examination, which was a prerequisite for the admission, Ms Çam had demonstrated that she was fully qualified for the enrolment at the Music Academy.<sup>17</sup> Moreover, the ECtHR stated that the Article 14 of the ECHR 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.<sup>18</sup> In view of the Government's

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<sup>8</sup> Ibid., Para. 57.

<sup>9</sup> Ibid., Para. 17.

<sup>10</sup> Ibid., Para. 49.

<sup>11</sup> Ibid., Para. 59.

<sup>12</sup> Ibid., Para. 11.

<sup>13</sup> Ibid., Para. 14 and 29.

<sup>14</sup> Ibid., Para. 29.

<sup>15</sup> Ibid., Para. 60.

<sup>16</sup> Ibid., Para. 61.

<sup>17</sup> Ibid., Para. 62.

<sup>18</sup> Ibid., Para. 54; See D.H. and Others v. the Czech Republic [GC], no. 57325/00, Para. 175, ECHR 2007: IV). The Contracting State enjoys 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, Para. 76, ECHR 2013.

further argument, that the Music Academy did not have the necessary infrastructure to meet the needs of students with disabilities at the material time<sup>19</sup>, the ECtHR reiterated that the ECHR is intended to guarantee rights that are practical and effective and not theoretical and illusory.<sup>20</sup> Therefore, the ECtHR emphasized the need to consider the changing conditions of international and European law and respond, for example, to any emerging consensus as to the standards to be achieved.<sup>21</sup> Most specifically, it noted 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, such as the Article 15 of the Revised European Social Charter<sup>22</sup>, Articles 2<sup>23</sup>, and 24 of the UN CRPD<sup>24</sup>, as well as the UNESCO's definition of inclusive education, according to which inclusion entails the right of all learners to quality education that meets basic learning needs and the development of their full potential, regardless of special educational needs, sex, social or economic backgrounds.<sup>25</sup>

Consequently, the ECtHR deemed the reading of the Article 14 of the ECHR in light of the requirements of those texts regarding reasonable accommodation, fundamental, which should be understood as „necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular

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<sup>19</sup> Çam v. Turkey, No. 51500/08, Para. 63, ECHR 2017.

<sup>20</sup> See Del Río Prada v. Spain [GC], no. 42750/09, Para. 88, ECHR 2013, and Dvorski v. Croatia [GC], no. 25703/11, Para. 82, 20 October 2015; see also Çam v. Turkey, No. 51500/08, Para. 54, ECHR 2017.

<sup>21</sup> See, mutatis mutandis, Konstantin Markin v. Russia [GC], no. 30078/06, Para. 126, ECHR 2012, and Fabris v. France [GC], no. 16574/08, Para. 56, ECHR 2013.

<sup>22</sup> „Disabled persons have the right to independence, social integration and participation in the life of the community.” Art. 15 of the Revised European Social Charter.

<sup>23</sup> „[...] ‘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, meaning 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[...].” Art 2 of the UN CRPD

<sup>24</sup> „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 [...] In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education by incorporating disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities[...]. 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.” Art. 24 of the UN CRPD.

<sup>25</sup> Çam v. Turkey, No. 51500/08, Para. 64, ECHR 2017; For the UNESCO's definition of Inclusive education see: <https://www.unesco.de/en/bildung/inklusive-bildung.html>

case” that persons with disabilities are entitled to expect in order to ensure „the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.<sup>26</sup> Such reasonable accommodation helps to correct factual inequalities which are unjustified and therefore amount to discrimination.<sup>27</sup>

Thereby, the Court has admitted that every child has his or her specific educational needs, and that this applies in particular to children with disabilities.<sup>28</sup> To this end, it has recognised that reasonable accommodation might depend on various factors, whether physical or non-physical, educational or organisational, in terms of the architectural accessibility of school buildings, teacher training, curricular adaptation or appropriate facilities.<sup>29</sup> However, according to the ECtHR it is not its task to define the resources to be implemented in order to meet the educational needs of children with disabilities and that national authorities, by reason of their direct and continuous contact with the vital forces of their countries, are actually better placed than an international court to evaluate local needs and conditions in this respect.<sup>30</sup> Nevertheless, the ECtHR explicitly stated that States should take special care in making their choices in this field, taking into account the effect of the latter on children with disabilities, whose particular vulnerability cannot be overlooked, thus, concluding that discrimination on grounds of disability also extends to refusal of providing reasonable accommodation.<sup>31</sup>

In considering the present case-file, the ECtHR found however, that the relevant domestic authorities at any point made neither an effort to identify the claimant's needs or to clarify how her blindness could have hampered her access to a musical education, nor did they ever thought of making physical adaptations for meeting any special educational needs arising from the claimant's blindness,<sup>32</sup> especially when considering the fact that since 1976 the Music Academy has made no attempt to adapt its teaching methods for making them accessible to blind students.<sup>33</sup>

## V. Annotation

The judgment of the ECtHR is an important step in interpreting the ECHR provision of prohibition of discrimination in the light of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Most specifically, in assessing whether the State having decided to provide specialist musical education, access to such education could be withheld from a group of persons in particular because the discrimination includes cases where a person or group is treated, without proper justification, less favourably

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<sup>26</sup> Art. 2 of the UN CRPD.

<sup>27</sup> Çam v. Turkey, No. 51500/08, Para. 65, ECHR 2017.

<sup>28</sup> Ibid., Para. 66.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., Para. 67.

<sup>32</sup> cf. McIntyre v. the United Kingdom, no. 29046/95, Commission decision of 21 October 1998, not published.

<sup>33</sup> Çam v. Turkey, No. 51500/08, Para. 68, ECHR 2017.

than another, the ECtHR, by noting the argumentation of the Government that the rules governing enrolment in the Music Academy was designed to admit only students with special talents, stated that by passing the entrance examination prior to any application for enrolment, the applicant demonstrated that she possessed all the requisite qualities to meet that requirement. Thus, there can be no doubt that the applicant's blindness was the sole reason for that refusal, with that making it clear that disability is no objective or reasonable justification for treating persons in similar situations differently.

Furthermore, after considering the justification of the Government that at the material time the Music Academy had lacked appropriate infrastructures such as resources, equipment, technical facilities or specially trained teachers to admit students with disabilities, the ECtHR underlined the importance of reasonable accommodation in ensuring equal access to education for students with disabilities by stating that it must have regard to the changing conditions of international and European legal instruments, such as the article 15 of the Revised European Social Charter, articles 2, and 24 of the UN-CRPD, as well as the UNESCO's definition of inclusive education, and respond, for example, to any emerging consensus as to the standards to be achieved.

Thus, in view of the fact that the claimant, at no stage of her complaint, made a request for a reasonable accommodation, the Court's present decision that the failure to identify and provide the necessary adjustments constitutes an infringement of the Article 14 of the ECHR taken in conjunction with Article 2 of Protocol No. 1 to the ECHR could be understood in line with the CRPD Committee's general comment on Art. 9 of the CRPD, according to which the duty to provide accessibility is an *ex ante* duty, meaning that States parties have the duty to provide accessibility before receiving an individual request to enter or use a place or service.<sup>34</sup>

While the ECtHR marks a paradigm shift in its jurisprudence in recognizing the right to reasonable accommodation by delivering this judgment<sup>35</sup>, it nevertheless, leaves some fundamental provisions of the UN CRPD unnoticed.

The ECtHR, in noting defendant's submission that all applicants for enrolment in the Music Academy are required to provide a medical certificate concerning their physical fitness, stated that initial grounds for withholding access to education in the Music Academy from the claimant lay not in the law but in the Music Academy's regulations. Thereby, failing to identify that in line with the Article 4 of the UN CRPD, State parties are obligated to ensure that public authorities, institutions, organizations or private enterprises act in conformity with the UN CRPD.<sup>36</sup> To this end, the ECtHR failed to ascertain that although

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<sup>34</sup> General Comment No 2, Art. 9 accessibility, (adopted 11 April 2014), Para. 25; see also, CRPD/C/14/D/21/2014, (adopted 21 August 2015).

<sup>35</sup> See, Graeme v. United Kingdom, No. 13887/88, ECHR 1990; Klerks v. the Netherlands, No. 25212/94, ECHR 1995; McIntyre v. the United Kingdom, No. 29046/95, ECHR 1998; Kalkanlı v. Turkey (dec.), No. 2600/04, ECHR 2009.

<sup>36</sup> The UN CRPD was signed by the Government of The Republic of Turkey on 30 March 2007 and ratified on 28 September 2009. The Optional Protocol of the CRPD was signed on 28 September 2009 and ratified on 26 March 2015. Thus, being put into effect as per Article 90

the regulations on enrolment in the Music Academy contained no explicit provisions geared to excluding blind persons, the requirement to submit a medical certificate concerning applicant's physical fitness instead of relying on the applicants demonstrated „academic capacity” in the chosen instrument/subject/field, could not only have negative effects on persons such as the applicant who has a physical disability, but also constitutes a breach of obligations by the state party to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.<sup>37</sup>

The ECtHR is an international court set up by the ECHR.<sup>38</sup> It rules on individual, a group of individuals or one or more of the other contracting states applications alleging violations of the civil and political rights set out in the ECHR and its Protocols.<sup>39</sup> The judgments delivered by the ECtHR are binding on the 47 Council of Europe Member States that have ratified the ECHR.<sup>40</sup>

The effect of the ECtHR decisions on government's legislation and administrative practice varies since the majority of the Contracting Parties to the ECHR have chosen different means of incorporating the ECHR into their own national legal systems; they either adopted it through constitutional provisions, statutes or judicial decisions.

Germany has a dualist system when it comes to the application of treaties, such as the ECHR, in the German legal order. According to Art. 59 Para. 2 of the Basic Law of the Federal Republic of Germany (German: Grundgesetz, GG), „Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law.“ Moreover, in line with Art. 25 of the GG, the general rules of international law shall be an integral part of federal law and shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory. However, the term „general rules of international law“ applies to custom and general principles, but not treaties. Therefore, the ECHR has the same legal status as a federal act of parliament, meaning that the ECHR has a similar status as all other federal acts of parliament. **Consequently**, the ECHR as an international treaty, cannot

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of the Turkish Constitution, the CRPD – like all other conventions on human rights – has the same force with the Constitution in the hierarchy of norms, meaning that the CRPD not only forms a basis for all legal and administrative arrangements, but also constitutes a principle of law to which independent Turkish courts can directly refer.

<sup>37</sup> Art. 4 Para. 1 of the UN CRPD; See also, General Comment No 4, Art. 24 Education, (adopted 26 August 2016), Para. 18 and 19.

<sup>38</sup> „To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as ‘the Court’. It shall function on a permanent basis.” Art. 19 of ECHR.

<sup>39</sup> *The Court in Brief:* [www.echr.coe.int/Documents/Court\\_in\\_brief\\_ENG.pdf](http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf)

<sup>40</sup> „The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.” Art. 46 Para. 1 of the ECHR.

be directly invoked in German courts since the ECHR had been incorporated into German law as an ordinary statute.

Thus, it was presumed that the judgments of the ECtHR were binding on Germany under international law, but not on German state organs and, especially its independent judiciary as neither the Convention nor the German Basic Law (GG) required that a judgment by the ECtHR should deprive a German court's decision of its binding force. Besides, in view of the fact that the ECHR had been incorporated into German law as an ordinary statute, the ECtHR could not function as a superior court and, consequently, German courts were not bound by any interpretation of the ECHR provided by the ECtHR.<sup>41</sup>

This view is outdated at least since the Federal Constitutional Court (FCC), in its decision of 14 October 2004, stated that the ECHR was incorporated into German domestic law through adoption by the German parliament in 1952.<sup>42</sup> Accordingly, the ECHR should be applied by German courts, like other federal statutes, „in the framework of accepted methods of interpretation”. Furthermore, the FCC maintained that the ECHR influences the interpretation of fundamental rights and the rule of law, as enshrined in the GG. As a result, it admitted that the provisions of the Convention and the jurisprudence of the ECtHR should serve as interpretative tools of German norms of a constitutional nature.<sup>43</sup> Moreover, the FCC noted that ECtHR judgments, in line with the rule-of-law principle enshrined in the GG, are binding on all German state organs, including the courts. Additionally, in view of the fact that the ECHR serves as a guaranty for fostering a pan-European development of human rights protection, the FCC considers that the Art. 1 Para. 2 GG, which insures special protection to some core human rights, in conjunction with the Art. 59 Para. 2 GG, form the constitutional basis for the responsibility to abide by the Convention in the interpretation of German fundamental rights.<sup>44</sup> To this end, it is made clear that an allegation before the FCC concerning state organs' disregard of the ECtHR judgments is possible since it is covered by a German fundamental right.<sup>45</sup>

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<sup>41</sup> See the Case, OLG Naumburg, 30.06.2004 – 14 WF 64/04, Para. 2D.

<sup>42</sup> Görgülü, BverfGE, Oct. 14, 2004, 2 BvR 1481/04, Para. 31.

<sup>43</sup> Ibid., Para. 32.

<sup>44</sup> „The German people therefore acknowledge inviolable and inalienable human rights as the bases of every community, of peace and of justice in the world.” Art. 1 Para. 62.

<sup>45</sup> Ibid., Para. 63.