EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

12 February 2018

Case Document No. 7

International Federation for Human Rights (FIDH) and Inclusion Europe v. Belgium
Complaint No.141/2017

FURTHER RESPONSE BY THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 11 January 2018

COMPLAINT No. 141/2017 PHL/5788

EUROPEAN COMMITTEE

OF SOCIAL RIGHTS

OBSERVATIONS IN REPLY

FOR: THE KINGDOM OF BELGIUM,

THE RESPONDENT STATE,

Represented by Mr Paul RIETJENS, Director General of Legal Affairs, Agent for Belgium, whose offices are located at SPF Affaires étrangères, Rue des Petits Carmes, 15 (Egmont II), 1000 Brussels, Belgium.

AGAINST: 1) THE INTERNATIONAL FEDERATION FOR HUMAN RIGHTS

THE FIRST COMPLAINANT ORGANISATION,

Represented by Mr Dimitris CHRISTOPOULOS, President, whose offices are located at Passage de la Main d'Or, 17, 75011 Paris, France,

2) INCLUSION EUROPE,

THE SECOND COMPLAINANT ORGANISATION,

Represented by Ms Maureen PIGGOT, President, whose offices are located at rue d'Arlon, 22, 1040 Brussels, Belgium.

Having regard to the collective complaint submitted on 12 January 2017 by the "International Federation for Human Rights" and "Inclusion Europe",

Having regard to the Kingdom of Belgium's observations on admissibility dated 3 March 2017,

Having regard to the decision on admissibility adopted by the European Committee of Social Rights on 4 July 2017,

Having regard to the submissions on the merits filed by the Kingdom of Belgium

on 22 September 2017,

Having regard to the observations in reply submitted by the complainant organisations on 15 November 2017,

Having regard to the observations submitted on 15 November 2017 by the "Interfederal Centre for Equal Opportunities" in accordance with Rule 32A of the Rules of the European Committee of Social Rights.

I SUBJECT OF THE COMPLAINT

1. In their collective complaint submitted on 12 January 2017, the complainant organisations:

> "*request the European Committee of Social Rights to rule that, in view of the lack of progress achieved in promoting access to mainstream education for children with an intellectual disability in the French Community, and by conversely allowing the situation to deteriorate, in breach of its commitments under the revised European Social Charter, Belgium has failed to comply with Articles 15 and 17 of the European Social Charter, read in isolation or in conjunction with Article E of the revised European Social Charter.*"[1]

In support of this allegation, the complainant organisations make the following points:

- according to Article 12, § 1, of the "decree of the French Community of 3 March 2004 on the organisation of special education", the enrolment of pupils in special education is conditional upon the presentation of a report showing that the reasonable accommodation put in place within mainstream education is inadequate, a requirement that applies only in the case of special education types 1, 3 and 8;[2]

- the mechanisms introduced in Chapter X of the above-mentioned decree for the integration of special education pupils into mainstream education are not effective as the procedures involved are complex and uncertain.[3]

2. The complainant organisations infer from this that the manner in which foundation level and secondary education is organised in the French Community constitutes a violation of Articles 15, 17 and E of the revised European Social Charter ("the Charter") and that it is discriminatory on three distinct levels.

They point out that " *the approach based on a typology of different educational categories (the 8 "types"), which themselves correspond to different categories of disability, and the disproportionate number of children and young persons who are directed towards special education are indicative of the persistence of the "medical" model of disability within the organisation of education in the French Community, which breaches the international commitments made by Belgium* […]".[4]

The discrimination to which it is alleged that the organisation of foundation level and secondary education in the French Community gives rise is as follows:

- discrimination on the ground of disability, as the latter leads to pupils being inexorably directed towards special education, not least because of the failure to cover the cost of mono-disciplinary speech therapy for children with a language development disorder or who suffer from dysphasia and who have an IQ lower than 86, to the detriment of an inclusive approach to the provision of education;

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[1] Collective complaint no. 141/2017, Conclusion.

[2] Collective complaint no. 141/2017, p. 8

[3] Collective complaint no. 141/2017, p. 11

[4] Collective complaint no. 141/2017, p. 14

- discrimination on the ground of the nature of the disability, as the projects for integration into mainstream education are aimed primarily at pupils in special education types 1 (mild mental disability) and 8 (learning difficulties), whereas pupils in type 2 special education (moderate or severe mental disability) are, it is alleged, massively under-represented;

- discrimination on the ground of socio-economic origin, as families on low incomes are unable to raise the funds that would enable their children to be placed in mainstream schools.

I EXHAUSTION OF DOMESTIC REMEDIES: A SINE QUA NON CONDITION FOR INTERNATIONALISING A DISPUTE, WHICH HAS NOT BEEN MET IN THE INSTANT CASE

2.1. Belgium refers mutatis mutandis to the observations made in this regard in its submissions on the merits of the complaint, subject to the clarifications provided below.

2.2. Belgium wishes to point out to the complainant organisations that the fact that no state has previously pleaded a failure to exhaust domestic remedies is not an argument as such and does not call into question the applicability of this principle to the proceedings before the European Committee of Social Rights.

Belgium, as a State Party, is surprised, moreover, to read the complainant organisations' rather peremptory statement to the effect that the "*failure to include such a condition for the admissibility of collective complaints was deliberate"*,[5] with no mention of the practice followed in implementing the treaty[6] or, at the very least, of the preparatory work on the Charter and its Protocol, which is essentially supplementary.[7]

The fact that the objection was not raised in other proceedings before the Committee, whether closed or pending, may be explained by various non-legal factors, such as:

- the exhaustion of domestic remedies by the complainant organisations or the lack of such remedies, either of which explanations would have rendered the objection irrelevant;

- or the State Party's wish to refrain from pleading failure to exhaust domestic remedies, it being understood that, while the ratio legis is to preserve states' sovereignty, there is nothing to prevent them from themselves deciding to waive their right to object, etc.

The application of the exhaustion of domestic remedies rule in the context of collective complaints before the Committee remains entirely relevant therefore.

2.3. If, against all odds, the Committee were to disregard this defence, its decision

[5] Observations of the complainant organisations, p. ***

[6] Article 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties.
[7] Article 32 of the 1969 Vienna Convention on the Law of Treaties.

would be considered to be a violation of Belgium's sovereignty as a State Party to the European Social Charter and the Protocol thereto and, through a knock-on effect, it would undermine the credibility of the collective complaints system put in place by the Charter and the Protocol.

In this connection, Belgium wishes to reiterate the importance of the requirement to exhaust domestic remedies, in that it recognises the right of states to remedy an allegedly unlawful situation - which is not the case here – through its own domestic legal system, before the dispute is referred to an international body.

The International Court of Justice, in the *Interhandel* case, and in its follow-up, the *Diallo* case, confirmed in this respect that:

> *"[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law.* ***Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system****".*[8] (emphasis added)

The term "*international court*" is used in the broad sense, it being understood that it refers to an international institution called upon to decide in an impartial, independent and adversarial manner a dispute between parties, in accordance with the relevant rules of international law.

Belgium would further point out that the Committee – which was set up by an international legal instrument[9] – fully falls within this definition, since, according to Rule 2 of its Rules of Procedure, it "*rules on the conformity of the situation in States with the European Social Charter, the 1988 Additional Protocol and the Revised European Social Charter*" and its members are bound by the requirements of independence, impartiality, availability and confidentiality.

In its *Kudla* judgement rendered by the Grand Chamber, the European Court of Human Rights confirmed that the ratio legis of the requirement that domestic remedies must be exhausted is to enable states to redress the allegedly unlawful situation, quod non, before the dispute is referred to an international body:

> *" On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum.*
> *By virtue of Article 1 (which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention.*
> *The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the*

[8] I.C.J. *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), preliminary objections, judgment of 24 May 2007, Reports 2007, p. 582 et seq, para 42.

[9] Article 25 of the European Social Charter.

> *Court (see, as a recent authority, Selmouni v. France [GC], no. 25803/94, § 74, ECHR 1999-V). The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (ibid.).*
> *In that way, Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the travaux préparatoires (see the Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651), is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6 § 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings".*[10]

Existing doctrine echoes this view when it states that:

> *"The rule according to which it is necessary to exhaust domestic remedies before bringing a case to the Court is a* ***principle that is deeply rooted in customary international law****. It is a consequence of the principle that the impugned state must be able to first remedy the alleged grievance through its own means in the context of its domestic legal order. It is firstly up to the national authorities to put right any violations of the Convention. That is the aim of the subsidiary role of the Convention as a whole given by the Court in addressing violations of the Convention".*[11] (emphasis added)

These conclusions are transposable mutatis mutandis to the proceedings before the European Committee of Social Rights, since they establish the self-contained nature of the exhaustion of domestic remedies rule.

The rule thus prevails in the absence of an express derogation and Belgium refers to the points made in this regard in point 2.3 of its submissions on the merits. Since neither the Charter nor the Protocol expressly derogates from it, it cannot be concluded that this rule does not apply. Restrictions upon the independence of states and, by extension, their sovereignty cannot be presumed.[12]

2.4. Contrary to the complainant organisations' assertions, "*the objective and collective nature of the collective complaints mechanism*" does not alter the fact that ultimately, there arises the issue of states' international responsibility with regard to their international commitments, so the requirement to exhaust domestic remedies must be met before asserting Belgium's international responsibility before an international body, as the complainant organisations have done.

In any event, the complainant organisations manifestly erred in law in stating that the exhaustion of domestic remedies rule should not apply in collective complaints

[10] ECtHR, *Kudla v. Poland*, judgment of 26 October 2000, Application No. 30210/96, Grand Chamber.

[11] J. VELU et R. ERGEC, *Convention européenne des droits de l'homme*, Répertoire pratique du droit belge, Bruylant, 2nd edition, 2014, p. 1020, para. 994.

[12] Permanent Court of International Justice, Series A, No. 10, Lotus case, 7 September 1927.

proceedings since international employers' and workers' organisations and the other organisations authorised to lodge a complaint with the Committee do not have access to traditional domestic remedies.

Not only is this statement peremptory, in that it prejudges the domestic legal decision, but also the situation described by the complainant organisations is not incompatible with the exhaustion of domestic remedies rule. On the contrary, given that, in the case in point, the rule permits the internationalisation of the dispute *ipso jure*.

2.5. Alleging, as the complainant organisations do, that there are no domestic remedies in the Belgian legal order which would enable them to assert their claims, shows a lack of knowledge of the anti-discrimination legislation on their part, moreover.

The decree of 12 December 2008 on measures to combat certain forms of discrimination shows that the complainant organisations were, and still are, entitled to bring cases before the Belgian courts.

The above-mentioned decree sets out the basic principles for combating discrimination as follows:

> *"Article 2. The purpose of the present decree shall be to lay down a general and harmonised framework for combating discrimination on the grounds of:*
>
> *1) Nationality, an alleged race, skin colour, descent, or national or ethnic origin;*
> *2) Age, sexual orientation, religious or philosophical beliefs, disability;*
> *3) Gender and related criteria including pregnancy, childbirth, maternity, gender reassignment, gender identity and gender expression;*
> *4) Civil status, birth, property, political views, language, current or future health status, a physical or genetic characteristic or social origin.*
>
> *(…)*
>
> *Article 4. The present decree shall apply in each of the fields mentioned below, insofar as they are within the territorial and substantive jurisdiction of the French Community, provided that the latter has not transferred the exercise of the jurisdiction concerned in accordance with Article 138 of the Constitution, to all persons, both for the public and private sector, inasmuch as it contains provisions intended to secure equal treatment in:*
> *1) Employment relationships;*
> *2) Education;*
> *3) Health policy;*
> *4) Social benefits;*
> *5) Affiliation to and involvement in any private-law professional organisations subsidised by the French Community;*
> *6) Access to public goods and services and the supply thereof;*
> *7) Access, participation or any other exercise of an economic, social, cultural or political activity accessible to the public.*
>
> *Article 5. Any discrimination based on one of the protected grounds shall be prohibited. Unless otherwise provided, in the context of this decree the term "discrimination" shall include:*
> *1) Direct discrimination, it being understood that any less favourable treatment of a woman due to pregnancy, childbirth, maternity, or gender reassignment shall constitute direct discrimination on the basis of gender;*
> *2) Indirect discrimination;*
> *3) Harassment and sexual harassment, and any less favourable treatment based on the rejection of such behaviour by the person concerned or the fact that he or she is*

subjected to this conduct;
4) Refusing to put in place reasonable accommodation for persons with disabilities, without prejudice to the rules laid down in this area by the competent authority in accordance with Article 5§1, II, 4 of the Special Institutional Reform Act of 8 August 1980, in conjunction with Article 3septies of decree II of 19 July 1993 assigning certain responsibilities of the French Community to the Walloon Region and to the French Community Commission;
5) Incitement to discriminate.
Any direct distinction based on one of the protected grounds shall constitute direct discrimination unless, and only in the cases where this decree provides for this possibility in the context of Part II, such distinction is objectively justified by a legitimate aim and the means for achieving that aim are appropriate and necessary.
Any indirect distinction based on one of the protected grounds shall constitute indirect discrimination,
1) Unless the apparently neutral provision, ground or practice which is the basis for the indirect distinction is objectively justified by a legitimate aim and the means to achieve it are appropriate and necessary; or,
2) Unless, in the case of an indirect distinction on the basis of disability, it is shown that no reasonable accommodation can be put in place.
A direct or indirect distinction based on one of the protected grounds shall not be considered a form of discrimination prohibited by the present decree if such direct or indirect distinction is imposed by or pursuant to another decree.
The above paragraph, however, shall be without prejudice to the conformity of direct or indirect distinctions, imposed by or pursuant to a law, with the Constitution, European Union law and international law in force in Belgium".

In the case of discrimination, the decree of 12 December 2008 allows any association, including the complainant organisations, to institute court proceedings:

"Article 39. The following interest groups may institute court proceedings in any disputes to which the application of this decree may give rise, where harm is caused to the objectives which they agreed to pursue in their statutes:
1) ***Public interest organisations and any association having legal personality for at least three years at the time of the facts, and having as an objective defending human rights or combating discrimination***;
2) Representative organisations within the meaning of the law of 19 December 1974 governing relations between the public authorities and the trade unions representing their staff;
3) Representative trade unions within the trade union consultation body appointed by the administrations, departments or institutions to which the law of 19 December 1974 governing relations between the public authorities and the trade unions representing their staff does not apply."

Mindful, moreover, that in matters relating to discrimination, the issue of proof can be problematic, Belgium has shifted the burden of proof, notably for the benefit of associations, including the complainant organisations:

" Article 42. Where a person who believes that he or she is a victim of discrimination, the bodies referred to in Article 37 or one of the interest groups mentioned in Article 39 invoke before a competent court facts from which discrimination based on one of the protected grounds may be inferred, it shall be for the respondent to prove that there has been no discrimination.
Facts from which it may be inferred that there has been direct discrimination based on one of the protected grounds shall include but shall not be limited to:
1) Elements which indicate a certain reoccurrence of unfavourable treatment of persons sharing a protected ground, inter alia, different isolated reports made to the bodies mentioned in Article 37 or one of the interest groups; or
2) Elements which show that the situation of the victim of less favourable treatment is comparable to the situation of the reference person.

Facts from which it may be inferred that there has been indirect discrimination based on one of the protected grounds shall include but shall not be limited to:
1) General statistics on the situation of the group which the victim of discrimination belongs to or generally known facts; or
2) The use of an intrinsically suspect distinguishing criterion; or
3) Statistics which show unfavourable treatment".

The allegations made by the complainant organisations to the effect that "*they did not have access in Belgium to effective remedies which would make it possible to ensure that the French Community of Belgium complied with the requirements of Articles 15 and 17 of the revised European Social Charter, taken alone or in conjunction with Article E of the Charter*"[13] are completely groundless therefore.

As well as the possibility of bringing an action for damages under ordinary law, in accordance with Article 1382 of the Civil Code, the decree of 12 December 2008 also introduces the right to seek an injunction, "as under the summary procedure", for the purpose of putting an end to any form of discrimination.

Injunction proceedings may also be instituted directly by the complainant organisations:

"*Art.* 50. *§ 1. At the request of the victim of discrimination, the bodies referred to in Article* 37, ***one of the interest groups referred to in Article 39***, *the prosecution service or, depending on the nature of the act, the labour law auditor's office, the president of the court of first instance or, depending on the nature of the act, the president of the labour court or of the commercial court, shall confirm the existence and order the cessation of any act, even if punishable under criminal law, which infringes the provisions of the present decree.*
§ 2. *At the request of the victim, the president of the court may grant him or her the flat-rate compensation referred to in Article 46, §* 2.
§ 3. The president of the court may require his or her decision or such summary as he or she may draft thereof to be posted, for such period as he or she shall determine, both outside and inside the infringer's establishments or premises, and order that his or her judgment or the summary thereof be published or disseminated in newspapers or by any other means, with all costs to be borne by the infringer.
Such publicity measures may be prescribed only if they are likely to contribute to the cessation of the impugned act or the effects thereof.
§ 4. Actions pursuant to § 1 shall be brought and examined under the summary application procedure.
They may be brought in the form of a petition, drawn up in four copies and sent by registered letter or lodged with the registry of the competent court.
In order to be valid, the petition shall contain:
1° An indication of the day, month and year;
2° The surname, first names, occupation and address of the petitioner;
3° The surname and address of the natural person or legal entity against whom the application is being made;
4° The purpose of and grounds for the application.
The registrar of the court shall immediately notify the other party by registered letter, to which shall be appended a copy of the petition, and shall invite him or her to appear not earlier than three days and not later than eight days after the date of despatch of the registered letter.
The action shall be heard notwithstanding any proceedings which may be instituted in respect of the same acts before any criminal court.
Where the facts submitted to the criminal court are the subject of an action for an injunction, no decision may be given in the criminal proceedings until a final decision has been rendered in respect of the action for an injunction. The time-limit for prosecution shall be suspended during the deferral.

[13] Observations of the complainant organisations, p. ***

The judgment shall be provisionally enforceable, notwithstanding appeal and without security. It shall be communicated by the registrar of the court forthwith to all the parties and to the Crown Prosecutor.
§ 5. The provisions of the present article shall be without prejudice to the powers and responsibilities of the Council of State, as set out in the co-ordinated laws of 12 January 1973 on the Council of State."

It must be recognised, therefore, that in alleging that there are no domestic remedies in the Belgian legal system, the complainant organisations erred both in fact and in law and feigned ignorance of the Belgian courts' extensive case law in this area.

2.6. Finally, Belgium wishes to remind the complainant organisations that the waiving of a right should be construed narrowly.

Belgium refers to the arguments put forward in this regard in its submissions on the merits. At the admissibility stage, the Committee examined, **from a formal point of view,** compliance with the admissibility criteria as set out in the Protocol and the Rules of Procedure, i.e.:

- a complaint lodged in writing and duly signed, relating to a provision of the Charter accepted by the Contracting Party concerned;
- an indication as to how the provision has not been applied in a satisfactory manner;

Belgium raised no objections, as it was merely a matter of establishing that the complainant organisations had standing to lodge a collective complaint under the Protocol and that the complaint had been duly substantiated in writing.

Contrary to the complainant organisations' assertions, it cannot consequently be inferred that Belgium has waived its right to object on the grounds of non-exhaustion of domestic remedies, since at the stage of admissibility – as defined in the context of the collective complaints procedure – that issue did not arise.

Belgium is within its rights, therefore, in raising the objection and demanding that it be upheld, since it relates to respect for the sovereignty of the Contracting States.

2.7. Since the complainant organisations have not availed themselves of the domestic remedies available under the Belgian legal system, through an action for damages under ordinary law or by seeking an injunction, their collective complaint should be considered inadmissible, or at the very least, unfounded.

I SCOPE OF BELGIUM'S INTERNATIONAL OBLIGATIONS UNDER ARTICLES 15, 17 AND E OF THE CHARTER

3.1. Belgium refers mutatis mutandis to the observations made in this regard in its submissions on the merits of the complaint, subject to the clarifications provided below.

3.2. In their observations in reply, the complainant organisations persist in examining

the obligations arising from the Charter through the lens of the United Nations Convention on the Rights of Persons with Disabilities,[14] as too does the Belgian Interfederal Centre for Equal Opportunities (UNIA).

What needs to be considered in this collective complaint, however, is whether Belgium's conduct is justified in the light of its obligations under the Charter, and not the above-mentioned UN Convention.

The reference to this Convention is wholly without foundation, therefore, as the Committee has no authority to review Belgium's conduct in the light of the rights and obligations instituted therein.

As part of its obligations under the Charter, Belgium is required to take "*the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private*" (emphasis added).

It is an obligation of means, one which has led the Committee to:

> *"consider necessary the existence of non-discrimination legislation as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, as a minimum, require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an effective right to education. Legislation may consist of general anti-discrimination legislation, specific legislation concerning education, or a combination of the two".*[15]

Under the Committee's case law, therefore, states may continue to operate a system of special education if, as has been established by Belgium in its submissions on the merits and its observations in reply, there are compelling reasons for doing so.

3.3. The reading of Article 24 of the UN Convention on the Rights of Persons with Disabilities which the complainant organisations and UNIA propose is in any case incorrect.

Firstly, the principles relating to treaty law, as codified in the 1969 Vienna Convention on the Law of Treaties, state that it is solely for the States Parties to a treaty to provide an authentic interpretation of an international obligation.

In the context of the United Nations Convention on the Rights of Persons with Disabilities, this power may be exercised in a concerted manner, where appropriate, through the Conference of States Parties, the sovereign body of the Convention, instituted in Article 40 thereof.

It falls neither within the competence of civil society nor within the competence of the Committee on the Rights of Persons with Disabilities, which consists of 18 independent experts whose main task is to make recommendations on the reports submitted by the States Parties.

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[14] Observations in reply filed by the complainant organisations, p. ***

[15] European Committee of Social Rights, Conclusions 2007, Statement of interpretation on Article 15.1.

The institutional context having been explained, Belgium would further point out that, in accordance with the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.

The complainant organisations and, in their wake, UNIA, have deliberately disregarded this principle, however, where Article 24 of the UN Convention on the Rights of Persons with Disabilities is concerned.

This disregard has the knock-on effect of undermining the legal scope which the complainant organisations seek to give to Articles 15 and 17 of the Charter, as interpreted through the lens of Article 24 mentioned above.

For what is proscribed in Article 24 of the United Nations Convention on the Rights of Persons with Disabilities is excluding people with disabilities from the mainstream education system solely on the basis of their disability:

> *"(…) States Parties shall ensure that: (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;*

It is thus exclusion on the basis of disability *per se* that the States Parties sought to prohibit.

It has to be recognised, however, that according to 2, §2, of the decree of 3 March 2004 on the organisation of special education, the referral of pupils with special needs to special education is based not on disability, but "*on the nature and extent of the educational needs and psycho-educational potential of the pupils* [with a view to ensuring] *the development of their intellectual, psychomotor, emotional and social abilities*".

Special education in the French-speaking part of Belgium is not "segregated education" therefore, as the complainant organisations maintain, since referrals to special schools are made solely on the basis of the educational prospects of the pupil with special needs. Contrary to what the complainant organisations claim, such referrals do not arise from the special needs pupil's disability *per se.*

3.4. Far from prohibiting States Parties from continuing to operate a special education system, the UN Convention seeks to tackle discrimination based on disability *per se* in the exercise of the right to education.

Articles 15 and 17 of the Social Charter build on the existing regulatory framework, by requiring the Contracting States, including Belgium, to implement, as far as possible, the right of pupils with special needs to be educated in a mainstream setting and to continue operating special schools only where there are compelling reasons to do so.

In the light of the foregoing, the claims made by the complainant organisations and, later, UNIA, to the effect that contemporary international law prohibits states from continuing to operate a system of special education, alongside mainstream education, are patently without any legal basis.

M. THE MANNER IN WHICH FOUNDATION LEVEL AND SECONDARY

EDUCATION IS ORGANISED IN FRENCH-SPEAKING BELGIUM IS COMPLIANT WITH ARTICLES 15, 17 AND E OF THE CHARTER

4.1.1. Belgium refers mutatis mutandis to the observations made in this regard in its submissions on the merits of the complaint.

A. THE ORGANISATION OF FOUNDATION LEVEL AND SECONDARY EDUCATION IN FRENCH-SPEAKING BELGIUM, WHERE INCLUSIVENESS IS THE RULE

4.2.1. Belgium refers *mutatis mutandis* to the observations made in this regard in its submissions on the merits of the complaint, subject to the clarifications provided below.

4.2.2. Whatever the complainant organisations contend, education in French-speaking Belgium is, on principle, inclusive.

Granted, the Pact for Excellence in Education is first and foremost a policy commitment, but it is gradually being incorporated into Belgium's domestic legal order.

For example, a new decree was adopted at a plenary session of the French Community's parliament on 6 December 2017, to improve the legislation on reasonable arrangements to accommodate special needs pupils in mainstream education (see list of attachments, document no. 2).

In this decree, "special need" is defined as follows: "*need arising from a characteristic, disorder or state, whether permanent or semi-permanent, of a psychological, mental, physical or psycho-emotional nature which is an obstacle to the learning process and requires the provision, within the school, of additional support to enable the pupil to pursue, in a regular and harmonious manner, his or her schooling in mainstream foundation level or secondary education".*

The term "special need" thus covers all types of disability, including those which come under type 2 special education, since according to the preparatory work on the decree (see list of attachments, document no. 2*bis*), the list of eligible persons includes pupils who have developed:

- a specific learning disability;
- a behavioural disorder;
- an attention deficit disorder, with or without hyperactivity;
- characteristics that qualify them as high potential;
- a disabling illness;
- a physical, mental or sensorial disability.

The decree of 6 December 2017 enshrines the right – which had already been recognised in the decree of 12 December 2008 on measures to combat certain forms of discrimination - to reasonable accommodation, by introducing a new Article 102/1 into the "missions decree" of 24 July 1997, providing that:

> *"Any pupil in mainstream foundation level or secondary education who has "special needs", as defined in Article 5, 22˚shall be entitled to benefit from reasonable*

> *accommodation in the form of appropriate material, organisational or educational arrangements, provided that his or her circumstances do not demand that he or she be placed in special education pursuant to the decree of 3 March 2004 on the organisation of special education."*

It is incorrect, therefore, to claim, as the complainant organisations have done, that Belgium is not honouring its political commitments through legislation.

In the event of refusal to make reasonable accommodation, as well as the possibility of seeking an injunction under the decree of 12 December 2008, the decree of 6 December 2017 also provides for a conciliation procedure and the possibility of appealing to the "Commission on Inclusive Compulsory Education" whose decisions are binding on schools.

4.2.3. Although the decree of 6 December 2017 is not due to come into force until the academic year 2018-2019, the competent authorities have already begun preparing for its implementation by management, teaching and educational staff in mainstream educational institutions.

Belgium refers here to the document, which is still at the draft stage and strictly confidential, that is intended to guide the various education stakeholders in the provision of reasonable accommodation, in the light of the decree of 6 December 2017 (see list of attachments, document no. 7). The final version of this document is expected to be released at the end of March 2018.

This document, moreover, is part of the broader efforts being made in Belgium to inform educational stakeholders about the preferred teaching methods when dealing with children with special needs in mainstream education.

The following material is accordingly available on the internet (see list of attachments, document no. 8):

- Teaching high potential children (document no. 8a);
- Teaching pupils with learning disabilities (document no. 8b);
- Teaching pupils who lack proficiency in the language of instruction (document no. 8c);
- Inclusion Pass – the right of pupils with special needs to collective support (document no. 8d).

4.2.4. Belgium further notes that the referral of special needs pupils to special education is strictly regulated and refers to the points made in this regard in paragraphs 4.2.5. et seq. of its submissions on the merits of the complaint.

With all due respect to the complainant organisations, the fact is that the Charter does not outlaw special education, but rather promotes inclusive education, allowing States Parties to continue operating a system of special education for children with special needs alongside the mainstream system, where there are compelling reasons for doing so.

4.2.5. Belgium further notes that the complainant organisations use the demographic argument to support their case, pointing out that, in absolute terms, the number of pupils attending special education has significantly increased.

It must be recognised, however, that the growth in the number of pupils in special education can also be explained by advances in medicine. For example, a growing number of premature babies – who, it will be recalled, are more likely to have disabilities – are surviving infancy and going on to attend pre-school, primary and secondary schools. In 2010, according to figures from the *Office Nationale de l'Enfance*,[16] 8.2 % of babies were born prematurely, i.e. 4,120 children, compared with only 3,640 in 2000 and 2,994 in 1994.

B. COMPELLING REASONS FOR CONTINUING TO PROVIDE SPECIAL EDUCATION

4.3.1. Belgium refers mutatis mutandis to the observations made in this regard in its submissions on the merits of the complaint, subject to the clarifications provided below.

4.3.2. Firstly, Belgium is surprised at the complainant organisations' reference to the judgment in *Smith and Grady v. United Kingdom*.[17]

In this judgment, the European Court of Human Rights rightly held that the fact that there was prejudice on the part of a heterosexual majority against a homosexual minority could not be considered to amount to sufficient justification under Article 8 of the European Convention on Human Rights for refusing to implement a public policy that would enable homosexual people to serve in the armed forces.

As noted by the Court in its judgment, it was not disputed "*that the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation*".[18]

The United Kingdom, therefore, had been perpetuating discrimination between individuals with the same objectively measurable capabilities and skills, on the sole basis of sexual orientation and with the avowed aim of not arousing the prejudice of an influential majority, in order to preserve "*the fighting power and operational effectiveness of the armed forces*".[19]

The conclusions drawn from this decision are not transposable, therefore, given that in the case which concerns us here, pupils with special needs are referred to special education at the end of a procedure which is strictly defined in legislation and conducted in a multi-disciplinary manner, with due account being taken, solely for the benefit of the child, of those impairments which are objectively observable.

Belgium refers here to the comments which it made on the special education referral system and the measures taken to promote projects for integrating pupils with special needs into mainstream education in paragraphs 4.2.5. et seq. and in paragraph 4.2.7.

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[16] ONE, Rapport 2010, « Banque de données médico-sociales », p. 52, available online at: http://www.one.be/uploads/tx_ttproducts/datasheet/Rapport_BDMS_2012_BD.pdf

[17] Observations of the complainant organisations, p. ***, footnote on page 7.

[18] ECtHR. Smith and Grady v. United Kingdom, judgment of 27 September 1999, applications nos. 33985/96 and 33986/96, para. 90.

[19] ECtHR. Smith and Grady v. United Kingdom, judgment of 27 September 1999, applications nos. 33985/96 and 33986/96, para. 95.

respectively of its submissions on the merits.

4.3.4. Belgium further notes that the complainant organisations are not satisfied with the replies given in the submissions on the merits, maintaining that they are purely formal and lend no support to the Government's claim that the measures introduced are effective.

In support of their contention, the complainant organisations quote figures showing that the proportion of children attending special schools has risen over the past ten years (from 4.9% of pupils at primary level in 2005-2005 to 5.3% in 2014-2015; and from 3.9% of pupils at secondary level in 2005-2006 to 4.7% in 2014-2015).

As Belgium has explained in paragraph 4.2.4., however, this increase is partly due to demographic factors, which the complainant organisations have failed to consider.

The 2010 statistics on births, in particular premature births, are particularly relevant, given that the children who were infants in 2010 were the pupils attending foundation level schools in 2014-2015.

Belgium also wishes to draw attention to the prevalence of high-risk behaviour among mothers, such as smoking and alcohol abuse (including foetal alcohol syndrome),[20] which have been scientifically proven to affect the development of the fœtus, effectively leading to an increase in the number of pupils with special needs. In absolute terms, the data reported by the complainant organisations indicate that the number of pupils in special foundation level education rose by 2,160 and the number of pupils in special secondary education by 2,940 respectively between 2004-2005 and 2014-2015.

The increases, which are portrayed as significant by the complainant organisations, may therefore simply be due to demographic factors and an increase in high-risk behaviour. Indeed, demographic factors and the increase in high-risk behaviour correlate with the growth, between 2014-2015 and 2017-2018, in the number of pupils with special needs in type 2 special education (see list of attachments, document no. 6).

4.3.5. Belgium wishes to remind the complainant organisations that in international law, states are presumed to act in good faith. The ratio legis of this principle has been brilliantly summarised in legal literature as follows:

> *"The presumption of good faith favours the stability of international transactions. It also prevents the application of a procedural rule from resulting in a too frequent divorce between the legal duty and the effective conduct, which would almost certainly undermine the legal order. Then there is the moral aspect: the benefit of the doubt must be accorded to those who claim to be honest. Last but not least, the presumption of good faith prevents states' honour from being called into question lightly. It thus helps to reinforce the confidence of the state in judicial proceedings. The requirements for rebutting the presumption must not be excessive, however. That would unduly restrict the material standards prohibiting bad faith or intention to harm. The credibility of the judge would suffer as a consequence. Case law shows that international arbitration*

[20] On the subject to alcoholism, see: https://www.alcoolassistance.net/alcool-grossesse ; https://aide-alcool.be/alcool-cerveau

> *bodies and courts have a propensity to examine each case on its merits and to rebut the presumption whenever circumstances so require."*[21]

The complainant organisations complain that the measures introduced in French-speaking Belgium are not effective, yet provide no evidence of this ineffectiveness, even though the burden of proof is on them.

They make only a rather peremptory statement to the effect that: "*the reason for this, in the view of the complainant organisations, is that the instruments in question are not being implemented in practice*".[22]

Given the resources available to the complainant organisations, an on-line survey of the parents of pupils with special needs could have been conducted, if only to provide concrete evidence to support their case.

Such a survey would have afforded an easy means of proving the organisation's claim that "*children who are denied admission are not being given the forms referred to in this provision of the "missions decree"*".[23] Without concrete evidence to support it, however, this assertion is purely gratuitous and unfounded. The Belgian Government's observations to the effect that foundation level and secondary education is, on principle, inclusive cannot be rebutted, therefore.

In any event, the increase in the number of complaints which the complainant organisations cite in support of their claims about the ineffectiveness of Belgium's efforts to ensure inclusive education is hardly a convincing argument.[24]

Firstly, the complaints or reports received by the Interfederal Centre for Equal Opportunities have no evidential value, since they do not necessarily mean that pupils with special needs have been discriminated against in terms of access to mainstream education.

Proof of this can be seen in the fact that in 2016, in the French Community, 104 reports were brought to the attention of the Interfederal Centre for Equal Opportunities, and files were opened in only 65 of those cases.[25]

More significantly, of these 65 cases, only 5 related to pupils with a moderate or severe mental disability.

The figures are extremely low, therefore, in relation to the total number of pupils in foundation level and secondary education in French-speaking Belgium. That said, discrimination is discrimination and numbers should not be the dominant consideration.

The Interfederal Centre does not explain, however, what happened in the cases in question, making it impossible to draw even the slightest concrete conclusion from them. It could be, therefore, that the public authorities or organising authorities managed to find solutions after the cases were opened, thus rendering any reference to these figures obsolete.

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[21] R. KOLB, « La bonne foi en droit international public », *Revue belge de droit international*, 1998/2, p. 729.

[22] Observations of the complainant organisations, p. ***

[23] Observations of the complainant organisations, p. ***

[24] Observations in reply filed by the complainant organisations, p. ***

[25] Observations of the Interfederal Centre for Equal Opportunities, p. ***

4.3.6. With regard to the management plan mentioned by Belgium in paragraph 4.2.3. of its submissions on the merits, the fact is that, contrary to what the complainant organisations maintain, this initiative has not been postponed until 1 September 2020 for all schools, insofar as the "missions decree", as amended by the decree of 19 July 2017, states that:

> *"A 6-year management plan shall be prepared within each school, according to the following timeline:*
>
> *- from 1 September 2018 for all volunteer schools, covering approximately one third of the pupils in each network, and at each level of education. Where, within a particular network and level, the number of volunteer schools is too great, the schools in the proportionately best represented areas which have the fewest pupils at 15 January 2017 shall be included in a later phase. Where an Organising Authority encompasses several schools, all the schools within the purview of that same Organising Authority may, if they so wish, be treated as a single school provided that the total number of pupils attending all these institutions is equal to or less than 250 pupils at 15 January 2017, without prejudice to the need for each institution to prepare a management plan. If not enough schools volunteer within a particular network or level, the numbers shall be supplemented by non-volunteer schools in the proportionately least represented areas which have the most pupils;*
>
> *- from 1 September 2019 for a further tranche of volunteer schools covering approximately one third of the pupils in each network and at each level of education. Where, within a particular network and level, the number of volunteer schools is too great, the schools in the proportionately best represented areas which have the fewest pupils at 15 January 2018 shall be included the following academic year. Where an Organising Authority encompasses several schools, all the schools within the purview of that same Organising Authority may, if they so wish, be treated as a single school provided that the total number of pupils attending all these schools is equal to or less than 250 pupils at 15 January 2018, without prejudice to the need for each institution to prepare a management plan. If not enough schools volunteer within a particular network or level, the numbers shall be supplemented by non-volunteer schools in the proportionately least represented areas which have the most pupils;*
>
> *- from 1 September 2020 for all other schools".*

The scheme is being phased in gradually, therefore, enabling each school to adapt.

4.3.7. With regard to the forms of teaching available in special secondary education, the complainant organisations criticise, on page *** of their observations in reply, the fact that pupils with special needs attending type 2 special secondary schools only have access to "forms" 1 and 2 special education which, in the opinion of the complainant organisations, serve to perpetuate their segregation in adulthood, rather than facilitating their inclusion.

This claim has no basis in fact and stems from a misunderstanding of the different forms of teaching available to pupils with special needs.

Special education is admittedly divided into four "forms".

The four forms mentioned above, however, apply exclusively to special education.

Alongside these are other forms of education, which are likewise available to pupils with special needs.

Indeed, pupils with special needs, including those with moderate to severe disabilities, who are in mainstream education, can choose between the different forms of teaching provided for in the law of 19 July 1971 on the general structure and organisation of secondary education, namely general, technical, vocational or arts.

In the case of pupils attending special schools, Belgium concedes that only special education “forms” 1 and 2 are available to special needs pupils who are in type 2 special secondary education, in accordance with Article 46 of the decree on the organisation of special education. It is important to note, however, that type 2 special secondary education is geared first and foremost to the developmental and educational needs of children and young people with moderate or severe mental disabilities.

With all due respect to the complainant organisations, this sort of disability demands that, in the best interests of the child, he or she be provided with a special framework aimed, first and foremost, at enabling him or her to integrate into a sheltered living environment or, in the best case scenario, a sheltering living and work environment. Belgium refers here to Article 8, § 2, of the decree of 3 March 2004, which elaborates on the educational opportunities for special needs pupils in type 2 special education.

Belgium recognises that this is not an easy fact for parents of special needs pupils in type 2 special education to accept but to enable them to enter adult life, professional support is needed. Far from perpetuating “segregation”, Belgium would further remind the complainant organisations that education “forms” 1 and 2 can be organised jointly for special needs pupils in special education types 2, 3, 4, 5, 6 and 7.

4.3.8. Belgium also draws the Committee’s attention to the progress made through integration projects, which shows that far from segregating, the education system in French-speaking Belgium seeks to steer learners, from the earliest possible age, towards mainstream education:

Type d'intégration/niveau	T1		T2		T3			T4			T5		T6			T7			T8	Total
	P	S	M	P	M	P	S	M	P	S	M	P	M	P	S	M	P	S	P	
Permanente partielle	0	1	0	0	1	0	1	0	1	0	0	0	0	0	0	4	26	1	0	35
Permanente totale	58	728	15	16	2	72	239	8	39	75	3	7	2	23	34	21	74	106	746	2268
Temporaire partielle	1	1	1	0	0	0	1	6	0	1	0	0	0	0	0	0	0	0	0	11
Temporaire totale	39	77	17	2	14	22	30	10	8	12	0	0	5	6	3	9	10	27	510	801
Total	98	807	33	18	17	94	271	24	48	88	3	7	7	29	37	34	110	134	1256	3115

Tableau 1 *Répartition par type d'enseignement, type d'intégration et niveau, année 2015-2016*

Type d'intégration/niveau	T1		T2		T3			T4			T5			T6			T7			T8	Total
	P	S	M	P	M	P	S	M	P	S	M	P	S	M	P	S	M	P	S	P	
Permanente partielle	1	1	0	0	3	1	2	0	0	0	0	0	0	0	0	0	8	29	1	0	46
Permanente totale	58	502	12	11	3	65	185	11	26	61	2	6	1	4	25	38	20	62	91	613	1796
Temporaire partielle	0	2	0	0	1	0	1	4	2	0	0	0	0	0	0	0	1	0	0	3	14
Temporaire totale	39	58	21	4	7	21	24	5	8	16	0	0	0	1	6	3	10	13	24	458	718
Total	98	563	33	15	14	87	212	20	36	77	2	6	1	5	31	41	39	104	116	1074	2574

Tableau 2 Répartition par type d'enseignement, type d'intégration et niveau, année 2014-2015

Type d'intégration/niveau	T1		T2		T3			T4			T5			T6			T7			T8	Total
	P	S	M	P	M	P	S	M	P	S	M	P	S	M	P	S	M	P	S	P	
Permanente partielle	0	0	0	2	4	1	2	0	1	1	0	0	0	0	0	0	7	25	1	0	44
Permanente totale	44	362	12	8	3	68	140	12	19	37	1	3	3	2	18	39	23	59	87	505	1445
Temporaire partielle	0	0	0	0	1	2	0	1	1	0	0	0	0	1	0	0	0	0	0	1	7
Temporaire totale	33	39	20	3	7	30	18	5	8	11	0	0	0	2	11	4	19	13	16	385	624
Total	77	401	32	13	15	101	160	18	29	49	1	3	3	5	29	43	49	97	104	891	2120

Tableau 3 Répartition par type d'enseignement, type d'intégration et niveau, année 2013-2014

Type d'intégration/niveau	T1		T2		T3			T4			T5		T6			T7			T8	Total
	P	S	M	P	M	P	S	M	P	S	M	S	M	P	S	M	P	S	P	
Permanente partielle	0	0	2	1	2	1	1	2	2	0	0	0	0	0	0	6	29	5	1	52
Permanente totale	48	245	6	5	6	55	88	5	12	40	4	0	0	12	31	17	51	80	382	1087
Temporaire partielle	0	0	0	1	2	1	0	0	2	0	0	0	0	0	0	0	0	0	0	6
Temporaire totale	32	18	14	0	12	13	11	5	8	13	0	1	1	8	9	12	10	19	319	505
Total	80	263	22	7	22	70	100	12	24	53	4	1	1	20	40	35	90	104	702	1650

Tableau 4 Répartition par type d'enseignement, type d'intégration et niveau, année 2012-2013

».

Integration, however, is broadly criticised by the complainant organisations as being contrary to what is required for inclusive education. It is also defined, wrongly in the Belgian context, by UNIA as being a situation in which pupils with special needs are taught in mainstream schools "*with the understanding that they can adjust to the standardised requirements of such institutions*".[26]

According to Article 130 of the decree of 3 March 2004 on the organisation of special education, however, the purpose of integration projects is to "*promote the social adjustment and education of pupils with special needs*".

The emphasis, therefore, is on the interests of the pupil with special needs.

There is no question of compelling him or her to adapt to the standardised requirements of mainstream education. Instead, the idea is to help the pupil, through integration, to complete his or her educational project. Belgium refers, moreover, to the comments which it made in paragraph 4.2.7. of its submissions on the merits.

4.3.9. Lastly, regarding the possibilities for appealing a decision denying a special needs child admission to mainstream education, it should be noted that the complainant organisations have failed to address the points made by Belgium in paragraph 4.2.2. of its submissions on the merits.

Remedies exist to challenge such decisions and the complainant organisations have

[26] Observations of the Interfederal Centre for Equal Opportunities, p. ***

not demonstrated that parents of pupils with special needs would encounter any problems in this regard, something they could have attempted to do by conducting an on-line survey of their members, for example.

Contrary to what is claimed by UNIA,[27] moreover, provided they are instituted correctly, summary injunction proceedings last between 1 and 3 months. At the end of that period, a decision is handed down which is, on principle, immediately enforceable, thereby enabling the pupil to return to school within a reasonable time.

The decree of 6 December 2017 (see list of attachments, document no. 2), moreover, gave parents of special needs pupils an additional remedy against decisions refusing to make reasonable accommodation, by setting up a Commission on Inclusive Compulsory Education (Article 5).

Contrary to the revised European Social Charter, however, the complainant organisations confirm, on page *** of their observations in reply, that they wish to see the introduction of "inclusive education at any price", without regard to the child's best interests, which, in certain compelling circumstances, may demand that he or she be placed in special education.

With all due respect to the complainant organisations, there can be no teaching of the kind they suggest without undermining the very essence of any educational project, the purpose of which is to push the pupil to achieve the maximum of which he or she is capable. It is in that context, moreover, that the decree of 6 December 2017 states that the reasonableness of accommodation is to be judged partly on the following criteria:

- financial impact of the accommodation, having regard to any financial support measures;
- the organisational impact of the accommodation, in particular as regards the supervision of the pupil concerned;
- the frequency and duration of the use to be made of the accommodation by the person with disabilities;
- the impact of accommodation on the quality of life of one or more actual users;
- the impact of the accommodation on the environment and on other users;
- the absence of equivalent alternatives.

Reasonable accommodation is a subtle alchemy, therefore, in which everyone involved in the educational project (the head teacher or his/her deputy, the class council or its representative, the representative of the CPMS attached to the school, the pupil's parents or the pupil himself/herself if over the age of 18), and not merely a "declaration of principle", of the kind favoured by the complainant organisations with their dogged insistence that pupils with special needs should be placed in mainstream education, even when it is detrimental to them.

It is a matter of acknowledging the reality of the situation on the ground and making a decision, case by case, in the best interests of the learner, one which can in any event be challenged by the pupil's parents or the pupil himself/herself if over the age of 18, before the Commission on Inclusive Compulsory Education.

As noted by the complainant organisations on page *** of their observations in reply,

[27] Observations of the Interfederal Centre for Equal Opportunities, p. ***

moreover, education is organised freely in Belgium, in accordance with Article 24 of the Belgian Constitution.

In other words, the parents of pupils with special needs have the right to demand that their child be enrolled in mainstream education, the effective exercise of this right being contingent on the incentives with regard to reasonable accommodation. That does not in any way alter the fact that Belgium may still continue to provide special education, alongside mainstream education.

The right to mainstream education, whether the complainant organisations like it or not, is not in fact an absolute right, meaning that it may be subject to such restrictions as are necessary in a democratic society, through measures which are reasonably proportionate to the legitimate aim pursued. In the case in point, referral to special education is the result not of coercion by the national authorities, but rather of a free choice by those exercising parental authority, provided that a multi-disciplinary report confirms that special education is necessary in the best interests of the child. The preferred approach, then, is a case-by-case one, and mitigation measures have been put in place, notably in the form of integration projects. As a result, the restrictions to which the right to mainstream education is subject are reasonably proportionate to the aim pursued, namely the psychological and educational development of the pupil with special needs in an environment that caters fully to his or her needs. In the same spirit, Article 15 of the Charter places an obligation of means on the Contracting Parties, allowing them to continue providing special education, where there are compelling reasons to do so.

The European Court of Human Rights has taken a similar view when examining compliance with the right to education enshrined in Article 2 of Additional Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

> *"The Court observes that only the applicant's right to education is at issue in the present case. The application as formulated by the applicant's mother, acting on his behalf, must be dismissed on the grounds that the applicant does not have victim status. It follows that his complaints are incompatible ratione personae with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.*
>
> *Regarding the applicant's complaints, the Court notes firstly that the right to education, as provided for in the first sentence of Article 2 of Protocol No. 2, secures for everyone, without distinction of any kind, "a right of access to educational institutions existing at a given time". This right is not absolute, however; it may give rise to limitations permitted by implication, since "by its very nature it calls for regulation by the State". In matters of regulation, the State authorities enjoy a certain margin of appreciation, but the Court must determine in the last resort whether the Convention requirements have been complied with.*
>
> *The Court notes secondly that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations (see Willis v. the United Kingdom, no. 36042/97, § 48, ECHR 2002-IV, and Okpisz v. Germany, no. 59140/00, § 33, 25 October 2005). Article 14 of the Convention, however, 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 if there is no objective and reasonable justification for it (see Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), 23 July 1968, § 10, Series A no. 6, and Thlimmenos v. Greece [GC], no. 34369/97, § 44, ECHR 2000-IV, Stec and Others v. the United Kingdom [GC], no. 65731/01, §§ 51, ECHR 2006-…, and, lastly, D.H. and Others v. the Czech Republic [GC], no. 57325/00,*

§ 175, ECHR 2007-…).

In the instant case, the Court observes that in Turkey, the right to education is secured for every child, constitutionally and legally. For Article 42 of the Turkish Constitution proclaims the right to education and instruction in keeping with the principle of equality of opportunity and the responsibility of the State regarding the provision of special education. Various pieces of legislation likewise affirm the right to education of children with disabilities, without discrimination on the basis of disability. Accordingly, all children with disabilities are recognised as having the right to receive an inclusive education in mainstream schools, both state-run and private, or to receive a special education in special institutions.

The Court notes that Turkey's domestic law further establishes the principle of responsibility for the education system as a guarantee of continuity in each child's educational pathway. It accordingly institutes and regulates the schooling of children with disabilities and provides for the setting-up of special education facilities and mechanisms and for the use of special teaching materials to help make it possible for children to complete their schooling. Education is thus under the control and responsibility of the Ministry of National Education, in the case of both state-run and private elementary schools. Within this ministry, there is a directorate general of primary education and departmental directorates of education whose responsibilities include special education.

In the context of the present case, the Court considers it appropriate to point out that in making these observations about the national law, it is not seeking a re-evaluation of the principles laid down by Turkish law. The Court reiterates indeed that its task is not to review the relevant national law and practice in abstracto. Instead, it must confine itself to examining the specific facts of the case before it (see, for example, Findlay v. United Kingdom, 25 February 1997, § 67, Reports of Judgments and Decisions 1997-I). It is simply a matter, therefore, given the nature of the applicant's complaints, of setting out the legal situation in Turkey.

In this context, it is clear from the material in the file that the school in which the applicant wished to enrol refused to admit him to the second year of elementary education because he was blind, explaining that it was unable to provide him with the education which his disability required. The Court notes in this regard that under Turkish law, elementary education is under the control and responsibility of the Ministry of National Education, in the case of both state-run and private schools. Within this ministry, institutions providing special education services have been set up, whose tasks include identifying children in need of special education, and organising and delivering such education.

The Court cannot ignore the fact, either, that at the time, the right of people with disabilities to have access to education was guaranteed de jure by the education system, whether in the form of education in special institutions or in the form of inclusive education in mainstream schools. The principle that children with disabilities are to be integrated into mainstream schools was furthermore enshrined in domestic law as a fundamental principle that was to guide the delivery of the education to which they were entitled (see relevant domestic law, above).

In the light of the above, the Court considers that the refusal of a single school to admit the applicant to the second year of elementary education cannot – in itself – be regarded as a breach by the State of its obligations under Article 2 of Protocol No. 1, or as a systemic negation of the applicant's right to education on the grounds of his blindness. It follows that the applicant's complaints are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention."[28]

Far from outlawing the provision of special education, the Court considers that the absence of such education may amount to discrimination in the exercise of the right to education. In this context and in the psychological and educational interests of pupils with special needs, Belgium operates a closely regulated system of special education, alongside mainstream education which is, on principle, available to all

[28] ECtHR, Kalkani v. Turkey, decision on admissibility of 13 January 2009, application no. 2600/04.

pupils.

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* *

FOR THESE REASONS,

The respondent State asks the European Committee of Social Rights to declare collective complaint No. 141/2017 unfounded.

For the Kingdom of Belgium,
Paul RIETJENS
Agent

Appendix: list of attachments

COMPLAINT N°141/2017 PHL/5788

LIST OF ATTACHMENTS

1. Decree of 24 July 1997 defining the priority missions of foundation level and secondary education and organising the structures necessary to achieve it.

2. Decree of 6 December 2017 on the reception, accompaniment and maintenance in mainstream foundation level and secondary education of pupils with special needs (text adopted at a plenary sitting of the Parliament, not yet published).

2*bis.* Preparatory work on the decree on the reception, accompaniment and maintenance in mainstream foundation level and secondary education of pupils with special needs.

3. Decree of 3 March 2004 on the organisation of special education.

4. Decree of 12 December 2008 on measures to combat certain forms of discrimination.

5. Decree of 30 April 2009 introducing differentiated management within schools in the French Community to ensure that every pupil has equal opportunities for social emancipation in a quality teaching environment

6. Variations in the number of children in special education between 2014-2015 and 2017-2018.

7. Special learning needs: description of the project, directions for use and accommodation valid for all (**confidential document**).