Strasbourg Observers

Substantive equality as the driving force behind reasonable accommodations for pupils with disabilities: the case of G.L. v. Italy

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In G.L. v. Italy (http://hudoc.echr.coe.int/eng?i=001-204322), the first section of the European Court of Human Rights decides on yet another case regarding the principle of inclusive education and the right to reasonable accommodations for persons with disabilities. The two most recent cases on inclusive education (Dupin v. France (http://hudoc.echr.coe.int/eng?i=001-189671) and Stoian v. Romania (http://hudoc.echr.coe.int/eng?i=001-194062), decided at a committee level) seemed to have marked a turn in the Court's appraisal of the right to education and the principle of non-discrimination. With G.L. v. Italy, however, the Court seems to return to its earlier case law, namely that of Çam v. Turkey (http://hudoc.echr.coe.int/eng?i=001-161149) and Enver Şahin v. Turkey (http://hudoc.echr.coe.int/eng?i=001-180499). In the judgment at hand, the ECtHR gets back in line with its promising line of case law on the inclusion of pupils with disabilities and sets a valuable next step in the direction of substantive equality.

The case of G.L. v. Italy concerns the right of a disabled pupil to specialised assistance in school. The ECtHR needed to assess how far the duty of reasonable accommodation reaches and had to rule on the extent to which a failure to provide reasonable accommodations can be justified by a lack of resources. In this respect, the Court clarifies that children with disabilities should be able to go to school under equal conditions as non-disabled children. Remarkably, the ECtHR specifies that this entails a duty on authorities who are confronted with budgetary restrictions to make sure these restrictions impact on the educational programme in the same way for disabled and non-disabled pupils. Substantive equality thus again proves to be the driving force behind reasonable accommodations for pupils with disabilities.

Facts and ruling

In the case of G.L. v. Italy, the applicant was diagnosed with non-verbal autism. Because of this disability, she had a right to a specialised assistant during her education in a mainstream school, in conformity with Italian national law. While she had a specialised assistant during kindergarten, this ended when she started to attend primary school. Having spent one school year without the specialised assistance, her parents filed a request for specialised assistance with the authorities. Following a lack of response and a reiteration of their request, the parents hired a private specialised assistant for their daughter. Nine months after having received the first request, the authorities replied that it would be difficult to put in place specialised assistance, but that they hoped it would

soon be possible to assign someone to the applicant. This did not happen. The school did provide an alternative, in the form of basic assistance and physical aid by some of the school staff, the cost of which amounted to 476,56 euro. The applicant's parents subsequently initiated court proceedings in which they complained of the lack of specialised assistance for their child, to which she had a right according to national law, and requested compensation for the expenses of the private specialised assistant. Their complaint was rejected by the domestic administrative court, which ruled that the municipality had taken the necessary steps in a timely manner and which, in its ruling, took into account the fact that there had recently been a reduction of resources allocated to the region. A subsequent recourse to the Council of State was also rejected on the ground that the recent reduction of resources was a valid justification for the failure to provide specialised assistance.

In essence, the applicant lacked the publicly provided specialized assistance to which she had a right for two consecutive school years. In the judgment emphasis lies on the fact that, although the national law foresees the putting in place of reasonable accommodations in an abstract way, the competent national authorities failed to elaborate on precisely how those accommodations needed to be implemented in the two school years concerned. The effect of this was that the applicant did not enjoy the necessary specialized assistance during this period. As the required specialised assistance was lacking, the applicant could not attend class in equivalent conditions to her non-disabled peers which amounts to a difference in treatment on the ground of her disability. The justification for this difference in treatment given by the government, namely the lack of resources, is found to be insufficient by the Court. The authorities moreover failed to seek a fair balance between the applicant's educational needs and the administration's limited capacity to respond to this. The Court hereby emphasises that limitations in the educational offer caused by budgetary restrictions should impact the educational offer for both non-disabled pupils and disabled pupils in an equivalent way. For these reasons, the Court rules that the failure to provide a specialised assistant to the applicant amounts to discrimination on the basis of disability and is in breach of article 14 of the European Convention on Human Rights (https://www.echr.coe.int/Documents/Convention_ENG.pdf) (ECHR) combined with article 2, Protocol No. 1 (https://www.echr.coe.int/Documents/Convention_ENG.pdf).

Inclusive education: optional vs. mandatory

To a large extent, the judgment builds upon earlier case law, most importantly on the judgments of Çam v. Turkey (http://hudoc.echr.coe.int/eng?i=001-161149) and Enver Şahin v. Turkey (http://hudoc.echr.coe.int/eng?i=001-180499). In G.L., the Court again grasps the opportunity to reiterate that in interpreting the right to education as laid down in article 2 Protocol No. 1, the relevant articles on the right to education for persons with disabilities of the Revised European Social Charter (https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93) and the Convention on the Rights of Persons with Disabilities (https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf) (CRPD) need to be taken into account. It moreover emphasizes that, as disabled children are a particularly vulnerable group, the state has a narrow margin of appreciation in instances that concern their fundamental rights. Furthermore, it underlines the fact that article 14 ECHR entails the duty of reasonable accommodation as foreseen in article 2 CRPD. This means that the principle of non-discrimination also encompasses the duty of the state to provide reasonable accommodations to correct factual inequalities that, in absence of justification, would amount to discrimination. Unjustified lack of reasonable accommodation thus amounts to discrimination on the basis of disability. Moreover, a lack of resources does not deprive the state of the responsibility to provide reasonable accommodation.

In clearly reiterating all these general principles, the Court follows the path embarked upon in all earlier judgments on the right to education of persons with disabilities. The Court furthermore adds that inclusive education for pupils with disabilities is important not only for them, but also for the non-disabled pupils who in that way become acquainted with disabilities and with human diversity.

In addition, discrimination that takes place in the context of primary education is all the more serious as primary education is compulsive education which provides the basis of instruction and social integration and is a child's first experience with *vivre ensemble.* The Court thus clearly underlines the fact that children with disabilities are a particularly vulnerable group, indicating the existence of more far-reaching positive obligations of the state concerning this group.

Generally, the Court has thus embarked upon a promising road. One critical remark, however, should not be left out: the Court could have gone further where it concerns the principle of inclusive education. In accordance with its international responsibilities, the Italian legal system has incorporated the principle of inclusive education for persons with disabilities. The Court remarks in this regard that in foreseeing the right of disabled children to inclusive education in mainstream education, the state made a choice that was within its margin of appreciation. In stating this, the Court seems to disregard relevant obligations stemming from the CRPD of which it had previously indicated that they should be taken into account while interpreting the right to education under article 2 Protocol No. 1 (compare G.L. (http://hudoc.echr.coe.int/eng?i=001-204322) §60 to §51). In article 24, the CRPD introduces a duty to provide inclusive education to all disabled persons. In my view, it is time to acknowledge that providing for the principle of inclusive education in national legislation is thus not 'option' or 'choice', falling within states' margin of appreciation. In contrast, it is a duty of the state that stems from the right to education combined with principle of non-discrimination under the ECHR, which are interpreted in conformity to obligations stemming from the CRPD, a duty that is moreover corroborated by a broad European consensus (see G.L. (http://hudoc.echr.coe.int/eng?i=001-204322) §53, repeated in §§61-62). After all, the Court notes that "inclusive education is unquestionably part of the international responsibility of States in the field [of the rights of persons with disabilities]" (G.L. (http://hudoc.echr.coe.int/eng?i=001-204322) §53, own translation).

The Court turns away from the path chosen in Stoian v. Romania

In following the foundations laid in the cases of Çam and Enver Şahin, the Court in G.L. clearly turns away from the path recently chosen in Stoian v. Romania (http://hudoc.echr.coe.int/eng?i=001-194062). In Stoian, the applicants similarly complained of a lack of personal assistance. In assessing if the government had complied with its duty of reasonable accommodation, the Court notes that the authorities '*made efforts* to find and retain a suitable personal assistant for him' (Stoian (http://hudoc.echr.coe.int/eng?i=001-194062), at §100). When comparing this to the Court's reasoning in G.L., however, it becomes clear that a different standard of assessment was used in G.L. In this case, the Court holds more demandingly that the authorities failed to do *all that was necessary* to provide *actual solutions* in order to enable the applicant to go to school in *equivalent conditions* (G.L. (http://hudoc.echr.coe.int/eng?i=001-204322) §70, own translation). Moreover, the Court in Stoian attaches importance to the fact that the applicant "*was never completely deprived of education,* as he continued to attend school, to be graded for his work, and to advance through the school curriculum" (Stoian (http://hudoc.echr.coe.int/eng?i=001-194062), at §105, emphasis added). These facts, however, are also present in the case at hand. The applicant did not drop out of school and she was provided with some limited aid by the school. While in Stoian these facts were enough to conclude that the authorities had complied with their duty of reasonable accommodation, they were such as to find a breach in G.L. The content of the duty to provide reasonable accommodation is thus clearly different in Stoian and in G.L. In G.L., the state is held to more demanding standards.

These changing standards are also commented upon by judge Wojtyczek in his concurring opinion (http://hudoc.echr.coe.int/eng?i=001-204322). He notices that the Court is not consistent in promulgating the requirements of the duty of reasonable accommodation. He criticises the fact that the majority elevates the standard of assessment from simply requiring 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case' (see the definition in article 2 CRPD

(https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf)) to requiring the more demanding condition of enabling school attendance in equivalent conditions (G.L. (http://hudoc.echr.coe.int/eng?i=001-204322), §66, as referred to in §2 of the concurring opinion). This is exactly what the current blogpost cheers upon. With this, the Court turns away from the path embarked upon in Stoian v. Romania, and instead builds further upon the promising foundations laid in Çam and Enver Şahin.

Substantive equality as the driving force behind reasonable accommodation

In the judgment, when it assesses the procedure before the domestic administrative courts, the ECtHR criticises the failure of the domestic courts to verify if the budgetary restrictions that were invoked by the state had the same impact on the educational offer for non-disabled and disabled pupils. The Court holds that, taking into account the model of inclusive education that was adopted in Italy and the jurisprudence of the Italian Court of Cassation on the duty of reasonable accommodation, *limits in course offers caused by budgetary restrictions should impact the educational offer for both non-disabled and disabled pupils in an equivalent way*. This is a very strong statement to be made by the ECtHR. It indicates a big and promising step towards fully implementing the notion of substantive equality (contrarily, see the concurring opinion (http://hudoc.echr.coe.int/eng?i=001-204322) of judge Wojtyczek at §4, finding the Court's position on this question of distributive justice problematic).

The Court adds the specific Italian context to this statement, namely that of embracing the principle of inclusive education and the existence of valuable jurisprudence of the Court of Cassation (see also the comments in the concurring opinion (http://hudoc.echr.coe.int/eng?i=001-204322), §3). In doing this, the ECtHR seems to seek to limit the broad impact of this important statement. One may only hope that this statement will live on past the specific context to which the Court attempted to confine it in the current judgment, and that it will evolve into a clear principle whereby recourse to the 'limited resources'-justification for failure to supply reasonable accommodation will only be accepted if these limited resources equally affect disabled and non-disabled pupils. In this way, substantive equality again proves to be the driving force behind the duty of reasonable accommodation, developing this principle towards its full capacity.

A promise of equality

In conclusion, the judgment in G.L. v. Italy is promising. After the most recent judgment in Stoian v. Romania and the decision in Dupin v. France, the ECtHR gets back on track with its earlier line of reasoning, as followed in Çam and Enver Şahin. The Court reiterates some important general principles that were established by these judgments and further develops its case law in the area of educational equality of persons with disabilities. Even though the Court could have gone even further, by fully embracing the principle of inclusive education and by not detracting from its step towards more substantive equality by suggesting that it might be confined to the particularities of the state concerned, the judgment in G.L. v. Italy is to be cheered upon. This is an important step to get back on track in providing substantive equality to all, including pupils with disabilities.

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