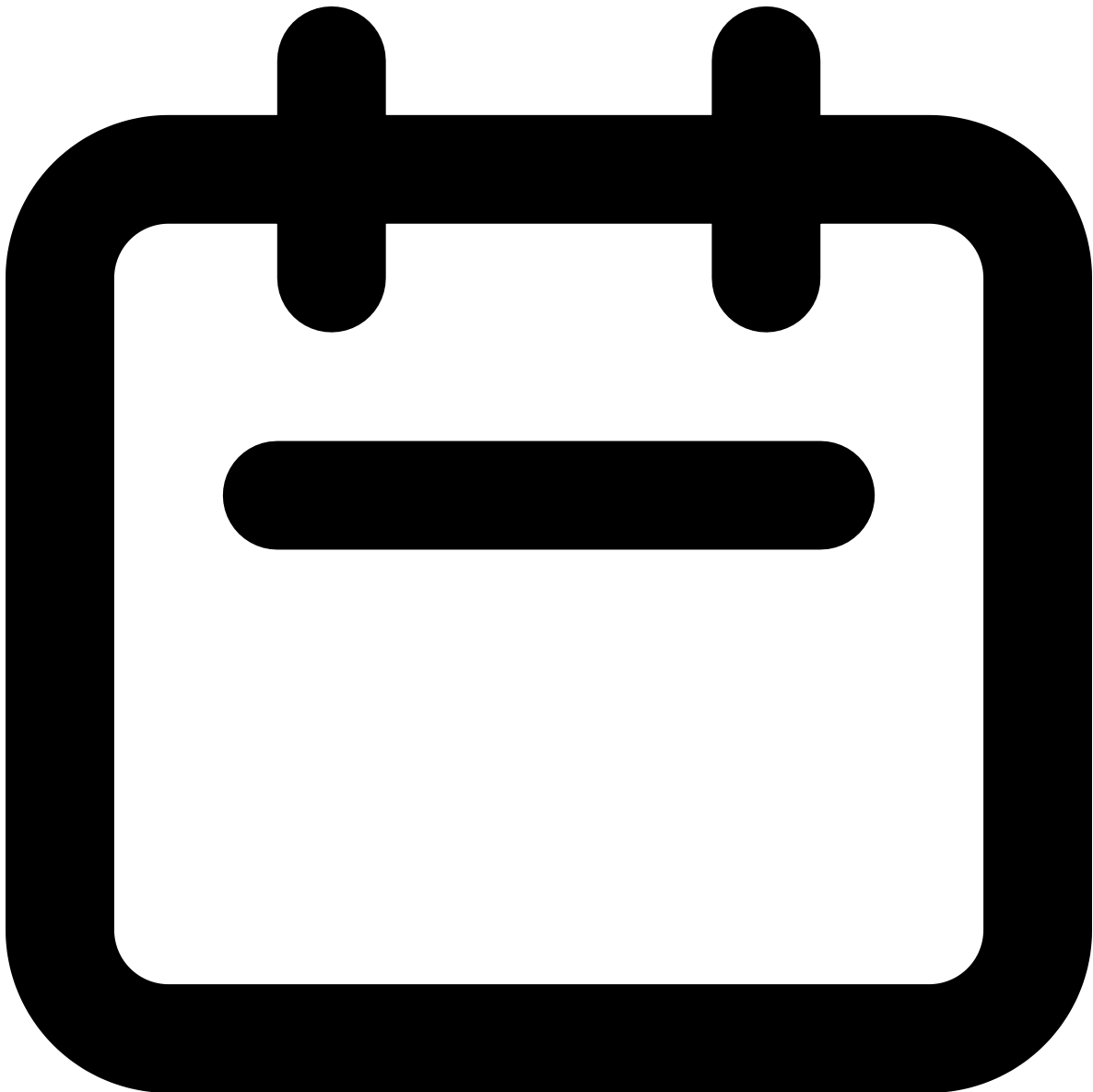


# Strasbourg Observers

- [Home](#)
- [Posts](#)
- [About](#)
- [Team](#)
- [Contact](#)

[Home](#) » Not the Court's finest work: inclusive education and reasonable accommodations for pupils with disabilities in T.H. v. Bulgaria

**Not the Court's finest work: inclusive education and reasonable accommodations for pupils with disabilities in T.H. v. Bulgaria**



July 20, 2023

**By Merel Vrancken**

In the case of [T.H. v. Bulgaria](#), the European Court of Human Rights finds that a school provided sufficient reasonable accommodation to satisfy the needs of a pupil with a disability and that no discrimination or harassment existed. This judgment follows several other cases about the inclusion of pupils with disabilities in mainstream education and requests for reasonable accommodation. However, there are a few notable differences between this judgment and the Court's past judgments, specifically regarding its interaction with the international legal framework and the principle of inclusive education. Aside from this aspect, the current post will discuss the distinction the Court makes between direct discrimination and reasonable accommodation, which creates confusing consequences.<sup>[1]</sup>

## Facts

A test at the beginning of his first year of primary education shows that the applicant, T.H., has behavioural problems and cognitive dysfunctions which could complicate the process of learning and adapting at school. Consequently, the school takes measures to accommodate his particular situation from the beginning of the first school year. Nevertheless, throughout the year, the problems get worse. T.H. disrupts classes and acts aggressively towards his classmates. This leads to a meeting of the pedagogical council, which discusses his behaviour and imposes a disciplinary sanction consisting of a warning. At the beginning of the second year, T.H. is diagnosed with a hyperkinetic disorder and a specific developmental disorder of scholastic skills, by reason of which he has special educational needs. In response to this, the school takes extra measures to accommodate him in consultation with his parents. However, incidents keep on happening in T.H.'s class and school environment. After a series of incidents, fellow students' parents complain to the head teacher about T.H.'s behaviour.

In the middle of the second school year and following a recommendation to this effect by a child psychiatrist, T.H. interrupts his schooling. During the following school year, he repeatedly changes schools until he finds a school where he settles after following an individual education plan. The applicant's parents complain about the first school's treatment of T.H. before the National Ombudsman and the Commission for Protection from Discrimination.

Although the former states that the school has provided insufficient accommodation for T.H., the latter is of the view that the school has not discriminated against the applicant.

## Judgment

The ECtHR begins its reasoning with a summary of the general principles. It repeats that Article 14 of the ECHR prohibits discrimination on the basis of disability, that a failure to reasonably accommodate persons with a disability constitutes discrimination and that the notion of reasonable accommodation should be interpreted in accordance with its meaning under Article 2 of the International Convention on the Rights of Persons with Disabilities (CRPD). In applying these principles, it distinguishes between two aspects of the complaint. On the one hand, it analyses whether his teachers have directly discriminated against the applicant on the basis of his disability by unjustifiably treating him less favourably than others on the grounds of his disability. On the other hand, it investigates whether the school has provided sufficient reasonable accommodation for T.H.

Considering the possible direct discrimination, the Court accepts that the applicant was in a relevantly similar situation to other children without a disability and that he had been treated differently on the basis of his disability. At the same time, the way the head teacher handled the incidents the applicant complained about was reasonably justified (§§ 109-113). Also, Court is not convinced by the harassment claim, as the available evidence leads to the conclusion that the applicant's teacher and the head teacher repeatedly reacted in a justified and proportionate manner to T.H.'s behaviour (§§ 114-117).

Concerning the question of reasonable accommodation, the Court remarks that before and after T.H.'s diagnosis, measures were taken to ensure his effective education. The school set up various meetings with the parents and its pedagogical advisor was involved. After the diagnosis, an individual educational plan was set up in consultation with and with amendments by the parents. Thus, the school took several measures to accommodate T.H.'s needs (§§118 – 120). These measures did not have the effect of solving or diminishing the behavioural problems and, after medical advice, the parents decided to remove T.H. from school. In this connection, the Court indicates that the difficulties T.H. encountered were to some extent caused by his parent's behaviour, who resisted the measures proposed by the school and insisted that all the problems stemmed exclusively from the attitude of the head teacher, the applicant's teacher, the school personnel and the other pupils. Adopting this attitude jeopardised the relationship between the parties concerned (§ 121). The Court accepts that the school did implement reasonable accommodations to see to T.H.'s special needs. As his behaviour also had a direct negative influence on the safety and well-being of the other pupils and their possibility of receiving effective education, the head teacher and the applicant's teacher needed to engage in a difficult balancing act between his interests and those of his classmates. In this respect, the ECtHR repeats that Article 14 of the Convention requires *reasonable* accommodation. This does not indicate that every possible adjustment should be made to alleviate the disparities resulting from someone's disability, regardless of the cost or the practicalities involved (§122). There has thus been no violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.

## Commentary

In the case at hand, the Court analyses whether there has been discrimination, be it direct or as a consequence of a lack of reasonable accommodation, in the organisation of the education of a child with a disability. This post will discuss two aspects of the judgment that stand out. A first aspect is that, in contrast to earlier cases on similar questions, this judgment does not refer to the relevant international legal framework concerning the education of pupils with disability and their right to reasonable accommodation, nor to the principle of inclusive education. As will be argued, this is a significant flaw in the Court's reasoning. Second, the judgment makes a confusing distinction between the allegations of direct discrimination and those of a lack of reasonable accommodation. The applicant complained about both types of discrimination based on largely similar facts, but the Court chose to separate them in its analysis.

### The international legal framework and the principle of inclusive education

The issue before the Court in the case of *T.H. v. Bulgaria* is very similar to that seen in earlier cases about education for pupils with a disability, namely what degree of reasonable accommodation of pupils with disability in mainstream education can be expected of a state (see [Çam v. Turkey](#) (2016) + [blogpost](#), [Emver Şahin v. Turkey](#) (2018) + [blogpost](#), [Stoian v. Romania](#) (2019) + [blogpost](#) and [G.L. v. Italy](#) (2020) + [blogpost](#)). The Court adjudicates this question in light of the prohibition of discrimination laid down in Article 14 of the ECHR, taken in conjunction with Article 2 of Protocol No. 1. Similar to previous cases, the Court explicitly refers to Article 2 of the CRPD for the interpretation of 'reasonable accommodation'. Notwithstanding this sole reference, the remainder of the judgment remains void of references to the international legal framework. In previous judgments, the Court explicitly and generously referred to treaties such as the CRPD, the [Revised European Social Charter](#) and other binding and non-binding instruments (see for instance *Çam* at §§ 37-38; *G.L.* at §§ 20-31). Discussing the relevant international legal framework has the advantage of putting the obligations under the Convention in context, as the Court aptly illustrated in the notable judgment of *G.L. v. Italy* (see §§ 62-69 + [blogpost](#)).

The importance of such referencing is moreover apparent when noticing that its omission has led to the principle of inclusive education being utterly absent from the Court's reasoning. Although the facts of the case show that this pupil was educated in a mainstream school and had a right to reasonable accommodation due to his special educational needs, the Court omits to mention the principle of inclusive education that is hereby applied. It can be deduced from the facts that Bulgaria is attempting to provide inclusive education for persons with a disability, by implementing the idea that pupils with a disability should be educated in mainstream education and accompanying this with individual educational plans and auxiliary measures. The request for reasonable accommodation thus is a part of this transition to inclusive education. In contrast to earlier cases, this last concept is not explicitly mentioned in any part of the judgment.

An analysis of the degree to which education is effectively organised in an inclusive way would more clearly contextualise the obligations that stem from reasonable accommodation. After all, inclusive education, [as defined under the CRPD](#), aims to eradicate general, structural barriers for pupils with a disability in mainstream education. Reasonable accommodation, on the other hand, consists of individual measures for a student when the structural adjustments prove to be insufficient in their individual situation. By applying this framework to the case at hand, the Court could have pointed more clearly to what Bulgaria has already achieved in guaranteeing effective education to students with disabilities and why the reasonable accommodation measures, in this case, were sufficient. As it is, the judgment does not provide much information on the extent to which Bulgaria has complied with its obligations concerning inclusive education. Therefore, it is impossible to state with any degree of certainty whether such an analysis would have led to the same substantive outcome, namely that the state had met its duty of reasonable accommodation.

Engagement with the international legal framework seems to equally [bother](#) the Court in other cases concerning disability rights. In the specific context of education of persons with disabilities, the Court has in earlier cases [been reluctant](#) to recognise a right to inclusive education under the ECHR. As in the case at hand, the Court consistently only applies the duty of reasonable accommodation. This can be contrasted with recent judgments concerning the segregation of Roma children in education, where the Court has repeatedly underscored the importance of inclusive education as 'the most appropriate means of guaranteeing the fundamental principles of universality and non-discrimination in the exercise of the right to education' ([Elmazova and Others v. North Macedonia](#), § 89; [Szołcsán v. Hungary](#), §69). The Court thus seems to be heading in different directions concerning inclusive education of pupils with a disability and Roma pupils.

### Direct discrimination vs. reasonable accommodation

A second notable aspect of this judgment is that the Court divides the case into a complaint of direct discrimination and one of reasonable accommodation. The Court acknowledges that these two points largely overlap when making this distinction. In addition, it leads to a paradox. When examining direct discrimination, the central question is whether a person has been treated less favourably than a person in a relevantly similar situation, but without a disability,

without an objective and reasonable justification. When looking into the request for reasonable accommodation, the logic is reversed: as a pupil with a disability is in a relevantly different situation from its fellow pupils without a disability, this pupil has a right to reasonable accommodation, i.e. differential treatment. When following the logic of the Strasbourg Court, the applicant is simultaneously in a relevantly similar situation as his fellow pupils and in a relevantly different situation from those same fellow pupils. He concurrently has a right to similar treatment and to differential treatment.

The Court's distinction can be explained as follows: when examining the complaint of direct discrimination, it takes into account incidents that have a negative effect on the applicant, and therefore disadvantage him. In its analysis of reasonable accommodation, the Court focuses on positive measures, i.e. measures implemented to help the applicant. However, this distinction comes with difficulties, as can be shown by discussing one particular incident: the meeting of the pedagogical council and the ensuing disciplinary sanction. The Court accepts that this was taken to advantage T.H., namely with the aim of directing his behaviour in a positive direction (§ 119). It can therefore be seen as a measure of reasonable accommodation. However, the Court scrutinises that same measure in its analysis of direct discrimination, thus considering it to have had a negative impact on the applicant (§ 113). The conflicting consequences that result from this distinction between direct discrimination and reasonable accommodation indicate that the ECtHR did not handle the allegations of different types of discrimination in the case at hand in the best possible way. The distinction that was made is confusing, to say the least.

## Conclusion

Although the outcome of *T.H. v. Bulgaria* does not seem unwarranted, it is possible to identify some flaws in the Court's examination of the case. First, the ECtHR omits reference to the relevant international legal framework and to the principle of inclusive education, which is essential for understanding the case and could have a determinative impact on its outcome. Second, the Court draws a distinction between direct discrimination and reasonable accommodation, but analyses both concepts in light of largely the same facts. This creates a confusing, paradoxical situation. In both respects, the Court could have done better.

This commentary can, however, end on a positive note. In the case before us, the school had implemented measures of accommodation already before the applicant had been diagnosed. The measures were amended and became more tailored to the applicant's situation after the diagnosis. In this respect, the school's actions were in line with the requirements of reasonable accommodation of the CRPD – and, as the Court purports to follow this interpretation, those of the ECHR. Under the CRPD, measures of reasonable accommodation cannot be dependent on an official diagnosis of a disability but instead need to be in place as soon as a pupil has need of them. As the Court does not make any explicit conclusions on this aspect of the case, it is important to highlight that in doing this, the school acted fully in accordance with the right to reasonable accommodation. Although the Court does not present us with its finest work in this case, it is encouraging to see that Bulgaria is taking real steps towards the inclusion of pupils with a disability in their mainstream education and seems to be putting in the required effort to achieve the transition to inclusive education with flying colours.

---

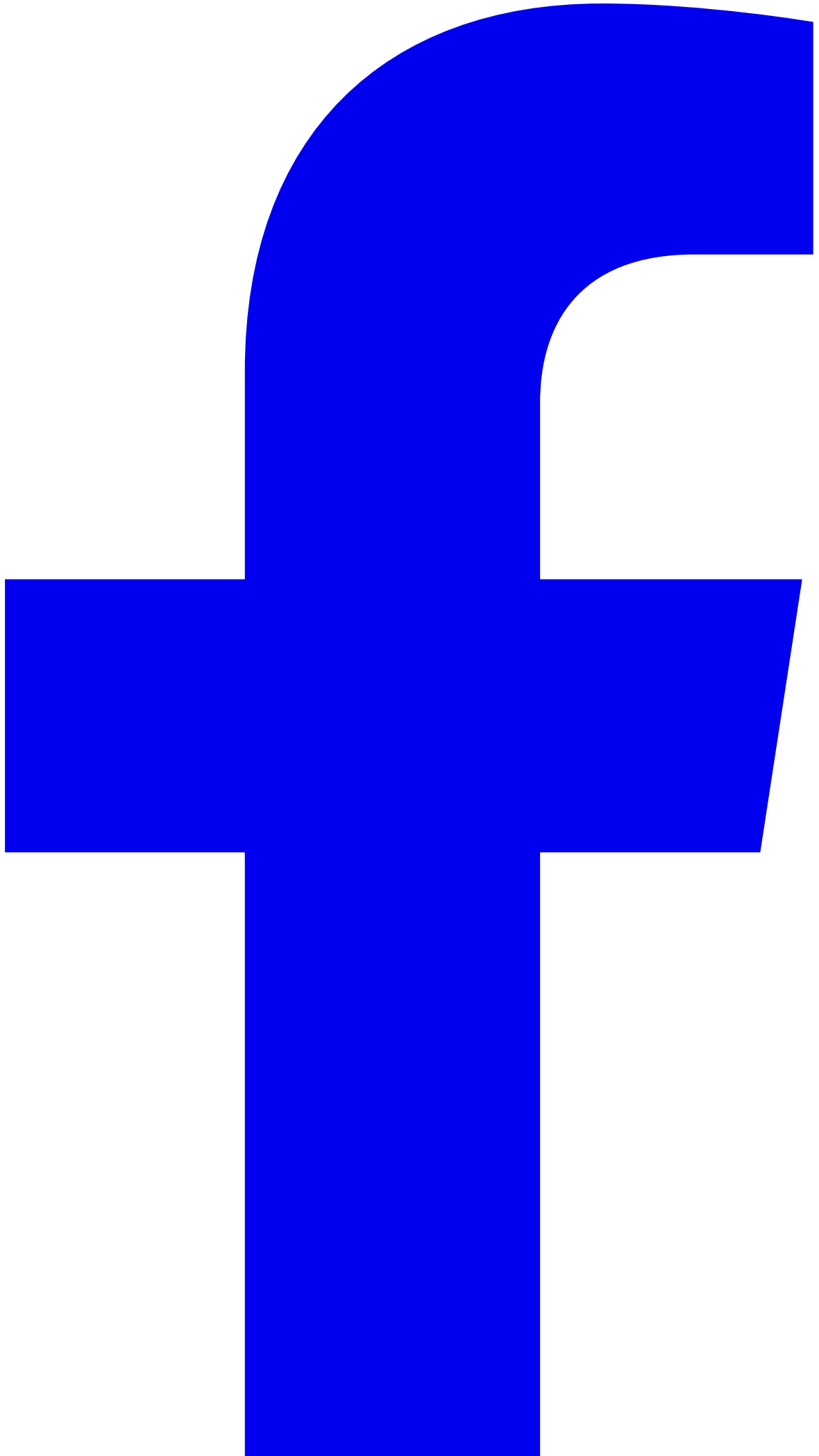
[1] This text is based on a Dutch version of this blog, forthcoming on [EHRC Updates](#).

 Print  PDF

Share this post

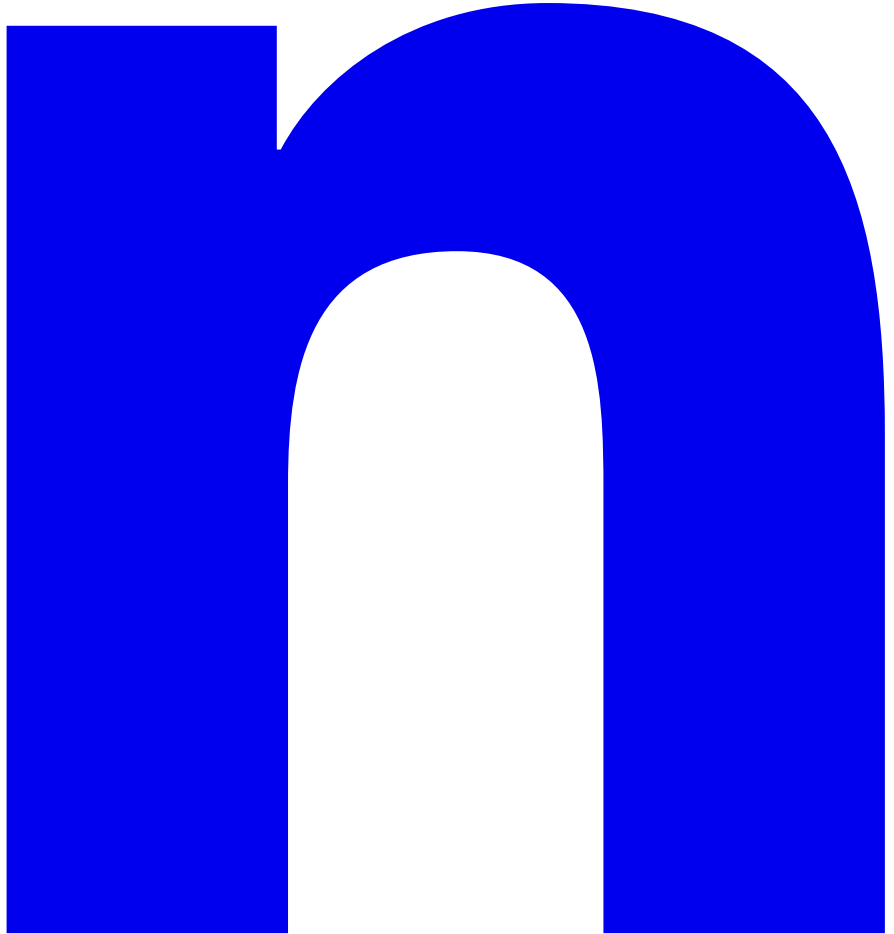
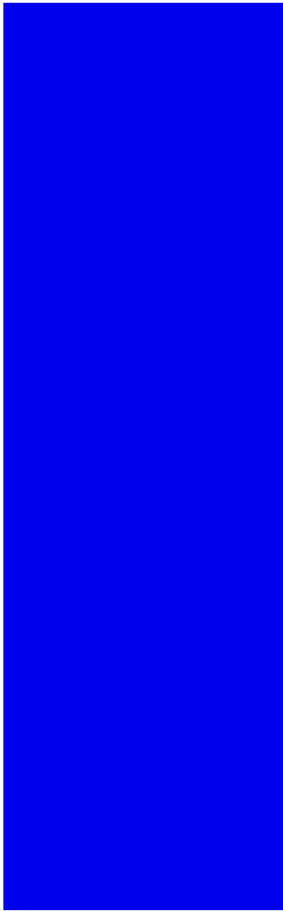
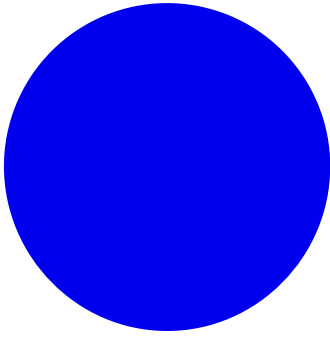


.

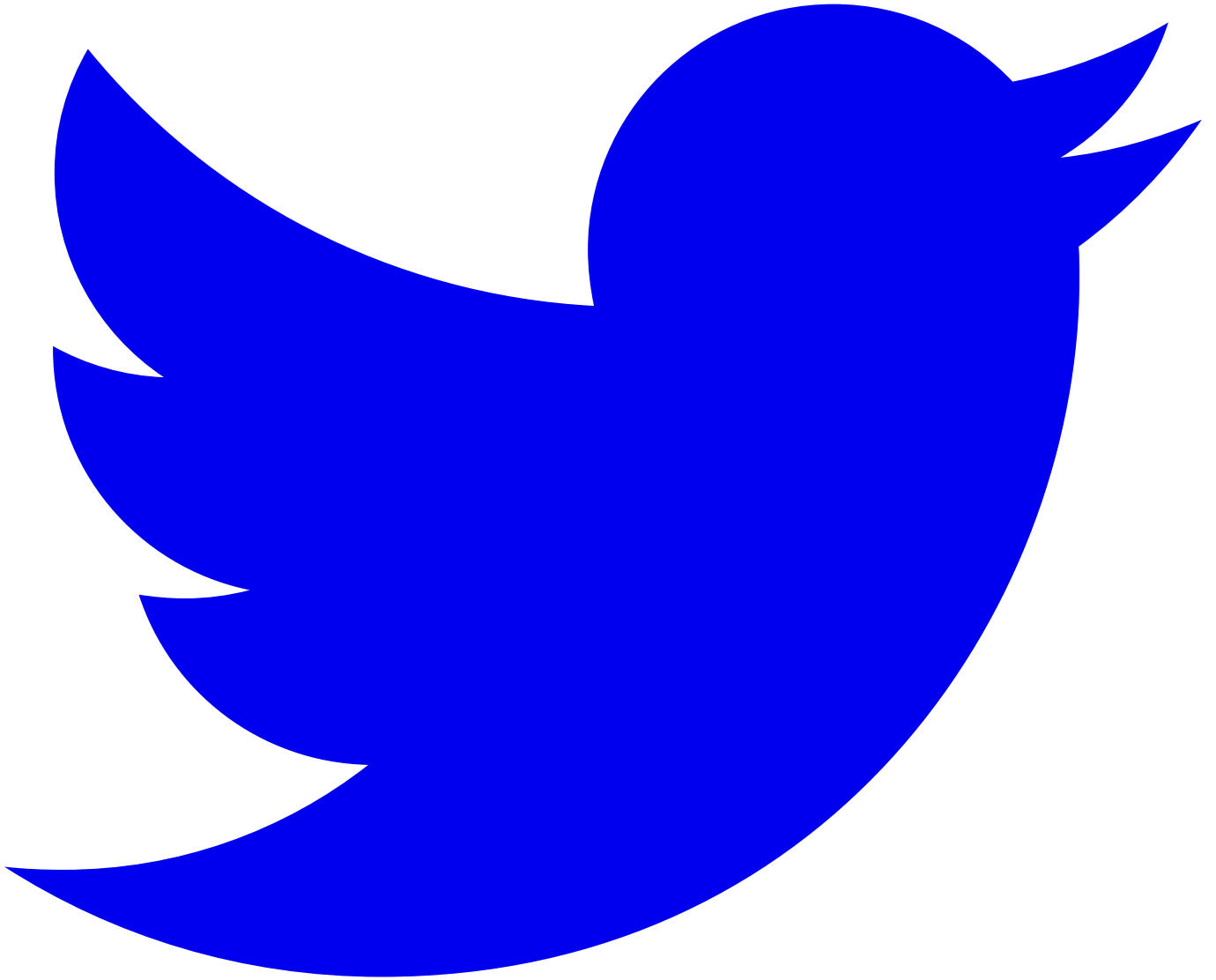




•

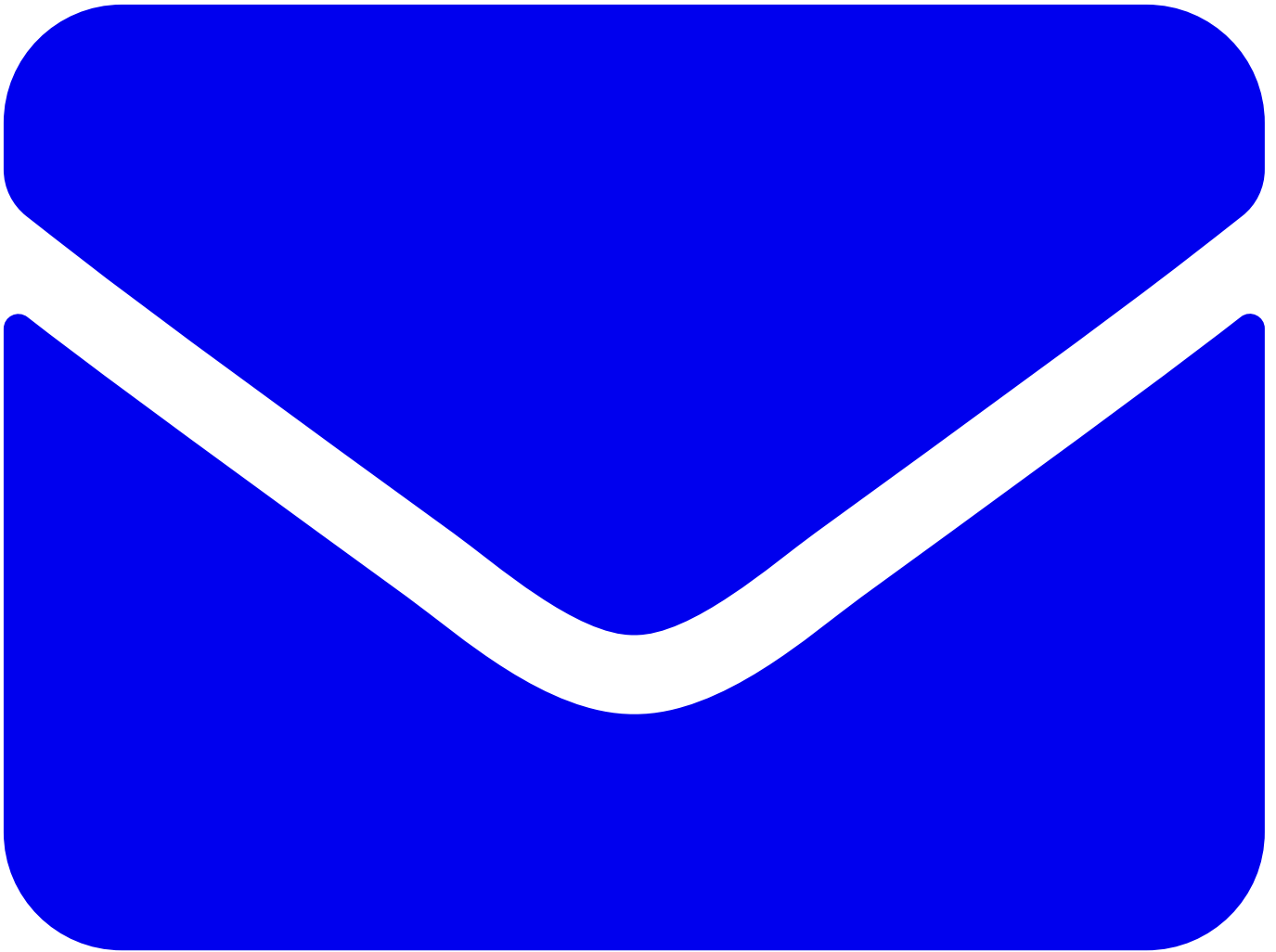


•



.





•

**BY Merel Vrancken**

Merel Vrancken is a PhD student and assistant in constitutional law at Hasselt University. She is working on a PhD on human rights and segregation in education.

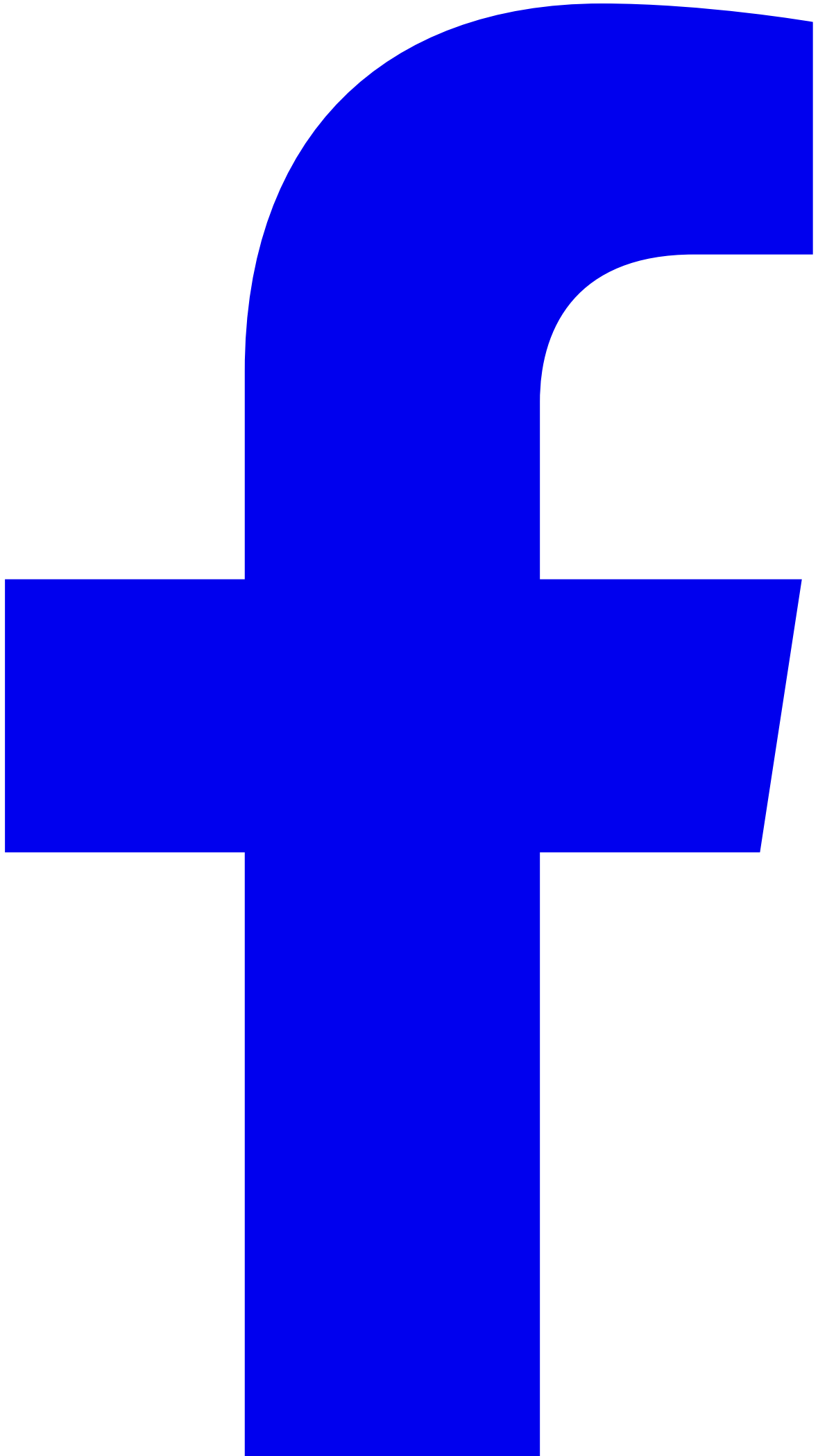
**Tags**

- [Disability](#)
- [Education](#)
- [Inclusive education](#)
- [Prohibition of Discrimination](#)
- [Reasonable accommodation](#)
- [T.H. v. Bulgaria](#)

**Share this post**

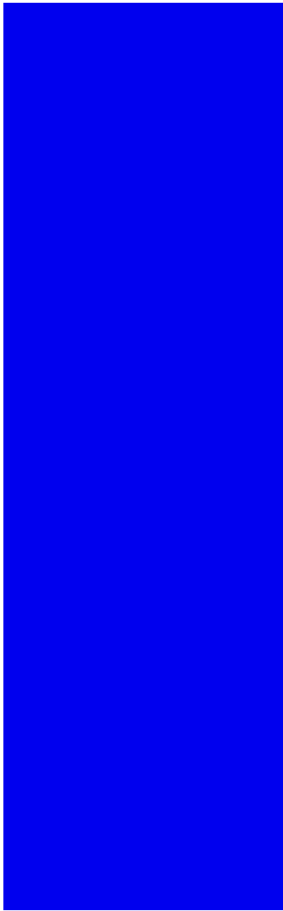
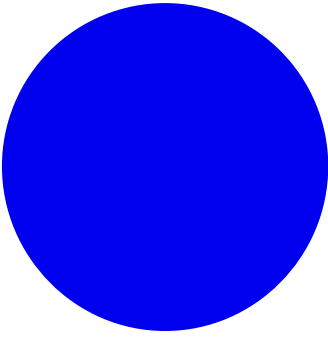


.

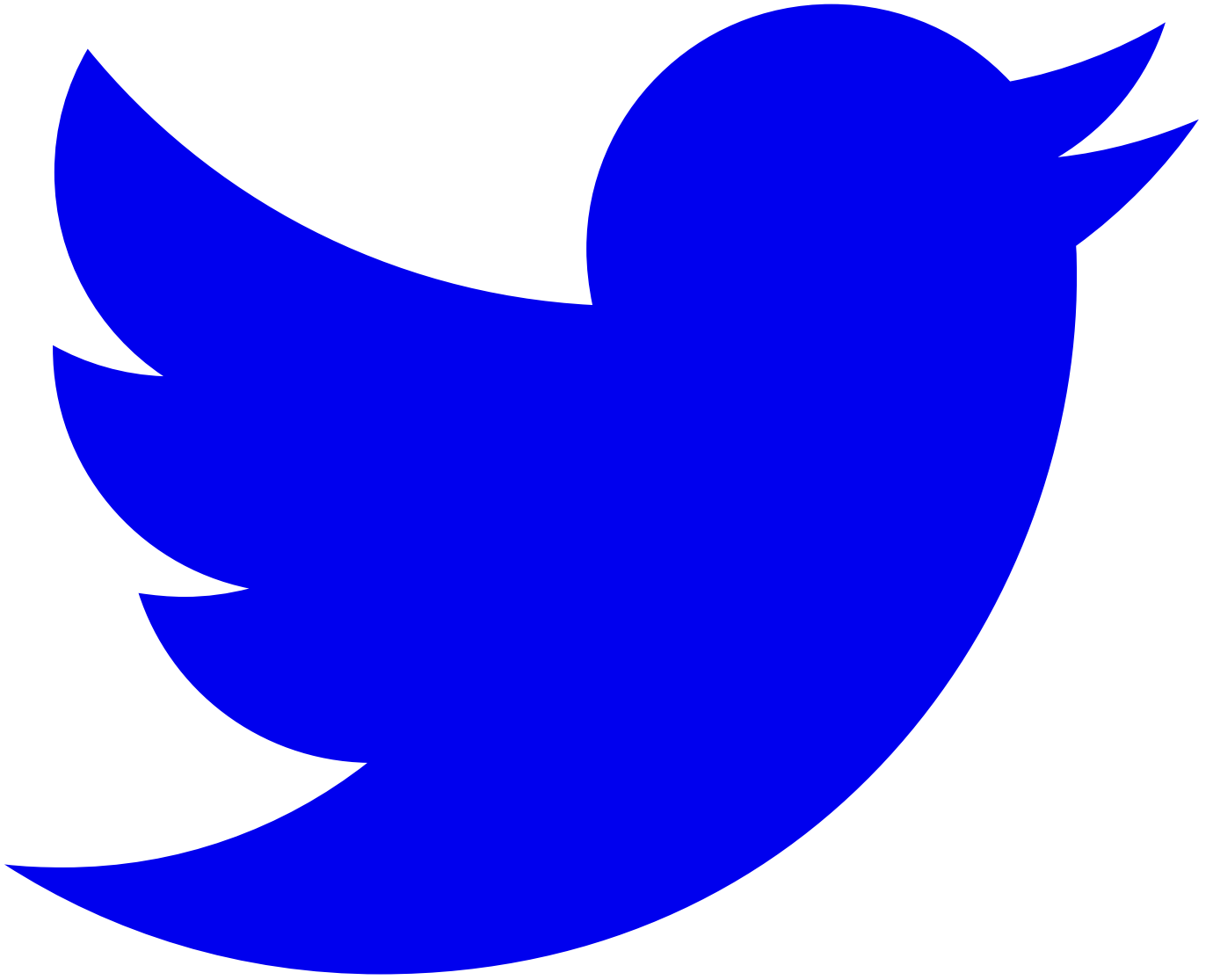




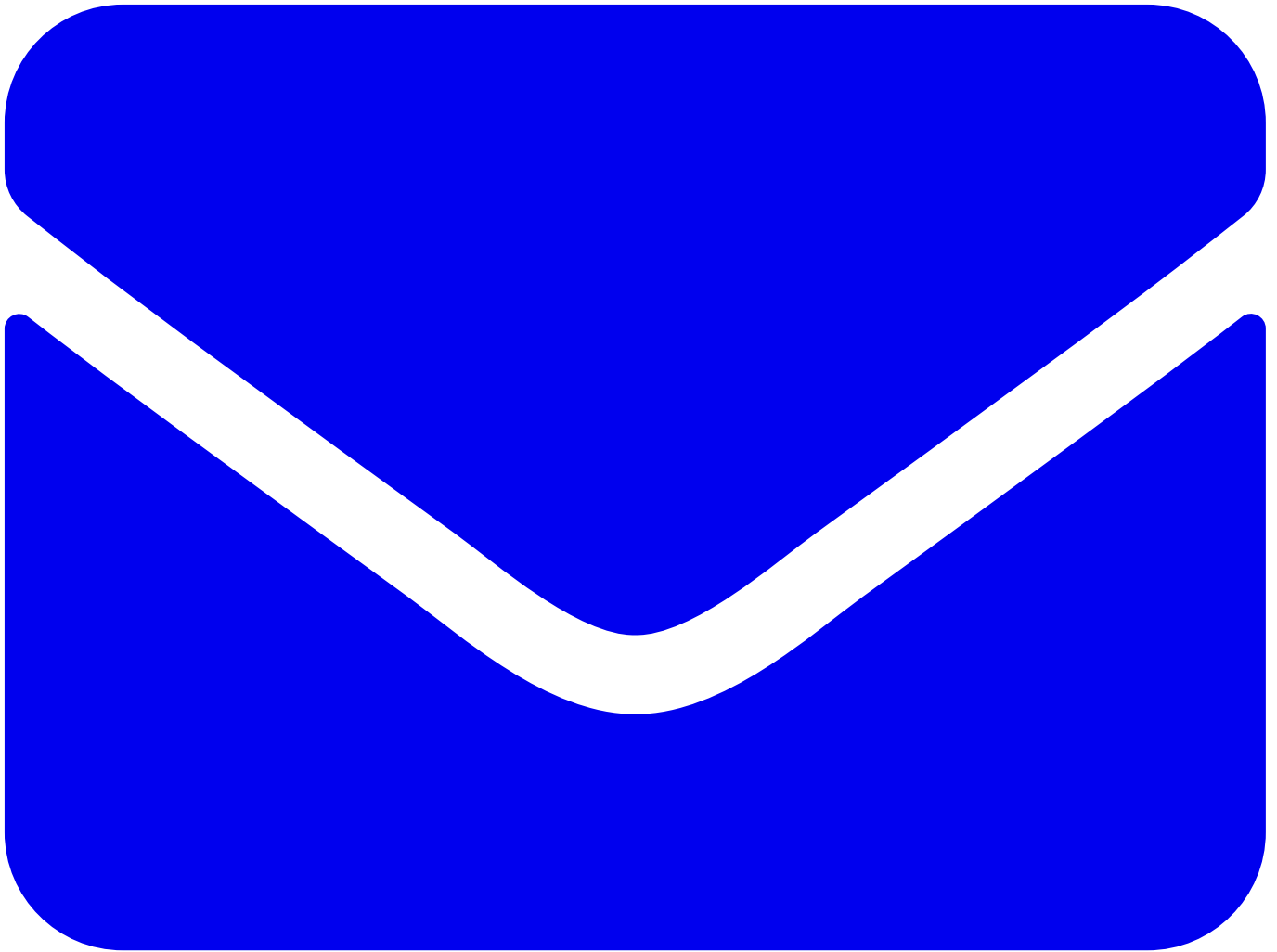
•



•



.



•

### Subscribe to our newsletter

Enter your email address to subscribe to this blog and receive notifications of new posts by email.

I agree with the privacy policy

Subscribe

Join 4,356 other subscribers

### On Strasbourg Observers

Strasbourg Observers is an academic blog that discusses recent developments at the European Court of Human Rights. The editorial team of Strasbourg Observers is based at the Human Rights Centre of Ghent University and the Centre for Government and Law of Hasselt University.

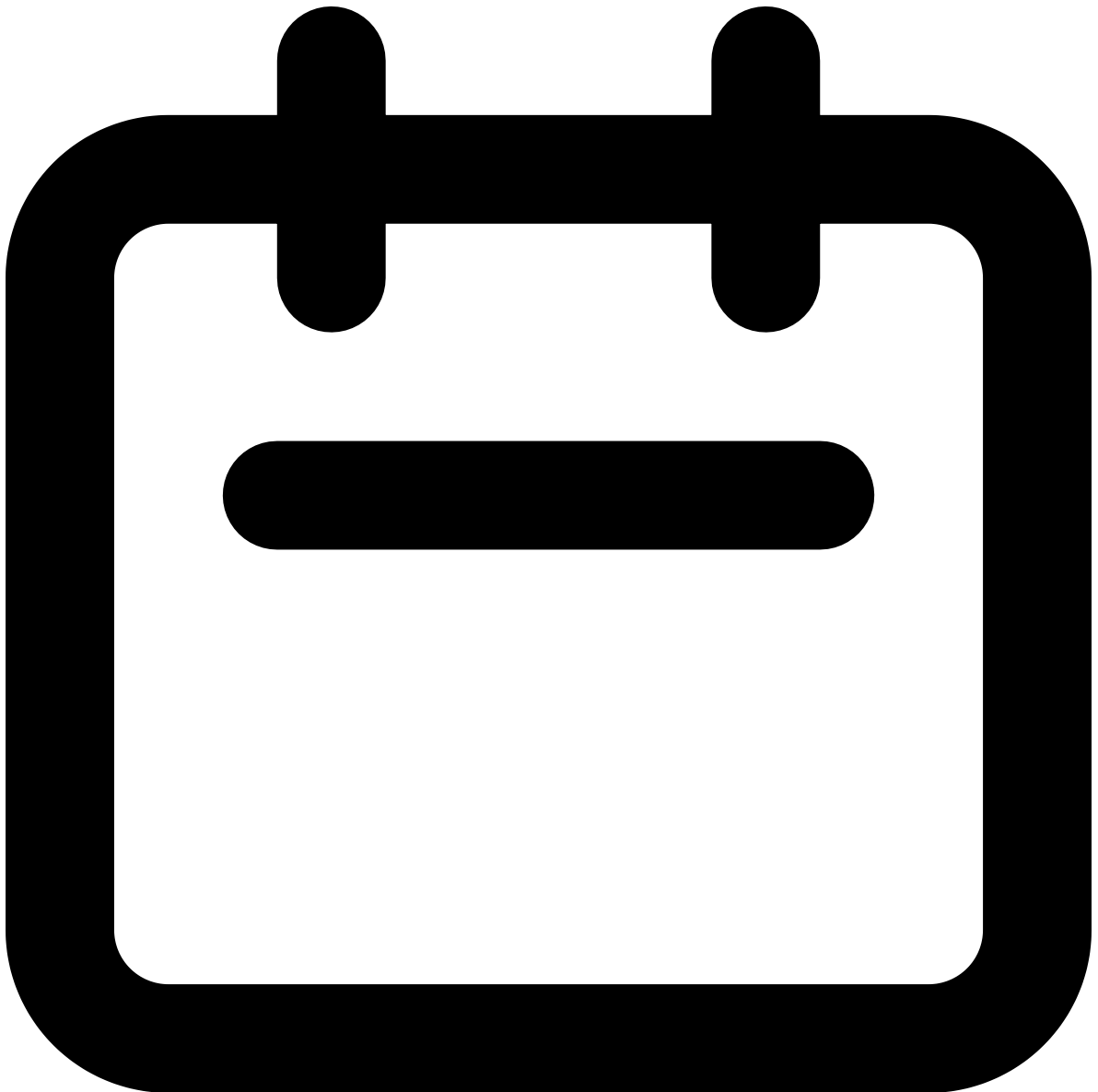
Strasbourg Observers would not be possible without the valued work of countless **guest bloggers**. Visit the “Contact” page on our website to find out how to become one!



### Related posts

- Merel Vrancken

## [Not the Court's finest work: inclusive education and reasonable accommodations for pupils with disabilities in T.H. v. Bulgaria](#)



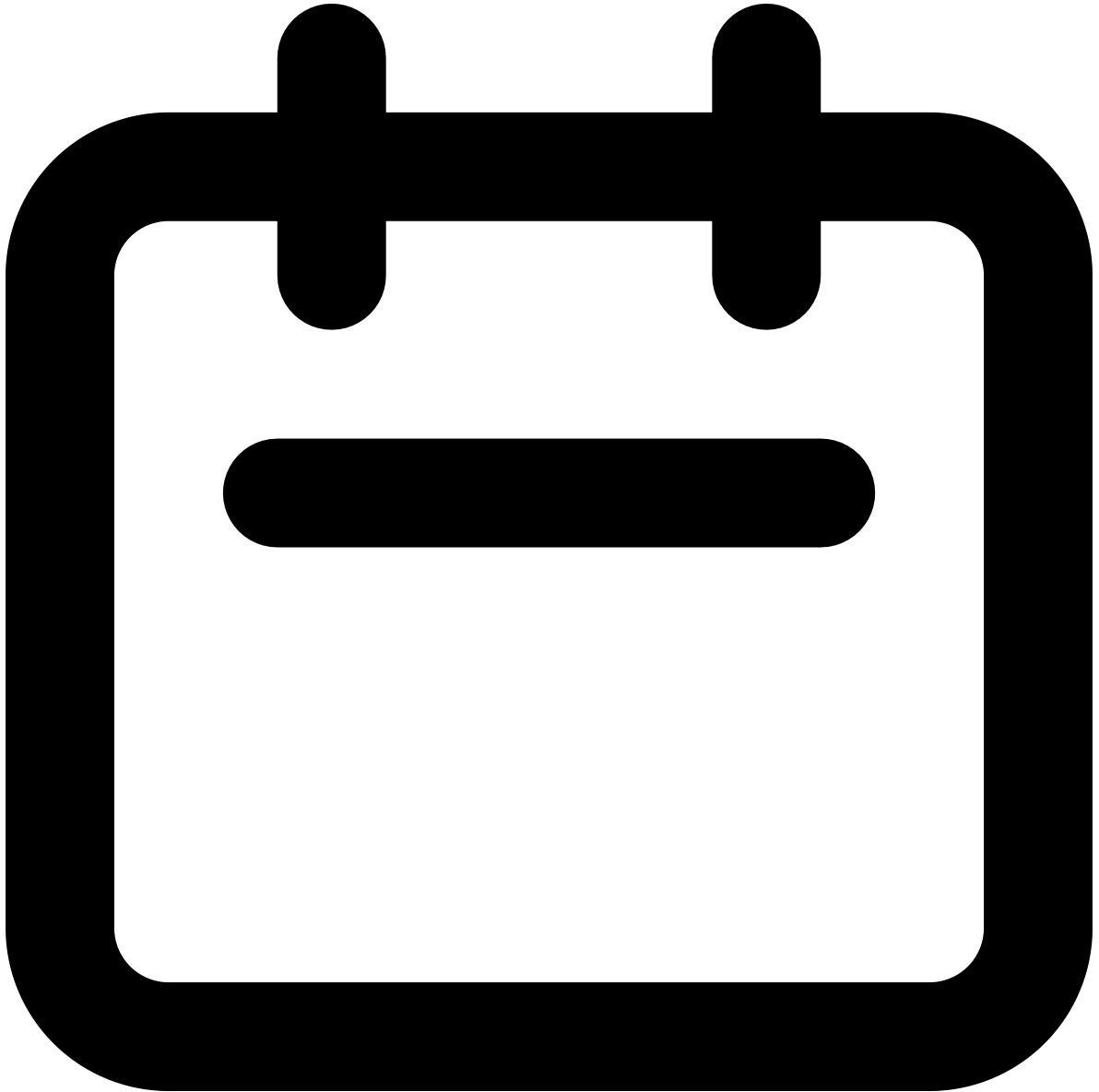
July 20, 2023

[Read more](#)

- Dr. Andy Hayward

**[Maymulakhin and Markiv v. Ukraine – A Case of Love Conquering All?](#)**





July 04, 2023

[Read more](#)

### Leave a Reply

Your email address will not be published. Required fields are marked \*

Comment \*

Name \*

Email \*


Save my name, email, and website in this browser for the next time I comment.

Notify me of follow-up comments by email.

Notify me of new posts by email.


[Post Comment](#)

## 2 Comments

-  *G.S.* says:  
[August 4, 2023 at 2:32 pm](#)

According to the summary of the judgment in this article “There has thus been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.”, which does not correspond to the original document. According to the paragraph 123 of the judgment “(...) there has been no breach of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1”. Thus, the editing of the article in that regard will be much appreciated as it creates a misunderstanding of the whole content.

[Reply](#)

-  *merevracken* says:  
[August 8, 2023 at 9:12 am](#)

Thank you very much for pointing out this mistake. I edited the sentence accordingly, as of course the Court did not find a violation in this case.

[Reply](#)

## Subscribe to our newsletter

Enter your email address to subscribe to this blog and receive notifications of new posts by email.

[Subscribe](#)

Join 4,356 other subscribers

Strasbourg Observers is an academic blog that discusses recent developments at the level of the European Court of Human Rights. The blog is based at the Human Rights Centre of Ghent University and the Centre for Government and Law of Hasselt University (Belgium).



## Menu

- [Home](#)
- [Blog](#)
- [About](#)
- [Team](#)
- [Contact](#)

## Contact

Universiteitstraat 4  
9000 Gent, Belgium

Martelarenlaan 42  
3500 Hasselt, Belgium

[strasbourgoobservers@gmail.com](mailto:strasbourgoobservers@gmail.com)

© 2023 Strasbourg Observers [Privacy](#) [Cookies](#)

[Website by Weichie](#)