



Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities Nineteenth session

Summary record (partial)** of the 364th meeting (closed)

Held at the Palais des Nations, Geneva, on Friday, 16 February 2018, at 10 a.m.

Chair: Ms. Degener

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- * All persons handling this document are requested to respect and observe its confidential nature.
 - ** No summary record was prepared for the rest of the meeting.

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The meeting was called to order at 10 a.m.

Activities under the Optional Protocol to the Convention

Communication No. 19/2014: Fiona Given v. Australia (CRPD/C/19/DR/19/2014)

1. **Mr. Tatić** (Rapporteur for the communication) said that the author, who had cerebral palsy, claimed that the State party had violated her rights under articles 29 (a) (i–iii), read alone and in conjunction with articles 4, 5 (3) and 9, by denying her the use of an electronic voting device and by failing to facilitate anonymous voting. The State party argued that the case was inadmissible because domestic remedies had not been exhausted. The State party also contended that making electronic voting available to all persons with disabilities would place an undue burden on it, pointing out that it was the Committee's own opinion that accessibility should be implemented gradually. The Working Group on Communications was of the view that, in the case in question, judicial review — the domestic legal remedy available to the author — would not have been particularly effective, since it would have taken place after the fact, once it was too late for the author to cast a ballot in the election, and that expanding the use of an existing electronic voting system would not constitute an undue burden. Accordingly, the proposal was that the Committee should conclude that the State party had failed to fulfil its obligations under articles 29 (a) (i–ii), read alone and in conjunction with articles 5 (20), 9 (1) and 4 (1) (a–b), (d–e) and (g) and should make a number of recommendations, including specific recommendations aimed at providing the author with an effective remedy and general recommendations aimed at preventing similar violations in future.

2. **The Chair** said that, if there were no questions or comments about the case, she would take it that the Committee wished to adopt the draft recommendation.

3. *The draft recommendation on communication No. 19/2014 was adopted.*

Communication No. 26/2014: Simon Bacher v. Austria (CRPD/C/19/DR/26/2014)

4. **The Chair** (Rapporteur for the communication), noting that an updated version of the draft recommendation on the communication had been circulated in the room, said that the case was particularly complex, and the Working Group on Communications had not managed to reach consensus. The case concerned the Bacher family, a member of which had cerebral palsy and used a wheelchair; he also had a number of other health conditions requiring frequent visits to the hospital. The family had been embroiled in a legal battle with their neighbour since 2002 over a path that was the only way to and from the Bacher home and that became quite treacherous in bad weather. While the path was on the family's property, the neighbour had a right of passage to it. The dispute had begun when the Bachers had had a roof built over the path; they had obtained prior authorization from the local authorities, but had not consulted the neighbour. The neighbour had contested the construction of the roof and had succeeded in getting it torn down. Over the course of several years, the Bachers had appealed the decision allowing the roof to be removed, had taken legal action to force the neighbour to contribute to the cost of maintaining the uncovered path and had sought assistance from a number of entities, including the Peoples First Organization, the Austrian Red Cross, the Green Party of Austria, the Ombudsman and the mayor; all of their efforts had been in vain. The author claimed that the lack of safe access to and from the home was a violation of articles 3, 9, 14, 19, 25, 26 and 28 of the Convention.

5. The State party argued that the communication was inadmissible *ratione temporis*. However, while it was true that the Committee could not hear matters relating to alleged violations that predated the entry into force of the Optional Protocol for the State party, it was not precluded from hearing those same matters if the violations continued after the instrument's entry into force. The author contended that the court decisions handed down against the family in 2012 and 2014 had perpetuated the violation. The State party also argued that the author had not exhausted all domestic remedies since an extraordinary remedy was available that would have allowed the Bacher family to appeal the 2003 judgment of the Innsbruck Regional Court. The author claimed that the family had done all it could and that all the lawyers and judges the family had spoken with had indicated that

there were no further options. Lastly, the State party argued that the case had no merit because it dealt with an entirely private matter between individuals and that article 9 of the Convention therefore did not apply.

6. Some members of the Working Group were of the view that the communication was admissible because some of the court decisions against the family had been taken after the entry into force of the Protocol and had dealt explicitly with the matter of the author's disability. Furthermore, while those members recognized that an extraordinary remedy was available, they deemed that the State party had failed to demonstrate that it would be effective in the case in question; therefore, it was not subject to exhaustion. There was consensus about the fact that only article 3, read in conjunction with article 9, was relevant in the case. Those who considered that there had been a violation, even though the matter was purely private, contended that States parties had a duty to protect persons with disabilities from the actions of private individuals. In the present situation, Austria was at fault for not providing the author with the necessary assistance to enable him to come and go from his home safely.

7. **Mr. Tatić** said that, if the majority opinion of the Committee was that the communication was admissible and that there had been a violation of rights under the Convention, he was likely to draft an individual dissenting opinion. The issue of accessibility had been considered by the Austrian courts only before the entry into force of the Optional Protocol for the State party; the elements of the case considered subsequently had dealt with property rights. The communication was therefore inadmissible *ratione temporis*, in keeping with the Committee's jurisprudence, such as the precedent set with regard to communication No. 6/2011, *McAlpine vs. the United Kingdom of Great Britain and Northern Ireland*. Moreover, it was not the duty of States parties to demonstrate that remedies were effective; the communication was therefore inadmissible because not all available national legal remedies had been exhausted. Although he would not make reference to the merits of the case in an individual dissenting opinion, he thought it pertinent to point out that article 9 made reference to goods and services that were "open or provided to the public". Opening up that restriction to include a private pathway would be too liberal an interpretation of the article's provisions.

8. **Mr. Pyaneandee** said that, on occasion, the strict application of the law could lead to injustice. The communication was admissible because violation of the author's rights had continued after the Optional Protocol had entered into force for the State party. In addition, it was clear that the local authority was at fault for having granted the author's family permission to construct a roof over the private pathway, only for that construction to later be deemed illegal by the courts. It was pertinent to draw a comparison with the Committee's jurisprudence regarding communication No. 3/2011, *H.M. vs. Sweden*, in which a local council had refused to grant building permission to the author, and the Committee had concluded that the State party had failed to fulfil its obligations under the Convention. Furthermore, it was not the case that the obligations established in article 9 were not binding on private parties.

9. He understood that the Schwaz District Court had raised the issue of the author's disabilities in its decision of 2012, but wished to know whether it had also addressed the way in which the local council's decision had affected the author's ability to live independently.

10. **The Chair** said that the question was whether the communication was admissible, given that one extraordinary remedy had not been exhausted. Although the State party had highlighted the extraordinary remedy in its reply to the author's complaint, the author's family had been informed by its lawyer that no further legal remedy was available following the decision of the Innsbruck Regional Court, and the Court itself had said that its decision was final. The author's family could therefore not have been expected to take further action to demonstrate that all available domestic legal remedies had been exhausted. In the case at hand, the expectation was not that the State party should demonstrate the effectiveness of all legal remedies, but rather that it should have demonstrated that the extraordinary remedy highlighted might have been effective had it been invoked.

11. The provisions of article 9 should not be interpreted in as restrictive a sense as Mr. Tatić had suggested. Article 4 (1) established that States parties had a duty to protect the human rights of persons with disabilities, including against discrimination by private actors. The author's neighbour's refusal to work toward a resolution to the dispute could be construed as harassment on the part of a private actor.

12. **Mr. Martin** asked whether the State party had informed the author's family of the available extraordinary remedy.

13. **Ms. Prophette-Pallasco** (Office of the United Nations High Commissioner for Human Rights) said that the State party had not informed the author's family of the extraordinary remedy before submitting its reply to the author's complaint.

14. **Mr. Tatić** said that he agreed with Mr. Pyaneandee's point regarding the local authority. However, he was not convinced that the lawyer advising the author's family could have been unaware of the extraordinary remedy.

15. **Mr. Pyaneandee** said that the extraordinary remedy in question could be successful only if the author met very stringent criteria. If a remedy was unaffordable or technically unenforceable, then there would be no point in pursuing it. In the case at hand, it was clear that the mayor and the family's lawyers had given up looking for any further domestic remedy.

16. **Mr. Buntan** said that he wondered whether the Committee's jurisprudence had set any precedent regarding cases in which the State party had failed to inform the author of the availability of a remedy. Could it be considered that such a remedy still existed and therefore that all domestic remedies had not been exhausted? He would be in favour of adopting the draft recommendation provided it was not inconsistent with the Committee's previous jurisprudence.

17. **Ms. Prophette-Pallasco** (Office of the United Nations High Commissioner for Human Rights) said that States parties did not have a duty to inform applicants of all available remedies. However, the jurisprudence of the Committee, and that of other human rights treaty bodies, in accordance with the burden of proof regarding the availability and effectiveness of extraordinary remedies was on the State party. In the current case, the State party had not demonstrated that the extraordinary remedy could have been effective for the author's family. That was why the remedy was considered to be unavailable.

18. **Mr. Pyaneandee** said that the Committee might be setting a dangerous precedent if it accepted the State party's argument that the author had failed to exhaust domestic remedies because he could have had recourse to the extraordinary remedy.

19. **Mr. Tatić** said that, although he was not convinced that the communication was admissible on the grounds that all available domestic legal remedies had been exhausted, he, too, was doubtful that the extraordinary remedy would have been effective. He would therefore limit his individual dissenting opinion to the question of the communication's inadmissibility *ratione temporis*.

20. **The Chair** said that, in the absence of any further comments, she would take it that the Committee wished to adopt the draft recommendation.

21. *The draft recommendation on communication No. 26/2014 was adopted.*

The discussion covered in the summary record ended at 11.10 a.m.