



## Convention on the Rights of Persons with Disabilities

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### Committee on the Rights of Persons with Disabilities

#### Communication No. 5/2011

##### Views adopted by the Committee at its twelfth session (15 September–3 October 2014)

<i>Submitted by:</i>	Marie-Louise Jungelin (represented by the Swedish Association of Visually Impaired Youth (US) and the Swedish Association of the Visually Impaired (SRF))
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sweden
<i>Date of communication:</i>	18 February 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 70 decision, transmitted to the State party on 1 December 2011 (not issued in document form)
<i>Date of adoption of the decision:</i>	2 October 2014
<i>Subject matter:</i>	Recruitment process and appropriate modification and adjustments to the workplace
<i>Substantive issues:</i>	Equality and non-discrimination; equal recognition before the law; work and employment; facts and evidence
<i>Procedural issues:</i>	Admissibility <i>ratione temporis</i>
<i>Articles of the Convention:</i>	5 and 27
<i>Article of the Optional Protocol:</i>	2 (f)

GE.14-21686



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## Annex

### **Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (twelfth session)**

concerning

#### **Communication No. 5/2011\***

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<i>Alleged victim:</i>	The author
<i>State party:</i>	Sweden
<i>Date of communication:</i>	18 February 2011 (initial submission)

*The Committee on the Rights of Persons with Disabilities*, established under article 34 of the Convention on the Rights of Persons with Disabilities,

*Meeting* on 2 October 2014,

*Having concluded* its consideration of communication No. 5/2011, submitted to the Committee on the Rights of Persons with Disabilities by Marie-Louise Jungelin under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts the following:*

#### **Views under article 5 of the Optional Protocol**

1.1 The communication is submitted by Marie-Louise Jungelin, a Swedish national born in 1970. She claims to have been the victim of violations by Sweden of articles 5 and 27 of the Convention. The author is represented by the Swedish Association of Visually Impaired Youth (US) and the Swedish Association of the Visually Impaired (SFR). The Convention and the Optional Protocol thereto entered into force for the State party on 14 January 2009,

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\* The following members of the Committee participated in the examination of the present communication: Mohammed Al-Tarawneh, Munthian Buntan, María Soledad Cisternas Reyes, Theresia Degener, Hyung Shik Kim, Lotfi Ben Lallahom, Stig Langvad, Lászlo Gábor Lovaszy, Edah Wangechi Maina, Ronald Mc Callum, Martin Babu Mwesigwa, Ana Pelaez Narvaez, Silvia Judith Quan-Chang, Carlos Ríos Espinosa, Damjan Tatic and Germán Xavier Torres Correa. The texts of a joint opinion by Committee members Mr. Ríos Espinosa, Ms. Degener, Mr. Buntan, Ms. Quan-Chang and Ms. Cisternas Reyes (dissenting) and an individual opinion by Committee member Mr. Tatic (dissenting) are appended to the present Views.

pursuant to article 45, paragraph 2, of the Convention and article 13, paragraph 2, of the Optional Protocol, respectively.

1.2 On 16 April 2013, during its ninth session, the Committee on the Rights of Persons with Disabilities decided, in accordance with rules 65 and 70 of its rules of procedure, to consider the questions of admissibility and the merits of the communication separately.<sup>1</sup> The Committee declared the communication admissible with regard to the claim raised by the author under articles 5 and 27 of the Convention.

### **Facts as presented by the author**

2.1 The author has had severe sight impairment since birth. She attended an ordinary school, holds a Bachelor of Laws degree from Stockholm University and has many years' experience in different types of jobs. These include experience with the police in Farsta, where she transcribed taped hearings, and at Folksam Rättsskydd, where she worked handling cases. She is used to working with various computers and case-handling systems adjusted to her needs.

2.2 In May 2006, she applied to the Social Insurance Agency (Försäkringskassan) to work as an assessor/investigator of sickness benefit and sickness compensation applications. It was a permanent position, which entailed dealing with such applications, investigating the applicants' needs for payment or benefit and assessing whether the person was entitled to them. In carrying out the required tasks, the employee was expected to gather and analyse information from different sources, such as the "issue tracking system" (ITS), auxiliary systems and the personnel administration programme, as well as documentation in paper format, including handwritten documents.

2.3 On 13 June 2006, the author was called to a recruiting conference and, on 21 June 2006, to a personal interview. At the interview she explained that she had had sight impairment since birth and that her visual ability was severely limited, but that she could differentiate between light and dark, and certain colours. She also explained about the aids available and pointed out that the Rehabilitation Department of the State party's Public Employment Service had promised her that it would inquire about adjustments to the computer programs used by the Social Insurance Agency.

2.4 On 25 August 2006, the author was informed that, although she fulfilled the competence, experience and reference requirements, she had not been considered for that vacant post because the Social Insurance Agency's internal computer systems could not be adapted for her sight impairment. According to the Agency, its information technology department was of the opinion that neither the hardware nor the software had the tools to convert information in the computer system into Braille. In addition, part of the system could not be made accessible to the author even with the use of various technical aids.

2.5 The author reported the case to the Swedish Disability Ombudsman.<sup>2</sup> In March 2008, the Ombudsman filed an application at the Labour Court on behalf of the author. It was claimed that she had the necessary qualifications to work as an investigator/assessor, and that the Social Insurance Agency could have made available technical aids and a personal assistant to reduce the effect of her impairment to such an extent that there would have been no reason to allow her impairment to affect the appointment decision. Therefore, by not taking reasonable support and adaptation measures to create a work situation comparable to that of a person without her functional impairment, and which would allow her to carry out the tasks assigned to the post, the Social Insurance Agency had directly

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<sup>1</sup> See the Committee's admissibility decision (CRPD/C/9/D/5/2011).

<sup>2</sup> Now the Equality Ombudsman.

discriminated against her and acted in violation of the former Prohibition of Discrimination in Working Life of People with Disability Act (1999:132). She had requested 70,000 Swedish kronar (SKr) as compensation for general damages, together with interest on that sum, and court fees.

2.6 In the course of the court proceedings, the Ombudsman held that the Social Insurance Agency had failed to carry out a proper survey of the options available for adjusting the working conditions to the author's needs; and to assess the potential financial support from the Rehabilitation Department of the Public Employment Service. The Ombudsman provided three different proposals for support and adaptation measures, which it argued that the Social Insurance Agency could reasonably have taken, (a) to adapt the ITS through programs that would enable the author to read the ITS information directly on a computer monitor and to navigate through the system, which would cost approximately between SKr 10 million and SKr 15 million, about 2 per cent of the Social Insurance Agency's IT budget; (b) to set up programs to convert the information – scanned documents – into synthesized speech or Braille; and (c) given that, at the time of the recruitment in 2006, the case officer had to deal mainly with paper documents, those could be translated into synthesized speech or Braille with the help of a scanner. All the measures proposed would have required the help of a personal assistant to deal with the handwritten texts, which allegedly amounted to 10 per cent of all the documentation. It further submitted that the assistant could also carry out additional tasks. It highlighted that that kind of measure had previously been implemented by the Social Insurance Agency in other cases, and that, as an employer, it would receive financial support from the State.

2.7 The Social Insurance Agency pointed out that, in the recruitment process, the author's application was seriously considered and that its information technology (IT) department was contacted in order to inquire whether the ITS and the auxiliary IT systems could be adapted for her needs. According to its survey, which included tests conducted by an independent company, even with technical aids the author would not be able to read all the information in the ITS and other computer systems or navigate through the systems. In addition, there was no technical tool for translating all the handwritten texts (for example, applications and medical certificates). The adjustment and adaptation of the whole IT system and/or any other solution would therefore be unreasonable. All proposals were time-consuming and would require an extremely large financial investment. The Agency also held that hiring a personal assistant for the author would imply that the author would deal only with the preparation of memoranda prior to a decision regarding the right to payment and that the assistant would carry out 80 per cent of the work. In practice, that would mean that the Social Insurance Agency would have to employ two people for one person's work tasks. Finally, it was submitted that, at the time of recruitment, about 95 per cent of the applications included handwritten documents to be dealt with by the investigator/assessor. All the support and adaptation measures required to make the post available for the author would therefore have been an unreasonable burden on the Agency.

2.8 On 17 February 2010, the Labour Court dismissed the Ombudsman's claims. It determined that the author's qualifications had to be judged with respect to all the tasks attached to the position, that is, she must be able to deal with the sickness benefit and sickness compensation applications within the ITS, and to handle the ITS and auxiliary systems in such a manner that she would be able to access and read information in the computer-based systems, navigate between programs and actively use them as working tools. Those tasks would also entail dealing with handwritten texts, a task which, despite the decrease in the number of handwritten documents, could not be considered to be peripheral for an investigator. The Court assessed different support and adaptation measures proposed by the Ombudsman and, in the light of the witnesses' and experts' opinions submitted by both parties, concluded that it had been shown that the support and adaptation measures that the Social Insurance Agency would have had to adopt to put the

author in a situation comparable with that of a person without her visual impairment were not reasonable. Thus she did not have the necessary qualifications for the position of investigator/assessor. In addition, the Court requested the Ombudsman to reimburse the Social Insurance Agency for court fees.

2.9 The author claims that the Labour Court's judgment cannot be appealed. Therefore, no other remedy is available at the domestic level.

### **The complaint**

3.1 The author argues that the decision by the Social Insurance Agency to discard her application for the investigator/assessor post constitutes a violation of articles 5 and 27 of the Convention.

3.2 The author submits that she was discriminated against within the Social Insurance Agency's recruitment process insofar as it discarded her application instead of adequately assessing the possibility of taking certain support and adaptation measures. If the Social Insurance Agency had adjusted its computer system for users requiring screen readers and Braille display, the author could have performed most of the tasks associated with the advertised post. Furthermore, as the State party's main public institution in charge of implementing the national policy on persons with disabilities, it was expected that the Agency would take measures in accordance with the obligations enshrined in the Convention.

3.3 In determining that the measures proposed by the Ombudsman to the Social Insurance Agency to adjust its computer systems and to provide other aids were not reasonable and proportionate, the Swedish Labour Court's decision was discriminatory and failed to guarantee the author equal protection and equal benefit of the law. In its assessment the Court did not properly consider the experts' and witnesses' opinions and dismissed the Ombudsman's proposals, without taking into account that the employer had an obligation to implement necessary and appropriate adjustments to the workplace to accommodate the needs of employees with disabilities. Furthermore, the Court did not consider the fact that any adjustment to the Social Insurance Agency's computer programs would benefit not only the author but any other future employee with visual impairments. Finally, the author argues that, although the technical inquiries requested by the Labour Court were not conclusive against the author's allegation, the burden of proof was not on the employer. Thus, the Court's judgement in itself constitutes a violation of the Convention.

3.4 The author further holds that the State party has not adopted all appropriate legislative and administrative measures vis-à-vis the rights enshrined in the Convention; that the law does not fully recognize the right of persons with disabilities to work on an equal basis with other persons; and that, likewise, the State party has not taken appropriate steps to forbid discrimination on the basis of disabilities with regard to all matters concerning forms of employment, including conditions of recruitment and hiring, and to guarantee that reasonable accommodation is provided to persons with disabilities.

### **State party's observations on the admissibility**

4.1 On 29 February 2012, the State party submitted its observations on the admissibility of the communication and requested the Committee to examine it separately from the merits. The State party considers the communication to be inadmissible as the facts brought before the Committee occurred prior to the entry into force of the Convention and the Optional Protocol.

4.2 The State party maintains that the communication is not clear. While dealing to some extent with the author's individual case, it focuses mainly on its legislation on

discrimination, in particular the Discrimination Act (2008:567) and its compatibility with the Convention. The State party recalls that an abstract review of national legislation (*actio popularis*) is not admissible by way of the individual communication procedure.

4.3 As to the author's individual case, the State party points out that the communication is not admissible *ratione temporis*, since the relevant events occurred in 2006, before the Convention and its Optional Protocol entered into force, on 14 January 2009. The non-retroactivity of treaties is a general principle of international law, as enshrined in article 28 of the 1969 Vienna Convention on the Law of Treaties and also reflected in article 2 (f) of the Optional Protocol. The State party further notes that there is as yet no jurisprudence from the Committee on the issue and refers to other relevant international jurisprudence, in particular the judgement of the European Court of Human Rights in the case of *Blečić v. Croatia*, in which the Court held, in paragraph 79, that:

Therefore, in cases where the interference pre-dates ratification while the refusal to remedy it post-dates ratification, to retain the date of the latter act in determining the Court's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention came into force in respect of that State. However, this would be contrary to the general rule of non-retroactivity of treaties.

4.4 In assessing the issue of admissibility *ratione temporis*, it is crucial to determine "the critical date", that is, the date on which the international instrument becomes binding upon the State party, and to decide whether the facts which constitute the alleged violation occurred prior to or subsequent to that date. In the present communication, the alleged violation took place in August 2006 but became final when the Government denied the author's appeal on 30 August 2007. It is thus clear that the facts were not of a continuous nature. The Disability Ombudsman subsequently instituted proceedings against the Social Insurance Agency before the Labour Court, claiming that the State should be ordered to pay damages to the author for having discriminated against her.

4.5 It cannot be concluded from the fact that the judgement concerning the alleged discrimination against the author was delivered by the Labour Court on 17 February 2010 that the Committee is competent *ratione temporis* to examine the present communication. If the decision of the Labour Court had been favourable to the author, the Court could have ordered financial compensation but could not have quashed the Social Insurance Agency's decision. When examining the case, the Labour Court applied the Act on the Prohibition of Discrimination in Working Life on Grounds of Disability (1999:132), which was in force when the events took place, and not the Discrimination Act (2008:567), which repealed the former Act and came into force on 1 January 2009. Further, the Convention makes no reference to an automatic right to compensation.<sup>3</sup> Therefore, the State party maintains that the Committee is not competent to examine the present communication in accordance with article 2 (f) of the Optional Protocol; that its examination would amount to giving retroactive effect to the Convention; and that it would also undermine the fundamental distinction between violation and reparation that underlies the law of State responsibility.

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<sup>3</sup> The State party refers to the jurisprudence of the Human Rights Committee, in communication No. 520/1992, *E. and A.K. v. Hungary*, decision adopted on 7 April 1994; and of the Committee on the Elimination of Discrimination against Women, in communication No. 7/2005, *Muñoz Vargas and Sainz de Vicuña v. Spain*, decision adopted on 9 August 2007.

### **The author's comments on the State party's observations**

5.1 On 31 May 2012, the author submitted her comments on the State party's observations and noted that the facts concerning the alleged discrimination occurred prior to the entry into force of the Convention and the Optional Protocol in respect of the State party. However, "the main facts that are subject to" her communication continued after the entry into force of the relevant treaties and, what is more, the Labour Court adopted its decision after that date.

5.2 The author argues that the main issue in her communication is not the denial of a job by the Social Insurance Agency in a discriminatory way but the fact that, even though the Convention was then in force, the Labour Court delivered a judgment that was not in accordance with the Convention. During the Court's inquiry the Ombudsman and technical experts presented clear proposals for possible and reasonable adaptations to the Social Insurance Agency's computer system, and the Court itself noted that it could have been expected that the Agency would have developed computer systems that would be accessible to persons with disabilities. Although the Labour Court fully examined her complaint, and assessed the evidence and technical reports, it did not oppose the obvious discrimination being pursued by a public authority such as the Social Insurance Agency. Hence the Labour Court's judgement itself violated the Convention, which had already entered into force at that time.

5.3 It is also pointed out that the State party has not fully implemented through legislation the rights and obligations contained within the Convention, and that the State party has not taken any measures to prevent this kind of discrimination from happening again.

### **State party's further observations**

6.1 On 2 July 2012, the State party submitted further observations on the admissibility of the communication. It reiterated that the main issue in the author's communication is not her individual case, but its legislation in general concerning persons with disabilities. Such general examination of a State party's legislation can take place only under article 36 of the Convention in the framework of the Committee's consideration of the reports of States parties.

6.2 As the events giving rise to the author's allegations took place in 2006, the task of the Labour Court was to examine whether the Social Insurance Agency had discriminated against the author when deciding in August 2006 not to employ her. Therefore, the Convention was not relevant for the Court's examination, since it was not in force when the alleged discrimination took place. The State party further points out that the parties did not refer to the Convention in the proceedings before the Court.

### **The Committee's decision on admissibility**

7.1 At its ninth session, on 16 April 2013, the Committee examined the admissibility of the communication.

7.2 The Committee ascertained that, as required under article 2 (c) of the Optional Protocol, the same matter had not been, or was not being, examined under another procedure of international investigation or settlement.

7.3 With respect to the admissibility *ratione temporis*, the Committee noted the State party's argument that the relevant events took place in August 2006 and 2007 before the entry into force of the Convention and the Optional Protocol on 14 January 2009, and that the Committee should declare the case inadmissible to avoid retroactive application of the Convention. Nonetheless, taking into account that the Labour Court had delivered its

judgment on 17 February 2010, the Committee concluded that it was competent *ratione temporis* to examine the present communication.

7.4 The Committee also took note of the author's claim that the facts that are the subject of her communication continued after the entry into force of the Convention and the Optional Protocol in respect of the State party, and that the Labour Court's judgment of 17 February 2010, which fully examined her claim of discrimination, itself violated the Convention since it failed to assess that the adjustments and modifications proposed by the Ombudsman and technical experts did not impose a disproportionate or undue burden on the Social Insurance Agency.

7.5 The Committee recalled that, in accordance with the general rules of international law, a treaty does not have retroactive effect whereby it could bind a party with respect to any act or event which took place, or any situation which ceased to exist, before its entry into force for the State party concerned, unless provided otherwise in the treaty.

7.6 The Committee observed that the decision of the Social Insurance Agency not to appoint the author as an investigator/assessor of sickness benefit and sickness compensation applications was communicated to her on 25 August 2006 and was confirmed by the Government in August 2007, prior to the entry into force of the Convention and the Optional Protocol in respect of the State party on 14 January 2009. However, on 17 February 2010, the Labour Court fully examined the Disability Ombudsman's application submitted on behalf of the author, including witnesses' and experts' opinions, and delivered the final judgment in the first instance on the author's claim of discrimination by the Social Insurance Agency. The Committee considered that, as the Court was the only judicial instance competent to deal with the claim of discrimination, its decision on the matter was the most relevant for the purpose of examining the claim of the author. It also considered that the judgment of the Labour Court could not be disassociated from the two decisions of the administrative bodies refusing to hire the author; that those three findings constituted facts which the Committee was requested to examine; and that the nature of the proceedings before the Labour Court was most relevant for the purpose of examining the State party's objection to the admissibility of the communication based on the *ratione temporis* argument. The Committee noted that the Labour Court had not merely examined formal aspects or errors of law in the previous decisions of administrative bodies, but had examined the Disability Ombudsman's claim of discrimination on its merits.<sup>4</sup> In the circumstances, the Committee considered the communication to be admissible, since the decision of the Labour Court of 17 February 2010 was issued when the Convention was already in force for the State party and therefore could not be subject to further appeal. Accordingly, the Committee considered that it was not precluded *ratione temporis* from examining the present communication, as some of the facts submitted to it and the exhaustion of domestic remedies, took place after the entry into force of the Convention and the Optional Protocol for the State party.

7.7 With respect to the exhaustion of domestic remedies, the Committee noted the author's allegation that the Labour Court's judgement could not be appealed and that there was no other available remedy. Accordingly, it considered that domestic remedies had been

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<sup>4</sup> The facts in the present communication concerning the relevance of the judgement issued after the entry into force of the Convention and the Optional Protocol for Sweden differ from the facts in communication No. 6/2011, *McAlpine v. United Kingdom of Great Britain and Northern Ireland*, decision adopted on 28 September 2012. In the latter case, the decision of the Court of Session taken after the entry into force of both instruments for the United Kingdom dealt only with the existence of errors of law and the Court did not examine the claim of discrimination as such.

exhausted. In the absence of other objections to the admissibility of the communication, the Committee declared the communication admissible.

### **State party's observations on the merits**

8.1 By note verbale of 20 November 2013, the State party submitted its observations on the merits of the communication.

8.2 The State party recalls that the Convention on the Rights of Persons with Disabilities entered into force for Sweden on 14 January 2009. The then Government considered that no amendments to existing national legislation were required. In that regard, the State party refers to chapter 1, article 2, of its Constitution, on equality and non-discrimination, according to which public authorities shall promote the opportunity for all to attain participation and equality in society, and public institutions shall combat discrimination of persons on the ground of, inter alia, functional impairment.

8.3 The State party further refers to the 1999 Act on the Prohibition of Discrimination in Working Life on Grounds of Disability (1999:132). That Act was repealed on 1 January 2009 following the entry into force of the Discrimination Act (2008:567), but was still applicable when the author initiated proceedings against the Swedish Social Insurance Agency before the Labour Court. Pursuant to section 3 of the 1999 Act, an employer may not disadvantage a job applicant or employee with a disability by treating him or her less favourably than the employer treats or would have treated people without disabilities in a comparable situation. According to section 5 of the 1999 Act, the prohibition of discrimination applies in a variety of situations in working life, including when the employer decides on the recruitment matter, selects an applicant for a job interview, or takes other action during the recruitment process.

8.4 In order to determine whether a person has been disadvantaged within the meaning of the 1999 Act, a comparison must be made between the employee or job applicant and an existing or hypothetical person in a comparable situation. In order to try to ensure that the person with disability is in a situation comparable to that of others, section 6 of the 1999 Act stipulates that an employer is required to take reasonable support and adaptation measures. The State party further informs the Committee that, according to the travaux préparatoires of the 1999 Act,<sup>5</sup> the support and adaptation required from the employer mean that an employer is not allowed to attach significance to a person's disability if it is possible and reasonable through support and adaptation measures to eliminate or reduce the impact of the impairment on his or her work capacity to a level where the most essential tasks can be performed. An employer that denies a person employment on the ground of disability, the impact of which could have been eliminated or reduced to a sufficient extent through reasonable support and adaptation measures, is guilty of direct discrimination. However, if the impairment actually affects the work capacity of the job applicant to a considerable degree, even if reasonable support and adaptation measures are implemented, he or she lacks the objective capabilities for the job and cannot claim to be a victim of discrimination.

8.5 Under the 1999 Act, appropriate measures may include procurement of occupational assistive devices or adjustments to the workplace and may involve changing how work is organized, in terms of working hours or tasks. An employer is only obliged to provide support and adaptation measures that may be considered reasonable on a case-by-case basis. The assessment includes the consideration of "(i) the cost of the measures in relation to the employer's ability to pay for them; (ii) the actual possibilities of implementing the measures and the estimated impact of the measures on the person with disability; (iii) the

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<sup>5</sup> Travaux Préparatoires of the 1999 Act, Government Bill 1997/98: 179, p. 51 f. and 85 f.

possibility to implement the measures in the workplace to be taken into account; (iv) the effect of the measures taken on the disabled person's ability to do the job in question; (v) the duration of the employment".<sup>6</sup>

8.6 The State party informs the Committee that the national legislation, including the 1999 Act, is based on various directives of the European Council on non-discrimination, including Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, which has been implemented in the national legislation through, inter alia, the 1999 Act and the Discrimination Act.

8.7 The State party specifies that the objective of the national disability policy is a society based on diversity, designed to allow people of all ages with disabilities to participate fully in social life and with equal living conditions for girls, boys, women and men with disabilities. Work to achieve those objectives specifically focuses on identifying and removing barriers to full participation in society for people with disabilities, preventing and combating discrimination, and giving children, young people and adults with disabilities the opportunity to achieve independence and self-determination. The disability policy objectives are to be implemented in all areas of society. Since 2001, a separate ordinance has been in place stating that, when designing and carrying out their activities, government agencies must take disability policy objectives into account and act to ensure that people with disabilities enjoy full participation in society and equal living conditions. On 1 January 2006, the State party established the Agency for Disability Policy Coordination (Handisam). It supports the Government in the implementation of the disability policy.

8.8 The State party considers that the main issue of the author's complaint is whether or not it would have been reasonable to require the Social Insurance Agency to undertake support and adaptation measures in the author's case to facilitate her employment with the Agency. Reiterating its comments of 24 February 2012, the State party considers that the Committee is precluded from examining the merits of the communication as it aims to achieve an examination in abstracto of the compatibility of the national legislation on discrimination with the Convention.

8.9 The State party further considers that there can be no doubt that the 1999 Act complies with the requirements of the Convention with regard to the issue of reasonable accommodation. Under sections 3 and 6 of the Act, an employer is required to take support and adaptation measures in order to ensure that a person with disabilities can attain a similar employment position to that of a person without disabilities, in order to avoid discrimination. The obligation is limited to measures that can be considered "reasonable". The State party considers that such a limitation, and the 1999 Act as a whole, is consistent with articles 5 and 27 of the Convention, and that the case therefore does not constitute a violation of the Convention as far as the national legislation is concerned.

8.10 As regards the issue of whether the relevant national law has been applied in accordance with the Convention in the present case, the State party refers to the jurisprudence of the European Court of Human Rights. According to that jurisprudence, a State is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of Convention rights. In the words of the Court, "by reasons of their direct and continuous contact with vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on [relevant] requirements".<sup>7</sup> The State party considers that the

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<sup>6</sup> Travaux Préparatoires of the 1999 Act, op. cit., p. 53 f. and 85 f.

<sup>7</sup> *Handyside v. the United Kingdom*, 7 December 1976, Series A No. 24, para. 48.

margin of appreciation doctrine as applied by the European Court reflects the subsidiary role of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) in protecting human rights where the primary responsibility lies with the contracting parties. The Court's role is to monitor their action, but it does not constitute a further court of appeal against the decisions of national courts applying national law.

8.11 The State party also refers to the jurisprudence of the Human Rights Committee and considers that it often allows States a margin of appreciation,<sup>8</sup> which is particularly wide when it comes to economic issues.<sup>9</sup> The State party considers that a similar approach should be adopted by the Committee when examining the present case, therefore taking the proceedings and assessment of the domestic authorities, and in particular the Labour Court, as a starting point for its review.

8.12 The State party underscores that the proceedings before the Labour Court involved not only written submissions from the Social Insurance Agency and the Equality Ombudsman, but also an oral hearing before the Court. That provided an opportunity for both parties to present written and oral evidence. Several witnesses, including the author, were heard under oath at the request of the parties. The State party considers that the Labour Court therefore had a very good basis on which to make its assessment of the case. Additionally, at the request of the author, the Equality Ombudsman acted as a plaintiff in the proceedings. Her case was therefore pursued by a public anti-discrimination authority, ensuring that her views and interests were properly represented. Finally, the Labour Court is a specialized court with expertise in assessing discrimination claims. Seven members of the Labour Court took part in the hearing and deliberations, and reached a unanimous conclusion that the claims of the Equality Ombudsman should be dismissed.

8.13 As to the examination and assessment by the Labour Court, the State party considers that the overall investigation did not provide evidence that reprogramming the case management system solely on account of the author would have resulted in her being able to navigate through the system. The proposed procedure of making all necessary data accessible appeared to be too time-consuming and extensive. According to the State party, it was therefore demonstrated that it would not have been reasonable for the Insurance Agency to have taken the support and adaptation measures which would have been necessary to put the applicant in a situation comparable to that of people without her disability.

8.14 The State party considers that the judgment undoubtedly shows that the Labour Court has made a full and thorough examination of the Equality Ombudsman's application, that the judgment is well reasoned and that the Labour Court took care to discuss the different claims made before reaching its conclusion.

8.15 With regard to the claim of the author that the Labour Court did not take into account that the adjustments to the computer program of the Social Insurance Agency would have been beneficial for any possible future employees with visual impairments, the State party argues that the provisions of the 1999 Act and the Discrimination Act regarding reasonable support and adaptation measures are designed to protect individuals from

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<sup>8</sup> Communication No. 61/1979, *Hertzberg et al. v. Finland*, Views adopted on 2 April 1982, para. 10.3; communication No. 1621/2007, *Raihan v. Latvia*, Views adopted on 28 October 2010, para. 8.3; communication No. 1136/2002, *Vjatseslav Borzov v. Estonia*, Views adopted on 26 July 2004, para. 7.3

<sup>9</sup> The State party refers to communication No. 197/1985, *Kitok v. Sweden*, Views adopted on 27 July 1988, para. 9.2, where the Committee held that "the regulation of an economic activity is normally a matter for the State alone".

discriminatory measures in individual cases, but that it does not aim at creating general accessibility.

8.16 Referring to the author's argument that in the proceedings before the Labour Court, the burden of proof was not on the employer, where it should have been placed, the State party clarifies that section 24 (a) of the 1999 Act implies that, where the person who claims to have been discriminated against provides evidence of circumstances that give reason to believe that he or she has been discriminated against, it is up to the other party to show that there has been no discrimination.

8.17 The State party further argues that the assessment made by the Labour Court involved applying the same kind of "reasonability test" that the Committee would have to apply in an assessment under articles 2, 5 and 27 of the Convention, requiring the scrutiny of economic factors, and balancing the different interests involved.

8.18 According to the State party, the fact that the ruling of the Labour Court was to the author's disadvantage has in itself no bearing on the conclusion that the domestic proceedings and assessment conducted in the present case maintained a high standard, and that there is no indication that they were arbitrary or otherwise flawed. The State party contends that the Committee should accept the Labour Court's conclusion that it was not reasonable for the Social Insurance Agency to adopt the support and adaptation measures that would have been necessary to put the author in a situation comparable to that of a person without her functional disability. Accordingly, it considers that there has been no violation of the Convention in the present case.

#### **Author's comments on the State party's observations**

9. On 11 March 2014, the author submitted her reply to the State party's observations, stating that she did not have any further comments to make on the matter, and that she reiterates all the arguments presented in the original communication.

#### **Consideration of the merits**

10.1 The Committee on the Rights of Persons with Disabilities has considered the present communication in the light of all the information received, in accordance with article 5 of the Optional Protocol, and rule 73, paragraph 1, of the rules of procedure.

10.2 The Committee notes the State party's argument that the Committee is precluded from examining the merits of the communication as it aims to attain an examination in abstracto of the compatibility of the national legislation on discrimination with the Convention. The Committee recalls that, in order for the author to be considered a victim, it is not sufficient for him or her to maintain that, by its very existence, a law violates his or her rights.<sup>10</sup> In the present case, the author considers that the 1999 Act has been applied to her disadvantage. The Committee is therefore not concerned with the 1999 Act in abstracto, but with its direct application by the Labour Court to the case of the author.

10.3 In the present case, the question is whether the 2010 judgment of the Labour Court amounts to a violation of the author's rights under articles 5 and 27 of the Convention. In that regard, the Committee notes the author's allegations that the judgment of the Labour Court was discriminatory insofar as it did not assess adequately the possibility for the Social Insurance Agency to take support and adaptation measures to adapt its internal computer systems to her sight impairment, and therefore to enable her to perform the

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<sup>10</sup> See communication No. 318/1988, *E.P. and others v. Colombia*, decision on inadmissibility of 25 July 1990, para. 8.2; and communication No. 35/1978, *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Views adopted on 9 April 1981, para. 9.2.

professional obligations attached to the position of assessor/investigator that she had applied for; and that it did not take into account that the adjustments to the Social Insurance Agency's computer program would have been beneficial for any possible future employees with visual impairments.

10.4 The Committee recalls that, in accordance with article 27, paragraphs (a), (e), (g) and (i), of the Convention, States parties have the responsibility to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions; to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment; to employ persons with disabilities in the public sector; and to ensure that reasonable accommodation is provided to persons with disabilities in the workplace. The Committee further recalls that under article 2 of the Convention, "reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. The Committee further observes that article 5, paragraphs 1 and 2, imposes on the State Party the general obligations to recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law, and to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

10.5 The Committee considers that, when assessing the reasonableness and proportionality of accommodation measures, State parties enjoy a certain margin of appreciation. It further considers that it is generally for the courts of States parties to the Convention to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>11</sup>

10.6 In the present case, the Committee considers that the Labour Court thoroughly and objectively assessed all the elements submitted by the author and the Social Insurance Agency before reaching the conclusion that the support and adaptation measures recommended by the Ombudsman would constitute an undue burden for the Social Insurance Agency. The Committee further considers that the author did not provide any evidence which would enable it to conclude that the assessment conducted was manifestly arbitrary or amounted to a denial of justice. In the circumstances, the Committee cannot conclude that the decision made was not, at the time of the Labour Court judgment, based on objective and reasonable considerations. Consequently, the Committee is of the view that it cannot establish a violation of articles 5 and 27 of the Convention.

11. The Committee on the Rights of Persons with Disabilities, acting under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, is of the view that the facts before it do not constitute a violation of articles 5 and 27 of the Convention.

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<sup>11</sup> See for example: Human Rights Committee, communications No. 1329/2004 and No. 1330/2004, *Pérez Munuera and Hernández Mateo v. Spain*, decision on inadmissibility adopted on 25 July 2005, para. 6.4; communication 1540/2007, *Malmond Walid Nakrash and Liu Qifen v. Sweden*, decision on inadmissibility adopted on 30 October 2008, para. 7.3.

## Appendix

### **Joint opinion of Committee members Carlos Rios Espinosa, Theresia Degener, Munthian Buntan, Silvia Judith Quan-Chang and Maria Soledad Cisternas Reyes (dissenting)**

1. We disagree with the position of the Committee that the main question in the present case is whether the judgment was discriminatory on the grounds that it did not assess adequately the possibility for the Social Insurance Agency to take support and adaptation measures to make its internal computer systems adapted to the author's sight impairment (10.3 above). In our view the question was broader, since the Swedish Ombudsman put forward different alternatives to the Social Insurance Agency to enable the author to perform the professional obligations attached to the position of assessor/investigator. The different alternatives should have been analyzed from the perspective of the criteria set forth in article 5 of the Convention, regarding the application of reasonable accommodation in a specific case.

2. It is true that the Committee has no power to act as a third instance when considering individual communications. It is also true that States parties enjoy a certain margin of appreciation when assessing the reasonableness of accommodation measures and the issue of undue burden in a particular case. Nevertheless, the Committee should have reviewed the criteria that were used by the State party in this particular case, in order to determine whether it amounts to a violation of articles 5 and 27 of the Convention. When the Labour Court made its ruling in 2010, the Convention was already in force in the State Party, as was noted by the Committee in the admissibility decision. In that regard, the Labour Court should have taken into consideration not only the standards contained in the 1999 Act on the Prohibition of Discrimination in Working Life on Grounds of Disability, but also the scope of "reasonable accommodation" as set forth in article 5 of the Convention. Such review does not require the Committee to make an abstract analysis of the law in order to see if it complies with the Convention; rather it implies reviewing the criteria that were applied in the specific case in order to determine whether or not it was reasonable to adopt the measures recommended by the Swedish equality Ombudsman.

3. In the present case, the Labour Court made an analysis based on five questions, all arising from the 1999 Act on the Prohibition of Discrimination in Working Life on Grounds of Disability: (i) the cost of the measures in relation to the employer's ability to pay for them; (ii) the actual possibilities of implementing the measures and the estimated impact of the measures on the person with disability; (iii) the possibility of implementing the measures in the workplace; (iv) the effect of the measures taken on the disabled person's ability to do the job in question; and (v) the duration of the employment. After examining the case with the above legal framework, the Labour Court concluded that the adjustments would have been too complicated and time-consuming.

4. "Reasonable accommodation" must be analysed on a case-by-case basis, and the reasonableness and proportionality of the measures of accommodation proposed must be assessed in view of the context in which they are requested. In the present case, the accommodation was required in a professional context. The test of reasonableness and proportionality should therefore ensure, inter alia, that (i) the measures of accommodation were requested to promote the employment of a person with a disability, with the professional capacity and experience to perform the functions corresponding to the position for which he or she applied; and (ii) the public or private company or entity to which the candidate applied can reasonably be expected to adopt and implement accommodation measures. It was never questioned that the author had the professional capacity and work

experience required to perform the duties of the position for which she had applied. One of the specific objectives of “reasonable accommodation” is to compensate for factual limitations with a view to promoting the employment of persons with disability, so that the lack of factual capacity to perform such functions can therefore not be considered as the main obstacle to the employment of a person.

5. We believe that the Labour Court failed to consider the potential impact of the measures suggested by the Ombudsman on the future employment of other persons with visual impairments as an additional positive criterion in the assessment of the requested accommodation measures. We are therefore of the view that, while reasonable accommodation is in principle an individual measure,<sup>a</sup> the benefit for other employees with disabilities must also be taken into account when assessing reasonableness and proportionality, in compliance with articles 5, 9 and 27 of the Convention. The Labour Court should have more carefully considered the profile, including the role and functions, of the Social Insurance Agency, one of the State party’s main public institutions in charge of implementing the national policy on persons with disabilities (para. 3.2, above). Finally, the Labour Court did not take into account the wage subsidy and assistance benefits that the candidate and potential employer could have accessed should the candidate have been selected, while such subsidy and assistance benefits were clearly referred to in the Ombudsman’s options.

6. In the light of the above and taking into account all the information provided by the parties, we consider that the Committee should have determined that the judgment of the Labour Court reflects a wide interpretation of the notion of “undue burden”, severely limiting the possibility for persons with disabilities of being selected for positions requiring the adaptation of the working environment to their needs. We believe that the Labour Court’s assessment of the requested support and adaptation measures, made in accordance with the 1999 Act, upheld the denial of reasonable accommodation, resulting in a *de facto* discriminatory exclusion of the author from the position for which she applied. The Committee should have considered such assessment as not consistent with the general principles set forth in preambular paragraphs (i) and (j) of the Convention, and amounting to a violation of articles 5 and 27 of the Convention.

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<sup>a</sup> See general comment No. 2 (2014) on article 9: accessibility, para. 25.

**Individual opinion of Damjan Tatic (dissenting)**

I agree with the joint individual opinion, with the exception of the issue of the need to take into account the potential effects of the reasonable accommodation on the future employment of persons with disabilities in the Swedish Agency, as expressed in the first and second sentences of paragraph 5.

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