



Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 48/2018*, **

<i>Communication submitted by:</i>	M.R. i V. (represented by counsel, Victoria Prada Pérez)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	17 November 2015 (initial submission)
<i>Date of adoption of Views:</i>	24 March 2022
<i>Subject matter:</i>	Right to non-discrimination in the maintenance or continuance of employment (assignment to modified duty)
<i>Procedural issues:</i>	Exhaustion of domestic remedies; insufficient substantiation; admissibility <i>ratione temporis</i>
<i>Substantive issues:</i>	General obligations under the Convention; equality and non-discrimination; work and employment; reasonable accommodation
<i>Articles of the Convention:</i>	3 (a)–(d), 5 (1) and (2) and 27 (1) (a), (b) and (g)–(i)
<i>Article of the Optional Protocol:</i>	2 (b) and (d)–(f)

1. The author of the communication is M.R. i V., a national of Spain born on 22 January 1961. The author claims that the State party has violated his rights under article 27 (1) (a), (b) and (g)–(i), read alone and in conjunction with article 3 (a)–(d) and article 5 (1) and (2), of the Convention. The Optional Protocol to the Convention entered into force for the State party on 3 May 2008. The author is represented by counsel, Victoria Prada Pérez.

* Adopted by the Committee at its twenty-sixth session (7–25 March 2022).

** The following members of the Committee participated in the consideration of the communication: Rosa Idalia Aldana Salguero, Danlami Umaru Basharu, Gerel Dondovdorj, Gertrude Oforiwa Fefoame, Vivian Fernández de Torrijos, Mara Cristina Gabrilli, Amalia Eva Gamio Ríos, Samuel Njuguna Kabue, Rosemary Kayess, Kim Mi Yeon, Abdelmajid Makni, Sir Robert Martin, Floyd Morris, Jonas Ruskus, Markus Schefer and Saowalak Thongkuay.



A. Summary of the information and arguments submitted by the parties

Facts as submitted by the author

2.1 The author states that he has a mental disability, specifically, an adjustment disorder with interpretative features.

2.2 On 14 December 2004, the National Social Security Institute declared that the author's status was one of permanent total disability¹ for the performance of his occupation within the Mossos d'Esquadra (Catalan autonomous police force). According to the medical report issued on 20 September 2004 by the Disability Medical Assessment Unit, the author's condition, an adjustment disorder with interpretative features, makes it inadvisable for him to use weapons. As a result of this declaration, the author lost his job as a civil servant in the Mossos d'Esquadra, since there were no regulations allowing for assignment to modified duty at the time.²

2.3 The author states that he was informed by the Ministry of the Interior of the autonomous regional government of Catalonia of the entry into force of Decree No. 246/2008, in accordance with article 61 (3) of Act No. 10/1994 of Catalonia. The Decree regulates the special administrative situation of modified duty in the Mossos d'Esquadra and, consequently, the procedure whereby he could apply to be reinstated and assigned to a post that would meet his needs. On 20 September 2009, the author applied to the Ministry to be assigned to modified duty in a non-police position with generic support duties, under article 19 of the Decree.

2.4 On 29 December 2009, the Health Surveillance Unit issued a medical report, in accordance with article 19.2 of the Decree, stating that it would not be "advisable" for the author to perform support tasks within the Directorate General of the Police, because his health condition might be aggravated by contact with police personnel in the workplace. On the basis of this report and article 19 of the Decree, the Ministry of the Interior rejected the author's application in a decision dated 15 February 2010.

2.5 On 19 April 2010, the author filed an administrative appeal with Barcelona Administrative Court No. 13, requesting that the decision of the Ministry of the Interior be declared null and void. In his appeal, the author argued that, in its medical report, the Health Surveillance Unit had "advised" rather than "stated" that he should not perform support tasks within the Directorate General of the Police, in accordance with article 22.4 of the Decree.³ On that basis, he argued that he could be assigned to a post outside the Directorate General of the Police. The author based his appeal on the Convention on the Rights of Persons with Disabilities and on several articles of the Constitution, namely article 10 on dignity and the applicability of international treaties, article 14 on equality and the prohibition of discrimination, article 23 on access to public service and article 35 on the right to work.

2.6 Barcelona Administrative Court No. 13 dismissed the author's administrative appeal in Judgment No. 273 of 18 October 2011. The Court ruled that the Decree does not recognize the right to be assigned to modified duty on an absolute basis, as the right remains contingent on the physical and mental ability of the civil servants concerned to perform their duties properly. The Court also clarified that the reference to support tasks within the Directorate General of the Police, in the medical report, concerned all posts in the area of "public safety", within or outside the Directorate General of the Police, and that the use of the verb "advise" should therefore be interpreted as a courtesy. Consequently, the fact that the author had applied for a non-police post did not exempt him from being screened by the Occupational Hazard Prevention Service. The Court added that, although the Decree does not state that such medical reports are binding, the report could hardly be ignored by the Ministry of the Interior, since the author did not present expert evidence in order to discredit the report as he

¹ Pursuant to article 137 of Royal Legislative Decree No. 1/1994 of 20 June.

² This concept is regulated by Decree No. 246/2008 of 16 December 2008.

³ Article 22.4 of Decree No. 246/2008 allows for persons with the status of permanent total disability for mental health reasons to be assigned to a post in an office or workplace of the ministry responsible for public safety that is not within the Directorate General of the Police.

had announced in his appeal that he would. The author also did not contest the fact that there were no jobs that involved no contact or interaction with the police.

2.7 On 14 November 2011, the author lodged an appeal against the judgment of Barcelona Administrative Court No. 13 with the High Court of Justice of Catalonia, in which he challenged the Court's subjective interpretation of the use of the verb "advise" in the medical report and argued that the Court had ignored the legal significance of the use of this word. The author requested that the decision of the Ministry of the Interior be declared null and void, that his right to be assigned to a post in accordance with the Decree be recognized and that the corresponding salary, including social security contributions, be paid retroactively, starting from the date on which he had applied for the post. On 2 May 2012, the author supplemented his appeal by submitting two rulings on similar cases involving Mossos d'Esquadra officers with the same level of disability who had been reassigned after losing their jobs, in order to illustrate the position previously taken by the High Court.⁴

2.8 On 7 March 2013, the High Court of Justice of Catalonia dismissed the appeal on the grounds that the medical report clearly stated that the author could not perform support tasks because his health condition would be aggravated by contact with police personnel, whether in the Directorate General of the Police or in other workplaces in the field of public safety. Regarding the rulings submitted by the author, the High Court pointed out that the factual background in those cases was different: the Decree had not been in force when they had been handed down and the people concerned had physical disabilities, whereas the author had a mental disability that could worsen.

2.9 On 24 April 2013, the author filed an application for annulment of the proceedings before the High Court of Justice of Catalonia against Judgment No. 273. The author asserted that the High Court had not ruled on the question of whether the judgment violated his fundamental rights relating to equality before the law and the prohibition of discrimination (Constitution, art. 14), access to public service (art. 23), the right to work (art. 35) and human dignity and the obligation to comply with international treaties (art. 10). The author also claimed that the judgment violated the principle of legality, because the regulations in force – specifically, article 22.4 of the Decree, under which he should have been assigned to a non-police technical support post – had not been properly applied.

2.10 On 19 September 2013, the High Court of Justice of Catalonia dismissed the application for annulment of the proceedings on the grounds that it had already ruled that there had been no violation of the constitutional provisions invoked in the author's initial claim.

2.11 The author filed an application for *amparo* with the Constitutional Court on 13 November 2013 in response to the judgment of the High Court of Justice of Catalonia. The author alleged violations of his right to effective protection (Constitution, art. 24 (1)), his right to work (art. 35), his right to have access to public service (art. 23) and the principle of legality (art. 9 (3)). On 29 January 2014, the Constitutional Court informed the author that his application for *amparo* had been dismissed because he had failed to demonstrate its particular constitutional significance.

Complaint

3.1 The author claims that the State party violated his rights under article 27 (1) (a), (b) and (g)–(i), read alone and in conjunction with article 3 (a)–(d) and article 5 (1) and (2), of the Convention, by rejecting his application for a non-police post with generic support duties in the police force, thus denying him the opportunity of being assigned to modified duty and remaining active in the Mossos d'Esquadra.

3.2 The author claims that the public authorities directly violated article 27 (1) (g), since he was a civil servant in the Mossos d'Esquadra, and that this violation, which was approved by the judiciary, sends a very bad message to Spanish society.

⁴ Judgment No. 147/2010 of Barcelona Administrative Court No. 12 and Judgment No. 1270/2011 of the High Court of Justice of Catalonia.

3.3 The author claims that, in connection with article 27 (1) (a), (b) and (g)–(i), the State party violated the general principles of respect for dignity, non-discrimination, full and effective participation and inclusion in society, respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, and equality and non-discrimination, which are enshrined in article 3 (a)–(e) of the Convention. The author notes that his case is an example of the medical model of disability being used to justify the exclusion of a person on the basis of his or her disability, whereas the Convention promotes the eradication of this approach and the adoption of the human rights model.

3.4 As regards the violation of article 5 (1) and (2), read in conjunction with article 27 (1), the author claims that he was subjected to discrimination on the basis of disability, as he was denied the opportunity of assignment to modified duty, which is provided for by law, in the course of administrative and judicial proceedings. The author claims that the State party dealt with his case in a perfunctory and subjective manner and neglected its positive obligations to provide reasonable accommodation and alternatives, thus discriminating against the author on the basis of disability and violating his right to equality and dignity. The author maintains that he was not treated like other people in the same situation and refers to the two judgments submitted to the High Court of Justice of Catalonia, concerning the reassignment of Mossos d'Esquadra officers with disabilities to posts outside the Directorate General of the Police.

3.5 The author draws attention, as a reminder, to several cases⁵ in which the Committee adopted Views that he considers relevant and applicable to his own case and in which violations of article 27 of the Convention were found.

3.6 The author requests that the Committee recognize the alleged violations of the Convention and recommend that the State party grant him the most appropriate reparation commensurate with the seriousness of the infringement of his rights, which would consist in his readmission to the civil service to perform assistance and support tasks in any department outside the Directorate General of the Police. The author also requests, as a measure of reparation, the payment of the corresponding salary starting from 20 September 2009, plus statutory interest, and the payment of social security contributions from the same date.

State party's observations on admissibility and the merits

4.1 On 23 May 2019, the State party submitted its observations on the admissibility and merits of the communication. The State party submits that the communication is inadmissible *ratione temporis* and because domestic remedies have not been exhausted, the communication is manifestly ill-founded and it constitutes an abuse of the right of submission, under subparagraphs (f), (d), (e) and (b), respectively, of article 2 of the Optional Protocol. Should the Committee find the communication admissible, the State party submits that the claims are without merit and that the author's rights under the Convention have been respected.

4.2 With regard to the facts as submitted by the author, the State party maintains that, at the time when he applied to be assigned to modified duty, the author was involved in working life through his own construction company and that his application was part of a trade union strategy.⁶

4.3 With regard to the author's administrative appeal, the State party notes that the author never provided an expert report contradicting those that had been issued and that advised against his being assigned to modified duty, despite having announced that he would do so.

4.4 The State party asserts that the judgments of the High Court of Justice of Catalonia provided by the author do not say what he claims. The starting point for these judgments was that the complainant had been assigned to a non-police support post in the force and was asserting his right to receive back pay from the time when the assignment should have occurred; however, the judgments do not establish the complainant's right to be assigned to modified duty outside the autonomous police force. Regarding the Committee's Views, the

⁵ *Gröninger et al. v. Germany* (CRPD/C/D/2/2010); *Jungelin v. Sweden* (CRPD/C/12/D/5/2011); and *A.F. v. Italy* (CRPD/C/13/D/9/2012).

⁶ The State party refers to a communication sent by the author to the Director of Services of the Ministry of the Interior on 19 July 2012.

communications mentioned by the author do not have the same subject matter as the present communication and two of them were rejected by the Committee.

4.5 The State party concludes by noting that there is no record of the author's having applied to the Spanish authorities or the courts for assignment to modified duty outside the police force in another department and/or another branch of the autonomous government of Catalonia and that he is raising this possibility for the first time with the Committee.

4.6 Regarding the admissibility of the communication, the State party notes that it ratified the Convention and the Optional Protocol on 21 April 2008 and that these instruments entered into force on 3 May 2008. The facts on which the present communication is based, namely the recognition of the author's permanent total disability status on 14 December 2004, occurred four years before the entry into force of the Optional Protocol. The communication is therefore inadmissible *ratione temporis*. The State party argues that the submission of a claim after the ratification of the Optional Protocol in connection with facts that occurred prior to ratification implies the retroactive application of the Convention and the Optional Protocol.

4.7 The State party affirms that Act No. 10/1994 of Catalonia and Decree No. 246/2008 establish regulations that have been in force since 20 December 2008. As regards their application to situations of permanent total disability that have arisen since 3 May 2008 in the Mossos d'Esquadra, they are in line with the Convention, as they provide for assignment to non-police technical support posts in the ministry of the autonomous regional government of Catalonia that is responsible for security. The State party explains that the government of Catalonia introduced a supplementary protective measure through the second transitional provision of the Decree, which applies to Mossos d'Esquadra officers who are in situations of permanent total disability as a result of events that occurred prior to the entry into force of the Decree. The State party argues that this exceptional and discretionary measure introduced by the government of Catalonia, which concerns events that occurred prior to the entry into force of the Convention and the Optional Protocol in the State party, cannot lead to the retroactive application of these international instruments to related situations that, consequently, fall outside the scope of their protection. Likewise, their protection should not be considered to extend to administrative decisions and judicial disputes relating to this supplementary measure. The State party claims that if it had strictly complied with its obligations under the Convention and the Optional Protocol and had not introduced this supplementary measure for the benefit of Mossos d'Esquadra officers who were already in situations of permanent total disability, it would not have been required to extend the application of the Convention and the Optional Protocol to such situations.

4.8 The State party reports that a total of 201 applications were received from Mossos d'Esquadra officers in situations of permanent total disability between 2009 and 2019, of which 198 resulted in assignment to a non-police technical support post, in accordance with Decree No. 246/2008. This shows that the autonomous regional government of Catalonia does its utmost to comply with the obligations set out in the Convention and the Optional Protocol in respect of the Mossos d'Esquadra. Extending the application of the Convention and the Optional Protocol would therefore be a disproportionate and excessive regulatory measure, according to the principle of the non-retroactivity of international treaties and article 2 (f) of the Optional Protocol.

4.9 The State party maintains that the author failed to exhaust domestic remedies in accordance with article 2 (d) of the Optional Protocol, because he never applied to the Spanish authorities or the domestic courts for recognition of his right to be assigned to modified duty in a department of the autonomous government of Catalonia other than the Directorate General of the Police. The State party claims that it became aware that the author was asserting this right only when he submitted his communication to the Committee and that he did so without having exhausted domestic remedies.

4.10 Regarding its claims of inadmissibility under article 2 (b) and (e) of the Optional Protocol, the State party notes that the author never provided an expert report discrediting the medical opinion on which the rejection of his application was based and supporting the possibility of his occupying a non-police post with generic support duties in the Catalan police force, despite having announced during the proceedings that he would do so.

Furthermore, the State party claims that the author acknowledged that his application had been submitted as part of a trade union strategy and that he had no personal interest in the outcome, since he was working in his own construction company. According to the State party, these two facts demonstrate that the communication constitutes an abuse of the right of submission and is manifestly ill-founded.

4.11 With regard to the merits, the State party reiterates the information provided about the laws of the autonomous regional government of Catalonia that regulate the option of modified duty for Mossos d'Esquadra officers who are in situations of permanent total disability for the performance of police duties. The State party notes that article 61 (3) of Act No. 10/1994 of Catalonia regulates the special administrative situation of modified duty to which Mossos d'Esquadra officers may be assigned on account of their age or a decline in their physical or mental health. The regulation set out in this article was approved through Decree No. 246/2008 of the government of Catalonia. Article 19.1 of the Decree regulates the assignment of Mossos d'Esquadra officers in situations of permanent total disability to non-police posts with generic technical support duties. Article 22.4 of the Decree states that those who have the status of permanent total disability for mental health reasons may be assigned to modified duty in offices or workplaces of the ministry responsible for public safety that are outside the Directorate General of the Police.

4.12 After reviewing the way in which these regulations were applied to the author's case, the State party maintains, with reference to the definition of reasonable accommodation contained in articles 2 and 27 (2) (i) of the Convention, that the accommodation measures that would have been needed in the workplaces of the ministry in question were unfeasible and disproportionate, given the author's particular disability and the possibility that his health condition might be aggravated by contact with police personnel. The State party notes that, according to the Committee's interpretation of the Convention,⁷ an employer is only obliged to provide support and adaptation measures that may be considered reasonable on a case-by-case basis. The State party notes that the Committee has explained that, although article 27 (1) (a), (e), (g) and (i) of the Convention prohibits discrimination on the basis of disability in the field of employment and requires the provision of reasonable accommodation in the workplace, the term "reasonable accommodation" should be understood to mean necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden. The State party adds that the Committee has reiterated that, when assessing the reasonableness and proportionality of accommodation measures, States parties enjoy a certain margin of appreciation.⁸

4.13 In the case of the author, the State party argues that the ministry in which he is requesting assignment to modified duty does not have any workplaces without uniformed and armed police personnel. It would clearly not be feasible to make adjustments that would ensure not only that the author did not come into contact with police officers but also that he remained sufficiently far away from weapons. According to the State party, it would not be reasonable to set up a new workplace in the ministry where there were no police officers present, nor would it be possible to prevent the author from coming into contact with other employees with police duties or employees who are uniformed and armed. The State party reiterates that the author never submitted to the autonomous regional government of Catalonia or the courts a revised medical report confirming that his state of health had improved and that he would be capable of taking up a non-police post in the ministry, as he was invited to do by the National Social Security Institute on 14 December 2004. Since the medical assessments reflect a consensus, the State party confirms the decisions and judgments relating to the author's case and affirms that they were handed down in accordance with due process and on the basis of logical reasoning and the application of domestic law and the Convention, without discrimination or arbitrariness.

4.14 In response to the allegation of a violation of article 5 of the Convention, the State party argues that the autonomous regional government of Catalonia did not, at any time, nullify the recognition, enjoyment or exercise, on an equal basis with others, of the right to

⁷ The State party refers to the case *Jungelin v. Sweden* as an example.

⁸ *Jungelin v. Sweden*; and Human Rights Committee, *Pérez Munuera and Hernández Mateo v. Spain* (CCPR/C/84/D/1329-1330/2004).

work. On the contrary, when the author was declared to be in a situation of permanent total disability, he was offered the possibility of taking up a non-police post with generic support duties, provided that those duties were compatible with his abilities. The unique nature of the author's disability means that, as long as his medical status remains unchanged, it is not feasible to assign him to a post in the offices of the ministry in question or to adapt existing jobs or workplaces through reasonable accommodation measures.

4.15 The State party concludes that the author has not been subjected to discrimination that is prohibited by the Convention or to any violation of his rights.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 31 July 2019, the author submitted his comments on the State party's observations. Referring to his letter to the Ministry of the Interior dated 20 July 2012, the author claims that the State party neglects to mention that he emphasized in his letter not only the personal motivations for his application but also the fact that his skills had not been assessed and that the details of his disability had been the sole focus. Since there had been no comprehensive assessment of his abilities, it would not have been possible to provide reasonable accommodation if he had been reassigned. The author explains that he therefore requested a review of his case in that letter, in view of the use of the verb "advise" in the reports and the fact that his abilities had not been assessed.

5.2 The author reiterates that the report of 29 December 2009 stated that it would not be "advisable" for the author to perform support tasks "within the Directorate General of the Police" and argues that the possibility of his being assigned to a non-police technical support post under article 22.4 of Decree No. 246/2008, as he had requested through administrative and judicial proceedings, was not examined. The author claims that the State party did not seriously and thoroughly examine the possibility of reassigning him, nor did it take steps or make inquiries that could lead to the conclusion that it had tried to provide reasonable accommodation. The author argues that it is impossible to work out from the reports how the State party could state with certainty that the author would inevitably come into contact with police personnel in "one of the offices of the ministry" and that it would be impossible to provide reasonable accommodation in order to allow for his reassignment. This wording, which is taken from the 2011 report of the Assistant Director General for Human Resources, implies that there could be an office where the author would not come into contact with police personnel, and the author reiterates that, in his case, the State party did not actively seek possible reasonable accommodation measures, nor is there any evidence that it tried to take such measures and that they would have imposed an excessive burden. The author concludes, on this point, that these reports resulted in direct discrimination against him on the basis of disability and a violation of his rights under article 27 (1) (a), (b) and (g)–(i), read in conjunction with article 3 (a)–(d) and article 5 (1) and (2).

5.3 In response to the State party's assertion that the author raised the possibility of assignment to modified duty in another department and/or another branch of the autonomous government of Catalonia directly with the Committee, without having submitted an application to that effect through domestic channels, the author maintains that he applied for the only option available to him under Decree No. 246/2008. Noting that he cannot be required to have applied for something that is not provided for by law, he argues that he applied for the only option available to those in situations of permanent total disability for mental health reasons, which is provided for in article 22.4 of the Decree. The author argues that the law does, on the other hand, establish the provision of reasonable accommodation as a positive obligation that must be fulfilled by the State party.

5.4 The judgments mentioned in his communication serve to show that Mossos d'Esquadra officers with disabilities have been reassigned to posts outside the Directorate General of the Police in the past. The author claims that this option was not properly explored in his case and that he knows of four such officers who were reassigned within the Ministry of the Interior, two who were reassigned to the Ministry of Labour, Social Affairs and Family, one who was reassigned to the Ministry of Health and four who were reassigned to the Ministry of Justice. The author states that he was extremely surprised by the statement made by the government of Catalonia to the parliament in 2015, confirming that all Mossos d'Esquadra officers seeking reassignment had been reassigned, for he is aware that several

other cases like his own have been submitted to the Committee.⁹ The author explains that he mistrusts the State party and suspects it of acting in bad faith when it comes to ensuring the rights of persons with disabilities.

5.5 The author reiterates that the Committee's Views¹⁰ mentioned in his communication are applicable to his case and that the recommendations they contain cannot be ignored by the State party, since they constitute model jurisprudence and establish clear guidelines. The author cites, in particular, the Committee's Views concerning the case *V.F.C. v. Spain*¹¹. Although the case differs from his own, the Views nevertheless state that "the process of seeking reasonable accommodation should be cooperative and interactive and aim to strike the best possible balance between the needs of the employee and the employer" and that "if such effective measures (which do not impose an undue burden) cannot be identified and implemented, assignment of the employee to modified duty should be considered a reasonable accommodation measure of last resort. In this context, the authorities of the State party have a responsibility to take all necessary reasonable accommodation measures to adapt existing posts to the specific requirements of the employee."

5.6 The author disagrees with the State party's claim that the communication is inadmissible *ratione temporis* and draws attention to the exception provided for in article 2 (f) of the Optional Protocol with respect to facts that occurred prior to the entry into force of the Optional Protocol but continued after that date. The author acknowledges that Decree No. 246/2008 and the applauded second transitional provision, which applies to persons who are in situations of permanent total disability, seem to indicate *de jure* compliance with the obligations assumed by the State party when it ratified the Convention. For that reason, the author argues that the State party cannot view the good practice set out in the second transitional provision of the Decree as "charity" and claim that applications for assignment to modified duty submitted by persons in his situation should not be examined in the light of the Convention. He claims that the exception provided for in article 2 (f) of the Optional Protocol applies to his case, since, by adopting the second transitional provision, the State party offered persons already in situations of permanent total disability the possibility of requesting assignment to modified duty within a period of one year. Consequently, the protection afforded by the Convention extends *de facto* to applications submitted within this time frame and the fact that the author's disability status was recognized in December 2004 is irrelevant. The author also argues that the thrust of his communication is that the Decree was applied in his case not in the light of the Convention but on the basis of a medical approach, and that these facts continued to occur after the date on which his disability status was recognized and therefore fall within the scope of the protection of the Convention.

5.7 Regarding the State party's claim of inadmissibility for failure to exhaust domestic remedies, the author reiterates that he has exhausted domestic remedies and that he availed himself of the only option available in cases of permanent total disability for mental health reasons, which is provided for in article 22.4 of the Decree.

5.8 The author maintains that the strictly private and personal reasons that caused him to submit his application only after some delay are of no importance. The time that he spent reflecting on the matter cannot by any means be interpreted as an abuse of the right of submission under article 2 (b) of the Optional Protocol, as the State party claims. The author argues that his communication is not frivolous or offensive, nor has it been resubmitted repeatedly after being dismissed by the Committee. The conditions that must be fulfilled in order for a communication to be declared inadmissible for abuse of the right of submission have not been met in this case.

5.9 With regard to the merits, the author reiterates that the State party did not assess his abilities, nor did it consider or implement reasonable accommodation measures, and that this resulted in clear discrimination on the basis of disability. The State party neglected its

⁹ The author attached to his communication the summary of session No. 53, first plenary meeting of the parliament of Catalonia, dated 29 April 2015.

¹⁰ *Gröninger et al. v. Germany; Jungelin v. Sweden; and A.F. v. Italy.*

¹¹ [CRPD/C/21/D/34/2015](#), para. 8.7.

positive obligations in this regard and approached his case from a medical perspective rather than a human rights perspective.

5.10 The author concludes by reiterating the requests that he made to the Committee in his initial submission.

B. Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee, and that it has not been, nor is it being, examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the communication should be declared inadmissible *ratione temporis* because the author's permanent total disability status was recognized four years before the entry into force of the Convention and the Optional Protocol. The State party argues that the second transitional provision of Decree No. 246/2008, which refers to persons whose disability status was recognized before the entry into force of the Convention and the Optional Protocol, goes beyond the requirements established by these instruments. Requiring that they be applied to the cases covered by this provision would lead to the retroactive application of these international instruments. On the other hand, the Committee notes the author's argument that the exception provided for in article 2 (f) of the Optional Protocol applies to his case and to those covered by the second transitional provision of the Decree. According to the author, by allowing persons already in situations of permanent total disability to request assignment to modified duty within a period of one year, the State party effectively extended the protection of the Convention to these persons. The author also claims that the date on which his disability status was recognized is irrelevant, since the facts that are the subject of his communication, which relate to the failure to apply the Decree to his case, continued after that date. The Committee notes that the author's complaint concerns his application for assignment to modified duty in a non-police position with generic support duties, which was submitted on 20 September 2009 and rejected on 15 February 2010. The Committee considers that, although the author's disability status was recognized prior to the entry into force of the Convention in the State party (on 3 May 2008), the alleged discrimination on the basis of disability in the application of Decree No. 246/2008 to the author's case occurred after the ratification of the Convention by the State party. Consequently, the Committee is of the view that it is not precluded *ratione temporis* from examining the present communication by the date on which the author's disability status was recognized.

6.4 The Committee notes the State party's contention that the author failed to exhaust domestic remedies because he never applied to the Spanish authorities or the domestic courts to be assigned to modified duty in a department of the autonomous government of Catalonia other than the Directorate General of the Police. According to the State party, the author raised this possibility directly with the Committee without having exhausted domestic remedies. The Committee also notes the author's argument that he exhausted domestic remedies by submitting the only kind of application for assignment to modified duty that is permitted by the relevant regulations (article 22.4 of the Decree) in cases of permanent total disability for mental health reasons. The Committee notes that the author's application of 20 September 2009 to the Ministry of the Interior of the autonomous regional government of Catalonia refers to "a non-police position with generic support duties" and that, during the domestic legal proceedings, he specified, on the basis of article 22.4 of Decree No. 246/2008, that the post could be "outside the Directorate General of the Police". The Committee considers that the measure of reparation sought before the Committee, namely "readmission to the civil service to perform assistance and support tasks in any department outside the Directorate General of the Police, in accordance with national and international law", is

consistent with those sought before the domestic courts. Consequently, the Committee is of the view that the author has exhausted the remedies available under domestic law and that the conditions set out in article 2 (d) of the Optional Protocol are not an obstacle to the admissibility of the present communication.

6.5 The Committee notes the State party's contention that the communication constitutes an abuse of the right of submission and is manifestly ill-founded, under article 2 (b) and (e) of the Optional Protocol, because the author submitted his application for assignment to modified duty as part of a trade union strategy and had no personal interest in the outcome. The State party also notes that the author never provided an expert report confirming that he would be capable of occupying a non-police post with generic support duties in the Catalan police force, despite having announced during the proceedings that he would do so. On the other hand, the Committee notes the author's argument that the reasons behind his application cannot be interpreted as an abuse of the right of submission. The Committee notes that the author's allegations concern the application of Decree No. 246/2008 to his case and that he demonstrates that he has been personally affected and claims to have suffered a violation of his rights under the Convention. The Committee notes that the author is not questioning the validity of the expert reports on his disability, but rather the interpretation of these reports by the State party authorities, which did not provide him with reasonable accommodation or allow him to be assigned to modified duty. The Committee therefore considers that the fact that the author failed to provide an expert report discrediting the one issued by the authorities is irrelevant. Consequently, the Committee is of the view that the conditions set out in article 2 (b) and (e) of the Optional Protocol are not an obstacle to the admissibility of the present communication.

6.6 However, the Committee notes that, in the communication and in the claims filed with the ordinary courts, the author did not present any arguments concerning possible violations of his rights under article 27 (1) (h) of the Convention, on the promotion of the employment of persons with disabilities in the private sector. The Committee therefore finds that the author has not substantiated his claims under article 27 (1) (h) of the Convention and declares this part of the communication inadmissible under article 2 (e) of the Optional Protocol.

6.7 Accordingly, and in the absence of other obstacles to admissibility, the Committee declares the communication admissible with regard to the author's claims under article 27 (1) (a), (b), (g) and (i), read alone and in conjunction with article 3 (a)–(d) and article 5 (1) and (2), of the Convention. The Committee therefore proceeds with its consideration of these claims on the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information that it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of its rules of procedure.

7.2 With regard to the author's claims under article 27 (1) (a), (b), (g) and (i), read alone and in conjunction with article 3 (a)–(d) and article 5 (1) and (2), of the Convention, the issue before the Committee is whether the State party violated his rights by rejecting his application for assignment to modified duty in a non-police position with generic support duties through the application of a regulation of the autonomous regional government of Catalonia (Decree No. 246/2008 regulating the special administrative situation of modified duty in the Mossos d'Esquadra, arts. 19 and 22) and by considering that the accommodation measures needed in his case would impose a disproportionate or undue burden.

7.3 The Committee notes the author's claims, under articles 5 and 27 of the Convention, that he was subjected to direct discrimination on the basis of disability because he was denied his legal right, as someone in a situation of permanent total disability for mental health reasons, to be assigned to modified duty in a non-police position with generic support duties. The author maintains that the State party dealt with his application for assignment to modified duty in a perfunctory and subjective manner, without seeking reasonable accommodation or alternatives in order to be able to ensure his right to work. In particular, the author argues that the State party can hardly state with certainty that he would inevitably come into contact with police personnel in any office of the ministry responsible for public safety and that it would

be impossible to take any reasonable accommodation measures that would allow for his reassignment. On the other hand, the Committee also notes the State party's claims that the adjustments or accommodation needed by the author would be unfeasible and disproportionate, given the possibility that his health condition might be aggravated by contact with police personnel and the need for him to remain sufficiently far away from weapons. Since the ministry does not have any workplaces without uniformed and armed police personnel, it would not be feasible to make adjustments in the author's case, nor would it be reasonable to set up a new workplace in the ministry where there were no police officers present. The State party also maintains that there was no discrimination or arbitrariness in the application of the Decree, since, when the author's permanent disability status was declared, he was offered the possibility of taking up a non-police post, provided that it was compatible with his abilities. According to the State party, in the absence of a medical report confirming that the author's state of health has improved, it is not feasible to assign him to a post in the offices of the ministry in question or to provide reasonable accommodation, given the unique nature of his disability.

7.4 The Committee recalls that States parties have a general obligation, under article 5 of the Convention, to ensure the right of persons with disabilities to equality and non-discrimination. The Committee also recalls that article 27 (1) of the Convention requires States parties to recognize the right of persons with disabilities to retain their employment, on an equal basis with others; to take all appropriate steps, including through legislation, to prohibit discrimination on the basis of disability with regard to the continuance of employment; and to ensure that reasonable accommodation is provided to persons who acquire a disability during the course of employment. The Committee further recalls paragraph 67 of its general comment No. 6 (2018), in which it states that in order to achieve de facto equality in terms of the Convention, States parties must ensure that there is no discrimination on the grounds of disability in connection with work and employment, and in which it refers to the relevant International Labour Organization (ILO) conventions, namely the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), both of which have been signed and ratified by Spain. Under article 7 of ILO Convention No. 159, the competent authorities of States parties must take measures with a view to providing and evaluating vocational guidance and vocational training to enable persons with disabilities to retain their employment.

7.5 The Committee recalls that article 5 of the Convention refers to the denial of reasonable accommodation as a prohibited form of discrimination. All forms of discrimination are equally contrary to the Convention, and it is inappropriate to differentiate among contraventions of the right to equality and non-discrimination in terms of their so-called degree of seriousness. The Committee also recalls that reasonable accommodation is an *ex nunc* duty, meaning that accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights.¹² To that end, the duty bearer must enter into dialogue with the individual with a disability, for the purpose of including him or her in the process of finding solutions for better realizing his or her rights and building his or her capacities.¹³ In addition, the Committee recalls that the preamble to the Convention highlights the necessity of recognizing the diversity of persons with disabilities, meaning that any institutional mechanism for dialogue in relation to reasonable accommodation must take each person's specific situation into account.

7.6 The Committee recalls that the process of seeking reasonable accommodation should be cooperative and interactive and aim to strike the best possible balance between the needs of the employee and the employer. In determining which reasonable accommodation measures to adopt, the State party must ensure that the public authorities identify the effective adjustments that can be made to enable the employee to carry out his or her key duties.¹⁴

¹² General comment No. 6 (2018), para. 24 (b).

¹³ *Ibid.*, paras. 26 (a) and 67 (h).

¹⁴ *V.F.C. v. Spain*, para. 8.7; and *J.M. v. Spain* (CRPD/C/23/D/37/2016), para. 9.7.

7.7 The Committee is of the view that assignment to modified duty, which is governed by a variety of regulations under Spanish law, is the institutional arrangement or mechanism whereby the State party seeks to reconcile its duties in relation to the right to work (continuance of employment) with its duties in relation to the right to equality and non-discrimination. The Committee notes that, in the present case, the author applied for assignment to modified duty in accordance with articles 19 and 22.4 of Decree No. 246/2008, concerning persons in a situation of permanent total disability for mental health reasons. The Committee also notes that his application was examined by the authorities on the basis of article 19.2 of the Decree, which requires “a prior report issued by the Occupational Hazard Prevention Service of the Subdirectorate General for Occupational Health and Hazard Prevention on the duties that can be performed by the civil servant based on his or her physical and mental abilities”. The Committee notes that, in the author’s case, the administrative disability ratings determined by the National Social Security Institute and the medical report drawn up in connection with his application were not focused on assessing the author’s potential to carry out modified duties or other complementary activities in order to determine more precisely the reasonable accommodation measures that would need to be taken in his case. The Committee also notes that the Health Surveillance Unit used subjective criteria in its report when it stated that it would not be “advisable” for the author to perform support tasks within the Directorate General of the Police because “his health condition might be aggravated” and that the author had a mental disability that “could worsen”.

7.8 The Committee recalls its general comment No. 6 (2018), in which it states that the concept of “reasonableness” should not act as a distinct qualifier or modifier to the State party’s duty; rather, the reasonableness of an accommodation measure is a reference to its relevance, appropriateness and effectiveness for the person with a disability.¹⁵ Nor should it be confused with the concept of “disproportionate or undue burden”, which sets the limit of the duty to provide reasonable accommodation. The Committee recalls that States parties should be guided by several elements as they carry out their duty to provide reasonable accommodation.¹⁶ These include the importance of engaging in dialogue with the person with a disability concerned, in order to identify and remove barriers to the enjoyment of rights, and the need to assess the proportional relationship between the means employed and the aim, which is the enjoyment of the right concerned. Lastly, the Committee recalls that, rather than immediately invoking the concept of disproportionate burden, States parties should ensure that any denial of reasonable accommodation is based on objective criteria and is analysed and communicated in a timely fashion to the person with a disability concerned.

7.9 In the present case, the Committee notes that no steps were taken to assess the author’s abilities or to identify the obstacles that might prevent him from taking up a non-police post with generic support duties in another office of the ministry in question, outside the Directorate General of the Police. The Committee also notes that the State party has failed to demonstrate that there were no other types of duties within the ministry responsible for public safety that the author would have been able to perform. The Committee notes that, according to the decision of 15 February 2010, the author’s application for assignment to modified duty was rejected solely on the grounds that “the Health Surveillance Unit issued a medical report and proposed that the Mossos d’Esquadra officer, M.R. i V., should not perform support tasks on account of his health condition”.

7.10 With respect to article 5 of the Convention, the Committee finds that the facts of the present case disclose one of the forms of discrimination prohibited by the Convention, whether it is viewed as direct discrimination or as a denial of reasonable accommodation. In addition, with respect to article 27 of the Convention, the Committee finds that, in the present case, the fact that the State party authorities rejected the author’s application for assignment to modified duty without seriously examining the possibility of providing reasonable accommodation in his case, through a dialogue with him, constitutes discrimination with regard to the continuance of employment. The Committee considers that it is clear from the application of article 27 to the author’s case that the State party assessed his application for assignment to modified duty on the basis of the medical model of disability, without

¹⁵ General comment No. 6 (2018), para. 25 (a)–(b).

¹⁶ *Ibid.*, para. 26.

examining the possibility of providing reasonable accommodation in genuine dialogue with him. The Committee concludes that, although Decree No. 246/2008, regulating the option of modified duty for Mossos d'Esquadra officers in situations of disability, pursues a legitimate aim, the way in which it is applied by the authorities violates the rights of such officers under articles 5 and 27 of the Convention.

7.11 In light of the above, the Committee finds that the rejection of the author's application for assignment to modified duty in a non-police position with generic support duties constituted a violation of article 27 (1) (a), (b), (g) and (i), read alone and in conjunction with article 3 (a)–(d) and article 5 (1) and (2), of the Convention.

C. Conclusion and recommendations

8. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under article 27 (1) (a), (b), (g) and (i), read alone and in conjunction with article 3 (a)–(d) and article 5 (1) and (2), of the Convention. The Committee therefore makes the following recommendations to the State party:

- (a) Concerning the author, the State party is under an obligation to:
 - (i) Compensate him for any legal costs incurred in filing the present communication;
 - (ii) Take appropriate measures to enter into dialogue with the author with a view to evaluating his potential to undertake modified duties or other complementary activities, including any reasonable accommodation that may be required.

(b) In general, the State party is under an obligation to take measures to prevent similar violations in the future, including by taking the necessary measures to align the application of Decree No. 246/2008 of 16 December of the autonomous regional government of Catalonia, regulating the special administrative situation of modified duty in the Mossos d'Esquadra, with the principles enshrined in the Convention and the recommendations contained in the present Views, in order to ensure that the possibility of providing reasonable accommodation is examined in dialogue with the officers who are requesting "assignment to modified duty".

9. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party should submit to the Committee, within six months, a written response, including information on any action taken in the light of the present Views and the recommendations of the Committee. The State party is also requested to publish the Committee's Views, have them translated into the official language of the State party and to circulate them widely, in accessible formats, in order to reach all sectors of the population.
