Committee on the Rights of Persons with Disabilities

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 47/2018**. ***

Communication submitted by: J.M.V.A. (represented by counsel, Victoria Prada Pérez)

Alleged victim: The author

State party: Spain

Date of communication: 20 April 2017 (initial submission)

Date of adoption of Views: 25 August 2023

Subject matter: Right to non-discrimination in the maintenance or continuance of employment (assignment to modified duty)

Procedural issue: Exhaustion of domestic remedies

Substantive issues: Discrimination based on disability; labour rights; reasonable accommodation

Articles of the Convention: 3 (a)–(e); 4 (1) (a), (b) and (d) and (5); 5 (1)–(3); 13 (2); and 27 (1) (a), (b), (e), (g), (i) and (k)

Article of the Optional Protocol: 2 (d)

1.1 The author of the communication is J.M.V.A., a national of Spain born on 25 November 1964. He claims that the State party violated his rights under articles 27 (1) (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a)–(e), article 4 (1) (a), (b) and (d) and (5), article 5 (1)–(3) and article 13 (2) of the Convention. The Optional Protocol entered into force for the State party on 3 May 2008. The author is represented by counsel.

1.2 On 18 May 2022, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to deny the State party’s request for the admissibility of the communication to be considered separately from the merits.

* Reissued for technical reasons on 9 January 2024.
** Adopted by the Committee at its twenty-ninth session (14 August–8 September 2023).
*** The following members of the Committee participated in the consideration of the communication: Muhammad Salah Al-Azzeh, Rosa Idalia Aldana Salguero, Rehab Mohammed Boresli, Gerel Dondovdorj, Gertrude Oforiwa Fefoame, Vivian Fernández de Torrijos, Odelia Fitoussi, Amalia Eva Gamio Ríos, Laverne Jacobs, Samuel Njuguna Kabue, Rosemary Kayess, Alfred Kouadio Kouassi, Abdelmajid Makni, Sir Robert Martin, 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 worked as an officer in the municipal police of L’Hospitalet de Llobregat, Catalonia. On 28 November 2008, he was involved in a traffic accident in which he acquired a physical disability. The author was in a situation of temporary incapacity for work until 4 February 2010.

2.2 On 10 March 2010, the Ministry of Labour and Immigration declared that the author’s status was one of “total permanent disability for the performance of his occupation”.

As a result of this declaration, he lost his job and was awarded a pension equivalent to 55 per cent of his salary.

2.3 On 9 February 2010, prior to the declaration, and given that such a declaration does not prevent a person from working, the author submitted an administrative application to L’Hospitalet de Llobregat Municipal Council requesting to be assigned the special administrative status of “modified duty” in accordance with articles 43 and 44 of Act No. 16/1991 of 10 July 1991, the Local Police Act, of the Autonomous Community of Catalonia. This autonomous community legislation on modified duty must be implemented by all municipal councils through the adoption of ordinances; however, L’Hospitalet de Llobregat Municipal Council had not issued any such ordinance at that time.

2.4 On 16 April 2010, L’Hospitalet de Llobregat Municipal Council rejected the author’s application, claiming that it was “materially and legally impossible, irregular and illegal” to retain him in his post as a local police officer owing to his status of “total permanent disability”. In its decision, the Municipal Council held that the declaration by Social Security of total permanent disability required the termination of the author’s status as a public official and, therefore, of his employment. The Municipal Council stated that the only way for the author to again take up a post as a public official would be to apply for a staff selection process. The Municipal Council also stated that, in its opinion, article 43 (1) of the Local Police Act, which provides for local police officers to be assigned to modified duty when their ability to perform regular duties is reduced for health reasons, can only be given effect when the employee remains in his or her post. In the case at hand, the author no longer held his post in the municipal police. Furthermore, the Municipal Council held that the possible consideration of assignment to modified duty for health reasons in accordance with article 43 (1) refers to cases of reduced ability, but not cases of total permanent disability.

2.5 On 22 November 2010, the author filed an appeal with the Administrative Court against the decision of L’Hospitalet de Llobregat Municipal Council rejecting his request to be assigned to modified duty. The author argued that the administrative decision was invalid on the grounds that it violated the right to work and vocational retraining (arts. 35 and 40 of the Constitution), the right of persons with disabilities to integration (art. 49), the right to have access to and to hold public office (art. 23) and the right to dignity (art. 10). The author cited article 43 (2) of the Local Police Act, which provides that if a person cannot remain in the same police force – performing other functions in accordance with his or her rank – owing to a lack of vacancies or for health reasons, he or she may be assigned to provide complementary services appropriate to his or her rank in another position in the same local authority. The author also cited the international standards enshrined in the Convention.

2.6 In its judgment No. 242/2012 of 17 July 2012, Barcelona Administrative Court No. 5 dismissed the author’s appeal. In its judgment, the Court referred to the approach taken by the High Court of Justice of Catalonia in a judgment which found that modified duty in a local police force was incompatible with the status of total permanent disability.

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1 The author indicates that, under the law in force in the State party, there are four degrees of permanent disability in relation to work: (i) partial permanent disability; (ii) total permanent disability for the usual occupation; (iii) absolute permanent disability for any type of work; and (iv) severe disability.

2 The author cites article 141 (1) and (3) of the consolidated text of the General Social Security Act adopted by Royal Legislative Decree No. 1/1994.
2.7 The author appealed against the judgment of the Administrative Court, arguing that the Court had failed to give the reasons for its decision and pointing out that the Convention had not been in force at the time of the cited 2005 judgment of the High Court of Justice. The author argued that the Convention was applicable to his situation and that it had changed conceptions regarding the integration of persons with disabilities, notwithstanding the fact that under previous Spanish law there had been nothing to prohibit persons with the status of total permanent disability from working. In his appeal, the author cited the obligations set forth in the Convention, in particular under article 27, and alleged discrimination.

2.8 On 9 July 2013, the High Court of Justice of Catalonia dismissed the appeal, citing a judgment handed down by the same chamber of the Court that had dealt with the case considered by the Committee in communication No. 37/2016. In its judgment, the Court pointed out that, by virtue of Act No. 7/2007, the Public Service Regulations Act, the author had lost his status as a public official and had retired upon the declaration of his status of total permanent disability. The judgment also made clear that L’Hospitalet de Llobregat Municipal Council had failed to issue regulations governing the situation of modified duty in the local police force. Regarding the Court’s findings, the author argues that article 68 of the Public Service Regulations Act provides that interested parties who have retired owing to permanent disability can be reinstated as public officials at their request when the objective cause of the retirement has disappeared. The author adds that the General Social Security System, which by virtue of Royal Decree No. 480/1993 applies to local police forces, does not provide for retirement in the event of a declaration of permanent disability.

2.9 On 16 October 2013, the author filed a petition for amparo with the Constitutional Court, claiming that the administrative decision of L’Hospitalet de Llobregat Municipal Council violated his right to work (art. 35 of the Constitution), the principle of equality (art. 14), the right to have access to and to hold public office on equal terms (art. 23 (2)), the principle of vocational retraining (art. 40), the right of persons with disabilities to integration (art. 49) and the right to dignity (art. 10). The author also claimed that the judgment of the High Court of Justice of Catalonia violated his right to effective protection (art. 24 (1)), in connection with the violation of the principles of equality (art. 14) and legality (art. 9 (2) and (3)). The author claimed that this judgment ignored all the case law he had put forward regarding the compatibility of total permanent disability status and modified duty. The author also pointed out that this judgment made no mention of the international standards cited in his appeal, such as the Convention. The author therefore requested that the decree of 16 April 2010 of L’Hospitalet de Llobregat Municipal Council and all subsequent court decisions be declared null and void.

2.10 On 18 June 2014, the Constitutional Court notified the author that the petition for amparo was inadmissible for failure to exhaust remedies, in particular the failure to file an application for annulment of proceedings. The author argues that this interpretation by the Constitutional Court is without prejudice to the fact that he has exhausted domestic remedies.

2.11 The author claims that there has been a change in the Constitutional Court’s interpretation of the obligation to exhaust all remedies by filing an application for annulment of proceedings. Procedural rules governing the administrative courts provide only for the

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4 The author explains that the special social security system for local government officials was integrated into the General Social Security System pursuant to Royal Decree No. 480/1993. He adds that article 14 (n) and (o) of the Public Service Regulations Act establishes, respectively, the right to retire in accordance with the applicable laws and the right to receive social security benefits corresponding to the applicable regime.
5 Applications for annulment of proceedings are governed by article 241 (1) of Organic Act No. 6/1985 of 1 July 1985 on the Judiciary, which states that: “Applications for annulment of proceedings shall generally not be admissible. On an exceptional basis, however, persons who have or should have had standing as parties may make an application in writing for the annulment of proceedings on the grounds of a violation of any of the fundamental rights referred to in article 53 (2) of the Constitution, provided that such violation could not have been invoked prior to the final decision in the matter, and provided that the said decision is not liable to challenge by means of ordinary or extraordinary remedies.”
review of cases at first and second instance – remedies which the author exhausted. The author points out that the application for annulment of proceedings is not a regulated remedy nor is it included in procedural rules. Organic Act No. 6/1985 on the Judiciary, which is not a procedural law, recognizes that it is a discretionary remedy. The Act stipulates that applications for annulment of proceedings are generally inadmissible and may be filed, on an exceptional basis, against proceedings that violate fundamental rights, provided that the violation could not have been invoked prior to the final decision in the matter, and provided that said decision is not liable to challenge by means of ordinary or extraordinary remedies. The author also refers to an interpretative note of the Constitutional Court of 20 December 2013 on the requirement to exhaust this remedy, which states that the purpose of requiring the exhaustion of prior judicial remedies is to preserve the subsidiary nature of the remedy of *amparo* and allow the ordinary courts to rule on the possible violation of fundamental rights. The author maintains that, in his case, in the judgments at first and second instance, the courts were able to rule on violations of fundamental rights. The author also submits that the application for annulment is not an effective remedy, because it is reviewed by the same court that handed down the judgment being challenged. The jurisprudence of different human rights treaty bodies emphasizes that it is unnecessary to exhaust discretionary and ineffective remedies. The author reiterates that, in his case, domestic law establishes the discretionary nature of the application for annulment of proceedings, and that pursuing this remedy would in fact have unnecessarily prolonged the proceedings.

**Complaint**

3.1 The author claims that the State party violated his rights under article 27 (1) (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a)–(e), article 4 (1) (a), (b) and (d), article 5 (1)–(3) and article 13 (2) of the Convention, by directly depriving him of the possibility of continuing to work under modified duty, on the grounds that his status of total permanent disability rendered him unfit for work.

3.2 The author claims that his right to work on an equal basis with others and his right not to be discriminated against on the basis of disability, under article 27 (1) (a), (b) and (i) of the Convention, were violated when he was excluded from assignment to modified duty after being declared in a situation of total permanent disability. He maintains that there is an administrative and judicial practice that prevents the continuance of employment once a declaration of permanent disability is made. The author claims that persons in a situation of permanent disability, such as himself, are not protected from discrimination, in that local authorities exclude them from assignment to modified duty by denying the existence of this right and by failing to develop regulations on modified duty as required by the Local Police Act. This discrimination also amounts to a violation of the author’s dignity, as recognized in paragraph (h) of the preamble to the Convention. The author claims that the decision of L’Hospitalet de Llobregat Municipal Council is premised on the medical model of disability, which focuses on the impairments, rather than the capabilities, of persons with disabilities. The author also claims that his right to equal conditions was violated because of the lack of relevant municipal regulations and because of the Municipal Council’s view that assignment to modified duty was only possible when the permanent disability was partial. He further claims that the Municipal Council discriminated by failing to consider either the possibility of assessing his capacity to perform other functions or the adoption of reasonable accommodation, but ruled them out owing to the declaration of total permanent disability and the loss of his status as a public official. This situation of discrimination is aggravated by the existence of similar cases in which persons with the status of total permanent disability have been assigned to modified duty. In the light of the above, the author claims a violation of his rights under article 3 (a)–(e), read in conjunction with article 27 (1) (a) and (b).

3.3 The author claims that this situation also amounts to a violation of article 4 (1) (a), (b) and (d) and (5) of the Convention. He argues that the administrative and judicial decisions handed down in his case, and L’Hospitalet de Llobregat Municipal Council’s lack of regulations on assignment to modified duty, highlight the State party’s failure to implement...
the Convention, which has been applicable in Spain since 2008, in a timely manner. The author claims that the failure of L’Hospitalet de Llobregat Municipal Council to regulate assignment to modified duty is a violation of article 4 (1) (a) and (b) of the Convention, bearing in mind that this is not the first case of discrimination against a police officer to be argued before the courts and brought to the Committee’s attention. The author claims that local police officers are being deprived of protection by local authorities’ failure to adopt regulations, the existence of regulations contrary to the Convention, and the refusal, despite the legal vacuum, to assign them to modified duty when the Local Police Act establishes no restrictions on doing so. The author claims a violation of article 4 (5) due to the lack of provisions in national and autonomous community laws that guarantee equality and non-discrimination for those who acquire disabilities so that they can remain in their posts. Although Spain is not a federal State, the author maintains that it does have a system of distribution of competences among the different autonomous communities, and that they, too, must implement the Convention. As the State party and the autonomous regional government of Catalonia have failed to ensure that this is the case, the author claims a violation of article 4 (5) of the Convention. The author also claims a violation of article 5 (1)–(3) of the Convention due to the lack of national laws recognizing and guaranteeing equality and the right to reasonable accommodation in the event of an acquired disability.

3.4 Regarding the alleged violation of article 13 (2) of the Convention, the author refers to the Committee’s jurisprudence and claims that the Spanish judiciary lacks appropriate training on the Convention. During the administrative and judicial proceedings related to his case, the authorities failed to apply the new human rights paradigm based on equality and non-discrimination against persons with disabilities, nor did they take into consideration that the Convention is directly applicable in the State party and that domestic laws must be interpreted in accordance with it.

3.5 The author claims a violation of article 27 (1) (e) and (g), read in conjunction with article 3 (a)–(e), article 4 (1) (a), (b) and (d) and article 5 (1)–(3) of the Convention, on the grounds that the State party fails to promote the employment and return to work of persons with disabilities in the public sector, since it does not permit their continued employment with different functions, but expels them from the civil service. The author also claims a violation of article 27 (1) (k), read in conjunction with article 3 (a)–(e), article 4 (1) (a), (b) and (d) and article 5 (1)–(3), on the grounds that the State party does not ensure the job retention and return to work of persons with disabilities, who are excluded by the State party’s laws and regulations and the administrative and judicial interpretation given to them.

3.6 The author requests the Committee to recognize the alleged violations of the Convention and to recommend that the State party grant him appropriate reparation and full compensation commensurate with the seriousness of the infringement of his rights, including his readmission to the municipal police of L’Hospitalet de Llobregat. The author also requests, as measures of reparation, an assessment of his capacity from the perspective of equality and non-discrimination, his subsequent assignment to modified duty, the payment of outstanding remuneration plus the corresponding legal interest and social security contributions, and full compensation that recognizes and appraises the moral harm suffered. In general terms, the author requests that the Committee recommend that the State party adapt its legislation to recognize the rights to assignment to modified duty, to accessibility and to reasonable accommodation in accordance with individuals’ abilities.

State party’s observations on admissibility

4.1 On 28 January 2019, the State party submitted its observations on the admissibility of the communication.

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8 The author highlights several judgments in which the courts have ruled out assignment to modified duty.
9 Act No. 7/2007 of 12 April 2007, the Public Service Regulations Act, and Legislative Decree No. 1/1997 of 31 October 1997 approving the consolidation in a single text of the precepts of certain legal texts in force in Catalonia on civil service matters.
4.2 The State party considers that the communication should be declared inadmissible because domestic remedies have not been exhausted in accordance with article 2 (d) of the Optional Protocol. The State party points out that the author acknowledges that he has not filed an application for annulment of proceedings in respect of the judgment of the High Court of Justice of Catalonia and that the Constitutional Court dismissed his petition for amparo on the grounds that he had not filed such an application. The State party argues that the remedy of amparo is subsidiary in the Spanish constitutional system and therefore the protection of fundamental rights is the responsibility of the ordinary courts. The purpose of the application for annulment of proceedings is to allow the court that issued the contested decision to hear the alleged violations; the remedy of amparo may be sought thereafter when the violations are attributed directly to said court.

4.3 The State party claims to have no knowledge of the “interpretative note” cited by the author or of the binding nature that he ascribes to it. The requirement to file an application for annulment of proceedings in the event of violations attributable to court decisions for which no ordinary remedy is available is clear, constant and public. This doctrine, which the Constitutional Court has applied consistently since the 2007 reform of the Organic Act on the Judiciary, is set forth in Constitutional Court Order No. 73/2015. In applying this doctrine to the present case, the Constitutional Court took the view that prior judicial remedies had not been exhausted.

4.4 The State party submits that the treaty bodies’ jurisprudence clearly indicates that the author’s doubts about the effectiveness of domestic remedies do not absolve him from exhausting them. The obligation to exhaust available domestic remedies and the requirement for authors to demonstrate that remedies are ineffective have been established by the Human Rights Committee.

Author’s comments on the State party’s observations on admissibility

5.1 On 6 November 2020, the author submitted his comments on the State party’s observations on admissibility.

5.2 The author restates his reasons for not filing an application for annulment of proceedings, including the fact that this remedy must be sought before the same court that issued the contested decision. In such cases, the effectiveness of the remedy, and the impartiality of its adjudication, are questionable. Furthermore, the application for annulment of proceedings is an “unclear” requirement which, as has been the case, may leave rights holders unprotected: if they do not file an application, the Constitutional Court may decide not to examine possible violations of fundamental rights.

5.3 The author reiterates that throughout the various judicial proceedings, he demonstrated the existence of a violation of fundamental rights. In his appeal to the Administrative Court against the decision by which L’Hospitalet de Llobregat Municipal Council rejected his request to be assigned to modified duty, the author claimed the violation of constitutionally recognized rights, citing the Convention, and invoked the invalidity of the contested administrative act. In his appeal against Administrative Court judgment No. 242/2012, the author cited the obligations contained in the Convention, especially under article 27. He alleged discrimination due to the application of differential treatment in his case and the Government’s failure to take measures to ensure his integration. The author indicates that he then filed a petition for amparo with the Constitutional Court for violation of various constitutional principles, which was not admitted because he had not filed an application for annulment of proceedings.

5.4 The author maintains that, in its Views concerning communication No. 34/2015, the Committee emphasized that only those remedies that have a reasonable prospect of success need be exhausted for the purposes of article 2 (d) of the Optional Protocol. The author

11 The State party cites J.B. and E.B. v. Australia (CCPR/C/120/D/2798/2016), para. 7.5; and J.I. v. France (CCPR/C/117/D/2154/2012), para. 6.5.
maintains that article 2 (d) of the Optional Protocol should not be an impediment to the admissibility of the communication, since he has exhausted all remedies available to him, and the application for annulment of proceedings has been shown to be unlikely to be effective. He also maintains that the State party has failed to demonstrate that filing an application for annulment of proceedings would have been an effective remedy, since it has not shown that filing such an application would have suspended the 30-day time limit for filing a petition for *amparo*. Nor does the State party specify how this remedy can be considered likely to succeed, bearing in mind that it would be brought before the same court that has already considered the matter. The author considers that, for all of the above reasons, the exception provided for under article 2 (d) of the Optional Protocol applies, since filing an application for annulment of proceedings is unlikely to bring him effective relief.

5.5 The author claims that the delay in the State party’s handling of the communication is having a negative impact on him and that he is still awaiting redress and recognition of the rights violations he experienced.

**State party’s observations on admissibility and the merits**

6.1 On 21 September 2022, the State party submitted its observations on admissibility and the merits of the communication.

6.2 The State party reiterates that the communication is inadmissible under article 2 (d) of the Optional Protocol for failure to exhaust domestic remedies. The State party submits that the author repeats the reasons given in the communication to explain why he did not avail himself of the application for annulment of proceedings. The State party considers that the author’s reasons do not account for the fact that the application for annulment of proceedings is a step prior to the petition for *amparo* and is used to contest decisions by claiming the violation of a right that could not have been complained of previously, so that it is this decision, and not previous ones, that produced the alleged violation.

6.3 Concerning the alleged violation of the right to effective judicial protection, the State party argues that the Committee, in other similar cases, considered that claims under article 13 of the Convention that had been included in petitions for *amparo* were inadmissible for failure to exhaust domestic remedies. In the present case, in the author’s petition for *amparo*, he alleged a violation of article 24 of the Constitution, equivalent to article 13 of the Convention, only in respect of the judgment of the High Court of Justice. Therefore, an application for annulment of proceedings was required.

6.4 On the merits, the State party notes that the Committee has pointed out that, while article 27 of the Convention requires States parties to ensure that “reasonable accommodation” is provided to persons with disabilities in the workplace, these are to be understood as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden.

6.5 The State party contends that, at the time of the facts presented in the communication, in 2008, the regulations in force provided for the loss of status as a public official upon retirement and award of a retirement pension due to a declaration of total permanent disability. The State party maintains that at no time did the author claim that the declaration of his status of total permanent disability was arbitrary or unlawful. The National Social Security Institute is competent to make such declarations following the issuance of a mandatory and non-binding technical opinion by the Disability Assessment Team. Classifications subsequently decided upon by the National Social Security Institute are subject to judicial review by the labour courts. The author has not been left unprotected and continues to receive the corresponding retirement pension, which is an entitlement. The State party considers that the Municipal Council did not apply the regulations in an arbitrary or discriminatory manner, and that when the administrative and judicial authorities decided upon the author’s request, the local authority had not adopted regulations on assignment to modified duty in the municipal police. The decision was issued in accordance with the regulations in force because the alternative would have been to follow an unregulated procedure without knowing which posts the local authority had set aside for modified duty. These regulations were not applied

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14 Ibid., para. 7.5.
to the author any differently from how they would have been applied to other public officials in the same situation, and therefore no violation of the right to equality and non-discrimination occurred.

6.6 In response to the allegations of a violation of article 13 (2) of the Convention, the State party maintains that the author was at all times able to challenge the administrative decision of L’Hospitalet de Llobregat Municipal Council before Barcelona Administrative Court No. 5 and subsequently before the High Court of Justice of Catalonia.

6.7 Regarding its obligations under article 4 of the Convention, the State party reports that, in July 2014, L’Hospitalet de Llobregat Municipal Council adopted a collective agreement with its employees that provided for the possibility for workers with the status of total permanent disability to continue to provide services for the Municipal Council and to be reassigned to other functions compatible with their health. However, this possibility was not applicable to the author because the declaration of his total permanent disability was issued before the adoption of the agreement.

6.8 The State party indicates that, on 27 May 2022, L’Hospitalet de Llobregat Municipal Council fulfilled its mandate under the Local Police Act to regulate the procedure for the assignment of municipal police officers to modified duty, with the publication of regulations in the Official Gazette of the Province of Barcelona. In their preamble, these regulations mention the recommendation, contained in the Convention and Royal Legislative Decree No. 1/2013 approving the General Act on the Rights and Social Inclusion of Persons with Disabilities, to effectively recognize the compatibility of work with pensions arising from any type of disability. The procedure for assignment to modified duty is set out in articles 5 to 9 of the regulations on modified duty of the L’Hospitalet de Llobregat municipal police. Article 17 governs the vacancies to be filled and their management in a situation of modified duty. The State party points out that article 20 of the regulations recognizes the compatibility of remuneration for services rendered in a modified-duty post and the receipt of financial benefits from Social Security. The State party maintains that these provisions cover the assignment to modified duty of members of L’Hospitalet de Llobregat municipal police whose situation of total permanent disability has been declared by the competent Social Security body and that, to date, the author has not applied for a modified-duty post.

6.9 The State party requests the Committee to declare the communication inadmissible and to dismiss it on the merits, considering that while the communication has been pending before the Committee, L’Hospitalet de Llobregat Municipal Council has adopted a regulation on the assignment to modified duty of members of the municipal police, and that the author can exercise his right to apply for a modified-duty post.

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

7.1 On 7 December 2022, the author submitted his comments on the State party’s observations on admissibility and the merits of the communication. The author highlights, firstly, the time taken by the State party in relation to this communication, submitted on 20 April 2017, whereas communication No. 48/2018, submitted subsequently, has now been resolved. The author claims that the State party has been prolonging these proceedings at the international level, and that the proceedings at the national level were prolonged from 2010 to 2014.

7.2 The author maintains that he cannot benefit from the new regulations on assignment to modified duty, as described by the State party, because he is no longer a public official or a member of L’Hospitalet de Llobregat local police, these being prerequisites to invoke the regulations. The author reiterates that, as the State party acknowledges, he no longer holds the status of public official because he was forced to retire as a result of the declaration of total permanent disability. The author argues that he cannot be expected to submit an application to benefit from regulations that are not applicable to his situation. He adds that the regulations are not comprehensive and neither respond to the Committee’s recommendations nor provide redress. The author underscores that there is a systemic

15 See https://bop.diba.cat/anuncio/3243542/aprovacio-definitiva-del-reglament-regulador-de-la-segona-activitat-de-la-guardia-urbana-ajuntament-de-l-hospitalet-de-llobregat.
problem in relation to persons with disabilities working as local police officers in Spain and refers to the Committee’s Views concerning communication No. 34/2015, by which it recommended the State party to harmonize the variety of regulations governing the assignment of public servants to modified duty in accordance with the Convention.  

7.3 With regard to the alleged failure to exhaust domestic remedies, the author reiterates the considerations outlined both in his communication and in the Committee’s Views concerning communication No. 34/2015, in which it is stated that he cannot be deprived of protection by a failure to consider the possible violation of his rights.

B. Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 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.

8.3 The Committee notes the State party’s argument that the communication should be found inadmissible for failure to exhaust domestic remedies, given that the author did not file an application for annulment of proceedings as a precondition for filing a petition for amparo, and that the Constitutional Court dismissed the petition for amparo on that basis. The State party has indicated that, under the legislation in force, an application for annulment of proceedings must be filed in all cases in which violations of fundamental rights claimed in the petition for amparo have not been considered previously by the ordinary courts. The Committee considers that only those remedies that have a reasonable prospect of success need be exhausted for the purposes of article 2 (d) of the Optional Protocol. In the present case, the Committee notes that the author invoked his complaints of discrimination on the basis of disability before Barcelona Administrative Court No. 5 and the High Court of Justice of Catalonia, thus exhausting ordinary remedies, and that he also filed an petition for amparo with the Constitutional Court. The Committee observes that the State party has not demonstrated how filing an application for annulment of proceedings before the High Court of Justice of Catalonia would have had any prospect of success in light of the fact that this Court had already considered the author’s claims of discrimination on the basis of disability and that, according to article 241 (1) of the Organic Act on the Judiciary, this previous consideration would have been a cause for rejection of such an application. Nor has the State party confirmed that filing an application for annulment of proceedings would have suspended the 30-day time limit for filing a petition for amparo. In the light of the above, the Committee concludes that it has not been established, in the particular circumstances of the case at hand, that an application for annulment of proceedings would have been an effective means of protecting the rights invoked before the Committee. The Committee therefore considers that the conditions established by article 2 (d) of the Optional Protocol are not an obstacle to the admissibility of the present communication.

8.4 The Committee notes, moreover, that the author brought his claims of a violation of the human rights referred to in the present communication, i.e., the rights to continuance of public employment and to equality and non-discrimination, in due time and form, before the

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16 V.F.C. v. Spain, para. 9 (b) (ii).
18 See, in this regard, European Court of Human Rights, Arrózpide Sarasola and others. v. Spain, judgment of 23 January 2019, applications No. 65101/16, No. 73789/16 and No. 73902/16, paras. 102 and 103. See also V.F.C. v. Spain, para. 7.3.
ordinary courts that reviewed his case at first and second instance, namely the Barcelona Administrative Court and the High Court of Justice of Catalonia, respectively. The Committee finds that, for the purposes of admissibility, the author has exhausted the remedies available under domestic law with regard to the fundamental rights to equality and non-discrimination and to access to public employment.

8.5 The Committee nonetheless notes that the author, in the claims filed with the ordinary courts, did not present any arguments concerning the right to effective judicial protection, and its relationship to possible violations of the right of persons with disabilities to have access to justice. It therefore finds that the author has not exhausted domestic remedies with regard to his claims under article 13 (2) of the Convention, and declares this part of the communication inadmissible under article 2 (d) of the Optional Protocol.

8.6 Accordingly, and in the absence of other obstacles to admissibility, the Committee considers that the author has sufficiently substantiated his claims under article 27 (1) (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a)–(e), article 4 (1) (a), (b) and (d) and (5) and article 5 (1)–(3) of the Convention. The Committee therefore declares this part of the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

9.1 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.

9.2 The Committee notes that the main issue before it is whether the State party has violated the author’s rights under the Convention by denying his request to be assigned the special administrative status of modified duty. It takes note of the author’s claim that, owing to the absence of municipal regulations governing the situation of modified duty at the time of the facts, the authorities’ interpretation of the Local Police Act (arts. 43 and 44) and the Public Service Regulations Act (art. 67) led them to consider that the situation of retirement as a result of total permanent disability was incompatible with assignment to modified duty.

9.3 The Committee takes note of the author’s arguments in relation to articles 5 and 27 of the Convention, namely, that he has been directly discriminated against on the grounds of disability with respect to the retention of his job as a local police officer, as he was forced to retire as a result of a declaration of total permanent disability. This declaration prevented him from requesting assignment to modified duty because of the failure of L’Hospitalet de Llobregat Municipal Council to implement local regulations in accordance with the Local Police Act. The author maintains that this declaration or administrative classification of his disability, issued by the National Social Security Institute, did not take account of his ability to perform modified duties or other complementary activities, as provided for in article 43 of the Local Police Act, according to which a specific “medical report” must be sought in order to assess the ability of the person concerned to carry out alternative duties. The author also highlights the existence of other autonomous community legislation expressly providing that a declaration of total permanent disability is compatible with assignment to modified duty;19 the regulations of the autonomous regional government of Catalonia governing the assignment to modified duty of members of the fire brigade, which also provide for such compatibility;20 and administrative decisions of the National Social Security Institute and court judgments declaring that receipt of a pension arising from total permanent disability and assignment to modified duty are compatible.21 On the other hand, the Committee takes note of the State party’s arguments that, at the time of the facts of the communication, in 2008, the regulations in force provided for the loss of civil servant status upon retirement and award of a retirement pension due to a declaration of total permanent disability. The State party also maintains that these regulations have been applied systematically and on an equal basis to the author and to all other persons who have been placed in the administrative category of total permanent disability. The Committee also takes note of the State party’s

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19 Act No. 6/1999 of 19 April 1999 on Local Police and Coordination of Local Police of the Valencian Community.
arguments that the regulations on modified duty of the L’Hospitalet de Llobregat municipal police, published on 27 May 2022, provide for the assignment to modified duty of members of the municipal police who have been declared in a situation of permanent disability, and that under these regulations the author can exercise his right to apply for a modified-duty post.

9.4 The Committee recalls that, under article 4 (1) (a) of the Convention, States parties have a general obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention, including those related to work and employment. 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 its general comment No. 6 (2018) on equality and non-discrimination, 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 to 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.

9.5 The Committee recalls that the Convention prohibits all forms of discrimination against persons with disabilities, including the denial of reasonable accommodation. This means that 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, that is, 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. 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.

22 General comment No. 6 (2018), para. 67.
23 Ibid., para. 24 (b). See also V.F.C. v. Spain, para. 8.5; J.M. v. Spain, para. 9.5; and M.R. i V. v. Spain (CRPD/C/26/D/48/2018), para. 7.5.
24 General comment No. 6 (2018), paras. 26 (a) and 67 (h).
within an organizational structure, must be taken into consideration. The Committee notes that, in the present case, the possibility of holding a dialogue for the purpose of evaluating and building the author’s capacities within the police force was completely ruled out because he was deprived of his status as a public official upon mandatory retirement, and that he had no opportunity whatsoever to request reasonable accommodation that would have enabled him to perform modified duties. The Committee also notes that the State party has not provided any information to indicate that other types of duties that the author might have been able to perform were not available within the police force in which he was employed.

9.7 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. 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.

9.8 In the present case, the Committee notes that the possibility of evaluating the barriers to the author’s retention within the police force was ruled out because he was deprived of his status as a public official upon mandatory retirement and that he had no opportunity to request reasonable accommodation that would have enabled him to perform modified duties. The Committee also notes that the State party has failed to demonstrate that other types of duties that the author might have been able to perform did not exist within the police force in which he served.

9.9 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 observes that, under article 43 of the Local Police Act, all persons with “reduced ability” are allowed to undertake modified duty assignments. The Committee notes that, by failing to enact local regulations, as it was required to do under the Local Police Act, and by applying the Public Service Regulations Act instead of modified-duty regulations, L’Hospitalet de Llobregat Municipal Council prevented the author from being assigned to modified duty. The Committee welcomes the introduction by L’Hospitalet de Llobregat Municipal Council of modified-duty regulations for members of the municipal police. However, it notes that these regulations, adopted on 27 May 2022, are applicable only to active members of L’Hospitalet de Llobregat municipal police and do not apply retroactively, and that therefore they would not seem to apply to the author, who is retired. In addition, the Committee observes that, in the author’s case, the administrative disability ratings determined by the National Social Security Institute did not include an analysis of the author’s potential to carry out modified duties or other complementary activities. Moreover, the Committee notes that articles 43 and 44 of the Local Police Act require the preparation of a special medical report on the alternative capacities of persons whose abilities are reduced, which was not done in the author’s case. The Committee observes that the author’s ability to perform the usual duties of police work has been reduced, but this has no bearing on his potential ability to perform modified duties or other complementary activities within the same police force.

9.10 In the present case, the Committee finds that, because of the failure to enact local modified-duty regulations, the author’s rights under the Convention have not been safeguarded, especially the possibility of having his particular disability evaluated with a view to building any capacities he may have to perform modified duties or other complementary activities. The Committee notes that the absence of local regulations renders

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25 Ibid., para. 26 (e).
26 Article 2.1 of the regulations on modified duty of L’Hospitalet de Llobregat municipal police, 27 May 2022.
all those with the status of total permanent disability ineligible for assignment to modified
duty, which in turn undermines the right to work, as occurred in the author’s case.

9.11 The Committee therefore finds that the rules under which the author was prevented
from undertaking modified duties or entering into a dialogue aimed at enabling him to carry
out activities complementary to the usual tasks of police work contravene the rights enshrined
in articles 5 and 27 of the Convention. The author was discriminated against with respect to
the continuance of his public employment, in violation of article 5, which protects the right
of persons with disabilities to equality and non-discrimination, and article 27, which protects
their right to work and employment. 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 regard to article 27 of the Convention, the
Committee finds that the present case discloses discrimination in relation to continuance of
employment, stemming from the denial of any dialogue or opportunity for an assessment of
fitness for alternative duties for persons who, like the author, have total permanent disability
status. The Committee further holds that, although the State party’s institutional rules
governing the assignment of its employees or officials to modified duty pursue a legitimate
aim, the law that was applied to the author in the absence of modified-duty regulations
governing L’Hospitalet de Llobregat municipal police resulted in a violation of his rights
under articles 5 and 27 of the Convention.

9.12 The Committee further notes that the State party has a wide variety of regulations in
the different autonomous communities and even within the same municipality and that this
variety of approaches to similar situations gives rise to discrimination on the grounds of
disability. The Committee is of the view, therefore, that the State party must comply with its
general obligations, under article 4 of the Convention, to modify and harmonize all local,
autonomous community and national provisions that bar individuals from being assigned to
modified duty without providing for an assessment of the challenges and opportunities that
persons with disabilities may have, and that thereby violate the right to work.27

9.13 Accordingly, the Committee finds that the author’s mandatory retirement as a result
of a traffic accident that left him with a permanent disability constituted a violation of article
27 (1) (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a)–(e), article
4 (1) (a), (b) and (d) and (5) and article 5 (1)–(3) of the Convention.

C. Conclusions and recommendations

10. 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), (e), (g), (i) and (k),
read alone and in conjunction with article 3 (a)–(e), article 4 (1) (a), (b) and (d) and (5) and
article 5 (1)–(3) 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:

(i) To afford him the right to compensation for any legal costs incurred in filing
the present communication;

(ii) To take appropriate measures to ensure that the author is given the opportunity
to undergo an assessment of fitness for alternative duties for the purpose of 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:

(i) Taking all necessary measures to align the modified-duty regulations of
L’Hospitalet de Llobregat municipal police and their application with the principles
enshrined in the Convention and the recommendations contained in the present Views,

ensuring that assignment to modified duty is not restricted only to officials of the municipal police;

(ii) Harmonizing the variety of local and regional regulations governing the assignment of public officials to modified duty in accordance with the principles enshrined in the Convention and the recommendations contained in the present Views.

11. 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, to have them translated into the official languages of the State party and to circulate them widely, in accessible formats, in order to reach all sectors of the population.