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Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Communication No. 55/2013

Decision on admissibility adopted by the Committee at its sixty-second session (26 October-20 November 2015)

Submitted by:	C.D. (represented by the Howard League for Penal Reform)
Alleged victim:	The author
State party:	United Kingdom of Great Britain and Northern Ireland
Date of communication:	13 March 2013
References:	Transmitted to the State party on 2 July 2013 (not issued in document form)
Date of adoption of decision:	2 November 2015

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Annex

Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (sixty-second session)

concerning

Communication No. 55/2013*

Submitted by:	C.D. (represented by the Howard League for Penal Reform)
Alleged victim:	The author
State party:	United Kingdom of Great Britain and Northern Ireland
Date of communication:	13 March 2013

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 2 November 2015,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is C.D., a British national born in 1993. She claims to be the victim of a violation by the United Kingdom of Great Britain and Northern Ireland of her rights under articles 2 (d) and (g) and 15 (1) of the Convention on the Elimination of All Forms of Discrimination against Women. She is represented by the Howard League for Penal Reform, a United Kingdom-based charitable organization working on penal reform. The United Kingdom ratified the Convention on 7 April 1986 and acceded to the Optional Protocol thereto on 17 December 2004.

1.2 On 4 December 2013, at the State party's request, the Working Group on Communications under the Optional Protocol, acting on behalf of the Committee, decided, pursuant to rule 66 of the Committee's rules of procedure, to examine the admissibility of the communication separately from the merits.

* The following members of the Committee participated in the adoption of the present communication: Ayse Feride Acar, Gladys Acosta Vargas, Bakhita Al-Dosari, Nicole Ameline, Magalys Arocha Domínguez, Barbara Evelyn Bailey, Niklas Bruun, Louiza Chalal, Náela Mohamed Gabr, Hilary Gbedemah, Nahla Haidar, Ruth Halperin-Kaddari, Yoko Hayashi, Lilian Hofmeister, Ismat Jahan, Dalia Leinarte, Lia Nadaraia, Theodora Nwankwo, Pramila Patten, Silvia Pimentel, Biancamaria Pomeranzi, Patricia Schulz, and Xiaoqiao Zou.

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Facts as submitted by the author

2.1 The author had a difficult upbringing and was placed in foster care at 12 years of age and later in a children's home. On 6 September 2007, at 14 years of age, she committed a robbery offence, to which she pleaded guilty and for which she was sentenced on 9 May 2008 at Leeds Crown Court. She was placed on a two-year supervision order, under which she was required to attend meetings with a youth offending team and to refrain from committing any further offences.

2.2 The author breached the supervision order and was convicted at Leeds Crown Court of theft on 19 November 2008 and of three assault offences and two criminal damage offences on 8 April 2009. The supervision order was nevertheless allowed to continue.

2.3 In September 2009, the author was placed in semi-independent accommodation. According to youth offending team reports of December 2009 and March 2010, she had "settled reasonably well" and "was demonstrating some motivation to change by attending college once a week and keeping her youth offending team appointments". In December 2009, she became pregnant and was attending a mother-to-be course.

2.4 In September 2009, the author breached the supervision order by failing to attend two youth offending team appointments, and in December 2009, breached it again by failing to attend a third appointment. On 8 February 2010, when she was brought before Leeds Crown Court, the judge adjourned the hearing and ordered the author to attend five more appointments. She did not do so and later explained that the male officer on the team had "behaved inappropriately towards her" and made her feel uncomfortable, although she did not provide that explanation at the resumed hearing on account of the presence of the officer in question.

2.5 On 22 March 2010, the hearing resumed and the author was sentenced to a six-month detention and training order for breaching the supervision order and was placed in a child detention centre. The judge considered that she had repeatedly failed to comply with the supervision order, which had been ineffective, and that "he had no alternative but to revoke the order and send [her] immediately to custody", which would be the minimum commensurate with the gravity of the offence of robbery and bearing in mind her troubled background, her pregnancy and her age.

2.6 The author appealed against the decision to the Court of Appeal, arguing that the sentence imposed was manifestly excessive, that the judge had failed to properly consider the child welfare principle, in particular given her vulnerability as a child in care, pregnant and with a history of self-harm and suicide attempts, and that the prison sentence should have been imposed only as a measure of last resort and for the shortest appropriate duration, namely four months. Although it was not a ground of appeal, in her written statement to the Court, the author described the stressful period that she had spent in custody, in particular as the only pregnant child, for which she had been bullied verbally and physically by other inmates, and with regard to losing her semi-independent accommodation and not being able to attend prenatal classes.

2.7 On 25 May 2010, the Court of Appeal dismissed the appeal and upheld the sentence, stating that the judge had done "all that could realistically have been expected of him, and that his final reluctant decision to pass a custodial sentence

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[could] not be properly criticized". As to the duration of the custodial sentence, the Court considered that the "judge had a number of factors to balance and … it [could] not be said that he was wrong to conclude that a six-month term was appropriate for her and for society". The Court also considered the author's subsequent progress in her behaviour and education and her pregnancy, but determined that, "balancing these various considerations, they [were] not persuaded that this [was] one of those exceptional cases where [the Court] should intervene with the completion of the order made by the judge".

2.8 The author argues that she has exhausted domestic remedies, noting that for a criminal case to be reviewed by the Supreme Court there must be a reference by the Court of Appeal to the effect that a point of law of general public importance is involved, which should be considered by the Supreme Court.[1]

2.9 The author applied to the European Court of Human Rights, arguing that the sentence was a violation of her right to a family and private life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). On 31 October 2012, the Court declared her application inadmissible, without providing any reasons. The author claims that her application to the Court does not constitute an "examination" under article 4 (2) (a) of the Optional Protocol given that it was declared to be inadmissible without reasons being given. She adds that in her complaint to the Court she did not raise the issue of discrimination, which is being raised before the Committee, although she advanced two grounds, namely her pregnancy and her sentence to detention for a significant proportion of her pregnancy contrary to her best interests and, second, her distressing experience during custody and the degrading treatment meted out to her. She also invoked the international standards enshrined in the Convention on the Rights of the Child.

Complaint

3.1 The author alleges that, in the circumstances of her case, the availability of a custodial sentence represents a national penal provision that constitutes discrimination against women. She cites the *Corston Report*[2] and rules 64 and 65 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),[3] and submits that the potential repercussions of imposing custodial sentences on pregnant minors are exceptionally grave, such that it is wholly disproportionate to impose a custodial sentence for a breach of a pre-existing community penalty. The sense of isolation that can develop (as it did in her case) while institutionalized has a far greater impact on a young woman who is pregnant, as she is unable to develop key supportive relationships. The inability to share key events, communicate or prepare for her child in a practical sense can have significant negative repercussions for both mother and child, as well as the wider community. The author further contends that it is not

[1] The author cites section 13 of the Criminal Appeal Act (1995).

[2] Jean Corston, *The Corston Report* (United Kingdom Home Office, 2007). This is a report in which the situation faced by women with particular vulnerabilities in the criminal justice system in the United Kingdom was reviewed.

[3] Rule 64: "Non-custodial sentences for pregnant women … shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger". Rule 65: "Institutionalization of children in conflict with the law shall be avoided to the maximum extent possible. The gender-based vulnerability of juvenile female offenders shall be taken into account in decision-making."

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possible for a pregnant woman in prison to choose not to go through degrading processes such as those she experienced when she was handcuffed for medical appointments and strip-searched upon return; that such processes were imposed because she was pregnant; and that, because the exceptionally grave repercussions could never apply to males, the availability of a custodial sentence in such circumstances was a penal provision that constituted discrimination against women, in contravention of article 2 (g) of the Convention.

3.2 The author further claims that the imposition of a custodial sentence in her circumstances violated her rights under article 15 (1) of the Convention. Again citing the *Corston Report*, she contends that the disproportionately detrimental effects for women of the penal provisions as compared with the effects for men demonstrate that women are not accorded substantive equality before the law in the State party.

State party's observations on admissibility

4.1 On 23 September 2013, the State party submitted its observations on the admissibility of the communication and requested the Committee to examine the issue of admissibility separately from the merits.

4.2 The State party contended that the communication was inadmissible under article 4 (1) of the Optional Protocol because the author had failed to exhaust domestic remedies. It noted that the substance of the discrimination complaint raised before the Committee should have been raised before the national courts. It cited the jurisprudence of the Committee to the effect that "the substance of their complaints that were subsequently brought before the Committee should first be made to an appropriate domestic body. Otherwise the motivation behind the provision would be lost. The domestic remedies rule was designed so that States parties have an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems before the Committee addresses the same issues."[4] It noted that the author's claims before the Committee under articles 2 (g) and 15 (1) turned on assertions of discriminatory treatment, which had never been raised before the Court of Appeal or the European Court of Human Rights, even though such a claim had been available to her. Under the Human Rights Act, the author could have invoked article 14 (prohibition of discrimination) of the European Convention on Human Rights. She instead invoked alleged breaches of her rights under articles 8 and 53 thereof.

4.3 The State party also contended that the communication was inadmissible because the same matter had already been examined by the European Court of Human Rights. It noted that the procedure before the Court clearly involved an examination of the complaint and therefore fell within the scope of article 4 (2) (a) of the Optional Protocol. The State party noted that the author had submitted no authority in support of her contention that the lack of reasons provided by the Court negated the "examination" status of the procedure and that her assertion was flawed

[4] The State party cites, in this connection, the jurisprudence of the Human Rights Committee, European Court of Human Rights case law and the Committee's views and decisions in communications No. 5/2005, *Goekce v. Austria*, views adopted on 6 August 2007; No. 10/2005, *N.F.S. v. the United Kingdom of Great Britain and Northern Ireland*, decision of inadmissibility adopted on 30 May 2007; and No. 8/2005, *Kayhan v. Turkey*, decision of inadmissibility adopted on 27 January 2006.

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inasmuch as, where the procedure, as in the present case, was of a judicial nature, the mere absence of reasons could not exclude it from the scope of article 4 (2) (a).

4.4 Lastly, the State party submitted that the communication was manifestly ill founded and therefore inadmissible pursuant to article 4 (2) (c) of the Optional Protocol. In her claim to the Court of Appeal and the European Court of Human Rights, the author did not challenge the lawfulness of any statutory provisions. She accepted that the detention order was lawful but contended that her detention as a pregnant child was not necessary or proportionate and that her sentence should have been for the briefest possible period. The State party suggested that what the author was challenging before the Committee was in fact the application of the statutory regime (the availability of a custodial sentence) to her case, thereby merely challenging the discretionary decision of the sentencing judge. The challenge to the exercise of judicial discretion thus fell outside the scope of article 2 (g), which deals specifically with national penal provisions.

Author's comments on the State party's observations

5.1 On 18 November 2013 and 4 February 2014, the author challenged the State party's observations on the admissibility of the communication. She argues that the substance of her claims, namely her condition as a pregnant minor, which made her particularly vulnerable to, and disproportionately affected by, the custodial sentence, was raised before the Court of Appeal. Her experience of discrimination in custody was also put squarely before the Court. Implicit in this factual and legal nexus is the contention that she was subjected to discriminatory treatment. The author notes that, while article 14 of the European Convention on Human Rights was not formally a ground of appeal, it was clear that the issue of discrimination was before the Court. In such circumstances, and given the context of seeking to protect human rights, she submits that the exhaustion rule should be applied with some degree of flexibility and without excessive formality.[5]

5.2 As to the use of international procedures, the author reiterates that the complaint submitted to the European Court of Human Rights could not be said to have been examined because it was not the same matter inasmuch as discrimination had not been explicitly raised before the Court and because the Court provided no reasons for its decision.

5.3 The author also disputes the State party's contention that the communication is ill founded. She argues that the statutory provisions that allow the imposition of a custodial sentence in circumstances such as hers constitute discrimination against women contrary to article 2 (g) of the Convention, and that the State party's failure to take positive action to eliminate the gender discrimination inherent in its criminal justice system and to recognize the need to make adjustments to ensure substantive equality before the law constitutes a failure to accord women equality with men before the law, in contravention of article 15 (1) of the Convention.

[5] The author cites the Court's case law to support her statement, for example in the cases of *Ringeisen v. Austria* (application No. 2614/65), *Lehtinen v. Finland* (application No. 39076/97), *Cardot v. France* (application No. 11069/84) and *Kozacioglu v. Turkey* (application No. 2334/03).

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State party's additional observations

6.1 On 28 February 2014, the State party reiterated that the issue of sex discrimination had at no time been raised before the national courts and that those courts had therefore not had the opportunity to assess or remedy the alleged violation. The State party argues that the case law of the European Court of Human Rights invoked by the author to suggest that the rule of exhaustion is neither absolute nor automatically applicable is irrelevant in her case and relates to exceptional circumstances where, for example, there are no effective remedies in national courts or where there is some relevant legal or political context.

6.2 The State party notes that, to comply with the rule on exhaustion of domestic remedies, it is sufficient for the complaint to be raised in substance and challenges the author's contention that the substance can be considered to have been raised where a complainant simply relies on the same facts before the national courts and the Committee. The State party argues, on the contrary, that the complainant must have made the substance of the complaint in both fact and law to the national authorities.

6.3 Lastly, the State party notes that neither of the author's arguments — that the statutory provisions pursuant to which a custodial sentence was imposed on her were inherently discriminatory against women and that the United Kingdom failed to ensure substantive equality before the law by failing to take positive action to eliminate discrimination inherent in its criminal justice system — were ever raised before the national courts.

Issues and proceedings before the Committee concerning admissibility

7.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

7.2 The Committee recalls that, under article 4 (1) of the Optional Protocol, it is precluded from considering a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

7.3 The Committee takes note of the State party's contention that domestic remedies were not exhausted in the present case because the author at no time presented her claims based on sex discrimination before the national courts, which she could have done under the Human Rights Act, and that therefore those courts had no opportunity to assess or remedy the alleged violations of the Convention as invoked by the author before the Committee. The author has contended that the issue of discrimination was implicit in her arguments and in the facts presented to the Court of Appeal, even though at no time did she invoke her discrimination claim as a ground of appeal. The Committee recalls that, in line with its established jurisprudence, authors of communications are required to raise in substance before the national courts the alleged violation of the provisions of the Convention, thereby enabling a State party to remedy an alleged violation before the same issue is raised

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before the Committee.[6] By "substance", the Committee understands that the alleged violation or violations should be invoked in the claims before national courts and not appear merely in the facts of the case.

7.4 In the present case, the Committee notes that, under the national law in force, the author could have put forward arguments that directly raised the issue of discrimination on the ground of sex before the Court of Appeal. The Committee also notes that at no time was a claim of sex discrimination made by the author before the Court and that her grounds of appeal were based solely on the sentence, which she claimed was manifestly excessive in view of her age at the time of the offence and the failure of the judge to properly consider the child welfare principle, especially in the light of her vulnerability as a pregnant child with a history of self-harm and a suicide attempt. In that regard, the Committee is of the view that the author's mere reference to her pregnancy does not constitute, implicitly or explicitly, a claim of discrimination on the ground of sex. The Committee further notes that the author has not supported her argument that the remedies available would have been ineffective to address such claims on the grounds of discrimination. In the circumstances, the Committee concludes that, for the purposes of admissibility, the author has not exhausted domestic remedies and that the communication is therefore inadmissible under article 4 (1) of the Optional Protocol.

7.5 In the light of its conclusion, the Committee decides not to examine any of the other inadmissibility grounds raised by the State party.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 4 (1) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

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[6] See, among others, the Committee's decisions in communications No. 11/2006, *R. Salgado v. the United Kingdom of Great Britain and Northern Ireland*, decision of inadmissibility adopted on 22 January 2007, para. 8.5; No. 8/2005, *Kayhan v. Turkey* (see footnote 4), para. 7.7; and No. 10/2005, *N.F.S. v. the United Kingdom of Great Britain and Northern Ireland* (see footnote 4), para. 7.3.

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