



Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Decision adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 42/2017*, **

<i>Communication submitted by:</i>	T.M. (represented by G.S.)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Greece
<i>Date of communication:</i>	21 March 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 29 June 2017 (not issued in document form)
<i>Date of adoption of decision:</i>	2 April 2019
<i>Subject matter:</i>	Social security benefits
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom from exploitation, violence and abuse; protection of the integrity of the person; respect for privacy; right to health services; right to habilitation and rehabilitation services; adequate standard of living and social protection
<i>Articles of the Covenant:</i>	1, 3, 16, 17, 22, 25, 26 and 28
<i>Article of the Optional Protocol:</i>	2 (d)

1.1 The author of the communication is T.M., a national of Greece, born in 1973. She claims to be a victim of a violation by the State party of her rights under articles 1, 3, 16, 17, 22, 25, 26 and 28 of the Convention. The author is represented by her husband, G.S. The Optional Protocol entered into force for the State party on 30 June 2012.

1.2 On 30 November 2017, pursuant to rule 70 (8) of the Committee's rules of procedure, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

* Adopted by the Committee at its twenty-first session (11 March–5 April 2019).

** The following members of the Committee participated in the examination of the communication: Martin Mwesigwa Babu, Danlami Umaru Basharu, Monthian Buntan, Imed Eddine Chaker, Mara Cristina Gabrielli, Amalia Eva Gamio Ríos, Jun Ishikawa, Samuel Njuguna Kabue, Rosemary Kayess, László Gábor Lovász, Robert George Martin, Gertrude Oforiwa Fefoame, Dmitry Rebrov, Jonas Ruskus, Markus Schefer and Risnawati Utami.

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

Facts as submitted by the author

2.1 The author was diagnosed with Asperger syndrome in January 2016. She identifies with the main traits of autism, such as difficulty in social interactions, non-standard ways of learning, keen interest in specific subjects, inclination to routines and challenges in typical communications. She is a graduate of a Greek polytechnic university and holds a Bachelor of Arts degree in Fine Arts. In 2004, she was hired as a scientist in the Greek forestry service, but she resigned from her job in 2007 as she was experiencing difficulties in her communication and cooperation with the administration of the service. After having resigned from her job, she worked as an artist.

2.2 On 13 May 2016, after having been diagnosed with Asperger syndrome in January 2016, the author applied for disability certification at the Disability Certification Centre (KEPA). KEPA operates within the structures of the social security system and it is overseen by the Ministry of Labour, Social Insurance and Social Solidarity. Its duties include: (a) determining disability percentage following a disability pension request; (b) characterizing and recognizing individuals as having disabilities; and (c) determining a disability percentage wherever a disability assessment is required within the State party's welfare system. In order to receive social benefits, a person with a disability needs to have acquired KEPA certification with a disability rate of at least a 67 per cent. Under Greek law, Asperger syndrome is listed as an irreversible, lifelong disability with a disability rate of 67 to 80 per cent.

2.3 The author was interviewed by the KEPA first-degree Health Committee on 22 July 2016 and 22 August 2016. The author claims that the first-degree Health Committee distorted her diagnosis and diagnosed her as having a severe borderline personality disorder with a disability rate of 50 per cent, without making any reference to the medical diagnosis of Asperger syndrome established in January 2016 by her doctor.

2.4 The author claims that she does not have recourse to available and effective remedies in the State party. She submitted to the KEPA second-degree Health Committee a written objection to the findings of the first-degree Health Committee of 22 August 2016, but alleges that she has received no response from the second-degree Health Committee. Without a decision on her objection from the second-degree Health Committee, she is unable to appeal the decision of the first-degree Health Committee to the first-instance Administrative Court. She further claims that the second-degree Health Committee is bound to decide cases on the basis of the decision of the first-degree Health Committee, meaning that the second-degree Health Committee was unable to rectify the error made in her case: it could not provide her with a correct certification, but could decide on the disability rate only. The author therefore also requested the Special Scientific Committee to intervene and for her case to be referred for a "sample case audit". She also requested the Administration Board to discuss her case and she submitted a complaint to the supervising director and the Citizens' Advocate. She did not receive a response from any of the authorities that she contacted. The author also submitted a complaint to the public prosecutor against the members of the first-degree Health Committee on 4 October 2016. However, the case has not yet been assigned to a prosecutor, which the author has been informed may not happen for up to eight months. She further states that, according to current statistics, an inquiry into her complaint may last between two and six years, or even more. She also submits that even if she could appeal to the Administrative Court, which she currently cannot, this process would be unduly prolonged as, according to current statistics, it takes an average of seven years for the Administrative Court to decide on a case.

Complaint

3.1 The author claims that the fact that the first-degree Health Committee noted on her disability certification that she had been diagnosed with a borderline personality disorder, rather than Asperger syndrome, amounted to a violation of her rights under articles 1 and 3 of the Convention, as it excluded her from equal and full participation in society. She further argues that by incorrectly indicating her diagnosis on the certificate, the State party

violated her rights under article 16 (1), (4) and (5) of the Convention, as no measures have been taken to correct the incorrect diagnosis that she was given during the certification process. She considers that, as a result, she has suffered psychological harm.

3.2 As concerns her claims under article 17 of the Convention, the author alleges that the actions of the State party authorities constituted a severe offence to her personality and integrity.

3.3 The author further claims a violation of her rights under article 22 of the Convention, as the State party violated her right to privacy concerning health information contained in her medical files. In this connection, she submits that the KEPA medical files database is interlinked with the State party's tax revenue service, meaning that thousands of public servants outside KEPA can access the diagnosis of a person certified under the KEPA system.

3.4 The author also considers that the State party has violated her rights under article 25 (b) and (d) of the Convention, as she was misdiagnosed under the KEPA system. She also claims a violation of her rights under article 26 (1) and (2) of the Convention insofar as the State party authorities have been indifferent in terms of recognizing her as a person with a disability and enabling her to attain and maintain full social and vocational ability and full inclusion and participation in all aspects of society.

3.5 The author claims that by denying her certification as an autistic person, the State party prevented her from having access to social security in violation of her rights under article 28 (1) and (2) of the Convention, which caused a deterioration in her standard of living. She claims that the KEPA system is being used politically to mislead and delay and to exclude a great number of persons with disabilities from having access to social benefits, by denying them the certification that enables them to do so, in order to limit the costs of the social welfare system.

3.6 Lastly, the author claims a violation of her rights under article 30 (2) of the Convention. She notes that she is a talented artist and was admitted to a school of fine arts, which was a State university. However, because of her difference, she has been subjected to discrimination and she was obliged to leave the school because of the difficulties she has had with the teachers at the school.

State party's observations on admissibility

4.1 In its observations dated 6 September 2017, the State party submits that the communication should be found to be inadmissible under article 2 (d) of the Optional Protocol due to non-exhaustion of domestic remedies.

4.2 The State party notes that the KEPA centres were established in order to ensure uniform health assessment in terms of degree of disability of persons insured under different insurance bodies. The KEPA first- and second-degree Health Committees are composed of certified doctors, who are specially trained and evaluated. In their assessment of an applicant, the Health Committees are required to take into account the medical data in the applicant's file, as well as the applicant's clinical situation. If an applicant disagrees with the assessment of the first-degree Health Committee, an appeal can be lodged with the second-degree Health Committee, which can either uphold or amend the decision of the first-degree Health Committee. If the applicant disagrees with the decision of the second-degree Health Committee, an appeal can be lodged with the administrative courts under the Code of Administrative Procedure.

4.3 The State party notes that the author filed an application for the certification of her disability on 13 May 2016. She was examined by the first-degree Health Committee of specialized psychiatrists and was diagnosed with "severe personality disorder, with behavioural disorders and very limited functionality", with an overall disability rate of 50 per cent, for a fixed period of one year (13 May 2016 to 31 May 2017). The author lodged an appeal against this decision with the second-degree Health Committee, disagreeing with the assessment of her disability rate. The author was invited twice, on 7 October and 1 December 2016, to attend a scheduled meeting before the second-degree Health Committee. She informed the second-degree Health Committee, in writing, that she would

not attend the meetings. She was invited a third time to a meeting, on 9 February 2017, and she appeared before the second-degree Health Committee; however, she did not comply with the procedure for confirming her presence and identity and she left the meeting, refusing to be examined. Her health assessment was therefore finalized as it had not been possible to re-examine the author.

4.4 The State party further notes that the medical assessment of the first-degree Health Committee expired on 31 May 2017, but that the author has not filed an application to KEPA for a new health assessment certification. Instead, the author and her husband filed lawsuits against the members of the first-degree Health Committee before the Public Prosecutor of the Athens Administrative Court of First Instance, which are currently pending.

4.5 The State party argues that the author has failed to comply with administrative procedures, by not allowing the examination of her case before the second-degree Health Committee to take place and by failing to contest any potential negative decision before the administrative courts. The State party further notes that the author has not submitted any request to any administrative body for any applicable disability benefit. It also notes that her complaint against the members of the first-degree Health Committee for breach of duty will not result in the restoration of her rights relating to her diagnosed disability, and thus cannot lead to the conclusion that the admissibility requirement has been fulfilled. As concerns the author's claim that any administrative proceedings would be unduly prolonged, the State party argues that her claims in this regard are general and vague and that mere subjective doubts about the effectiveness of domestic remedies does not absolve the author of the duty to exhaust them.

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

5.1 On 18 October 2017, the author submitted her comments on the State party's observations on admissibility. She maintains that the communication is admissible. The author expresses disagreement with the State party's description of the KEPA system. She further submits that she did not appeal the decision of the first-degree Health Committee because she disagreed with the assessed disability rate, but because it had issued an incorrect diagnosis.

5.2 As concerns the request that she should appear before the second-degree Health Committee, the author feared that this was a trap and that it would simply reaffirm the incorrect diagnosis. She refers to a decision by the Council of State in 2017, and notes that this case, which concerned disability benefits, was initiated in 2003 but finalized only in 2017. She further states that she filed a lawsuit against KEPA for "insult of personality" before the Athens Administrative Court of First Instance on 15 May 2017, claiming that she had been subjected to psychological violence, abuse and bullying by State officials. She notes that she expects the case to be decided by the Court in five to seven years' time.

B. Committee's 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 nor has it been and 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 found inadmissible under article 2 (d) of the Optional Protocol on the grounds of non-exhaustion of domestic remedies, as the author failed to comply with applicable administrative procedures by not allowing the examination of her case by the second-degree Health Committee, and as she did not contest any potential negative decision before the administrative courts. The Committee notes the author's claims that no domestic

remedies were available and effective in her case. It further notes the author's claim that she feared appearing before the second-degree Health Committee as she considered that it would simply reaffirm the incorrect diagnosis of the first-degree Health Committee.

6.4 The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no reasonable prospect of success, authors of communications must exercise due diligence in the pursuit of available remedies, and it notes that mere doubts or assumptions about the effectiveness of domestic remedies do not absolve the authors from the obligation to exhaust them.¹ In the present case, the Committee considers that by failing to comply with the administrative procedures related to her complaint before the second-degree Health Committee and by failing to appeal any negative findings before the administrative courts, the author failed to exhaust available domestic remedies.

6.5 The Committee further notes the author's submission that any potential appeal before the administrative courts would be unduly prolonged. It also notes the State party's argument that the author's claims in this regard are general, vague and mere assumptions. The Committee notes the author's argument that, according to current statistics, it would take an average of seven years for the Administrative Court to decide on a case. However, the Committee considers that as the author has not initiated any appeal of the decisions of the Health Committees before the competent administrative courts, it is not in a position to reach any conclusions as to the alleged duration of the proceedings of reference. The Committee therefore considers that the communication is inadmissible pursuant to article 2 (d) of the Optional Protocol.

C. Conclusion

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 (d) of the Optional Protocol;
- (b) That the present decision shall be communicated to the State party and to the author.

¹ *D.L. v. Sweden* (CRPD/C/17/D/31/2015), para. 7.3, and *E.O.J. et al. v. Sweden* (CRPD/C/18/D/28/2015), para. 10.6. See also *V.S. v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3, *García Perea and García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2, and *Zsolt Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3.