



Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 34/2015*

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<i>Communication submitted by:</i>	V.F.C. (represented by the Spanish Committee of Representatives of Persons with Disabilities and the Association for the Workplace Integration of Local Police Officers with Disabilities)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	16 October 2015 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 70 decision, transmitted to the State party on 2 November 2015
<i>Date of adoption of Views:</i>	2 April 2019
<i>Subject matter:</i>	Right to non-discrimination in the maintenance or continuance of employment (assignment to modified duty)
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims
<i>Substantive issues:</i>	General obligations under the Convention; equality and non-discrimination; work and employment; reasonable accommodation
<i>Articles of the Convention:</i>	3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); 5 (1), (2) and (3); 13 (2); 27 (a), (b), (e), (g), (i) and (k)
<i>Articles of the Optional Protocol:</i>	2 (c) and (d)

1. The author of the communication is V.F.C., a national of Spain born on 5 July 1979. He claims to be a victim of a violation by the State party of his rights under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a), (b), (c), (d) and (e);

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



article 4 (1) (a), (b) and (d) and (5); article 5 (1), (2) and (3); and article 13 (2) of the Convention. The author is represented by the Spanish Committee of Representatives of Persons with Disabilities and the Association for the Workplace Integration of Local Police Officers with Disabilities.¹ The Optional Protocol entered into force for the State party on 3 May 2008.

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

The facts as submitted by the author

2.1 On 20 May 2009, the author suffered a traffic accident that left him with a permanent motor disability.²

2.2 On 20 July 2010, the Ministry of Labour and Immigration declared that the author's status was one of "permanent disability for the performance of his occupation".³ As a result of that finding, he was required to take mandatory retirement and was expelled from the local police force.

2.3 On 30 July 2010, the author submitted an application to the Barcelona City Council requesting it to assign him to "modified duty" and identify a post suited to his disability.⁴ He also applied for the payment of his salary and the social security contributions not collected since his expulsion from the local police force. The author based his application on the rules set out by the Autonomous Community of Catalonia in Act No. 16/1991 of 10 July 1991 (Local Police Act).⁵ On 15 September 2010, the Barcelona City Council denied the author's application on the basis of article 7 (2) of the modified-duty regulations of the Barcelona municipal police (ordinance).⁶

2.4 On 14 March 2011, the author filed an administrative appeal against the Barcelona City Council's decision before Administrative Court No. 13 in Barcelona. The author claimed that article 7 (2) of the regulations referred to in the preceding paragraph was null and void on the grounds that it violated the fundamental rights to work and to vocational rehabilitation (arts. 35 and 40 of the Constitution), the inclusion of persons with disabilities (art. 49), access to and retention of public employment (art. 23) and respect for human dignity (art. 10). The author also highlighted the contradiction between the autonomously-

¹ The Spanish Committee of Representatives of Persons with Disabilities is the independent body designated by Spain to monitor implementation of the Convention in accordance with article 33 (2).

² According to background information provided by the author, the Institut Català d'Avaluacions Mèdiques issued the following medical opinion: "Lisfranc fracture-dislocation of the right foot and fracture of the right tibial malleolus treated with open reduction and double-screw osteosynthesis; slow recovery with reflex sympathetic dystrophy; post-traumatic arthrosis of the tarsus; persistent right dorsal foot pain and functional limitation".

³ The author indicates that, under the law in force in the State party, there are four degrees of permanent disability in relation to work: "permanent partial disability", "permanent total disability for usual occupation", "permanent absolute disability for any type of work" and "severe disability". Workers with "permanent partial disability" are allowed to remain at their usual workplace, but this option is not available to workers with any of the other degrees of disability. Workers with "permanent total disability" are barred from carrying out the chief duties, or any duties, of their usual occupation, but not from carrying out other duties.

⁴ The author states that modified duty is intended for workers with reduced ability to perform regular duties, i.e. those who are unable to perform the duties of the post because of age or because they have total disability status.

⁵ Under article 43 of the Act, local police officers with reduced ability to perform regular duties are assigned to modified duty in accordance with the relevant municipal regulations (ordinance). The article indicates that, as a general rule, local police officers are assigned to modified duty within the same police force to which they belong, where they carry out other duties in accordance with their rank. If this is not possible owing to a lack of vacancies or to the nature of the disability, they may be assigned to perform complementary services. The Act also provides that, in order to be assigned to modified duty, officers must undergo a medical examination to assess their abilities and fitness for the new post.

⁶ Under that article, modified-duty status is not available to persons with any degree of disability other than partial disability, as determined by the competent body (in this case, the Social Security Institute).

community law (Act No. 16/1991), which allows assignment to modified duty, and the aforementioned ordinance, which restricts it.⁷

2.5 Administrative Court No. 13 partially upheld the author's appeal and overturned the decision of the Barcelona City Council. The court found that the impugned ordinance violated fundamental rights such as access to and retention of public employment and public functions in conditions of equality and non-discrimination (articles 23 and 14 of the Constitution). The court also held that the author's assignment to modified duty should be considered in accordance with the findings of the medical board referred to in Act No. 16/1991.

2.6 On 13 July 2012, the Barcelona City Council filed an appeal against the above-mentioned judgment with the High Court of Catalonia. On 18 September 2012, the author filed a formal objection to the appeal, reiterating the arguments made in his appeal of 14 March 2011 and also claiming that the ordinance was contrary to the relevant national law (article 141 of the General Act on Social Security), which places no restrictions on assignment to modified duty.⁸ On 9 July 2013, the High Court of Catalonia upheld the appeal filed by the Barcelona City Council and overturned the judgment under appeal on the basis of article 7 (2) of the ordinance, which does not allow persons with "permanent total disability" to be assigned to modified duty. The High Court of Catalonia took the view that, as the author was on full mandatory retirement as a result of that provision, Act No. 16/1991 did not apply to him because he was no longer a local police officer.

2.7 On 30 September 2012, the author filed an application with the Constitutional Court for the remedy of *amparo* against the judgment of the High Court of Catalonia. The author claimed that the judgment was in violation of the right to effective judicial protection (article 24 of the Constitution) in relation to the right to equality and legality (article 9 (2) and (3) of the Constitution). On 18 November 2014, the Constitutional Court informed the author that his application for *amparo* was not admissible because he had not exhausted all other means of challenging the decision; specifically, he had not filed an "application for annulment of proceedings".⁹ In the individual communication submitted to the Committee, the author states that he had three reasons for not submitting such an application: the fact that it is not mandatory, according to the Constitutional Court's interpretation; the fact that its effectiveness is doubtful, given that the application is filed with the same court that handed down the judgment being challenged; and the fact that the regulations governing such applications are complex, unclear and contradictory, causing legal uncertainty and potentially leaving victims of human rights violations without legal protection.

2.8 On 21 April 2015, the author submitted his case to the European Court of Human Rights. The application was found inadmissible on the grounds that it did not meet the requirements under articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The author claims that this rejection is insufficiently substantiated and that his case was not considered

⁷ Autonomous-community laws are enacted at the level of the autonomous communities, while regulations are lower-ranking provisions issued by local authorities for the purpose of implementing autonomous-community laws. The author states that, according to the principle of hierarchy established in article 9 (3) of the Constitution, lower-ranking provisions may not be more restrictive than the law or provision they are intended to implement, as occurs in the case of article 7 (2) of the modified-duty regulations of the Barcelona municipal police.

⁸ Article 141 of this law provides that persons who are deemed to have a permanent total disability for the purposes of their occupation are entitled to the corresponding lifetime pension even if they continue to receive remuneration from the same company, provided that the duties they perform are not the same as those that gave rise to the permanent total disability.

⁹ 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."

on the merits. In this connection, he refers to the Human Rights Committee's jurisprudence according to which, in these circumstances, his case cannot be considered to have been examined under another international procedure.¹⁰

2.9 In light of the foregoing, the author contends that he has exhausted both administrative and judicial domestic remedies, as well as the possibility of filing an application for *amparo* before the Constitutional Court.

The complaint

3.1 The author claims a violation of his rights under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with articles 3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); 5 (1), (2) and (3); and 13 (2) of the Convention, as the State party, by means of its domestic regulations, arbitrarily discriminated against him by forcing him to retire from his position as a local police officer and refusing to assign him to modified duty, on the grounds of his "permanent total disability for usual occupation". He alleges that the modified-duty regulations of the Barcelona municipal police are overtly discriminatory in that they provide for differential treatment of persons in different administrative categories of disability, even though placement in such categories is not determined on the basis of a medical examination for evaluating the possibility of assignment to tasks or duties that represent alternatives to the traditional or usual tasks and duties of the position (regular duty). This policy thus provides for the application of different solutions to the same factual situation, i.e. the loss or reduction of abilities, without allowing the person's ability to perform modified-duty assignments to be acknowledged and assessed by means of a medical examination. Furthermore, it fails to promote the employment of persons with disabilities in the public sector, as it does not allow such persons to remain employed while performing duties that are different from those they can no longer perform as a result of their disability. It also fails to promote their reintegration; instead, it requires their expulsion from the public service and their mandatory retirement. Referring to the Committee's general comment No. 2 (2014) on accessibility, the author argues that these regulations do not allow jobs to be adapted, through reasonable accommodation, to enable persons with "permanent total disability" to perform modified duties in their usual workplace or position.

3.2 The author also claims a violation of article 4 (1) (a), (b) and (d) and (5), read in conjunction with article 27, because the State party has not repealed national provisions that are incompatible with the Convention, given that there continues to be discrimination against persons with disabilities whose status has been defined as "permanent total disability for work". The author adds that the State party has likewise failed to eliminate discriminatory practices, given that the above-mentioned policy serves as a basis for applying and justifying administrative and judicial practices that are discriminatory. The author further claims that, although State and autonomous-community legislation prohibit discrimination based on disability and require employers to make adaptations in order to ensure that public service positions are accessible to persons with disabilities, such legislation does not make provision for situations in which an employee acquires a disability and do not ensure that such employees can continue their employment in conditions of equality and non-discrimination.

3.3 The author also claims a violation of article 5 (1), (2) and (3), read in conjunction with article 27. He states that he was discriminated against, given that, under the above-mentioned ordinance, he was denied access to modified duty because his disability was categorized as "permanent total disability for work", whereas persons in other categories of disability are allowed such access. The author adds that this discrimination is due to the fact that his degree of disability was established by an administrative decision taken in the absence of a medical examination for evaluating his ability to undertake a modified-duty assignment.

¹⁰ The author refers to *Kehler v. Germany* (CCPR/C/71/D/834/1998), para. 6.2; *María Cruz Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010), para. 7.3; *Lemercier v. France* (CCPR/C/86/D/1228/2003), para. 6.3; and *Bertelli Gálvez v. Spain* (CCPR/C/84/D/1389/2005), para. 4.3.

3.4 Lastly, with regard to the violation of article 13 (2), read in conjunction with article 27, the author refers to the Committee's jurisprudence and complains that the Spanish judiciary has not been given appropriate training with respect to the Convention. The legal provisions that were applied to the author in the administrative and judicial proceedings that led to his mandatory retirement were interpreted without due regard for the content and implications of the international obligations arising from the status of Spain as a State party to the Convention.

State party's observations on admissibility and the merits

4.1 On 29 April 2016, the State party submitted observations on the admissibility and merits of the communication. It contends that the communication should be declared inadmissible on the basis of failure to exhaust domestic remedies, pursuant to article 2 (d) of the Optional Protocol. Should the Committee find the communication admissible, the State party submits that the allegations are without merit and that the author's rights under the Convention have been respected.

4.2 The State party submits that the author has not exhausted all of the judicial remedies provided for in Spanish law for the protection of the fundamental rights which he claims have been violated. Specifically, it states that the author has not met the requirement to exhaust all domestic legal avenues of appeal, including an application for *amparo* before the Constitutional Court, which is the highest court for safeguarding fundamental rights. As evidence of this state of affairs, the State party notes that, for reasons attributable to the author, no "application for annulment of proceedings" was filed. The purpose of such an application is to preserve the subsidiary nature of the remedy of *amparo* by ensuring that cases are not brought before the Constitutional Court until after the ordinary courts have been given the opportunity to issue a ruling and, where appropriate, to remedy the violation of fundamental rights for which a remedy of *amparo* might be sought. In other words, under the application for annulment of proceedings, all of the fundamental rights that are alleged to have been violated must be reviewed by an ordinary court as a prerequisite before such violations can be considered by the Constitutional Court. In the judicial proceedings before the Administrative Court of Barcelona, the author referred to the violation of his fundamental rights to non-discrimination and to access to public employment (articles 14 and 23 of the Constitution, respectively). Nevertheless, in applying to the Constitutional Court for the remedy of *amparo* against the judgment handed down by the High Court of Catalonia, the author also alleged a violation of his right to effective judicial protection (article 24 of the Constitution). The Constitutional Court thus held that the author had not exhausted all legal avenues of appeal, given that an application for annulment of proceedings would have obliged him to claim the violation of his right to effective judicial protection before the last ordinary court to hear his case, i.e. the High Court of Catalonia. The State party takes the view that the filing of such an application is a prerequisite for seeking the remedy of *amparo*, thus contradicting the author's claim that applications for annulment of proceedings are optional.

4.3 With respect to the merits, the State party contends, first, that there was no violation of the right to due process, as the author had every opportunity, under domestic law, to challenge administrative or judicial decisions rejecting his claims.

4.4 The State party also maintains that there are no grounds for finding that the country's domestic regulations or their application to the author's case are discriminatory. It should be noted, first, that within the margin of discretion afforded by the Spanish legal order, different legal consequences arise from different categories of disability status, as duly determined by the relevant authority. Under the State party's domestic regulations, the body that is competent to take administrative decisions on disability status is the Social Security Institute, which, in the present case, defined the author's status as "permanent total disability for usual occupation". Under article 7 (2) of the ordinance implementing the Local Police Act (No. 16/1991), referred to in paragraph 2.3 above, this resulted in the author's mandatory retirement and, consequently, made him ineligible for assignment to modified duty or any other work. This is further supported by the public service regulations, which provide that public servants lose their status as such when they enter full

retirement, which may result from a finding of “permanent total disability”.¹¹ In the State party’s view, the point at issue is not whether a person with “permanent total disability” status is physically capable of carrying out tasks or duties other than those that are usual in his or her occupation, but whether the implementing regulations of Act No. 16/1991, under which this administrative category of disability is incompatible with assignment to modified duty, were correctly applied. Under Spanish law, persons who are no longer public servants cannot be assigned to modified duty.

4.5 In addition, the State party submits that the author’s citing of other autonomous-community laws that do allow assignment to modified duty, such as those under which only persons with “permanent absolute disability for any occupation” or “severe disability” are ineligible, or laws such as the Catalan law on firefighters, does not show that his right to equality and non-discrimination has been violated. In the State party’s view, these differences reflect the different degrees of territorial autonomy granted to the various autonomous communities under the Spanish constitutional system, or the differences between the duties performed by police and those performed by firefighters, which warrant different regulations.

4.6 The State party maintains that the regulations referred to in paragraph 4.4 above are applied to all persons with “permanent total disability” status, meaning that there cannot be said to have been any discriminatory application of domestic regulations. In the present case, the regulations were applied to the author no differently from how they would have been applied to any other person in exactly the same factual and legal situation, with “the same type of injury”.

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

5.1 On 22 June 2016, the author submitted comments on the State party’s observations on the admissibility and merits of the communication. He reiterates that he has exhausted ordinary judicial and administrative remedies, ending with the judgment of the High Court of Catalonia. He maintains that the application for *amparo* that he filed with the Constitutional Court, which was found inadmissible on the basis of non-exhaustion of other legal avenues, is a remedy of a subsidiary and exceptional nature. The “application for annulment of proceedings”, which involves the invocation of all the violations of fundamental rights that were not invoked previously, in an application filed with the same court that handed down the decision being challenged, is an unclear requirement that leaves rights holders unprotected. As the application must be filed with the same court that handed down the decision which the applicant seeks to challenge, its effectiveness, and the impartiality of its adjudication, are questionable.

5.2 Concerning the merits, the author challenges the State party’s arguments purporting to show that it has not violated article 13 of the Convention. He reiterates that the communication does not concern formal access to a procedure, but the failure to apply the rights set forth in the Convention in the context of domestic judicial proceedings. In support of his position, the author attaches a recent Constitutional Court judgment invoking the Convention to safeguard the rights of a person with disabilities whose interests were not duly protected during judicial proceedings. In other words, the author’s view is that a failure on the part of adjudicating bodies to understand and apply the Convention in resolving legal conflicts may leave rights holders unprotected and undermine the law. Moreover, the author refers to a provision of the Constitution (art. 10 (2)) under which domestic provisions relating to fundamental rights and civil liberties must be interpreted in accordance with treaties and international agreements ratified by Spain that concern the same matters. Lastly, he refers to Constitutional Court judgments finding that the application of this article must also take into account the jurisprudence of international bodies responsible for monitoring compliance with such international treaties.

5.3 Regarding the State party’s contention that the author’s case was not treated in a discriminatory manner, the author reiterates that the domestic regulations applied in his

¹¹ Article 63 of Royal Legislative Decree No. 5/2015 of 30 October 2015 approving the consolidated text of the Public Service Regulations Act.

case are discriminatory in the abstract, as they prevent persons with reduced abilities from being assigned to modified duty in accordance with an evaluation of their real and effective ability to perform a function other than the ones usually corresponding to the position in question. By not allowing persons with “permanent total disability” to be evaluated for their ability to perform alternative duties, the ordinance that was applied to the author – specifically, article 7 (2) of the modified-duty regulations of the Barcelona municipal police (ordinance) – discriminates against individuals who have disabilities that prevent them from remaining in their current post, in this case a public service position such as that of a local police officer. By treating individuals unequally (allowing some but not others to be assigned to modified duty) even though they are in the same factual situation (that of having reduced ability to perform their usual occupation), the State party discriminates against persons with disabilities; it does not take account of the real and effective capacities that could come to light in an evaluation of ability to perform alternative duties, including the possibility of making reasonable accommodation to enable such persons to perform modified duties or complementary activities. The author also points out that the territorial or jurisdictional distribution of autonomy under the Spanish constitutional system cannot be invoked or relied upon as a basis for contravening the provisions of the Convention, as provided in article 4 (5).

5.4 The author attaches a bill, currently under consideration in the autonomous parliament of Catalonia, that would provide for the uniform treatment of regional police officers (*mossos d’esquadra*), local police officers and firefighters, including with regard to assignment to modified duty, so as to end discrimination against certain persons on the basis of disability.¹² The author states that the bill expressly acknowledges that the current regulations are discriminatory, in contravention of articles 1 and 27 of the Convention.

5.5 Lastly, the author attaches three administrative decisions issued by the Social Security Institute whereby assignment to modified duty is found to be compatible with disability status in the case of firefighters in Catalonia. The author questions the State party’s contention that a finding of permanent total disability results in mandatory retirement, thereby disqualifying a person who is no longer in active service from performing modified duties.¹³

State party’s additional observations

6.1 On 9 September 2016, the State party submitted observations on the author’s comments. The State party reiterates its arguments with respect to the admissibility of the communication and maintains that the subsidiary nature of the remedy of *amparo* before the Constitutional Court should not be misinterpreted to mean that the prior submission of an application for annulment of proceedings is not mandatory or is merely optional. Rather, the subsidiarity of that remedy requires that any violation of the fundamental rights set out in article 53 (2) of the Constitution must be invoked before the highest ordinary court with jurisdiction to consider it before an application for *amparo* may be deemed admissible by the Constitutional Court. Thus, while the procedural outcome of such an application is a contingent issue that depends on the circumstances of the case, the remedy itself cannot be said to be ineffective. This type of application, which is similar to an application for reconsideration, is defined as such within the discretionary authority of legislative bodies to regulate procedural matters.

6.2 The State party contends that the Constitutional Court judgment cited by the author has no substantive bearing on the present case, as that judgment concerns the involvement of a person with disabilities in judicial proceedings and alleged violations of due process that arose as a result of difficulties in informing the person of decisions affecting the person’s rights during the proceedings. In the present case, by contrast, the author’s disability is the primary, determining factor for the adjudication of his interests, and he has not been the victim of insufficient access to justice.

¹² Proposed decision on modified duty for regional police officers, local police officers and firefighters (No. 250-00453/11).

¹³ Social Security Institute (Lleida), decisions, Rev. 2013/50060, 50061 and 50062.

6.3 Lastly, the State party reiterates its position that the relevant domestic provisions are of a general, abstract nature and that they therefore cover all persons to whom the rules on disability and assignment to modified duty are applicable, establishing different legal consequences in accordance with the different elements that are considered and weighed in each case by the relevant legislative body at the State, autonomous-community or local level. Further, the State party refers to the European Union directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation¹⁴ to argue that the present case concerns a legitimate difference that has been established through appropriate and necessary means that respect the rights of the author. The present case thus cannot be deemed to involve unequal treatment amounting to discrimination against the author.

B. Committee's consideration of admissibility and the merits

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Committee must, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

7.2 The Committee notes that the author submitted a complaint to the European Court of Human Rights based on the same facts presented to the Committee. By decision of 4 June 2015, the European Court found that his complaint "did not meet the admissibility criteria set out in articles 34 and 35 of the Convention". The Committee recalls that, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of a case, "the same matter" should be deemed to have been examined within the meaning of article 2 (c) of the Optional Protocol.¹⁵ However, the Committee considers that, based on the succinct nature of the decision rendered by the European Court and, in particular, the absence of any argument or clarification to justify a rejection of the application based on the merits,¹⁶ it is not in a position to determine with certainty that the case presented by the author has already been the subject of an examination, however limited, on the merits.¹⁷ The Committee thus finds that article 2 (c) of the Optional Protocol does not constitute a barrier to the admissibility of the present communication.

7.3 The Committee takes note of the State party's contention that the communication should be found inadmissible for non-exhaustion of domestic remedies because the author failed to file an "application for annulment of proceedings" as a precondition for filing an application for the remedy of *amparo*, and that his application for *amparo* was rejected by the Constitutional Court on that basis. The State party has argued that the legislation in place requires that such an application be filed in all cases in which the alleged violation of fundamental rights contained in the *amparo* proceedings has not been previously considered by the ordinary courts. The Committee considers that only those remedies that have a reasonable prospect of success need be exhausted¹⁸ for the purposes of article 2 (d) of the Optional Protocol. In the present case, the Committee notes that the author invoked his claims of discrimination based on disability before Administrative Court No. 13 in Barcelona and the High Court of Catalonia, thereby exhausting ordinary remedies, and that he also filed an application for *amparo* before the Constitutional Court. The Committee

¹⁴ Article 2 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *Official Journal of the European Union*, L 204/23, 26 July 2006.

¹⁵ In this connection, see *Mahabir v. Austria* (CCPR/C/82/D/944/2000), para. 8.3; *Linderholm v. Croatia* (CCPR/C/66/D/744/1997), para. 4.2; and *A.M. v. Denmark* (CCPR/C/16/D/121/1982), para. 6.

¹⁶ See *X v. Norway* (CCPR/C/115/D/2474/2014), para. 6.2.

¹⁷ *Mahabir v. Austria*, para. 8.3.

¹⁸ See *Cesario Gómez Vázquez v. Spain* (CCPR/C/69/D/701/1996), para. 10.1; *Joseph Semey v. Spain* (CCPR/C/78/D/986/2001), para. 8.2; *Alba Cabriada v. Spain* (CCPR/C/82/D/1101/2002), para. 6.5; *Maximino de Dios Prieto v. Spain* (CCPR/C/87/D/1293/2004), para. 6.3; and *Villamón Ventura v. Spain* (CCPR/C/88/D/1305/2004), para. 6.3.

observes that the State party has not demonstrated how filing an application for annulment of proceedings before the High Court of Catalonia would have had any prospect of success in light of the fact that this Court had already considered the disability-based discrimination claims presented by the author 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 justified that filing an application for annulment of proceedings would have interrupted the 30-day time frame for filing an application for *amparo*.¹⁹ In light of all the above, the Committee concludes that there is no evidence that, in the particular circumstances of the case at hand, an application for annulment of proceedings would have been an effective remedy for the protection of 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.

7.4 The Committee notes, moreover, that in the present case the author duly filed timely 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, before the ordinary courts that reviewed his case at first and second instance, namely the Administrative Court of Barcelona and the High Court of Catalonia, respectively. The Committee observes that the additional inclusion, in the author's application for *amparo* before the Constitutional Court, of an allegation that his right to effective judicial protection had been violated, which was the basis for that Court's finding of inadmissibility, cannot deprive the author of protection by preventing consideration of the merits of the allegations concerning the violation of his rights to work (continuance of employment) and to equality and non-discrimination. 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.

7.5 The Committee nonetheless notes that the author, in the claims filed with the ordinary courts, does 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.

7.6 Accordingly, and in the absence of other obstacles to admissibility, the Committee declares the communication admissible with regard to the author's claims under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a), (b), (c), (d) and (e); article 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (3) of the Convention. The Committee therefore proceeds to the consideration of these allegations on the merits.

Consideration of the merits

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

8.2 As to the author's claims under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a), (b), (c), (d) and (e); article 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (3) of the Convention, the issue before the Committee is whether the State party violated his rights by applying a rule of the Barcelona City Council (article 7 (2) of the modified-duty regulations of the Barcelona municipal police) whereby persons who have taken mandatory retirement as a result of "permanent total disability" for the purposes of performing their usual duties as local police officers are not allowed to undertake a modified-duty assignment.

8.3 The Committee notes the author's arguments in relation to articles 5 and 27 of the Convention, to the effect that he has been directly discriminated against on the grounds of

¹⁹ In this connection, see the judgment of the European Court of Human Rights in the case of *Arrózpide Sarasola and others v. Spain* (application Nos. 65101/16, 73789/16 and 73902/16), paras. 102 and 103.

disability with respect to the retention of his post as a local police officer, given that he was forced to retire as a result of a declaration of “permanent total disability”, which, in turn, disqualified him from requesting assignment to modified duty. The author submits that this declaration or administrative classification of his disability, issued by the 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 Act No. 16/1991 of 10 July 1991 (Local Police Act), under which a specific “medical report” must be sought in order to assess the ability of the person concerned to carry out alternative activities. The author also notes the existence of other autonomous-community legislation expressly providing that a declaration of “permanent total disability” is compatible with assignment to modified duty, as well as the Catalan law governing the eligibility of firefighters for modified-duty assignments, under which such a declaration is likewise compatible with modified duty. He further notes the existence of administrative decisions of the Social Security Institute and court judgments finding that the receipt of a pension for “permanent total disability” is compatible with assignment to modified duty. The Committee also takes note of the State party’s contention that the author has not been discriminated against because the domestic provisions governing the different degrees of disability and their compatibility with the receipt of a disability pension or with employment in the public sector are within the discretionary authority of legislative bodies. The State party reiterates, in this connection, that the distinction between different degrees of disability is made for legitimate purposes and that the relevant regulations thus cannot be said to be discriminatory on the grounds of disability. It also maintains that these regulations have been applied consistently, on an equal basis, to the author and to all other persons who have been placed in the administrative category of “permanent total disability”. While the State party does not deny that the author may, in fact, have the ability to perform duties other than the usual tasks required in police work, it reiterates that the point at issue in the present case is whether it is appropriate to challenge the consistent application of rules for determining which persons, of those who have reduced ability to perform the duties of a local police officer, are allowed to undertake modified duties.

8.4 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 further 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. It also recalls its general comment No. 6, in which it states that in order to achieve *de facto* equality in terms of the Convention, States parties must ensure that there is no discrimination on the grounds of disability in connection with work and employment, and in which it refers to the relevant International Labour Organization (ILO) conventions, namely the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), both of which have been signed and ratified by Spain.²⁰ 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.

8.5 The Committee likewise recalls that the Convention prohibits all forms of discrimination against persons with disabilities, including the denial of reasonable accommodation as a prohibited form of discrimination. 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, meaning that accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or

²⁰ General comment No. 6 (2018) on equality and non-discrimination, para. 67.

wants to exercise his or her rights.²¹ 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 In addition, the Committee recalls that the preamble to the Convention highlights the necessity of recognizing the diversity of persons with disabilities, meaning that any institutional mechanism for dialogue in relation to reasonable accommodation must take each person's specific situation into account.

8.6 The Committee observes as well that the State party enacted the General Act on the Rights and Social Inclusion of Persons with Disabilities in order to update its legislation in accordance with the standards laid down in the Convention.²³ This law provides that, in order to safeguard the right of persons with disabilities to equal opportunities, the public authorities must take anti-discrimination measures and affirmative action measures (art. 64 (1)). The Committee is of the view that such anti-discrimination measures should include capacity management strategies, including reasonable accommodation, through which public authorities can build the capacities of their employees who have acquired a disability. While reasonable accommodation is an *ex nunc* duty, i.e. one that arises when the person with a disability requires it, States parties must take all necessary preventive measures to enable public authorities to manage capacities so as to optimize the exercise of the rights of persons with disabilities. In order to assess the relevance, suitability and effectiveness of reasonable accommodation, factors such as financial costs, available resources, size of the accommodating party (in its entirety), the effect of the modification on the institution and the overall assets, rather than just the resources of a unit or department within an organizational structure, must be taken into consideration.²⁴ 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 servant upon his mandatory retirement, and he had no opportunity whatsoever to request reasonable accommodation that would have enabled him to perform modified duties. The Committee further notes that the State party has failed to show 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.

8.7 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. The Committee has consulted the domestic legislation of various national jurisdictions as well as academic studies to gain a thorough understanding of the concept of reasonable accommodation. 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.

8.8 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 General Act No. 16/1991, all persons with "reduced ability" are allowed to undertake modified-duty assignments. It also observes that, under article 7 (2) of the modified-duty regulations of the Barcelona municipal police, any member of that police force whose abilities are reduced

²¹ Ibid., para. 24 (b).

²² Ibid., paras. 26 (a) and 67 (h).

²³ Royal Legislative Decree No. 1/2013 of 29 November 2013, approving the consolidated text of the General Act on the Rights and Social Inclusion of Persons with Disabilities.

²⁴ See general comment No. 6, para. 26 (e).

and who is classified as having a “permanent total disability” is not eligible for assignment to modified duty. In addition, the Committee observes that, in the author’s case, the administrative disability ratings determined by the 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 article 43 of General Act No. 16/1991 calls for the conduct of a special medical assessment of the alternative capacities of persons whose abilities are reduced, yet this 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.

8.9 In the present case, the Committee finds that the rules that prevented the author from being assigned to modified duty, i.e. article 7 (2) of the modified-duty regulations of the Barcelona municipal police (ordinance), do not safeguard his rights under the Convention, 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 observes that, in seeking to take different degrees of disability into account in an objective fashion in order to establish, on a basis of equality, the conditions in which eligibility for a disability pension is compatible with retention of employment, the modified-duty regulations of the Barcelona municipal police forestall the possibility for anyone with “permanent total disability” status to be assessed for ability to perform alternative duties. This, in turn, undermines such persons’ right to work, as occurred in the author’s case.

8.10 The Committee therefore finds that the rules under which the author was prevented from undertaking a modified-duty assignment 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. In addition, it finds that, since article 7 (2) of the modified-duty regulations of the Barcelona municipal police renders all those with “permanent total disability” status ineligible for assignment to modified duty, the author was discriminated against on the grounds of his disability with respect to “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 such persons’ 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 “permanent total disability” status. The Committee further holds that, although the State party’s institutional rules governing the assignment of its employees or public officials to modified duty pursue a legitimate aim, the ordinance applied to the author violates his rights under articles 5 and 27 of the Convention.

8.11 The Committee also notes that the modified-duty regulations of the Barcelona municipal police date from 2002, whereas the State party ratified the Convention in 2008. In this regard, the Committee notes that the domestic legislation adopted prior to the State party’s ratification of the Convention continues to use terms such as *incapacidad* (inability or incapacity) and *dictamen médico* (medical report), which reflect a “medical approach” to the evaluation of the extent to which persons with disabilities can participate in various areas of society, as noted in the present case. 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.

8.12 Accordingly, the Committee finds that the author's mandatory retirement constituted a violation of article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a), (b), (c), (d) and (e); article 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (3) of the Convention.

C. Conclusions and recommendations

9. 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 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a), (b), (c), (d) and (e); article 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (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 to:

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

(ii) 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 the Barcelona municipal police (ordinance) and their application with the principles enshrined in the Convention and the recommendations contained in the present Views to ensure that assignment to modified duty is not restricted only to persons with a partial disability;

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

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