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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. 43/2017*, **

Communication submitted by:	N.B and M.W.J (represented by counsel, Inclusion London)
Alleged victims:	The authors
State party:	United Kingdom of Great Britain and Northern Ireland
Date of communication:	25 May 2015 (initial submission)
Document references:	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 16 November 2017 (not issued in document form)
Date of adoption of decision:	6 September 2019
Subject matter:	Access to disability funds
Procedural issues:	Exhaustion of domestic remedies; substantiation of claims; abuse of the right of submission
Substantive issues:	Independent living; protection of the integrity of the person; personal mobility; participation in cultural life, recreation, leisure and sport
Articles of the Convention:	17, 19, 20, 30 and 31
Article of the Optional Protocol:	2 (b) (d) and (e)

1.1 The authors of the communication are N.B and M.W.J, nationals of the United Kingdom of Great Britain and Northern Ireland, born in 1984 and 1963, respectively. They claim to be victims of violations by the State party of articles 17, 19, 20, 30 and 31 of the Convention. The Optional Protocol entered into force for the State party on 6 September 2009. The authors are represented by counsel.

* Adopted by the Committee at its twenty-second session (26 August–20 September 2019).

** The following members of the Committee participated in the examination of the communication: Ahmad Al-Saif, Danlami Umaru Basharu, Monthian Buntan, Imed Eddine Chaker, Amalia Eva Gamio Rios, Jun Ishikawa, Samuel Njuguna Kabue, Rosemary Kayess, Miyeon Kim, László Gábor Lovászy, Robert George Martin, Martin Babu Mwesigwa, Gertrude Oforiwa Fefoame, Dmitry Rebrov, Jonas Ruskus, Markus Schefer and Risnawati Utami.

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1.2 On 30 May 2018, pursuant to rule 70 (8) of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to grant the State party's request for the admissibility of the communication to be examined separately from the merits.

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

The facts as submitted by the authors

N.B.

2.1 The author has muscular dystrophy. She lives with her parents in Harrow, London. She uses a powered wheelchair and requires assistance with almost all tasks. In 2005, she was awarded 35 hours of personal assistance support by the London Borough of Harrow. However, this did not cover the assistance required to play power-chair football. Her then social worker proposed that she apply for assistance to the Independent Living Fund, a non-departmental government body. The author met with an agent of the Fund, who indicated that the Fund would be in a position to pay for a personal assistant to enable her to continue to play power-chair football. However, she did not submit an application at that time and it was not until some years later that she called the Fund to request assistance. She was then told that an application form would be sent to her. Yet, when she called a few days later, after not having received the application form, she was informed that the Fund had been closed to new applicants.

2.2 At the time of the complaint, the author had been assessed by the London Borough of Harrow as requiring 32 hours of weekly personal care to assist her with getting up in the morning, having breakfast and going to bed at night. She requires two assistants at the same time as she needs to be lifted by hoist. She also receives 33 hours of support through the Access to Work Scheme, to assist her with physical tasks at work. She employs her mother as her assistant. She also receives a State benefit, Disability Living Allowance, totalling 127 pounds sterling each week (approximately 161 United States dollars). Finally, she receives a disability student allowance for five hours of support each week. With this assistance, she employs her father. The author argues that these support measures do not provide her with the support required to lead an independent life, including going out on dates or training sufficiently for power-chair football.

M.W.J.

2.3 The author sustained a brain injury in 2006, which caused reduced mobility and an inability to speak as a result of paralysis of her cranial muscles. As a result, she was awarded substantial care support, including from the Fund. She lived with her husband, who was able to continue working, as the author had the support that she required. She made such progress that, in 2009, following a reassessment of her needs, she moved from the higher to the middle rate of Disability Living Allowance, requiring about half of the care previously provided, and the Fund's support ceased as a result.

2.4 In 2011, the author and her husband were involved in a road accident and, as a result, the author sustained a perforated eardrum, broken clavicle and further brain injury that caused the onset of epilepsy. She had five serious epilepsy seizures between July 2012 and May 2013, requiring hospitalization for several nights each time. A seizure sustained in 2013 could only be stopped by an induced coma, which was described as life-threatening. While medication has reduced the seizures, it has also reduced the author's mobility, increased her confusion and fatigue and impaired her speech. She receives the higher level of Disability Living Allowance again but is unable to apply to the Fund because it is now closed to new applicants. She has five personal assistants who work eight hours daily. Her 16-year-old daughter assists her for a couple of hours in the evenings and her husband assists her at night and at the weekends. However, she has no free time when her husband is not present, as she requires constant assistance.

Independent Living Fund

2.5 At the time of the submission of the complaint, the Fund was a non-departmental government body within the Department for Work and Pensions. The Fund had an annual budget of 350 million pounds to support approximately 20,000 persons with severe disabilities. The Fund occupied a distinct place within the disability support scheme, bridging the support provided by local authorities and the benefits system. The Fund's trustees decided to close, on a provisional basis, the fund to new applicants on 17 June 2010 and, on 13 December 2010, the Fund announced that it would be closed permanently to new applicants. A ministerial statement was made to that effect, referring to "informal consultation with disability organizations". However, the authors argue that no consultations took place and that no impact assessment was made, which is a requirement under community care legislation, including the National Health Service and Community Care Act 1990 and the Equality Act 2010. The Fund was closed permanently to all applicants on 30 June 2015.

2.6 The authors note that the closure of the Fund to new applicants was not challenged by them at the time of the closure. They argue that such a challenge could only have been brought through an application for judicial review, filed on the basis of a lack of consultation by the domestic authorities in breach of the duties contained in the Equality Act. Such a challenge would have needed to have been made through an administrative claim filed before the administrative courts. Under the Civil Procedure Rules, a judicial review challenge has to be filed "promptly" and in any event within three months of the action complained of. The authors claim that persons in their position and circumstances were unlikely to be aware of the fact that they were able to challenge this decision. They additionally argue that, in any event, an application for judicial review would not have provided them with an effective remedy as it would have constituted an administrative challenge and not a substantive examination of the merits of the closure of the Fund.

The complaint

3. The authors claim to be victims of a violation of their rights under articles 17, 19, 20, 30 and 31 of the Convention. They allege that the closure of the Fund to new applicants in 2010 resulted in a reduction in the support available to them and, in particular, their ability to live an independent and fulfilling life, given that the local care system focuses exclusively on essential basic care. They claim that this closure will prevent them from living independently in accommodation of their choosing, forcing them to live in institutional care, and it will significantly reduce their mobility. They argue that N.B. will also not be able to pursue her hobby, power-chair football. The authors note that, in failing to undertake consultations and an equality impact assessment, the State party failed to comply with its obligations under the Equality Act, in violation of their rights under article 31 of the Convention.

State party's observations on admissibility

4.1 On 8 February 2018, the State party submitted its observations on admissibility of the communication. The State party submits that the communication should be found to be inadmissible as: (a) the authors have not exhausted all available domestic remedies as required under article 2 (d) of the Optional Protocol; (b) the complaint is an abuse of the right of submission under article 2 (b) of the Optional Protocol as there has been a significant and unjustified delay between the facts of the complaint arising and the filing of the complaint itself; and (c) the complaint is manifestly ill-founded under article 2 (e) of the Optional Protocol.

4.2 The State party notes that the authors have not suggested that they made any attempt to challenge the closure of the Fund to new applicants by way of domestic proceedings. It notes that they did not bring proceedings by way of judicial review: (a) when the Fund was first closed to new applicants; (b) when they first became aware of that fact; or (c) at any time before they submitted their complaint before the Committee. The State party submits that the complaint is therefore inadmissible as the authors have failed to exhaust all available domestic remedies.

4.3 The State party notes that the closure of the Fund to new applicants in June 2010 was announced in public by its Strategic Policy Director and its Chief Executive. Additionally, in a written ministerial statement made in Parliament on 13 December 2010, the Minister for Disabled People announced that the Fund would remain permanently closed to new members. That decision was taken following an "informal consultation with disability organizations, local government representatives and colleagues at the Department of Health and Social Care". On 18 December 2012, the Government publicly announced that it had decided to close the Fund completely from April 2015. This was consistent with the policy of devolving certain funding responsibility for care and support for disabled persons to local authorities and devolved administrations.

4.4 The State party notes that the decision to close the Fund was the subject of a high-profile and well-publicized judicial review challenge before the High Court of England and Wales. There was a subsequent appeal to the Court of Appeal. In 2013, the Court of Appeal held that the decision to close the Fund was unlawful because the Secretary of State had breached the public sector equality duty in section 149 of the Equality Act by failing to have due regard to the equality matters specified in that section.[1] Following the judgment, the Department for Work and Pensions reconsidered the question and conducted a fresh equality impact analysis. On the basis of that analysis, among other things, the Secretary of State decided once again to close the Fund. The announcement was made by way of a written ministerial statement on 6 March 2014. That decision was the subject of a further high-profile judicial review challenge in 2014, which was unsuccessful.[2] The Fund closed on 30 June 2015 and all relevant funding was reallocated to local authorities.

4.5 The State party further notes that the complaint as submitted by the authors concerns a specific historic decision to close the Fund to new members, taken nearly five years before the complaint to the Committee was made. In the intervening period, the Fund itself has ceased to exist. It submits that the authors could and should have challenged the closure of the Fund to new applicants by way of judicial review in the High Court, and it notes that this was the approach taken by other claimants.[3] It argues that the domestic law of the United Kingdom offers both an effective means of challenge and an effective range of remedies to a litigant wishing to challenge a decision of a State body.

4.6 The State party notes that the authors have argued that they were unable to challenge the closure of the Fund to new applicants as any such challenge would have been out of time. The State party notes that the Civil Procedure Rules, which govern procedure in the civil divisions of the Courts of England and Wales, require that all claims by way of judicial review must be brought (a) promptly; and (b) in any event not later than three months after the grounds to make the claim first arose. The State party notes, however, that the High Court also has a discretion to allow judicial review claimants to issue proceedings out of time, if there is a good reason to do so.[4] This discretion has been exercised in cases in which the applicant was unaware of the decision, when their claim raised questions of public importance and when the applicant then acted expeditiously once they became aware of it.[5] The State party argues that the authors could and should have applied for judicial review as soon as they became aware of the closure of the Fund to new applicants and that if they had done so, their claim for judicial review would almost certainly not have failed simply because it was out of time. The State party additionally notes that the authors do not set out precisely when they first became aware that the Fund had closed to new applicants but that it appears as N.B. could have challenged the decision by way of judicial review in time, or shortly after the three-month window expired, as based on her own information,

[1] Judgment of the Court of Appeal, *R (Bracking) v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. Available at www.bailii.org/ew/cases/EWCA/Civ/2013/1345.html.

[2] Judgment of the High Court, *R (Aspinall, Pepper and others) v. Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin). Available at www.bailii.org/ew/cases/EWHC/Admin/2014/4134.html.

[3] Ibid. and *R (Bracking) v. Secretary of State for Work and Pensions*.

[4] Civil Procedure Rules, rule 3.1 (2) (a).

[5] The State party refers to *R. v. Secretary of State for the Home Department Ex p. Ruddock* [1987] 1 W.L.R. 1482; and *Law Society of England and Wales v. Legal Services Commission and others* [2011] EWHC 2250 (Admin).

she appears to have been informed of the closure of the Fund by telephone shortly after the decision was taken. The State party notes that the situation of M.W.J. is less clear but that she could have applied to the High Court to exercise its discretion to extend time, arguing that she had not been aware of the closure of the Fund to new applicants in June 2010.

4.7 The State party further notes that the authors assert that any application for judicial review would not have provided them with a sufficient or effective remedy as it would have merely been an administrative challenge. The State party argues that the authors were entitled to bring a combination of both procedural and substantive challenges to the decision to close the Fund to new applicants. It argues that the success of the claimants in *Bracking*[6] demonstrates that procedural challenges – for example, a case asserting that the decision maker failed to conduct a proper consultation or to comply with the duty in section 149 of the Equality Act – may result in the quashing of a public authority's decision. It further argues that the authors were also entitled to challenge the substance of the decision itself. It notes that judicial review claims in respect of decisions taken in the field of social security and benefits have been successfully challenged for alleged violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) in domestic courts, on the basis that the decision discriminated unlawfully against disabled persons.[7] The State party submits that the authors' argument that they lacked a sufficient and effective remedy in domestic law is entirely without merit.

4.8 The State party further submits that the complaint is an abuse of the right of submission, because of the long delay between the decision of December 2010 to close the Fund to new applicants and the submission of the complaint before the Committee in May 2015. The State party notes that, although the Convention and Optional Protocol do not set out a time limit within which complaints must be made to the Committee, in such circumstances, treaty bodies have consistently held that it is an abuse of the right of submission to file a complaint following a long and unjustifiable delay.[8] It notes that the delay in the authors' case is nearly five years and that the authors have not offered a proper or sufficient explanation for such a delay. It further argues that the delay is particularly significant as the authors waited until the closure of the Fund was imminent before complaining of a previous decision to admit no new members to the scheme.

4.9 The State party further submits that the complaint is manifestly ill-founded as: (a) the remedies sought by the authors are irrelevant as they have been superseded by subsequent events in light of the permanent closure of the Fund and the reallocation of the funds to local authorities and devolved administrations; (b) the authors have not established that the closure of the Fund affected them directly as they have not established that they would have been eligible for payments under the scheme; and (c) the authors have not established that they would be unable to live independently, following the closure of the Fund to new applicants, taking into account that local authorities and devolved administrations are responsible for providing support to disabled persons pursuant to the Care Act 2014, under which the concept of independent living is a guiding principle.[9] It further notes that, in addition to support provided by local authorities under the Care Act, disabled persons may also be entitled to receive various disability benefits to help them with the additional costs of disability and to lead more independent lives. It submits that the authors have not established that they are unable to live independently as a result of the decision to close the Fund to new applicants.

[6] See *R (Bracking) v. Secretary of State for Work and Pensions*.

[7] The State party refers to *R (Carmichael and Rourke) v. Secretary of State for Work and Pensions* [2016] UKSC 58 and *R (Hurley) v. Secretary of State for Work and Pensions* [2015] EWHC 3384 (Admin).

[8] The State party refers to *Gobin v. Mauritius* (CCPR/C/72/D/787/1997), para. 6.3; and *Kudrna v. Czech Republic* (CCPR/C/96/D/1582/2007), para. 6.3.

[9] The State party refers to the statutory guidance accompanying the Care Act.

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

5.1 The authors reiterate their claim that they did not bring proceedings by way of judicial review because any challenge would have been out of time and any judicial review challenge would not have been an effective remedy. They argue that judicial review is a procedure for challenging the decisions of those who perform public functions and that it is a discretionary court procedure. They note that N.B. found out about the closure of the Fund on or around the day that it closed. Although she worked for an organization for deaf persons and persons with disabilities at the time, neither she nor other people in her organization realized that she could challenge the closure of the Fund at the time, particularly as she had not been in receipt of it herself.

5.2 The authors further argue that judicial review claims are prohibitively expensive and can generally only be pursued by individuals with the benefit of legal aid. They submit that it is very difficult to secure legal aid and that it is only available to those on means-tested benefits and very low incomes. They argue that it would have been highly unlikely that either of them would have been financially eligible for legal aid as N.B. was in full-time work and the earnings of the husband of M.W.J. would have been taken into account to determine her financial eligibility. The legal aid scheme does not allow for deductions based on disability-related expenditure. They submit that, even if N.B. was aware of the possibility of a challenge or M.W.J was aware of the decision to close the Fund to new applicants, it was highly unlikely that either of them would have been able to pursue a judicial review claim due to the lack of funding.

5.3 As regards the State party's argument that the complaint is an abuse of the right of submission, the authors recall that neither the Convention nor the Optional Protocol set out a time limit within which complaints must be made to the Committee. They therefore submit that there is no basis for the State party's contention that the complaint has been unduly delayed.

5.4 As concerns the State party's argument that they have failed to substantiate their claims for the purposes of admissibility, the authors argue that: first, the remedies sought by them are not irrelevant. While the Fund no longer exists, the purposes for which it did exist remain. Additionally, the State party failed in its obligation to consult on the closure of the Fund. Second, they were directly affected by the decision to close the Fund to new applicants: M.W.J. was directly affected, as she would have been eligible to make a claim to the Fund, had it not been closed to new applicants, while N.B. was on the verge of making a claim to the Fund. Third, benefits provided under the Care Act do not meet the same needs and aims as those distributed under the Fund.

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 or is it being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's submission that the communication should be found inadmissible under article 2 (d) of the Optional Protocol on the grounds of failure to exhaust all available domestic remedies, as the authors failed to bring proceedings by way of judicial review either when the Fund was first closed to new applicants, when they first became aware of that fact or at any time before they submitted their complaint to the Committee. The Committee further notes the State party's argument that the authors could have challenged the decision to close the Fund to new applicants on both procedural and substantive grounds, as well as its argument that the authors could have specifically argued that the decision discriminated unlawfully against persons with disabilities. The Committee also notes the authors' claims that they were unable to bring proceedings by way of judicial review as: any challenge would have been out of time; judicial review is a discretionary

court procedure; and judicial review claims are prohibitively expensive and it would have been highly unlikely that they would have been eligible for legal aid.

6.4 The Committee recalls its jurisprudence that, although there is no obligation to exhaust all available domestic remedies if they have no reasonable prospect of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and that mere doubts or assumptions about the effectiveness of domestic remedies do not absolve authors from exhausting them.[10] In the present case, the Committee notes that the authors failed to challenge the decision to close the Fund to new applicants by way of judicial review. It notes the authors' argument that they were unable to do so, as at the time they became aware of the possibility to submit such a challenge the time limit of three months had passed. The Committee notes, however, the State party's argument that, under the Civil Procedure Rules, the authors could have applied for judicial review when they first became aware of the closure of the Fund to new applicants and that, as such, it was not a procedural requirement that they file a challenge within three months of the decision itself. The Committee notes that the authors have not provided any further information refuting the State party's argument in this regard. It further notes the State party's uncontested statement that: (a) the decision to close the Fund was publicly announced; (b) the judicial review challenges filed by other affected persons were also highly publicized; and (c) N.B. was informed by telephone about the decision to close the Fund shortly after that decision had been taken and that she could have therefore challenged it even within the initial three-month period. The Committee takes note of the authors' argument that a judicial review challenge is not an effective remedy as it is a discretionary court proceeding. It notes, however, the State party's uncontested argument that the authors could have challenged the decision to close the Fund to new applicants on both procedural and substantive grounds, as well as arguing that it was discriminatory on the basis of disability. The Committee finally notes the authors' argument that they were unable to challenge the decision to close the Fund to new applicants because of financial constraints and lack of access to legal aid. The Committee notes, however, that the authors have not demonstrated that they attempted to file an application for legal aid. The Committee therefore considers that, by failing to bring proceedings by way of judicial review, the authors failed to exhaust all available domestic remedies.[11] The Committee therefore considers that the communication is inadmissible pursuant to article 2 (d) of the Optional Protocol.

6.5 Having thus concluded, the Committee will not examine separately the grounds for inadmissibility under article 2 (b) and (e) 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 authors.

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[10] *O.O.J. et al. v. Sweden* (CRPD/C/18/D/28/2015), para. 10.6; *D.L v. Sweden* (CRPD/C/17/D/31/2015), para. 7.3; and *T.M. v. Greece* (CRPD/C/21/D/42/2017), para. 6.4. See also *García Perea and García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2; *Zsolt Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3; and *V.S. v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3.

[11] See also *N.S.F. v. United Kingdom of Great Britain and Northern Ireland* (CEDAW/C/38/D/10/2005), para. 7.3; *Salgado v. United Kingdom of Great Britain and Northern Ireland* (CEDAW/C/37/D/11/2006), para. 8.5; and *J.S. v. United Kingdom of Great Britain and Northern Ireland* (CEDAW/C/53/D/38/2012), paras. 4.11 and 6.3.