



## 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. 46/2018\* \*\*

<i>Communication submitted by:</i>	S.K. (represented by counsel, Jukka Kumpuvuori)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Finland
<i>Date of communication:</i>	7 February 2018 (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 27 February 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	24 March 2022
<i>Subject matter:</i>	Personal assistance
<i>Procedural issues:</i>	Exhaustion of domestic remedies; lack of substantiation
<i>Substantive issues:</i>	Discrimination on the grounds of disability; right to liberty; living independently and being included in the community
<i>Articles of the Convention:</i>	5, 14 and 19
<i>Article of the Optional Protocol:</i>	2 (d) and (e)

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\* Adopted by the Committee at its twenty-sixth session (7–25 March 2022).

\*\* The following members of the Committee participated in the examination of the communication: Rosa Idalia Aldana Salguero, Danlami Umaru Basharu, Gerel Dondovdorj, Gertrude Oforiwa Fefoame, Vivian Fernandez de Torrijos, Mara Cristina Gabrilli, Amalia Eva Gamio Ríos, Samuel Njuguna Kabue, Rosemary Kayess, Kim Mi Yeon, Abdelmajid Makni, Robert George Martin, Floyd Morris, Jonas Ruskus, Markus Schefer and Saowalak Thongkuay.



1. The author of the communication is S.K.,<sup>1</sup> a national of Finland, born on 8 January 1982. He claims to be a victim of violations by the State party of articles 5, 14 and 19 of the Convention. The author is represented by counsel. The Optional Protocol entered into force for the State party on 10 June 2016.

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

### **The facts as submitted by the author**

2.1 The author has a physical and intellectual disability. He needs assistance in all daily activities. According to medical reports, the author cannot be accommodated into a group residence, and for independent living he needs a personal assistant 24 hours a day.

2.2 Personal assistance was introduced in the Finnish legal system in 1987 through the Disability Services Act 380/1987. At that time, the only way of organizing personal assistance was through the employment of a personal assistant by the person with a disability or his/her family. The personal assistant system was reformed in 2009. One reason for the reform was that the duty of a personal assistant to act as a private employee had restricted the enjoyment of the service from part of persons with disabilities. It was argued that the new service would also provide support for persons with complex needs and high support requirements. Different forms of personal assistance services were introduced, enabling that the service be provided without the obligation to function as an employee. Thus, after the reform of the Disability Services Act in 2009, personal assistance has been possible to arrange: 1) by compensating a person with disability for the necessary and reasonable costs of recruiting an assistant (the municipality of the person's place of residence may also in practice undertake to pay the assistant's wage and fulfil the other employer obligations, but the person with disability or his/her family is the employer); 2) by providing the person with a service voucher; or 3) through the provision of services by the municipality or through the purchase of services from private or public service providers. According to the 2009 law, in order to receive personal assistance, the person has to have the resources to define the contents and the modalities of implementation of personal assistance<sup>2</sup> (the so-called "resource-criteria"). The author clarifies that the term "resources" does not refer to monetary resources, but to the capacity of a person to define the content of personal assistance.

2.3 The 2009 reform has later been explained by the Finnish Ministry of Social Affairs and Health to be only partial because the resource-criteria was still necessary. However, it was argued that the introduction of this criteria limited the accessibility of the personal assistance by some persons with disabilities, particularly persons with cognitive impairments. The interpretation of the Supreme Administrative Court has been restrictive, especially with regard to the provision of personal assistance to enable persons with intellectual disabilities to live at their own home. However, personal assistance was considered to be suitable for outside home activities. Similar interpretations, or even more restrictive ones are given in municipalities. The deletion of the resource-criteria was proposed by the previous government, but the current government wishes to maintain it. Civil society organizations are strongly and almost unanimously emphasizing and demanding the deletion of the resource criteria.

2.4 On 1 January 2014, the author rented an apartment so that he could live independently in his own home. The same year, he applied for personal assistance for 140 hours per week in accordance with the Disability Services Act, to be able to live independently. The plan was that the author would first live in his own home with the support of personal assistance and with the help of his parents and thereafter with only personal assistance.

2.5 On 2 October 2015, the official under the Basic Security Board of Kirkkonummi granted 60 hours per week of personal assistance to the author, for independent activity

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<sup>1</sup> The author has requested anonymity.

<sup>2</sup> Section 8 (c) (2) of the Disability Services Act, which provides that the purpose of personal assistance is to assist a person with a severe disability to make his or her own choices when carrying out the activities referred to in paragraph 1 (activities of daily life, work and studies, hobbies, social participation and maintenance of social interaction).

outside his home, which was against his plans of living independently with the help of personal assistance in his own home. By a decision of 11 November 2015, the Basic Security Unit of the Basic Security Board of Kirkkonummi upheld the official's decision.

2.6 On 26 May 2016, the Helsinki Administrative Court dismissed the author's complaint against the decision of the Basic Security Board. The court referred to a 2008 report of the Social Affairs and Health Committee, which had stated that it was a prerequisite of receiving personal assistance that the person in need of help has the resources to define the contents of the assistance and the way of realizing it. This requirement would exclude persons with disabilities who, according to the assessment carried out by a third party, are themselves unable to define their need for assistance. The report further states that, in most cases, the need for assistance is mainly based on care, treatment and surveillance, which should be accommodated by other means than personal assistance.

2.7 The court mentioned that the author needed help in all his daily tasks and moving; that he communicates through gestures, expressions and single words; that he was participating in household tasks to a certain extent, but that the documents provided did not demonstrate that he would have the initiative to do the tasks himself. He must be reminded and encouraged to get on with the tasks. The court further considered that personal assistance was intended to support the own choices and independent life of persons with severe disabilities. Therefore, the person must have the ability to define the contents of the assistance and the way in which it is realized, and such a definition cannot be based on another person's opinions. The court revealed that, according to the medical reports in the author's file,<sup>3</sup> he has the ability to express his needs in daily situations, but not to determine the content and modalities of the assistance he would need to live in his own house. Thus, the Board considered that the author does not have the resources to define his need for assistance and the way in which it should be realized, and that he could therefore not be granted the 140 hours of personal assistance per week. The court therefore upheld the Board's decision to grant the author 60 hours of personal assistance per week, mainly to enable him to carry out independent activities outside the house and to get ready for these activities.

2.8 The author appealed the decision of the Administrative Court considering that it did not explain what kind of "ability to express the contents and realization of the assistance" is required to receive the personal assistance that is necessary to live in one's own home. He also invoked article 19 of the Convention, submitting that the contracting parties acknowledge the equal right of all persons with disabilities to live in a community where they have choices equal to others and considering that it should also be possible to arrange the living of persons with disabilities in their own homes with the help of personal assistance.

2.9 On 14 June 2017, the Supreme Administrative Court dismissed the author's appeal. It held that the author possessed the ability to express his needs in day-to-day situations, but it was not demonstrated that he would have been able to define the contents and manner of provision of the assistance, which is necessary in the case of personal assistance for the purpose of independent living in one's own home. The author lacked the resources to determine the contents and the manner of provision of the personal assistance insofar as it relates to the facilitation of independent living in his own home. The court considered that the fact that the author had previously been able to use personal assistance at home did not provide him with a legitimate expectation that he should automatically be granted with personal assistance in compliance with section 6 of the Administrative Procedure Act. It also considered that national or international rules and regulations do not provide the author with the specific right to a personal assistant at home while he does not comply with the requirements defined in section 8 (c) (2) of the Disability Services Act.

2.10 Eventually, the author moved back with his parents, because they could not move with him in his own house to provide him with 24/7 assistance.

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<sup>3</sup> Statements given by a health centre physician on 8 September 2014 and 16 December 2015; statement given by a specialist in neurology on 28 November 2014; statement given by the ward physician of a clinic of psychiatrists on 17 April 2015; reports dated 10 January 2014 and 1 February 2014 by the author's personal assistants; a physiotherapist's report dated 7 August 2015; and a report on the visit to the author's home on 18 September 2015.

### **The complaint**

3.1 Invoking General Comment No. 5, the author complains under article 19 of the Convention that he has been denied his personal and individual choice and control across the key areas of his life. He has been presumed to be unable to live independently in his own home with the help of personal assistance. The support given to him is in practice tied to particular living arrangements. Resources are not available to individually planned services, but rather to institution-like services. The municipality and the State have refrained from providing the suitable welfare services that would enable him to live independently in the community. In his case, this has led to dependence on family, as well as isolation and segregation.

3.2 The author claims that he is unable, because of the lack of adequate personal assistance, to live his own life with his own daily schedule and routines, and is always obliged to adapt and follow the routines of his family members. Yet, informal help from his parents is the only way to keep him away from institution-like settings, which is not compatible with his personal needs and would very quickly deteriorate his well-being. Furthermore, article 19 of the Convention does not permit any form of institutional support services, because they segregate and limit personal autonomy. The institutionalization of the author would therefore amount to a violation of article 19. Should the informal support of the family members come to an end, the institutionalization of the author would be the only option left by the interpretation of the legislation by State party authorities. For the time being, the violation results from the fact that assistance to the author should not have to be provided informally by his family.

3.3 The author further submits that the State party is in violation of the Convention because the authorities have not adopted a human rights based approach when assessing his need for personal assistance, but have instead adopted a medical approach of the author's impairment. Had it not been for the support of his parents he would have been forced to receive housing service in an institutional setting.

3.4 The author considers that article 5 of the Convention has also been violated, in conjunction with article 19. Statistics from civil society organizations show that persons with intellectual impairments live with their parents even when adults. There is a significant lack of community services for persons with intellectual disabilities that would comply with the requirements of article 19 of the Convention. The current practice therefore amounts to a violation of the principles of equality and non-discrimination. The criteria of having the resources for defining the contents and modalities of implementation of personal assistance contained in the Disability Services Act discriminates in the author's case, but also for persons with intellectual disabilities in general. According to the author, persons with other forms of disabilities are more eligible for personal assistance than persons with intellectual disabilities because the criteria only affects persons with intellectual disabilities.

3.5 Finally, the author invokes a violation of article 14, considering that no support is available to him in the community. If his parents would not be helping him, the author would be forced to live in an institution-like setting, which would not cater for his personal needs and not allow him to choose with whom and where to live.

3.6 As to the admissibility *ratione temporis* of his complaints, the author contends that the violations have continued after the entry into force of the Convention and its Optional Protocol for the State party on 10 June 2016.<sup>4</sup> He notes that the decision of the Supreme Administrative Court, which cannot be dissociated from the lower courts' decisions, has examined his right to personal assistances after the entry into force of both the Convention and its Optional Protocol.

### **State party's observations on admissibility and the merits**

4.1 On 27 April 2018 and 27 August 2018, the State party submitted its observations on admissibility and the merits. While admitting that the communication is admissible *ratione temporis*, the State party considers that it is not for the Committee to review the facts or the

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<sup>4</sup> The author cites the Committee's views in the case of *Jüngelin v. Sweden* (CRPD/C/12/D/5/2011).

application of domestic legislation in the case at stake and that the author has failed to substantiate, for the purposes of admissibility, that the conduct of the authorities amounted to arbitrariness or denial of justice. It argues that the author has only raised indirectly in domestic proceedings his claim under article 5 of the Convention, and that he has not raised at all his claim based on article 14 of the Convention, which amounts to non-exhaustion of domestic remedies. It adds that the author is essentially raising a hypothetical violation of article 14 because he has not provided any further substantiation as to how this provision may have been violated and because the author has not been deprived of his liberty in any way.

4.2 As to the merits, the State party points out that article 19 of the Convention does not require the States parties to ensure the independent living of persons with disabilities specifically by means of the type of personal assistance referred to in the Disability Services Act, but requires them to ensure that these persons have access to a range of in-home, residential and other community support services, including personal assistance.<sup>5</sup> It notes that the purpose of personal assistance is to support the personal choices, that is, the right to self-determination of the person with disability. That purpose cannot be fulfilled if the person with disability is unable to make his or her own choices, even when supported. In such cases, the person's needs can be served better and more safely by means of other services.<sup>6</sup> Thus, the condition of resources safeguards the person's right to self-determination and protects the person's mental and physical integrity against abuse.

4.3 The State party considers that doctors may take a stand on a person's need for assistance, but that the determination of the most suitable service to support the person's independent living cannot rest only on a doctor's assessment. According to the report received by the National Supervisory Authority for Welfare and Health, service housing under the Disability Services Act was proposed to the author's guardian as an alternative service for the author. Service housing consists of a dwelling and residential services necessary for the client's daily coping. Residential services may include assistance in activities related to habitation, such as moving, getting dressed, personal hygiene, taking one's meals and cleaning, as well as services needed to promote the recipient's health, rehabilitation and well-being. The Act does not define where and how the service housing should be organized. Residential services related to service housing may be provided at the client's home, whether rented or owned.

4.4 The State party declares that it has not been able to ascertain whether there has been a misunderstanding that could have given the author's guardian the impression that service housing could not be provided in the author's own home, for example, as individual services produced by the service provider so that the assistants remain the same. However, this does not imply that the author's case would have been decided differently. The State party also notes that the author has not submitted any new application.

4.5 As to the alleged violation of article 5 of the Convention, the State party highlights that neither the Disability Services Act nor the Disability Services Decree contain any definition, categorization or other factor that would place people in mutually unequal positions as a result of a diagnosis. The fulfilment of the condition concerning resources to define the content of personal assistance and the manner of providing it is assessed on the basis of the person's individual situation, needs and abilities, not of the person's diagnosis or type of disability.

#### **Author's comments on the State party's observations on admissibility and the merits**

5.1 On 30 May 2018 and 24 December 2018, the author submitted comments on the State party's observations. He insists that he does not argue that the Disability Services Act was

<sup>5</sup> This is corroborated by *H.M. v. Sweden* (CRPD/C/7/D/3/2011), para. 8.9 and *Bacher v. Austria* (CRPD/C/19/D/26/2014), para. 10 (a) (i) because in-home personal assistance is not "the only" option that could support the author's independent living and inclusion in the community.

<sup>6</sup> The preamble for the government's proposal for the 2008 Disability Services Act states that the nature of personal assistance requires that the person in need of assistance must have such resources. If the need for help and assistance is mainly based on a need for care, treatment or supervision, another solution than personal assistance should be found.

incorrectly interpreted or applied as a matter of domestic law, but rather that its interpretation and application contradicts the requirements of the Convention because domestic courts have not taken into account the provisions of the Convention. He further reiterates that the personal assistance system hinders in particular the rights of persons with intellectual disabilities to live independently and that the eligibility criteria is discriminatory.

5.2 As to the State party's allegation that he has not raised article 14 of the Convention in domestic proceedings, the author clarifies that in one of his submissions to the Supreme Administrative Court, he included a publication<sup>7</sup> that made references to the claim that the right to live in the community is closely linked to fundamental rights such as personal liberty. He also argued in that submission that personal assistance being restricted to activities outside the author's own home is in violation of the right to personal liberty and the right to privacy guaranteed by the Constitution, by the Convention and by the European Convention on Human Rights. The author therefore considers that he did raise article 14 of the Convention in domestic proceedings. He also submits – referring to his claim under article 5 of the Convention – that indirect reference to Convention standards should suffice.

5.3 As to the merits, the author reiterates that the Finnish legislation denies personal assistance for people who need support for their decision-making. He finds it illogical and unlawful that he was recognized to have the resources to define the contents of the assistance and the manner of providing it outside his home and when preparing for activities outside his home, but that he was judged not to have such resources with respect to the in-home assistance he needs. It is still unclear what type of resources are enough to qualify for resource criteria for in-home assistance.

5.4 The author considers that the State party's argument that the condition concerning resources safeguards the person's right to self-determination is contradictory and not supported by the Convention. He insists that the resource requirement discriminates because it is restricted to persons who can make independent decisions about assistance – thus not available to persons with severe intellectual disabilities, for example.

5.5 The author contests the State party's statement that service housing was proposed to him. He is not aware of any proceedings, records or reports of the National Supervisory Authority for Welfare and Health. There are no decisions on service housing for the author and the municipality has not offered him such service. In the administrative decision of 11 November 2015, it is only mentioned that the municipality suggested the author's mother to apply for service housing.<sup>8</sup> However, the author declares that the State party has not demonstrated that service housing would be an alternative to catering 24/7 service for persons with intellectual disabilities. This service is available for persons with other type of disabilities, but not for those with intellectual disabilities because of the artificial and discriminatory resource criteria.

5.6 According to the author, the State party has not given any example where the independent living of a person with an intellectual disability would have been organized at his or her own apartment because such cases seem not to exist. However, there are cases where such an arrangement has been possible for persons with other types of disabilities – those who "have the resources." The State party does not explain why the author would not need that service which would allow him to live independently. In conclusion, as a consequence of the resource criteria in Finnish legislation, the author enjoys the right under article 19 of the Convention outside his home, but not inside his home.

5.7 As to article 5 of the Convention, the author points to the State party's statement that persons without sufficient decision-making "resources" cannot secure the service, which represents a form of categorization that is disadvantageous for the author. Thus, discriminatory categorization does exist and, in this sense, the author reminds that the

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<sup>7</sup> Council of Europe, Commissioner for Human Rights, *The right of people with disabilities to live independently and be included in the community*, 2012.

<sup>8</sup> The author clarifies that there are two types of personal assistance under Finnish law: the personal assistance itself, with the resource criteria, and the personal assistance within the service housing, without the resource criteria.

previous government was of the view that the resource argument was discriminatory in nature.

5.8 Finally, as to article 14 of the Convention, the author reminds that the State party has an obligation to prevent a deprivation of liberty. He explains that if he does not get personal assistance, he is either forced to live with his parents or to move to a care home/institution, which represents deprivation of liberty.

### **State party's additional observations**

6.1 On 8 March 2019 and 28 August 2019, the State party reiterated its previous observations, recalling that the Convention does not oblige it to provide the author with personal assistance under section 8 (c) of the Disability Services Act, but to provide him with a sufficient range of support services to support the living and inclusion in the community and to prevent isolation and segregation. The fact that the legal criteria for personal assistance are not met does not prevent a person with disability from living independently. The State party disagrees with the author's suggestion that no other service than personal assistance would allow him to live independently. It reiterates that independent living by a person with disabilities can be organised in the form of service housing as defined in the Disability Services Act in a flat either owned or rented by the person involved. The services that such a person needs at home can be customised and provided by a permanent team of carers, for example, and they can be adopted to a 24/7 need for services. Alternatively, service housing can be provided for a person in a suitable housing unit in which the needs for specific services are duly taken into account. In such a case, the person involved takes possession of the rented flat subject to all regular rights and obligations of a tenant and receives the services from the staff that are necessary for coping on a daily basis. The State party reiterates that service housing as defined in the Disability Services Act was proposed to the author's guardian as an optional service.

6.2 For the State party, the right to access individualised, assessed support services is an economic, social and cultural right. The obligation of States parties under the Convention is to take measures to progressively realize these rights, as well as to act consistently with the obligations of immediate effect. Article 19 of the Convention does not require the States parties to provide all persons with whatever form of arrangements they consider preferable.

6.3 The State party submits that, as of November 2018, the author declined any other services<sup>9</sup> as an alternative to the personal assistance he requested. His guardian was not willing to accept alternative services proposed by the municipality.

6.4 The State party also provides information on the ongoing domestic reform of the legislation on disability services. During the consultation process held in the summer of 2017, it was considered important that personal assistance continue to be determined by the person with disability himself or herself. While many of those parties were indeed of the opinion that the retention of the resource criterion in the law would undermine equality among people with disabilities, others held that the resource criterion was needed in order to ensure that the provision of personal assistance remained a service that contributed to the right of self-determination of the person concerned. After an overall assessment balancing the strengths and weaknesses of the requirement, its underlying aims as well as taking into account the views presented during the consultation process, it is now being proposed to maintain it in the legislation.

6.5 The State party further clarifies that the "resources requirement" in the Disability Services Act does not mean that a person with disabilities would need to be able to determine the contents and manner of provision of the assistance entirely independently. Such determination may be made with the support of another person or by using various communication aids. Consequently, it is enough that the person possesses "some resources" that may be activated by the support provided by another person or a communication aid.

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<sup>9</sup> Transport services consisting of 18 free trips per month outside regular working hours; personal assistance pursuant to the Disability Services Act and day activities pursuant to the Act on Special Care of the Disabled on three days per week, including travel to the day centre and back.

This has been confirmed on several occasions by the Supreme Administrative Court.<sup>10</sup> Thus, although the resources requirement can be met in situations where the content and manner of provision of the assistance may be made with support, the national authorities did not in the author's specific situation find that he met the resources requirement. The author's mere disagreement with the domestic court's decision does not as such imply a violation of the Convention.

6.6 As to the author's allegation of discrimination, the State party emphasises that the resources requirement does not make any distinction, exclusion or restriction based on disability as such, nor does it have the effect of depriving those who do not meet it of the possibility to live independently and be included in the community by other means.

#### **Author's additional comments**

7.1 On 7 April 2019 and 25 September 2019, the author submitted additional comments. He insists that any service other than personal assistant would not allow him to live independently. The current assistance provided by his parents as informal carers has been the only means for the author to avoid living in an institution-like setting. While admitting that article 19 of the Convention does not require any specific service to be provided, but a range of services, the author held that if he needs just personal assistance, then that is the service that must be provided to him. The obligation cannot be discharged by the State party with providing him another service, which is insufficient to guarantee his independent living. The services necessary must be provided without requiring him to move to an institution.

7.2 Following the State party's statements that service housing would be an alternative service, the author's counsel contacted the Ministry for Health and Social Affairs. The Ministry was not able to provide information on the existence of 24/7 solutions for persons with intellectual disabilities in their own apartment.<sup>11</sup> This renders such a service only theoretical. As to the State party's statement that service housing was proposed to the author's guardian, the author denies the existence of such "proposals" that would enable him to live in his own apartment and receive assistance there.

## **B. Committee's consideration of admissibility and the merits**

### **Consideration of admissibility**

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee and nor has it been or is it being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the author's claims that the decision of the Supreme Administrative Court, which cannot be dissociated from the lower courts' decisions, and which examined his right to personal assistances, was handed down after the entry into force of the Optional Protocol for the State party. It also notes that the State party does not contest the competence *ratione temporis* of the Committee to address the author's complaint. Therefore, the Committee considers that it is not precluded by article 2 (f) of the Optional Protocol from examining the present communication.

8.4 The Committee notes the State party's argument that the author's complaints under articles 5 and 14 of the Convention should be found inadmissible under article 2 (d) of the Optional Protocol on the grounds of non-exhaustion of all available domestic remedies, although it does admit that the author has raised indirectly his claim under article 5 in

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<sup>10</sup> The State party refers to two decisions by the Supreme Administrative Court on 12 August 2011.

<sup>11</sup> In its further observations of 28 August 2019, the State party notes that the Ministry does not keep registers or other statistics on decisions made for persons with disabilities as clients of municipal services nor on persons receiving such services.

domestic proceedings. The Committee notes the author's statement that indirect reference to article 5 should be enough and that he did make reference to his right to liberty under article 14. Accordingly, it considers that the author has exhausted domestic remedies for the purposes of article 2 (d) of the Optional Protocol.

8.5 However, as regards the author's claims under article 14 of the Convention, the Committee notes the author's argument that in the absence of personal assistance, he is either forced to live with his parents or to move to a care institution, which represents deprivation of liberty. However, the Committee also notes that these allegations are submitted in general terms, and that the author was never deprived of his liberty in the sense of article 14, which relates to any form of detention or institutionalization of persons with disability.<sup>12</sup> The Committee therefore considers that this part of the communication is inadmissible for lack of substantiation, under article 2 (e) of the Optional Protocol.<sup>13</sup>

8.6 There being no other obstacles to admissibility, the Committee declares the communication admissible and proceeds to its examination on the merits.

### Consideration of the merits

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

9.2 The Committee first notes the author's claim that, in the absence of an in home personal assistance, he is not able to exert his freedom of choice to live independently and therefore needs to depend on his parents' support to avoid entering a specialized health-care institution because the State party does not provide him with the suitable personal assistance that would enable him to live independently in the community. In this regard, the Committee recalls that the right under article 19 of the Convention to live independently and be included in the community means exercising freedom of choice and control over decisions affecting one's life with the maximum level of self-determination and interdependence within society.<sup>14</sup> The provision in article 19 (b) of the Convention requires States parties to take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of their equal right to live and participate in their communities by ensuring that persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community. The Committee further recalls that persons with disabilities have the right to choose services<sup>15</sup> and that while individualized support services may vary in name, type or kind according to the cultural, economic and geographic specifics of the State party, all support services must be designed to support living within the community, preventing isolation and segregation from others, and must in actuality be suitable for this purpose.<sup>16</sup>

9.3 In the present case, the Committee notes the author's argument that only personal assistance would be suitable for him to be able to live independently in his own home. It also notes the State party's argument that independent living by a person with disabilities can be organised in the form of service housing, another type of service stipulated in the Disability Services Act. The Committee further notes the disagreement between the parties as to the suitability of service housing to the author's needs and also in respect of the availability and its acceptance by the author. In any event, the Committee notes that the State party has not demonstrated the suitability in practice of service housing to the author's needs. To the contrary, it refused his request for in-home personal assistance based on the grounds that he would be unable to choose, a seemingly ableist argument contravening the human rights

<sup>12</sup> See the guidelines on article 14 of the Convention, "The right to liberty and security of persons with disabilities," September 2015.

<sup>13</sup> *Y. v. United Republic of Tanzania* (CRPD/C/20/D/23/2014), para. 7.7.

<sup>14</sup> General comment No. 5 (2017) on living independently and being included in the community, para. 8.

<sup>15</sup> *Ibid.*, para. 28.

<sup>16</sup> *Ibid.*, para. 30.

model of disability.<sup>17</sup> In the absence of elements that would reveal the practical application of this theoretical type of service, the Committee considers that the rejection of the author's application for personal assistance has deprived him of access to a practical option that could support his living and inclusion in the community.<sup>18</sup> The Committee therefore concludes that the author's rights under article 19 (b) of the Convention have been violated.

9.4 The Committee further takes note of the author's allegations of discrimination in view of the rejection by the State party's competent authorities of his application for personal assistance. It notes his argument that the resources requirement under section 8 (c) (2) of the Disability Services Act constitutes a barrier for persons who require support to determine the content and modalities of assistance to enjoy personal assistance on an equal basis with others. The Committee also notes the State party's argument that the resources requirement does not make any distinction, exclusion or restriction based on disability as such, nor does it have the effect of depriving those who do not meet it of the possibility to live independently and be included in the community by other means.

9.5 The Committee recalls that under article 2 of the Convention, "discrimination on the basis of disability" is defined as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, and includes all forms of discrimination, including denial of reasonable accommodation. The Committee further recalls that a law that is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different.<sup>19</sup> The Committee recalls that in cases of indirect discrimination, laws, policies or practices that appear neutral at face value have a disproportionately negative impact on persons with disabilities. Indirect discrimination occurs when an opportunity that appears accessible in reality excludes certain persons owing to the fact that their status does not allow them to benefit from the opportunity itself.<sup>20</sup> The Committee further observes that under article 5 (1) and (2) of the Convention, States parties have obligations to recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law; and to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

9.6 The Committee notes that, in the present case, the author's application for a certain number of hours of personal assistance was rejected as he did not meet the resources requirement under section 8 (c) (2) of the Disability Services Act of having the ability to determine the content and modalities of the assistance he would need to live in his own house. It further notes that the author received a reduced number of hours of personal assistance for his activities outside his home, but not for those inside his home. The Committee notes the State party's argument that the purpose of personal assistance is to support the personal choices, in other words, the right to self-determination of the person with disability. It also notes the State party's argument that such a purpose cannot be fulfilled if the person with disability is unable to make his or her own choices. The Committee further notes the author's argument that because of this requirement to have the ability to determine the content and modalities of assistance –without support for decision making – persons with intellectual disabilities are discriminated against on the basis that they require support to determine the content and modalities of assistance.

9.7 In the present case, the Committee notes that the author receives personal assistance for activities outside his home. The State party has not explained the grounds on which the

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<sup>17</sup> See Report of the Special Rapporteur on the rights of persons with disabilities, 17 December 2019, A/HRC/43/41, paras. 9-15.

<sup>18</sup> *H.M. v. Sweden*, para. 8.9.

<sup>19</sup> *H.M. v. Sweden*, para. 8.3.

<sup>20</sup> General comment No. 6 (2018) on equality and non-discrimination, para. 18 (b).

author was deemed to have the ability to determine his outdoor assistance, but not his indoor assistance. The State party has also not explained how such a requirement with an intellectual component – the ability to determine the content and modalities of assistance – makes it possible for people who require support to be able to express their choice on an equal basis with others.. The Committee therefore concludes that, in the present case, in the absence of an objective and reasonable justification by the State party, the application of the resource-criteria requirement under section 8 (c) (2) of the Disability Services Act disproportionately affected the author as a person who required support to meet the resource criteria and resulted in him being subjected to indirect discrimination..

9.8 The Committee therefore finds that the fact that the relevant domestic authorities rejected the author’s application for personal assistance on the basis of resource criteria is indirect discrimination against persons with intellectual disabilities as it had the effect of impairing or nullifying the author’s enjoyment and exercise of the right of living independently and being included in the community on an equal basis with others, in violation of his rights under article 5 (1) and (2) read alone and in conjunction with article 19 of the Convention.

9.9 In the light of the above, the Committee concludes that the State party has failed to fulfil its obligations under articles 19 and 5 (1) and (2), read alone and in conjunction with article 19 of the Convention.

### **C. Conclusion and recommendations**

10. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under article 19 and article 5 (1) and (2), read alone and in conjunction with article 19 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) Provide him with an effective remedy, including by reconsidering his application for personal assistance to ensure that he can exercise his right to live independently, in light of the Committee’s Views;

(ii) Provide adequate compensation to the author for the costs incurred in filing this communication;

(iii) Publish the present Views and circulate them widely in accessible formats so that they are available to all sectors of the population.

(b) In general, the State party is under an obligation to take measures to prevent similar violations in the future, including by ensuring that its legislation on personal assistance and the manner in which it is applied by administrative institutions and domestic courts is consistent with the State party’s obligations to ensure that legislation does not have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with intellectual disabilities on an equal basis with persons with other types of disabilities when seeking to access personal assistance;

(c) In particular, the Committee recommends the State party to amend the Disability Services Act to ensure that the resource-criteria requirement based on the beneficiary’s “ability” to determine the content and modalities of the required assistance is not an obstacle to the independent living of persons who require support in decision-making.

11. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee’s rules of procedure, the State party should submit to the Committee, within six months, a written response, including information on any action taken in the light of the present Views and recommendations of the Committee.