



Convention on the Rights of Persons with Disabilities

Distr.: General
21 May 2012

Original: English

Committee on the Rights of Persons with Disabilities

Communication No. 3/2011

Views adopted by the Committee at its 7th session, 16 to 27 April 2012

<i>Submitted by:</i>	H.M. (represented by Mr. H-E.G. and Mrs. B.G.)
<i>Alleged victim:</i>	The author
<i>State Party:</i>	Sweden
<i>Date of communication:</i>	6 December 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 70 decision, transmitted to the State party on 9 February 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	19 April 2012
<i>Subject matter:</i>	Refusal to grant building permission for the construction of a hydrotherapy pool for the rehabilitation of a person with a physical disability on grounds of incompatibility of the extension in question with the city development plan
<i>Procedural issues:</i>	Non-substantiation of claims;
<i>Substantive issues:</i>	Purpose of the Convention; discrimination on the basis of disability; reasonable accommodation; general principles enshrined in the Convention; general obligations under the Convention; equality and non-discrimination; accessibility; right to life; liberty and security of the person; living independently and being included in the community; personal mobility; health; habilitation and rehabilitation; adequate standard of living and social protection
<i>Articles of the Convention:</i>	1; 2; 3; 4; 5; 9; 10; 14; 19; 20; 25; 26 and 28
<i>Articles of the Optional Protocol:</i>	2(e)
[Annex]	

Annex

Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (7th session)

concerning

Communication No. 3/2011*

Submitted by: H.M. (represented by Mr. H-E.G. and Mrs. B.G.)

Alleged victim: The author

State Party: Sweden

Date of communication: 6 December 2010 (initial submission)

The Committee on the Rights of Persons with Disabilities, established under article 34 of the Convention on the Rights of Persons with Disabilities,

Meeting on 19 April 2012,

Having concluded its consideration of communication No. 3/2011, submitted to the Committee on the Rights of Persons with Disabilities by Ms. H.M. under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, of the Optional Protocol

1. The author of the communication, dated 6 December 2010, is Ms. H. M., a Swedish national born in 1978. The author claims to be a victim of a violation by Sweden of her rights under articles 1, 2, 3, 4, 5, 9, 10, 14, 19, 20, 25, 26 and 28 of the Convention on the Rights for Persons with Disabilities. The Optional Protocol to the Convention entered into force for Sweden on 15 January 2009. The author is represented by Mr. H-E.G. and Mrs. B.G..

* The following members of the Committee participated in the examination of the present communication: Amna Ali Al-Suwaidi, Mohammed Al-Tarawneh, Monsur Ahmed Chowdhury, Maria Soledad Cisternas Reyes, Theresia Degener, Gábor Gombos, Fatiha Hadj-Salah, Hyung Shik Kim, Lofti ben Lallahom, Stig Langvald, Edah Wangechi Maina, Ronald McCallum, Ana Pelaez Narvaez, Silvia Judith Quan-Chang, Carlos Rios Espinosa, Damjan Tatic, Germán Xavier Torres Correa and Jia Yang.

The facts as presented by the author

2.1 The author has a chronic connective tissue disorder, Ehlers-Danlos Syndrome (EDS), which has led to hypermobility (excessive over-flexibility of joints), severe luxations and sub-luxations (dislocation of joints), fragile and easily damaged blood vessels, weak muscles and severe chronic neuralgia. She has not been able to walk or stand for the last eight years, and she has difficulty sitting and lying down. Her impairment has resulted in her being bedridden for the last two years, which has weakened her even further. The author cannot take medicines, since she also has atypical hypersensitivity to medicines.

2.2 The author can no longer leave her house or be transported to hospital or rehabilitation care because of the increased risk of injuries that may be incurred due to her impairment. The destructive course of the impairment is still continuing and the only type of rehabilitation that could stop its progress is hydrotherapy, which in the author's circumstances would only be practicable in an indoor pool in her house. Water therapy is recommended for Ehlers-Danlos Syndrome by specialists. In the author's case, it would improve her quality of life as, for example, her joints would become more stable, she would build more muscle, her blood circulation would improve and her pain and suffering would be alleviated.

2.3 On 7 December 2009, the author applied for planning permission for an extension of approximately 63 square metres to the house on her privately owned piece of land. The extension would to a large extent (approximately 45 square metres)¹ be on land where building is not permitted.

2.4 On 17 December 2009, the request for building permission was rejected by the Örebro Local Housing Committee. The author appealed the decision of the Local Housing Committee to the Örebro County Council. The appeal was rejected on 3 March 2010. This decision was appealed to the Karlstad Administrative Court. On 28 April 2010, the Administrative Court granted the appeal and referred the author's application for planning permission back to the Örebro Local Housing Committee for a new hearing of the case.

2.5 The Administrative Court stated, in particular, the following:

“Against the background of the fact that the major part of the remaining plot of land must not be built on, an alternative placement according to the plan is not possible. [...] It has not been stated that H. M. could meet the need for an exercise pool with a smaller extension in closer accordance with the plan. As far as the documents of this case go, it is not a realistic alternative to move to another house where her need for an exercise pool can be met, or to move to another suitable institution. Furthermore it is evident from the medical documents that an exercise pool would be of particularly great importance to the life situation and life quality of H. M. and that it would also be cost saving for her future care and attention. With reference to what has now been stated, the Administrative Court, in a balance of interests in accordance with Chapter 1, § 5 of the Planning and Building Act, finds that the interests of H. M. to use the land for the extension in question should have preference over the general public interest to preserve the area in complete compliance with the detail plan. Against the background of the extraordinary cause which is the basis for this evaluation, the Administrative Court cannot see a risk that an approval would lead

¹ The Administrative Court of Appeal in its decision of 1 July 2010 refers to 48 square metres (see para. 2.6).

to similar applications for the approval of similar measures on other properties in the area. Consequently, the grounds referred to by the Local Housing Committee do not constitute a reason for refusing a building permission.”²

2.6 The Municipality of Örebro appealed the decision of the Administrative Court to the Administrative Court of Appeal (Gothenburg) and, on 1 July 2010, the Administrative Court of Appeal refused the author’s application for planning permission. It stated, in particular, the following:

“The building permission that H. M. has applied for goes against the regulations of the detail plan in the sense that the proposed construction to a large extent (approximately 48 square meters) will be placed on the so-called “dotted land”, which means on land where, according to the plan, it is not allowed to build. Like the County Council has stated, such a construction cannot be permitted to be built even as a minor divergence from the detail plan with regard to what is stated in Chapter 8, § 11 of the Planning and Building Act.”³

2.7 The author petitioned the Supreme Administrative Court (Stockholm) for leave to appeal the decision of the Administrative Court of Appeal. The author’s petition was refused on 5 August 2010.

The complaint

3.1 The author claims that she has been discriminated against by the decisions of the State party’s administrative bodies and courts, since they have failed to take into account her rights to equal opportunity for rehabilitation and improved health. She has thereby been refused her right to a worthwhile quality of life. The refusals are based merely on public interest to preserve the development plan and have become more of a matter of principle, which has a severe impact on the living conditions of a person with disability. Furthermore, her house has previously been adapted to her disability-related needs at a cost of EUR 42,000. The new extension would not be visible from the street, and the land parcel behind her house, for which the planning permission has been applied, is thickly wooded, with many bushes and clumps of trees. The neighbours have also given their consent to the extension. The author argues that a single departure from the development plan, should the application be approved, would not be detrimental to the surroundings. Given the exceptional nature of her case, there would be no risk of repeated similar requests.

3.2 The author maintains that the only hope of rehabilitation is hydrotherapy at home, any other options being excluded, and encloses two medical certificates dated 29 September 2009 and 28 June 2010 as documentary evidence that, for her rehabilitation, no alternative to hydrotherapy at home exists. The author also considers that the health, interest and well-being of a person with disability come above the public interest of not allowing any buildings on land that has been marked out as areas which should not be built on. She also recalls that she is an owner of the piece of land for which the building permission in question was requested.

3.3 The consequences of planning permission not being granted would result in a significant risk for the author of becoming bedridden for an indefinite period of time, with severe muscular atrophy, stretched ligaments, severe dislocations with, inter alia, reduced

² Translation provided by the author.

³ Translation provided by the author.

chest expansion, which would impede full inhalation and cause acute pain. In the absence of rehabilitation, the author runs the risk of eventually having to enter a care institution.

3.4 The author requests the Committee to determine whether the Convention has priority over the decision of the Local Housing Committee, which was based on the State party's Planning and Building Act. In other words, the Committee is requested to decide on whether the author's needs for rehabilitation and care due to her disability are of primary consideration over the public interest as protected by the Local Housing Committee.

State party's observations on admissibility and merits

4.1 On 5 September 2011, the State party provided its observations on the admissibility and merits of the author's communication. It submits that the Planning and Building Act contains provisions concerning the planning of land and water areas and concerning building. Municipalities regulate the use and development of land via a detailed development plan. Both public and private interests are to be considered when issues are addressed under the Act. A building permit is required for most new buildings and extensions. In order for a building permit to be granted within an area covered by a detailed development plan, the planned measures must not contravene the detailed development plan.

4.2 A building permit may be granted for a measure that involves a minor departure from the development plan, if the departure is compatible with the purpose of the plan. Examples of what constitutes a minor departure include a construction that encroaches on protected land by just a few metres, or that exceeds the maximum building height for structural reasons. The Supreme Administrative Court considered, in a judgement delivered in 1990, that a measure which involved construction on 125 square metres of protected land did not constitute a minor departure. When an authority or court assesses whether a certain measure which departs from the detailed development plan could be considered a minor departure, both private and public interests should be taken into account. The author has not claimed that the measure for which she has applied for a building permit constitutes a minor departure from the detailed development plan in force. Under such circumstances, the granting of a building permit is not possible under the Planning and Building Act.

4.3 According to the Health and Medical Services Act, the obligation to offer good health and medical services is incumbent on county councils. The obligation includes, inter alia, offering rehabilitation and supplying assistive devices for persons with disabilities. These measures should be planned in consultation with the individual. A patient should always be offered treatment, where a scientifically proven, tried and tested treatment is available. When several treatment options are available, the patient should be given the option of choosing the treatment he or she prefers. However, in the case of multiple treatment options, the benefits of a certain treatment must be weighed against its cost. The Discrimination Act contains provisions concerning the prohibition of discrimination connected with disabilities.

4.4 The State party states that in November 2009, the author applied to Örebro Municipality for a building permit to build an extension on land of which large parts are protected under the detailed development plan. The extension would cover approximately 65 square metres (45 square metres of which on protected land) and contain a hydrotherapy pool for rehabilitation. She requested an exemption from the prohibition on building under the applicable development plan, with reference to her complicated health situation. She

submitted medical certificates from a doctor for the purpose of corroborating her need for a hydrotherapy pool. The doctor in question does not work for the county council. In a supplementary document to her application for a building permit, she stated that the proposed location of the planned extension was the only possible location on the property, primarily for functional reasons.

4.5 In December 2009, the Municipality rejected the author's request, considering that the extension would not constitute a minor departure from the development plan. In January 2010, the author filed an appeal to the County Administrative Board, arguing that there were exceptional grounds for granting a building permit, given her health problems, and referred to documentation submitted previously. The documents stated that a pool of the specified size is necessary for the alleviation of her symptoms and rehabilitation. The author also submitted that she has practically no opportunity to leave the property due to the high risk of infection and mobility problems. In March 2010, the County Administrative Board rejected her appeal on the grounds that the measure contravenes the provisions of the development plan and the departure from the plan is of a type and size that cannot be considered minor.

4.6 The author appealed against this decision to the Administrative Court in Karlstad, maintaining that hydrotherapy in a pool in her home environment is the only possibility of improving her situation. She claimed that transportation by ambulance to other hydrotherapy facilities is not an option, as ambulance staff are unwilling to transport her due to her fragile condition; nor can she move out, since she is dependent on her parents, who live nearby. She added that the extension would not be visible from the street, affect the overall appearance of the area or alter its character. In April 2010, the Administrative Court overturned the decision of the municipality, and the case was referred back to the municipality for new consideration. The Court found that the author's interest in using the land for the extension in question should take precedence over the public interest in maintaining the area entirely in accordance with the development plan. The judgement was not unanimous.

4.7 In May 2010, Örebro Municipality appealed against the judgement to the Administrative Court of Appeal in Gothenburg. In July 2010, the Administrative Court of Appeal overturned the judgement of the Administrative Court, and upheld the decision of the Municipality and the County Administrative Board, stating that the decision-making authorities and courts cannot disregard existing legislation and other provisions when assessing a building permit matter, that the building permit for which the author had applied contravenes the development plan and that such a measure cannot be considered a minor departure from the plan. The judgement was adopted unanimously.

4.8 In July 2010, the author appealed against the decision of the Administrative Court of Appeal to the Supreme Administrative Court, claiming that the decision to reject her application was not reasonable or proportionate to the damage caused to her. She maintained that her need for a hydrotherapy pool outweighs the interest of following the existing development plan. On 5 August 2010, the Supreme Administrative Court decided not to grant leave to appeal, whereby the decision to reject the author's application became final and not subject to further appeal.

4.9 With regard to the admissibility of the communication, the State party submits that it is not aware of the present matter having been or being examined under another procedure of international investigation or settlement and acknowledges that all domestic remedies

have been exhausted, as required by article 2(c) and 2(d) of the Optional Protocol. However, it maintains that the author's claims fail to rise to the basic level of substantiation required for purposes of admissibility and should be declared inadmissible pursuant to article 2(e) of the Optional Protocol.

4.10 On the merits, the State party notes the author's claims that she has been discriminated against as a result of negative decisions adopted by the Swedish authorities and courts because her right to rehabilitation and good health has not been taken into consideration, and the principle of proportionality has not been applied. The State party further submits that the burden of proof for an alleged violation of the Convention, at least initially, rests with the author. This includes the onus of demonstrating the existence of the circumstances invoked in support of the complaint. It also points out, with reference to the request that the author be granted a building permit, that the Committee does not have the authority to overturn a judgement by a Swedish Court or a decision by a Swedish authority. Nor does it have the power to replace the domestic judgement or decision with a decision of its own. The Committee can only conclude either that the circumstances of the case reveal a violation of the Convention or that there has been no such violation.

4.11 The State party maintains that the author has merely referred to a number of articles of the Convention without advancing grounds for how her rights under these articles have been violated. Therefore, it can only explain in general terms how Swedish legislation relates to and fulfils the requirements contained in the articles that may be relevant in this case. Other articles referred to by the author do not have a bearing on the present case and the State party would not submit any comments with regard to them.

4.12 Article 5 of the Convention prescribes that all persons are equal before and under the law and prohibits any discrimination on grounds of disability. This is a fundamental and clear premise in Swedish legislation and follows from the Swedish Constitution. The relevant Act in this case, the Planning and Building Act, is applied in the same way to all, whether they have disabilities or not. Nor are there any clauses in the Act that might lead indirectly to discrimination against persons with disabilities. The rejection of the application for a building permit in this case is in no way due to the author's disability, but rather consistent with practice that applies equally to all.

4.13 As to the author's claim under article 19 of the Convention, there is nothing in Swedish legislation to prevent persons with disabilities from choosing their place of residence or way of life. All measures offered at municipal level, e.g. service accommodation, are non-compulsory for individuals. A number of alternative measures are available from municipalities in order to make it easier for individuals with specific needs to live in their own homes, e.g. contribution to home adaptation, personal assistance and home help.

4.14 With regard to the claims under articles 25 and 26 of the Convention, the State party recalls that in Sweden county councils have the obligation to provide health and medical services, including rehabilitation, to everyone who is resident in the county council area. Accordingly, it is not the application of the Planning and Building Act that should secure the author's rights in accordance with articles 25 and 26 of the Convention. Instead, these rights should be fulfilled by way of the county council carrying out its obligations according to the Health and Medical Services Act. The State party maintains that it must be up to the author to account for her contacts with the county council and for the treatment she has been offered, for example by submitting relevant medical documentation. However,

she has not made any such submissions in this regard. In the absence of an account by the applicant on this issue, the State party assumes that the author has been offered treatment in accordance with her needs. The author has not substantiated her allegation that she cannot obtain adequate care if she is not allowed to build a hydrotherapy pool in accordance with her request for a building permit.

4.15 In the light of the foregoing, the laws applied in the present case are not discriminatory. The decisions and judgements delivered by domestic authorities were not motivated by the author's disability and are therefore not discriminatory within the meaning of article 5 of the Convention. Moreover, none of these decisions violates article 5 or any other provisions of the Convention in any other way.

4.16 In conclusion, the State party submits that the present communication does not reveal a violation of the Convention. Since the author's claims under various articles of the Convention fail to rise to the basic level of substantiation, the communication should be declared inadmissible for lack of substantiation.

Author's comments on the State party's observations

5.1 On 14 November 2011, the author provided her comments on the State party's observations on admissibility and merits.

5.2 The author claims that the refusal to issue building permission amounts to discrimination, since all possible avenues of recourse that might ensure her rehabilitation, as a "functionally disabled person", have been exhausted. The opposition to the construction of a hydrotherapy pool in connection with the adapted accommodation in her home would deprive her of treatment absolutely necessary for her health condition. She submits that the application of laws and regulations which appear to be neutral has proved to be unfair towards her and will have an indirect effect of discrimination. The fact that a Swedish "functionally disabled citizen" cannot obtain the lawful right to adequate rehabilitation, through an application for building permission for special adaptation of her home, will amount to a violation of the Convention.

5.3 The author notes that the State party in its observations contends that no violation of the Convention has taken place, and refers to a building permission case from 1990 which received a negative decision against a departure from the plan of an area of 125 square metres – a considerably larger area than the building extension of 45 square metres requested by her. The author questions the relevance of the reference to a case dating from 1990, on a matter of a completely different kind. She claims that, in her case, a restrictive interpretation of the Building Act of 1987 regarding protected land has been applied.

5.4 The author further notes that, notwithstanding the magnitude of the departure from the plan in the building permission, there is still a requirement for life-enhancing circumstances for a "functionally disabled person" with a rightful claim to equality with regard to quality of life. Claims for the applicability of the principle of proportionality can be made in a case where the purpose and interest of the individual would strongly outweigh the interests of society at large. A nominally larger departure from the Planning and Building Act can probably be regarded as relatively small from the point of view of society, while it would be of vital importance in ensuring her quality of life, including her right to good health.

5.5 It is right that both the Planning and Building Act and the Health Act are stipulated, to uphold the building regulations and health rights relating to citizens with regard both to building norms and health laws. However, the author claims that her rights as a “functionally disabled person” cannot be accommodated via the national health laws. Since a departure from the Planning and Building Act is not permitted for the specific purpose, a disabled person is not being provided with proper health care appropriate to his/her condition. As a result, the “functionally disabled person” in question is exposed to discrimination, since no measures have been taken in order to comply with her right to good health care.

5.6 According to the author, due to the degree of disability and the state of her health, her right to rehabilitation, as set out in articles 25 and 26 of the Convention, can only be secured by way of an application for building permission. In the author’s opinion, the extent of the State party’s reliance on the national health laws is of little concern when the obvious need of a person with a disability cannot be met through the interpretation and application of these laws.

5.7 With regard to the State party’s argument that everyone is equal before the law, the author submits that it must be possible to apply the law in such a manner that no one in society suffers. She claims that, by ratifying the Convention, the State party has undertaken to provide for the rights of persons with disabilities.

5.8 As to her health situation, the author submits that the doctor who issued the certificate has his own practice and is connected to the County Council. She further claims that relevant medical documentation was supplied with the application for the building permission. This doctor visits her regularly since she is no longer able to go to the County Council’s institutions for health care and rehabilitation due to her seriously reduced functional ability. Information as to her psychological condition, as well as the medical measures warranted, was provided with the application for building permission and with the subsequent appeals. The national health laws referred to by the State party cannot be claimed to apply to the author’s case.

5.9 The author has also provided a supplementary medical report issued by the Head of the Neurology Clinic of the Örebro University Hospital on 24 October 2007. According to the report, the author’s “condition is hereditary and medically untreatable. Different types of aids can be offered but they must always be adapted to the situation of the patient [...] Treatment is also often required in the home since the patient cannot be moved to different institutions for treatment. This leads to higher costs of living and handicap compensation can therefore come into question when an assessment has been completed”.⁴ The author concludes that treatment at home was previously prescribed in 2007 and that, in order to maintain the muscular structure, protect the connective tissue and reduce the pain which cannot be treated with medicine, her last resort is rehabilitative hydrotherapy at home. Her already limited anatomical ability would not allow for any other form of treatment. The right to the claims of the National Health law can only be fulfilled by allowing a specific departure from the plan in the building permission for her special needs.

⁴ Translation provided by the author.

State party's further observations

6. On 10 January 2012, the State party informed the Committee that it maintains its observations on admissibility and merits of the communication, as submitted to the Committee on 5 September 2011.

Issues and proceedings before the Committee*Consideration of admissibility*

7.1 Before considering any claims contained in a communication, the Committee on the Rights of Persons with Disabilities must, in accordance with rule 65 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Convention.

7.2 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 or has been or is being examined under another procedure of international investigation or settlement. The Committee notes that no objection has been raised by the State party in connection with the exhaustion of domestic remedies and considers that the requirements of article 2(d) of the Optional Protocol have been met.

7.3 The Committee considers that articles 1 and 2 of the Convention, in view of their general character, do not in principle give rise to free-standing claims under the Convention, and therefore can be invoked in the framework of individual communications under the Optional Protocol only in conjunction with other substantive rights guaranteed under the Convention. In the circumstances of the present communication, the Committee considers that this part of the communication is inadmissible under article 2(e) of the Optional Protocol.

7.4 The Committee notes that the author has invoked a violation of article 9 of the Convention (accessibility), 10 (right to life), 14 (liberty and security of the person), 20 (personal mobility), without however providing further substantiation as to how these provisions may have been violated. Therefore, the Committee considers that these claims are insufficiently substantiated, for purposes of admissibility, and are thus inadmissible under article 2(e), of the Optional Protocol.

7.5 The Committee considers that the author's remaining allegations under articles 3, 4, 5, 19, 25, 26 and 28, of the Convention, have been sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

8.1 The Committee on the Rights of Persons with Disabilities has considered this communication in the light of all the information received, in accordance with article 5 of the Optional Protocol and rule 73, paragraph 1, of the Committee's rules of procedure.

8.2 The Committee takes note of the author's allegations of discrimination in view of the fact that the State party's competent authorities, when considering her application for permission to build a hydrotherapy pool that would meet her rehabilitation needs, failed to apply the principle of proportionality and weigh her interests in using the plot of land that she owns for the construction of the hydrotherapy pool against the general interest in preserving the area in question in strict compliance with the development plan. It further

notes the State party's argument that the Planning and Building Act is applied equally to all, whether the person has a disability or not, and that the Act contains no clauses that would indirectly lead to discrimination against persons with disabilities.

8.3 The Committee recalls, with reference to article 2, paragraph 3, of the Convention, that "discrimination on the basis of disability' means 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." The Committee observes that a law which 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.

8.4 The definition of discrimination on the basis of disability in article 2, paragraph 3, of the Convention explicitly states that "it includes all forms of discrimination, including denial of reasonable accommodation". Additionally, article 2, paragraph 4, defines reasonable accommodation as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

8.5 In the present case, the information before the Committee shows that the author's health condition is critical and access to a hydrotherapy pool at home is essential and an effective – in this case the only effective – means to meet her health needs. Appropriate modification and adjustments would thus require a departure from the development plan, in order to allow the building of a hydrotherapy pool. The Committee notes that the State party has not indicated that this departure would impose a "disproportionate or undue burden". In this connection, the Committee notes that the Planning and Building Act allows for departure from the development plan, and that it can thus accommodate, when necessary in a particular case, an application for reasonable accommodation aimed at ensuring to persons with disabilities the enjoyment or exercise of all human rights on an equal basis with others and without any discrimination. On the basis of the information before it, the Committee therefore cannot conclude that the approval of a departure from the development plan in the author's case would impose a "disproportionate or undue burden" on the State party.

8.6 The Committee recalls that article 25 of the Convention, when referring to the right to health, stipulates that "States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation".

8.7 At the same time, the Convention refers to habilitation and rehabilitation in article 26, and states that "States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life", through comprehensive habilitation and rehabilitation

services and programmes, in such a way that these services and programmes “begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths”.

8.8 In this regard, the Committee notes that the State party, when rejecting the author’s application for a building permit, did not address the specific circumstances of her case and her particular disability-related needs. The Committee therefore considers that the decisions of the domestic authorities to refuse a departure from the development plan in order to allow the building of the hydrotherapy pool were disproportionate and produced a discriminatory effect that adversely affected the author’s access, as a person with disability, to the health care and rehabilitation required for her specific health condition. Accordingly, the Committee concludes that the author’s rights under articles 5(1), 5(3), 25 and the State Party’s obligations under article 26 of the Convention, read alone and in conjunction with articles 3 (b), (d), and (e), and 4(1) (d) of the Convention, have been violated.

8.9 The Committee further notes the author’s claim that, in the absence of an indoor hydrotherapy pool at home, she will eventually have to enter a specialized health-care institution, and that the State party did not refute the author’s allegations. In this regard, the Committee recalls the provision in article 19(b) of the Convention, which 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 rejection of the author’s application for a building permit has deprived her of access to hydrotherapy, the only option that could support her living and inclusion in the community. The Committee therefore concludes that the author’s rights under article 19(b) of the Convention, have been violated.

8.10 Having reached this conclusion, the Committee does not consider it necessary to address the author’s claims under article 28 of the Convention.

9. Acting under article 5 of the Optional Protocol to the Convention, and in the light of all the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations under articles 5(1), 5(3), 19(b), 25 and 26, read alone and in conjunction with articles 3 (b), (d) and (e), and 4(1) (d), of the Convention. The Committee therefore makes the following recommendations to the State party:

1. Concerning the author: The State party is under an obligation to remedy the violation of the author’s rights under the Convention, including by reconsidering her application for a building permit for a hydrotherapy pool, taking into account the Committee’s Views. The State party should also provide adequate compensation to the author for the costs incurred in filing this communication;

2. General: the State party is under an obligation to take steps to prevent similar violations in the future, including by ensuring that its legislation and the manner in which it is applied by 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 disabilities on an equal basis with others.

10. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the 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 circulate them widely, in accessible formats, in order to reach all sectors of the population.

[Adopted in English, French, Spanish, Arabic and Chinese, the English text being the original version. Subsequently to be issued also in Russian as part of the Committee's annual report to the General Assembly.]
