Case summary:[[1]](#footnote-1) *Simon Bacher (represented by Viktoria Bacher) v Austria*

[CRPD/C/19/D/26/2014](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/085/15/pdf/G1808515.pdf?OpenElement)

Communication No. 26/2014

Date of communication (initial submission): 8 February 2014

Date of adoption of Views: 16 February 2018

Invoked provisions of the Convention: [3](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx%22%20%5Cl%20%223), [9](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9), [14](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#14),[19](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#19), [25](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#25), [26](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#26) and [28](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#28)

Provisions of the Optional Protocol: Articles [2 (c)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx#2), [(d)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx#2) and [(f)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx#2)

Keywords: Disability, non-discrimination, Accessibility; reasonable accommodation; general obligations of States parties under the Convention; right to adequate standard of living and social protection.

Decision: The State party has failed to fulfil its obligations under article 9, read alone and in conjunction with article 3 of the Convention.

Full decision in PDF format: [English](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/085/15/pdf/G1808515.pdf?OpenElement).

Full decision in PDF and/or Word format in UN official languages should be made available in the UN Official Documentation System. Search in <https://documents.un.org>, fill the blank space after ‘Symbol’ with the CRPD case code mentioned above and then click on ‘Details’.

Facts

Simon Bacher is a person with Down syndrome, autistic and occasionally needs a wheelchair for mobility. He lives with his family in Vomp. The house and the two neighbouring houses are only accessible by a path which becomes particularly dangerous during bad weather. Thus, his parents decided to protect the path with a roof. A planning permission with financial support was granted by the local authority to build such a roof, in agreement with the immediate neighbours. Nonetheless, two neighbours (Mr. R and his uncle) were not consulted as the law requires to consult only neighbours within 15 m of the construction. The roof was built in 2001.

Mr. R sued Bacher’s family before the Schwaz District Court claiming that the roof violated his right of way. On July 2002, the Court ordered the demolition of the roof. Bacher’s family lodged an appeal before the Innsbruck Regional Court, requesting the court to consider Bacher’ safety and disability related needs. On April 2003, the Innsbruck Court upheld the previous decision and set a claim of 4,000 Euros preventing any further appeal. The destruction of the roof was supposed to be in December 2003, but the builders refused to demolish the roof. On April 2004, a firm of builders arrived unannounced and removed the roof. Bacher’s family submitted a complaint against the removal of the roof, as it was done in the absence of a court official, and insisted on the risks that Simon faces as a person with disability following the removal of the roof. On July 2004, the Schwaz District Court held that Bacher’s family was “committed to accept the dismantling of the roof’, making no reference to Simon Becher’s disability. On October 2004, Bacher’s parents appealed that decision, but the Court rejected it and ordered Bacher family to pay the cost of the demolition of the roof.

In July 2004, a hailstorm further damaged the path. The Tyrol government granted aid for the repair work. However, Mr. R, who had to be consulted before any reparation, refused the aid, and the path could not be repaired. In the meantime, Bacher started undergoing Cystic Fibrosis treatment as an outpatient, which increased his need to use the path. His parents tried several new initiatives and proposals unsuccessfully. Between 2011 and 2012, the Disability Ombudsman has mediated with the Mayor of Vomp, who suggested that Bacher should be placed in a home or that the whole family should move away. The family refuses that Bacher be institutionalized. Regarding the suggestion that the family should move away, the author submits that this house is close to the places where Bacher receives his treatments and that, as Tyrol is a very expensive area, alternatives are not affordable.

In November 2009, Bacher’s family opened a case against the neighbours requesting a financial contribution to repair the path. On February 2012, the Schwaz Court decided against the family, claiming the neighbours barely used the path and are not responsible for its maintenance. The decision was not appealed as Bacher’s family understood that no further appeal was possible and was already in debt. In May 2014, Bacher’s family contacted the Mayor because the neighbour started using the path very often. The Mayor refused to take any action and suggested to contact the judge of the Schwaz Court. On May 2014, the judge replied that the matter of the case “had nothing to do with the rights of persons with disability” and that it was the family’s use of the path that damaged it.

The complaint submitted to the Committee

The author claims that the State has breached its obligations under Articles [3](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#3), [9](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9), [14](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#14),[19](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#19), [25](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#25), [26](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#26) and [28](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#28) of the Convention. She submits that the removal of the roof occurred prior to the entry into force of the Convention but the violation of her brother’s rights is continued because of the decisions adopted by State party after the entry into force of the Convention.

Regarding article 3, the author claims that her brother’s right to be treated with respect and dignity and his right to participation and inclusion have been systematically ignored. Regarding article 9, she claims that her brother’s right to accessibility has been violated by the Austrian courts decisions that have prevented his family to take the necessary measures to protect the path and to enable him to carry out his daily activities.

Regarding article 14, the author claims that Bacher’s rights to liberty and security have been violated because the unsafe path prevents him from leaving home in bad weather conditions. Regarding article 19, the author claims that her brother’s right to live independently has been affected by the lack of access to his home, which reduces his independent mobility.

Regarding article 25, the author submits that Simon Bacher’s right to health has been violated due to lack of accessibility which prevented him from attending his treatments at the Hospital. Regarding article 26 and 28, the author submits her brother’s right to rehabilitation has been violated. Further, she claims that the lack of safe access to home and the high costs of the unfruitful proceedings have violated her brother’s right to adequate standard of living.

State party’s observations on admissibility

The State party submits that the communication should be declared inadmissible pursuant to article 2, paragraph (f), of the Optional Protocol because the facts occurred prior to the entry into force of the Optional Protocol which came into force on 26 October 2008.

The State party submits that the author did not exhaust domestic remedies: Although the Innsbruck Regional Court in its appellate judgment of April 2003 held that the ordinary further appeal was inadmissible, the Austrian Code of Civil Procedure provides that a party may file a request with the appellate court to amend its verdict and declare an ordinary further appeal admissible. Moreover, Bacher’s parents had the possibility to appeal the judgment of 2004 and of 2012 but they did not do so. The State party further submits that no violation of the Convention has been alleged before domestic authorities.[[2]](#footnote-2)

The author’s comments on the State party’s observations

The author reiterates that even if the removal of the roof occurred prior to the entry in force of the OP, the violation of her brother’s rights continues through the decisions that focus on property rights, without considering her brother’s rights as a person with disability.

Regarding the exhaustion of domestic remedies, the author submits that they sought correct legal advice throughout Austria, but all the experts considered that appeals would be ineffective, financially burdensome and that the judicial authorities clearly did not demonstrate any kind of interest for her brother’s disability.

Regarding the State`s argument that no reference was made to a violation of the Convention before the domestic courts, she submits that her brother’s disability was mentioned at all court hearings and witnessed by several experts who participated in the proceedings.

State party’s observations on the merits and further observations on admissibility

The State argues that the communication is based on civil proceedings regarding the pedestrian and vehicular right of way (easement) granted to the owner of a neighboring property (the entitled party) on the property owned by the Simon Bacher’s father (the obliged party). The State party submits that Simon Bacher was never a party to these proceedings.

Regarding the subject matter of the complaint, the State reiterates its arguments on the admissibility of the case and further notes that neither a conciliation procedure, nor a judicial procedure pursuant to the Austrian Federal Act on the Equal Treatment of Persons with Disabilities was carried out.

*On the merits of the case*

The State considers that the author’s allegations are not substantiated, and the complaint does not show why an alternative solution recommended by the courts would not be reasonable.

The State further argues that the facts underlying the present communication do not fall within the scope of the Convention, as it would not have a general positive obligation to protect specific groups of persons in the core area of civil rights, and that restrictions can only be imposed if they are provided for by law, required in accordance with a legitimate public interest, and not disproportionate. The obligations arising from articles 1 and 9 of the Convention do not give rise to an obligation to guarantee that the interests of a person with disability *per se* justify an interference with property rights.

Regarding the argument that the decisions of the Austrian courts caused a disadvantage to Bacher on grounds of disability, the State party refers to the Committee’s jurisprudence recalling that a neutral measure can also lead to discrimination if a disproportionate number of persons with disabilities are affected. In this case, restricting the easement of a third party would have to be qualified as a disproportionate and undue burden. It concludes that there is no indication arbitrariness or denial of justice in this context.

Regarding the author’s claim under article 3, the State party recalls that it governs general principles, but not individual rights. Regarding allegations under article 14, 19, 23, 25 and 27, the State party argues that they do not come into question, as per the facts of the case.

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

Regarding the State party’s arguments that the rights were not claimed before domestic courts, the author recalls that Bacher's disability was mentioned in all the hearings in 2002, 2003, 2004, 2010 and 2012. However, courts did not show any interest for Bacher’s safety.

Regarding the State party’s argument that parties’ interests could have been reconciled by choosing an alternative structure to cover the path, the author highlights that none of the alternatives proposed was accepted by Mr. R.

Regarding the State party’s argument on failure to exhaust domestic remedies, the author reiterates that they were informed by lawyers that no further remedy was available.

Committee’s consideration of admissibility

The Committee has ascertained, as required under article 2 (c) of the OP, 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.

Regarding compliance with article 2 (f) of the Optional Protocol, the Committee cannot deal with events occurred prior to the entry into force of the Convention in State party, “unless those facts continued after that date”. While noting that the judgments of the Innsbruck Regional Court (2 April 2003) and of the Schwaz District Court (8 July 2004) were adopted before the entry into force of the Convention in the State party, the Committee observes that those decisions were referred to by the author as part of the context in which the decisions of the Schwaz District court of 2012 and 2014 were adopted.

The Committee notes that even though the decision of 2012 mainly addressed the request of the Bacher family for their neighbours’ financial support to maintain the path, the disability of Simon Bacher was discussed. Furthermore, the Committee considers that this complaint was submitted as an ultimate option after having exhausted all domestic remedies related to the roof and the intrinsically linked issue of the accessibility of the path. The Committee also considers that the 2012 and 2014 judgments must be read in the context of the accessibility issue that is at the core of all the procedures initiated by the Bacher family and cannot be disassociated from the procedures and judgments of 2003 and 2004. Accordingly, the Committee considers that it is not precluded *ratione temporis* to examine the present communication as some of the facts submitted took place after the entry into force of the Convention and the Optional Protocol for the State.

Regarding the exhaustion of domestic remedies, the Committee notes that the judgement of 2 April 2003 indicates that the it could not be revised, and that the lawyers and authorities consulted by the Bacher family confirmed that the decision was final. Further, the Code of civil procedure sets clear conditions under which such an appeal could be submitted, which do not seem to correspond to the case under review. Additionally, the State does not provide any argument that would enable it to conclude that such an appeal would have had any chance of success, after more than 10 years of judicial proceedings during which the special needs of Simon Bacher as a person with disability were not considered relevant. The Committee recalls that under article 2(d), only remedies with a reasonable chance of success need to be exhausted. Accordingly, the Committee considers that it is not precluded from examining the present communication for the non-exhaustion of domestic remedies.

Regarding the State`s submission that Bacher’s family did not allege any violation of the Convention before domestic authorities, the Committee notes that since the initial complaint of the neighbors requesting the destruction of the roof in 2002, the issue before the courts was always linked to accessibility. The Committee notes that the 2012 proceedings that were initiated by Bacher family requesting the servitude holders to contribute to the maintenance of the path so that it is accessible. The Committee considers that since this issue was raised before the domestic authorities, it is not prevented from examining the author’s allegations under article 9 of the Convention.

Regarding the author’s allegations under article 3 of the Convention, the Committee recalls that, in view of its general character, this article does not in principle give rise to free-standing claims and can only be invoked in conjunction with other substantive rights guaranteed under the Convention. Regarding the author’s allegation under articles 14, 19 ,25, 26 and 28 of the convention, the Committee notes that the information provided does not reflect that the Bacher`s family raised these issues in substance before the domestic authorities. The Committee therefore finds the allegations linked to these articles inadmissible under article 2(d) of the Optional Protocol.

Finally, the Committee declares the communication admissible, as it raises issues under article 9, read alone and in conjunction with article 3 of the Convention.

Committee’s Consideration of the merits

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

As argued by the State, the pedestrian and vehicular right of way (easement) granted to the neighbours of the Bacher’s family gave rise to a dispute between individuals (the entitled party and the obliged party), which was not directly initiated by the authorities. In that regard, while noting the State’s argument that its obligations would not extend to “purely private matters”, the Committee recalls that this type of dispute is governed by the legal order of the State, which, in any event, bears the ultimate responsibility to ensure that the rights under the Convention are respected, including the right for a person with disability to access to his/her home. Accordingly, the State party has an obligation to, inter alia, guarantee that the decisions adopted by its authorities do not infringe the rights of the Convention.

States parties also have the obligation to protect rights by adopting measures to prevent the direct or indirect interference of individuals with their enjoyment. Thus, the scope of the provisions of the Convention extends to relations between individuals. In this connection, the Committee also recalls that under article 4(1) of the Convention, “States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties: (e) to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise”. A property right issue linked to the exercise of a contract between individuals and the conflict arising from it must be interpreted through the Convention: when the courts of the State party intervened to resolve the conflict between the parties, they were bound by the Convention.

The Committee recalls that “accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society”. In compliance with article 9 of the Convention, States parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures shall include the identification and elimination of obstacles and barriers to accessibility. The Committee further recalls that, in compliance with article 2 of the Convention, reasonable accommodation may have to be adopted as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden […] to ensure to persons with disabilities the enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others”, including their right to accessibility.

The Committee recalls that, in assessing the reasonableness and proportionality of accommodation measures, State parties enjoy a certain margin of appreciation. It further considers that it is for the courts of States to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice. In this case, the role of the Committee is to assess whether the decisions adopted by the courts of the State party have enabled the respect of the rights of Simon Bacher under article 9, read alone and in conjunction with article 3 of the Convention.

In the context of this case, the Committee notes that the decision of the Schwaz court of 2012 does not make a thorough analysis of the special needs of Bacher, while they had been clearly referred to by his parents in all previous court hearings and summons. State’s authorities have rather focused on the resolution of the property right issue at stake, ignoring the multidimensional consequences of the decisions on the accessibility rights of Bacher, and leaving on his family the whole responsibility to enable his access to home and to the external public services that he needs for his daily life.

The Committee therefore considers that the decision of the Schwaz court of 9 February 2012, read in the context of the previous judicial decisions, constitutes a denial of justice for Simon Bacher, in violation of article 9, read alone and in conjunction with article 3 of the Convention.

Conclusion and recommendations

The Committee concluded that the State has failed to fulfil its obligations under article 9 read alone and in conjunction with article 3 of the Convention, and recommends:

1. Concerning Simon Bacher, the State is obliged to provide him with an effective remedy, in particular, to facilitate a solution to the conflict related to the use of the path considering the special needs of Simon Bacher as a person with disability and these Views; to award him financial compensation for the violations suffered; and to reimburse the author for the legal costs reasonably incurred in domestic and international proceedings.
2. As measures to prevent similar violations in the future, the State shall ensure capacity-building of the local authorities and courts responsible for monitoring accessibility standards, develop an effective monitoring framework to ensure and enforce accessibility standards, and translate these views into the official language of the State, to publish them and to distribute them widely, in an accessible format.

Individual Opinion of Committee member Damjan Tatic (dissenting view)

Mr. Tatic dissent relates to the inadmissibility *rationae temporis* of the author’s allegations. The 2012 judgment only related to the claim for payment that the family of Simon Bacher presented to request the neighbors who have a servitude over the path, and not with the issue of accessibility. Thus, it cannot be considered as a continuation or reaffirmation of the decisions adopted before the entry into force of the Convention in the State party. Accordingly, the author’s allegations of violations of the Convention are inadmissible *rationae temporis*.

1. This summary has been prepared by the International Disability Alliance. For more information on how to lodge individual communications under the Optional Protocol to the CRPD, visit [IDA’s disability rights litigation website.](http://www.internationaldisabilityalliance.org/es/node/105)  [↑](#footnote-ref-1)
2. The State party refers to the CRPD, *S.C. v. Brazil,* Communication no. 10/2013, para 6.5. [↑](#footnote-ref-2)