Case summary:[[1]](#footnote-1) **V.F.C.** (represented by the Spanish Committee of Representatives of Persons with Disabilities and the Association for the Workplace Integration of Local Police Officers with Disabilities) **v. Spain**

[CRPD/C/21/D/34/2015](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjUFu35WL78LztCL12TZZEBlKqTTw8BIOtUBLKmkqp4LG5FOMSKA7ZfRALwWUA7KiG5LhKHn%2fVRlhHSL2i7aG237QFvni3JIAxd1%2bVFsIFBibAawijRf4puirgmNpyl3bg%3d%3d)

Communication No. 34/2015

Date of communication (initial submission): 16 October 2015

Date of adoption of Views: 2 April 2019

Invoked provisions of the Convention: [3 (a), (b), (c), (d) and (e)](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#3); [4 (1) (a), (b) and (d)](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#4) and [(5); 5 (1), (2) and (3)](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#5); [13 (2)](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#13); [27 (a), (b), (e), (g), (i) and (k)](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#27)

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

Keywords:

Decision: The State party has failed to fulfil its obligations under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a), (b), (c), (d) and (e); article 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (3) of the Convention

Full decision in PDF format: [English](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjUFu35WL78LztCL12TZZEBlKqTTw8BIOtUBLKmkqp4LG5FOMSKA7ZfRALwWUA7KiG5LhKHn%2fVRlhHSL2i7aG237QFvni3JIAxd1%2bVFsIFBibAawijRf4puirgmNpyl3bg%3d%3d), [Spanish](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjUFu35WL78LztCL12TZZEBlKqTTw8BIOtUBLKmkqp4LG5FOMSKA7ZfRALwWUA7KiFhr3W5VhBlapZHcw9lvrSg3mdFoiUW3gZ7uWqHHtStS83gSTfHnIhrIpDZaCZ4H6Q%3d%3d), [Arabic](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjUFu35WL78LztCL12TZZEBlKqTTw8BIOtUBLKmkqp4LG5FOMSKA7ZfRALwWUA7KiA4p5xiRiYa0c5TINUogzC8BOKEVXd8J9SWR3yAEWzn9KjncWwfaygMtLDAEuwz%2fgg%3d%3d), [Russian](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjUFu35WL78LztCL12TZZEBlKqTTw8BIOtUBLKmkqp4LG5FOMSKA7ZfRALwWUA7KiLNrEibj7xBhh4ncw5B%2bQHfSDncYSs3BdfqKBdGlYj8lKDt8JLLZcFzREb%2bHeUchMw%3d%3d), [Chinese](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjUFu35WL78LztCL12TZZEBlKqTTw8BIOtUBLKmkqp4LG5FOMSKA7ZfRALwWUA7KiOmgR1fkE1R2eAboba5FDqCD9u1gtyVWyWr5EjALhek1Zg60pPVAd7tjRaZPYoOmYw%3d%3d).

**Facts**

The author is a national of Spain born in 1979. In May 2009, he suffered a traffic accident that left him with a permanent motor disability. On 20 July 2010, the Ministry of Labour and Immigration declared that the author’s status was one of “permanent disability for the performance of his occupation”. As a result, he was required to take mandatory retirement and was expelled from the local police force.

On the same month, the author requested to the Barcelona City Council to reassigned him to a “modified duty” and identified a post suited to his disability. He also applied for the payment of his salary and the social security contributions not collected since his expulsion from the local police force. His application was based on the rules set out by the Autonomous Community of Catalonia in Act No. 16/1991 (Local Police Act).

On 15 September 2010, his request was denied on the basis of article 7 (2) of the modified-duty regulations of the Barcelona municipal police. On 14 March 2011, the author filed an administrative appeal against the Barcelona City Council’s decision before Administrative Court No. 13 in Barcelona. The author claimed that article 7 (2) of the regulations referred to above was null and void on the grounds that, under the Constitution, it violated the fundamental rights to work and to vocational rehabilitation, the inclusion of persons with disabilities, access to and retention of public employment and respect for human dignity. Also, that there is a contradiction between the autonomous-community law (Act No. 16/1991), which allows assignment to modified duty, and the aforementioned ordinance, which restricts it.

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

In July 2012, the Barcelona City Council appealed the decision of the Administrative Court before the High Court of Catalonia. In September 2012, the author filed an objection to the appeal, reiterating the arguments made and also claimed that the ordinance was contrary to article 141 of the General Act on Social Security, which places no restrictions on assignment to modified duty.

In July 2013, the High Court upheld the appeal filed by the Barcelona City Council and overturned the judgment under appeal on the basis of article 7(2) of the ordinance, which does not allow persons with “permanent total disability” to be assigned to modified duty. The High Court of Catalonia took the view that, as the author was on full mandatory retirement as a result of that provision, Act No. 16/1991 did not apply to him because he was no longer a local police officer.

In September 2013, the author filed an *amparo* remedy[[2]](#footnote-2) before the Constitutional Court against the judgment of the High Court. The author claimed that the judgment was in violation of the right to effective judicial protection (article 24 of the Constitution) in relation to the right to equality and legality (article 9 (2) and (3) of the Constitution).

In November 2014, the Constitutional Court declared the *amparo* remedy inadmissible because the author did not exhaust all instances against the decision, specifically, he did not file an “application for annulment of proceedings”. In the individual communication submitted to the Committee, the author states that he did not submitting such an application because it is not mandatory, according to the Constitutional Court’s interpretation; its effectiveness is doubtful, given that the application is filed with the same court that handed down the judgment being challenged; and the regulations governing such applications are complex, unclear and contradictory, causing legal uncertainty and potentially leaving victims of human rights violations without legal protection.

In April 2015, the author submitted his case to the European Court of Human Rights where the application was found inadmissible because it did not meet the requirements under articles 34 and 35 of the European Convention on Human Rights. According to the author, the rejection was insufficiently substantiated and was not considered on the merits. Therefore, he claimed that under the Human Rights Committee’s jurisprudence, his case cannot be considered to have been examined under another international procedure.

**The complaint**

The author claims a violation of his rights under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with articles 3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); 5 (1), (2) and (3); and 13 (2) of the Convention.

He argues that the State party discriminated against him by forcing him to retire from his position as a local police officer and refusing to assign him to modified duty, on the grounds of his “permanent total disability for usual occupation”. Also, that the modified-duty regulations of the Barcelona municipal police are discriminatory because there is a differential treatment of persons in different administrative categories of disability, even though placement in such categories is not determined on the basis of a medical examination for evaluating the possibility of assignment to tasks or duties that represent alternatives to the traditional or usual tasks and duties of the position (regular duty). Therefore, the policy provides for the application of different solutions to the same factual situation. It also fails to promote the employment of persons with disabilities in the public sector, as it does not allow them to remain employed, performing different duties from those they can no longer perform as a result of their disability.

Regarding the violation of article 4(1) (a), (b) and (5), read together with article 27, the author claims that the State party has not derogated national provisions that discriminate against persons with disabilities whose status has been defined as “permanent total disability for work” and are incompatible with the Convention. Also, that the State has failed to eliminate discriminatory practices such as the policy above mentioned. Moreover, despite the legislations prohibit discrimination based on disability and require employers to make adaptations to ensure that public service positions are accessible to persons with disabilities, such legislation does not make provision for situations in which an employee acquires a disability and do not ensure that such employees can continue their employment in conditions of equality and non-discrimination.

Regarding the violation of article 5 (1), (2) and (3), read in conjunction with article 27, the author asserts that he was discriminated against as he was denied access to modified duty because his disability was categorized as “permanent total disability for work”, whereas persons in other categories of disability are allowed such access. This discrimination is due to the fact that his degree of disability was established by an administrative decision taken in the absence of a medical examination for evaluating his ability to undertake a modified-duty assignment.

Regarding the violation of article 13 (2), read in conjunction with article 27, the author referred to the Committee’s jurisprudence and complained that the Spanish judiciary has not received appropriate training with respect to the CRPD. Thus, in the administrative and judicial proceedings, the applied legal provisions were not interpreted according to Spain’s international obligations under the CRPD.

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

The State party submitted that the communication should be declared inadmissible because the author failed to exhaust all domestic remedies, including an application for *amparo* before the Constitutional Court, which is the highest court for safeguarding fundamental rights. The State party notes that, for reasons attributable to the author, no “application for annulment of proceedings” was filed, which objective is to preserve the subsidiary nature of the remedy of *amparo* by ensuring that cases are not brought before the Constitutional Court until after the ordinary courts have been given the opportunity to issue a ruling and, where appropriate, to remedy the violation of fundamental rights for which a remedy of *amparo* might be sought.

The State claims that there was no violation of the right to due process because the author had every opportunity to challenge the administrative and judicial decisions. Also, that there the domestic regulations or their application to the author’s case are not discriminatory. First, because within the margin or discretion of the State, different legal consequences arise from different categories of disability status, as duly determined by the authority. The author’s status as “permanent total disability for usual occupation” was determined by the competent authority under the domestic laws. Under article 7(2) of the Local Police Act, he was ineligible for assignment to modified duty or any other work. The latter is also supported by the public service regulations, which state that public servants lose their status when they enter full retirement, which may result from, a finding or “permanent total disability”.

The State party asserted that author’s citing of other autonomous-community laws that do allow assignment to modified duty does not show that his right to equality and non-discrimination has been violated. The State party maintained that the regulations referred to are applied to all persons with “permanent total disability” status, so there is no discriminatory application of domestic regulations.

### Committee’s consideration of admissibility and the merits

First, the Committee considered that, since the European Court did not clarify or justified the rejection of the application based on the merits, it is not in a position to determine that the author’s case has already been the subject of an examination on the merits. Therefore, the Committee found that under article 2(c) of the OP, there is no barrier to the admissibility of the present communication.

Regarding the State’s contention that the communication should be found inadmissible for non-exhaustion of domestic remedies because the author failed to file an “application for annulment of proceedings”, the Committee considered that only those remedies that have a reasonable prospect of success need be exhausted for the purposes of article 2 (d) of the Optional Protocol. The Committee note all the efforts made by the author to exhaust the appropriate remedies. Also that he State party did not demonstrate how filing an application for annulment of proceedings before the High Court of Catalonia would have had any prospect of success, considering that this Court had already considered the disability-based discrimination claims presented by the author and that, according to article 241 (1) of the Organic Act on the judiciary, this previous consideration would have been a cause for rejection of such an application. The Committee found that, for the purposes of admissibility, the author exhausted the remedies available under domestic law with regard to the fundamental rights to equality and non-discrimination and to access to public employment.

However, as the author did not filed any claims with the ordinary courts concerning the right to effective judicial protection and its link to possible violations of the right to access to justice, the Committee found that the author did not exhaust the domestic remedies with regard to his claims under article 13 (2) of the Convention. Thus, the Committee declared that part of the communication inadmissible under article 2 (d) of the Optional Protocol.

The Committee declared the **communication admissible** with regard to the author’s claims under **article 27 (a), (b), (e), (g), (i) and (k),** **read alone and in conjunction with article 3 (a), (b), (c), (d) and (e); article 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (3)** of the Convention.

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

According to the Committee, under article 4 (1) (a) of the Convention, States parties have a general obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention, including those related to work and employment. Also, that article 27 (1) of the Convention requires the recognition of the right of persons with disabilities to retain their employment, on an equal basis with others; to take all appropriate steps to prohibit discrimination on the basis of disability with regard to the continuance of employment; and to ensure that reasonable accommodation is provided to persons who acquire a disability during the course of employment. Also, that under its General Comment No. 6, States parties must ensure that there is no discrimination on the grounds of disability in connection with work and employment, and in which it refers to the relevant International Labour Organization (ILO) conventions, namely the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), both of which have been signed and ratified by Spain. Under article 7 of ILO Convention No. 159, the competent authorities of States parties must take measures with a view to providing and evaluating vocational guidance and vocational training to enable persons with disabilities to retain their employment.

The Committee also asserted that the CRPD prohibits all forms of discrimination against persons with disabilities, including the denial of reasonable accommodations, which are an *ex nunc* duty, meaning that they must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights. The duty bearer must dialogue with the person with disability to include them in the process of finding solutions for realizing their rights and building their capacities. The Committee recalled the preamble to the CRPD that highlights the recognition of the diversity of persons with disabilities. The latter means that the institutional mechanisms for dialog in relation to reasonable accommodation must take each person’s specific situation into account.

The Committee observed that the purpose of the Spanish General Act on the Rights and Social Inclusion of PWD was to update its legislation with the standards of the CRPD. Under the mentioned Act, the public authorities are obligated to take anti-discrimination measures and affirmative action measures. The Committee is of the view that such anti-discrimination measures should include capacity management strategies, including reasonable accommodation, through which public authorities can build the capacities of their employees who have acquired a disability. States parties must take all necessary preventive measures to enable public authorities to manage capacities so as to optimize the exercise of the rights of persons with disabilities. To assess the relevance, suitability and effectiveness of reasonable accommodation, factors such as financial costs, available resources, size of the accommodating party (in its entirety), the effect of the modification on the institution and the overall assets, rather than just the resources of a unit or department within an organizational structure, must be taken into consideration.

In the present case, the Committee observed that the possibility of holding a dialogue for the purpose of evaluating and building the author’s capacities within the police force was completely ruled out because he was deprived of his status as a public servant upon his mandatory retirement, and he had no opportunity to request reasonable accommodation that would have enabled him to perform modified duties. Thus, the Committee notes that the State party failed to prove that other types of duties that the author might have been able to perform were not available within the police force in which he was employed.

The Committee recalled that the process of seeking reasonable accommodation should be cooperative and interactive and aim to strike the best possible balance between the needs of the employee and the employer. In determining which reasonable accommodation measures to adopt, the State party must ensure that the authorities identify the effective adjustments that can be made to enable the employee to carry out his or her key duties. If such effective measures (which do not impose an undue burden) cannot be identified and implemented, assignment of the employee to modified duty should be considered a reasonable accommodation measure of last resort. Therefore, the State party has a responsibility to take all necessary reasonable accommodation measures to adapt existing posts to the specific requirements of the employee.

The Committee considered that the assignment to modified duty (already governed by Spanish regulations) is the institutional arrangement/mechanism to reconcile the State party’s duties related to the right to work (continuance of employment) with its duties concerning the right to equality and non-discrimination. The Committee observed that, under General Act No. 16/1991, all persons with “reduced ability” are allowed to undertake modified-duty assignments. Also, that under the modified-duty regulations of the Barcelona municipal police, any member of the police whose abilities are reduced and classified as having a “permanent total disability” is not eligible for assignment to modified duty. In this case, the administrative disability ratings determined by the Social Security Institute did not include an analysis of the author’s potential to carry out modified duties or other complementary activities. Under the General Act No. 16/1991, a special medical assessment of the alternative capacities of persons whose abilities are reduced is mandated but was not done in the author’s case. The Committee observed that the author’s ability to perform the usual duties of police work has been reduced, but this has no bearing on his potential ability to perform modified duties or other complementary activities within the same police force.

The Committee found that the rules preventing the author from being assigned to modified duty (article 7(2) of the modified-duty regulations of the Barcelona municipal police) did not safeguard his rights under the CRPD, especially the possibility of having his particular disability evaluated to build any capacities he may have to perform modified duties or other activities.

The Committee observed that the conditions in which eligibility for a disability pension is compatible with retention of employment, the modified-duty regulations of the Barcelona municipal police forestall the possibility for anyone with “permanent total disability” status to be assessed for ability to perform alternative duties. This undermines the right to work.

**The Committee therefore found that the rules under which the author was denied a modified-duty assignment contravene articles 5 and 27 of the Convention. The Committee also found that, since the modified-duty regulations of the Barcelona municipal police render all those with “permanent total disability” status ineligible for modified duties, the author was discriminated against on the grounds of his disability with respect to “continuance” of his public employment, in violation of articles 5 and 27 of the CRPD.**

**The Committee found that, under article 5 of the Convention, the facts of the present case disclose one of the forms of discrimination prohibited by the Convention, whether it is viewed as direct discrimination or as a denial of reasonable accommodation.**

**The Committee also found that, under article 27 of the CRPD, the present case also discloses discrimination in relation to continuance of employment, arising from the denial of any dialogue or opportunity for an assessment of fitness for alternative duties for persons who, like the author, have “permanent total disability” status. The Committee held that although the State party’s rules governing the assignment of its employees to modified duty pursue a legitimate aim, their application to the author violated his rights under articles 5 and 27 of the CRPD.**

Regarding article 4 of the CRPD, the Committee noted that the modified-duty regulations of Barcelona’s police date from 2002, whereas the State party ratified the Convention in 2008. The domestic legislation adopted prior to the State party’s ratification of the Convention continues to use terms such as *incapacidad* (inability or incapacity) and *dictamen médico* (medical report), which reflect a “medical approach” to the evaluation of the extent to which persons with disabilities can participate in various areas of society. The Committee further noted that the State party has a wide variety of regulations in the different autonomous communities and even within the same municipality and that this variety of approaches to similar situations gives rise to discrimination on the grounds of disability.

Therefore, the Committee asserts that the State party must comply with its obligations under article 4 of the CRPD to modify and harmonize all local, autonomous-community and national provisions that prevents individuals from being assigned to modified duties without an assessment of the challenges and opportunities that persons with disabilities may have, and that thereby violate the right to work.

**Conclusion**

**The State party has failed to fulfil its obligations under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with article 3 (a), (b), (c), (d) and (e); article 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (3) of the Convention**

**Recommendations**

Concerning the author, the Committee asserted that the State has the obligation to:

1. Compensate him for any legal costs incurred in filing the present communication.
2. Take appropriate measures to ensure that the author is given the opportunity to undergo an assessment of fitness for alternative duties for the purpose of evaluating his potential to undertake modified duties or other complementary activities, including any reasonable accommodation that may be required.

Also, the Committee asserted that the State party has to prevent similar violations in the future and recommended:

1. Taking all necessary measures to align the modified-duty regulations of the Barcelona municipal police and their application with the principles of the Convention and the recommendations contained in the present Views to ensure that assignment to modified duty is not restricted only to persons with a partial disability;
2. Harmonizing the variety of local and regional regulations governing the assignment of public servants to modified duty in accordance with the principles of the Convention and the recommendations contained in the present Views.

Finally, under article 5 of the OP and rule 75 of the Committee’s rules of procedure, the State party is required to submit to the Committee, within six months, a written response, including information on any action taken in the light of the present Views and recommendations of the Committee.

The State party is also requested to publish the Committee’s Views, to have them translated into the official language of the State party and to circulate them widely, in accessible formats, in order to reach all sectors of the population.

1. This case 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, consult IDA’s factsheet available on [IDA’s disability rights litigation website.](http://www.internationaldisabilityalliance.org/en/disability-rights-litigationhttp:/www.internationaldisabilityalliance.org/en/disability-rights-litigation)  [↑](#footnote-ref-1)
2. Appeal on the ground of unconstitutionality [↑](#footnote-ref-2)