Case summary:[[1]](#footnote-1) *N.B. and M.W.J (represented by Inclusion London) v United Kingdom of Great Britain and Northern Ireland*

[CRPD/C/22/D/43/2017](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f22%2fD%2f43%2f2017&Lang=en)

Communication No. 43/2017

Date of communication (initial submission): 25 May 2015

Date of adoption of Views: 6 September 2019

Invoked provisions of the Convention: [17](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9), [19](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9), [20](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9), [30](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9) and [31](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9)

Provisions of the Optional Protocol: 2

Keywords: Independent living; protection of the integrity of the person; personal mobility; participation in cultural life, recreation, leisure and sport;

Decision: The Communication is inadmissible under article 2(d) of the Optional Protocol.

Full decision in English available [here](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f22%2fD%2f43%2f2017&Lang=en)

**Facts**

The authors of the communication are Ms. N.B and Ms. M.W.J, British nationals born in 1984 and 1963, respectively. **They claim a violation of their rights under articles** [**17**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9)**,** [**19**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9)**,** [**20**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9)**,** [**30**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9) **and** [**31**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9) **of the Convention.** The authors are represented by Inclusion London. The Optional Protocol entered into force for the State party on 6 September 2009.

*Ms. N. Baker* is a person with muscular dystrophy and uses a powered wheelchair; she lives with her parents and requires assistance with almost all the tasks. In 2005, she was awarded 35 hours of assistant support by the borough of Harrow (London) and she received also a weekly allowance and other measures. However, these measures were not sufficient to provide her with the support required to lead an independent life and they do not cover assistance required to play power-wheel football. Therefore, she asked information for receiving assistance from the Independent Living Fund (ILF), which seemed to be in a position to fund a personal assistant, enabling her to continue her sports activities. It was only some years later that she called ILF to request assistance and she was then told that an application form would be sent to her. After not having received the application form, she called the ILF, which informed her that the ILF had been closed to new applicants.

*Ms. M.W.Jones* sustained a brain injury in 2006, which caused reduced mobility and the inability to speak. She was awarded substantial care support, including from the ILF. She lives with her husband who was able to continue working, as the author had the support that she required. After a reassessment in 2009, she moved from the higher to the middle rate of Disability Living Allowance, requiring about half of the care previously provided and the ILF funding ceased. In 2011, the author and her husband were involved in a road accident and, as a result, she sustained a perforated eardrum and further brain injury that caused the onset of epilepsy. In 2013 a sustained seizure could only be stopped by an induced medical coma: it reduced the seizures, but it also reduced the author’s mobility. Due the situation, she received the higher level of Disability Living Allowance again but she was unable to apply to the ILF because it has closed to new applicants.

She has five personal assistants and her daughter and husband assists her. However, she has no free time when her husband is not present, as she requires constant assistance.

The *Independent Living Fund (ILF)*: it was a non-departmental government body within the Department for Work and Pensions. The Fund had a yearly budget of 350 million GBP to support around 20,000 persons with “severe” disabilities. On a provisional basis of 17 June 2010, the ILF trustees decided to close the fund to new applicants; the announcement was made on 13 December 2010 and a ministerial statement was made to that effect, referring to “informal consultation with disability organisations”. However, the authors argue that no consultations took place and that no impact assessment was made, as required by community care legislation[[2]](#footnote-2). The fund was permanently closed to all applicants on 30 June 2015.

The authors did not challenge by them the closure of the ILF to new applicants at the time of the closure, because such challenges could only be brought through an application for judicial review, filed on the basis of lack of consultation by the domestic authorities in breach of the duties contained in the Equality Act and be done by means of an administrative claim filed before administrative courts. The authors claim that they were not in a position to now that they were able to challenge this decision. They additionally argue that an application for judicial review would not have provided them with an effective remedy as it would have constituted an administrative challenge and not a substantive examination of the merits of the closure of the fund.

**The complaints**

**The author claims violations of his rights under** [**17**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9)**,** [**19**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9)**,** [**20**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9)**,** [**30**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9) **and** [**31**](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9) **of the Convention.**

With regard to article 17,19, 20,30, according to the authors the closure of the ILF to new applicants in 2010 resulted in a reduction in the support available to them, and in particular, their ability to live an independent and fulfilling life, given that the local care system focusses exclusively on essential basic care. Ms. Baker will also not be able to pursue her sport hobby.

With regard to article 31, the authors note that, in failing to undertake consultations and an equality impact assessment, the State party failed to comply with its obligations under the Equality Act and thus violates their rights under such article.

**State Party’s observations on admissibility**

On 8 February 2018, the State party submitted its observations on the admissibility of the communication. The States considers communication on should be held inadmissible for under article 2(d) of the Optional protocol (lack of exhaustion of all available domestic remedies); and it also presents sets of arguments related to the author’s claim under article 2 (b) (communication constitutes an abuse of the right) and (e) (the communication is manifestly ill-founded).

As the inadmissibility for non-exhaustion of all available domestic remedies, the State party notes that that they did not bring proceedings by way of judicial review when the fund was first closed to new applicants, not even when they first became aware of that fact, nor at any time before they submitted their complaint before the Committee.

In fact, the closure of the ILF to new applicants in June 2010 was announced publicly and then by a written ministerial statement in December 2010. The decision was taken following an “informal consultation with disability organisations, local government representatives”. On 18 December 2012, the Government publicly announced the completely closure of the in April 2015. Moreover, the decision was subject of a well-publicised judicial review challenge before the High Court of England and Wales: an appeal to the Court of Appeal was made in 2013 and another in 2014. The State also notes that the authors’ concerns a decision to close the fund to new members, taken nearly five years before the complaint to the Committee was made, and in the meantime, the ILF itself has ceased to exist. It submits that the authors should have challenged the closure of the fund by way of judicial review in the High Court. As the authors’ argument that challenge the closure would have been out of time, the State notes that - even all claims by way of judicial review must be brought *“(a) promptly; and (b) in any event not later than three months after the grounds to make the claim first arose*”[[3]](#footnote-3) - the High Court also has a discretional power to allow judicial review claimants to issue proceedings out of time. This discretion can be exercise when: the applicant was unaware of the decision; their claim raises questions of public importance, and the applicant then acted expeditiously once they became aware of it. Thus, the authors could and should have followed this possibility. As concerns the authors’ assert that any application for judicial review would not provide them with an effective remedy and would be just an administrative challenge, the State party notes that judicial review claimed in respect of decisions related to social benefits have been successfully challenged for alleged violations of the European Convention on Human Rights in domestic courts. In view thereof, the State considers that the complaint is inadmissible for non-exhaustion of all available domestic remedies.

As the abuse of the right of the submission, the State highlights that the Convention and Optional Protocol do not set out a time limit within which complaints must be made. However, the State party notes that, where no time limits have been prescribed, Treaty Bodies have consistently held that it is an abuse of the right of submission to file a complaint following a long and unjustifiable delay[[4]](#footnote-4). With regard to the present case, the State highlights the long delay between the decision of December 2010 to close the ILF to new applicants and the submission of the complaint before the Committee in May 2015. Moreover, authors do not give explanation for such delay. It further argues that this delay is particularly significant as the authors waited until the closure of the ILF was imminent before complaining of a previous decision.

As the inadmissibility for the manifestly ill-founded of the complaint, the State considers that the authors’ claim is inadmissible since the remedies sought by the authors are irrelevant as they have been superseded by subsequent events in light of the permanent closure of the ILF and the reallocation of the funds to local authorities and devolved administrations. Moreover, the authors have not established that the closure of the ILF affected them directly and especially it would not enable them to live independently. It further notes that, in addition to support provided by local authorities under the Care Act, disabled persons may also be entitled to receive various disability benefits to help them with the additional costs of disability and to lead more independent lives.

**Author’s comments on the State party’s submission**

The authors reiterate that they did not bring proceedings by way of judicial review because any challenge would have been out of time and ineffective remedy. Ms. Baker found out about the closure of the ILF on or around the day that it closed and she nor other people in her organisation realised that she could challenge the closure of the fund. The authors further argue that judicial review claims are very expensive and it can generally only be pursued by individuals with the benefit of legal aid. They argue that it would have been highly unlikely that either of them would have been financially eligible for legal aid. They consider that it was highly unlikely that either of them would have been able to pursue a judicial review claim due to the lack of funding.

As concerns the State party’s argument of inadmissibility under ar. 2(b) of the Optional Protocol, the authors recall that neither the Convention nor the Optional Protocol set out a time limit within which complaints must be made. As concerns the State party’s argument of inadmissibility under art. 2(e), the authors argue that the State party failed in its obligation to consult on the closure of the fund and they were directly affected by the decision: Ms. Jones would have been eligible to a claim to the ILF, had it not been closed to new applicants; Ms. Baker was about making a claim to the ILF. They also highlight that benefits provided under the Care Act do not have the same aims as those distributed under the ILF.

**Committee’s consideration of admissibility**

In accordance with article 2 of the OP and with rule 65 of the rules of procedure, the Committee has to decide on the admissibility of the communication before considering any claim in a communication.

First, the Committee has ascertained that the same matter has not already been examined by the Committee, and has not been and is not being examined under another procedure of international investigation or settlement.

Second, the Committee notes the State party’s argument that the authors’ complaint should be declared inadmissible for failure to exhaust domestic remedies since the authors could have challenged the decision to close the ILF to new applicants on both procedural and substantive grounds. The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no reasonable prospect of being successful, authors must exercise their due diligence in the pursuit of available remedies; the mere assumptions about the effectiveness of domestic remedies do not absolve authors from exhausting them.

In the present case, the Committee notes that the authors failed to challenge the decision, because when they became aware of the possibility to challenge, the time limit of three months had passed. The Committee however notes that the authors could have applied for judicial review when they first became aware of the closure of the fund to new applicants, and that, as such, it was not a procedural requirement that they file a challenge within three months of the decision itself. The Committee notes the State party’s argument that, the authors have not provided any further information in this regard, as well as that they do not contest that the decision to close the fund was publicly announced, the judicial review challenges were also highly publicised, and Ms. Baker was informed over the phone about the decision and that she could have therefore challenged it even within the three-month. The Committee takes note of the authors’ argument that a judicial review challenge is not an effective remedy as it is a discretionary court proceeding. It however notes the State party’s uncontested argument that the authors could have challenged the decision to close the ILF to new applicants on both procedural and substantive grounds, as well as arguing that it was discriminatory on the basis of disability.

The Committee finally notes the authors’ argument that they were unable to challenge the decision because of financial constraints and lack of access to legal aid. However, it notes that the authors have not demonstrated that they attempted to file an application for legal aid.

Finally, the Committee declares that the authors’ complaint is inadmissible under article 2(d) of the Optional Protocol. Having thus concluded, the Committee will not separately examine the admissibility grounds under article 2 (b) and (e) of the Optional Protocol.

**Conclusion**

The Committee therefore decides:

**That the communication is inadmissible under article 2 (d) of the Optional Protocol;**

That the present decision shall be communicated to the State party and to the authors.

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%3A/www.internationaldisabilityalliance.org/en/disability-rights-litigation)  [↑](#footnote-ref-1)
2. Such as Community Care Act and the Equality Act 2010. [↑](#footnote-ref-2)
3. Following the Civil Procedure Rules. [↑](#footnote-ref-3)
4. The State party refers to (CCPR/C/96/D/1582/2007), *Kudrna v Czech Republic*, para 6.3; and (CCPR/C/72/D/787/1997), *Gobin v Mauritius*, para 6.3. [↑](#footnote-ref-4)