Case summary:[[1]](#footnote-1) J.M. v Spain

Case code: CRPD/C/23/D/37/2016

Communication no 37/2016

Date of communication (initial submission): 18 March 2016

Date of adoption of Views: 21 August 2020

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

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

Keywords: discrimination on the ground of disability, work and employment, reasonable accommodation

Decision: Violation of Articles [27](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx) [(a), (b), (e), (g), (i), (k),](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx) read alone and in conjunction with articles [3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); and 5 (1), (2) and (3)](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx) of the Convention.

Full decision in PDF format (webpage): [Arabic](https://undocs.org/ar/CRPD/C/23/D/37/2016), [Chinese](https://undocs.org/zh/CRPD/C/23/D/37/2016), [English](https://undocs.org/CRPD/C/23/D/37/2016), [French](https://undocs.org/fr/CRPD/C/23/D/37/2016), [Russian](https://undocs.org/ru/CRPD/C/23/D/37/2016) and [Spanish](https://undocs.org/es/CRPD/C/23/D/37/2016)

**Facts**

The author is J.M., a national of Spain born on 13 March 1968. On 13 February 2008, the author got a permanent impairment due to a traffic accident. He was recognized to be “unfit” to his work, because of a total disability, therefore he was granted a pension. On 27 July 2009, the author requested Figueras Municipal Council to assign him for “modified duty”. The author’s request was rejected and he was dismissed from his post as a public official. On 3 September 2009, the autonomous regional government of Catalonia recognized the author as having a degree of disability of 65%. On 17 September 2009, the author submitted an application for a review of the Council’s decision, referring the Council had undertaken to draft modified-duty regulations for the municipal police within a year, but that it failed to do so. The author contends that the absence of regulations should not be to his detriment. The Figueras Municipal Council rejected the author’s application for a review, arguing that under the Public Service Regulations Act a declaration of “permanent total disability” was a ground for mandatory retirement.

The author initiated judicial proceedings. However, the Girona Administrative Court No. 1 dismissed the author’s complaints. Since the author`s appeals were also dismissed by the High Court of Justice of Catalonia and the Constitutional Court, he submitted his case to the European Court of Human Rights in July 2014. His application was not examined because the application could not be submitted within six months of the final court decision. Therefore, the author contends that he has exhausted domestic remedies.

The complaint submitted to the Committee

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 CRPD.

Regarding article 27, he refers to two State obligations: (a) the duty to respect equality and non-discrimination; (b) the requirement to develop and guarantee access to and retention in employment. The author also considers that the failure to recognize his right to work violates the principle of accessibility. The author contends that his right to equal conditions has not been protected, since he was denied the possibility of being assigned to modified duty owing to a lack of diligence on the part of Figueras Municipal Council in developing regulations and a disregard of higher-ranking rules, such as autonomous laws, that provide for this right.

Regarding article 4, the author claims that the decision of Figueras Municipal Council, made on the grounds of a lack of regulations violates the Convention. He originally requested alternative employment arrangements, pending the drafting of regulations by the Council. However, regulations were not introduced until 2015, and no effort was made to find alternatives.

Regarding article 5 (1), (2) and (3) of the CRPD, he argues that he has suffered double discrimination: 1) on grounds of disability – the real reason for his expulsion from the local police force without taking appropriate accommodation measures; 2) if he had been a member of another force, he would have had the reasonable accommodation.

Regarding article 13 (2) in conjunction with article 27, he claims the State ’s judiciary has not been given appropriate training on the Convention.

Regarding article 27 (1) (e) and (g) in conjunction with articles 3 (a), (b), (c), (d) and (e), 4 (1) (a), (b) and (d), and 5 (1), (2) and (3), he claims, that the State failed to promote the employment of persons with disabilities refusing to apply reasonable accommodation.

Regarding article 27 (1) (k), read in conjunction with articles 3 (a), (b), (c), (d) and (e), 4 (1) (a), (b) and (d), and 5 (1), (2) and (3), he claims that his employment rights were not protected, since he lost his post due to the lack of regulations and the interpretations by the administrative and judicial authorities.

The author requests the Committee to recommend that the State grant him appropriate reparation and comprehensive compensation, including his readmission to the local police force and an assessment of his capacity from the perspective of equality and non-discrimination, and comprehensive compensation for moral harm.

State ’s observations on admissibility and the merits

The State considers that the complaint should be dismissed in its entirety.

The State maintains there have been no violation of the rights under article 13 of the CRPD and enshrined in article 24 of the Constitution. Further, the State claims that country’s domestic regulations are not discriminatory, because the modified-duty regulations of the municipal police is not applicable to the author`s case since under the regulations, assignment to modified duty is incompatible with his disability status. This resulted in the author’s mandatory retirement, thereby disqualifying him from assignment to modified duty or any other work.

The State acknowledges the long period which elapsed between the coming into force of the Local Police Act (No. 16/1991) and the adoption of the municipal regulations in 2015 and that, as the author submits, such a situation should not be to the detriment of citizens. It was not detrimental in the current case, because it is not possible for officials in either the national police force or the autonomous police force to be assigned to modified duty on grounds of permanent total disability. Thus, there is no evidence of unequal treatment at the regulatory level.

Regarding article 27, the States maintains that the author has been treated in accordance with the legal system in force. He has not been treated any differently to any other official in the same situation and belonging to the same force or of the same rank. There has been no arbitrary or discriminatory application of the rule in the present case. In the present case, the regulations were applied to the author no differently from how they would have been applied to any other person in exactly the same factual and legal situation, with the same type of injury.

The State claims, that no discrimination has occurred as a result of there being different regulations governing different situations since there are two distinct levels of autonomous territorial legislation as established by the Constitution. Thus, each legislative body has discretionary power as the competent authority in its territory, granted by citizens, as long as it remains within the material scope ascribed to it by the Constitution or other laws.

Authors’ comments on the State ’s observations on admissibility and the merits

Regarding article 13, the author reiterates that the communication concerns the failure to apply the rights set forth in the Convention in domestic judicial proceedings. The author refers to a provision of the Constitution (art. 10 (2)) under which domestic provisions relating to fundamental rights and civil liberties must be interpreted in accordance with treaties and international agreements ratified by the State. Lastly, as well as to Constitutional Court judgments finding that the application of this article must also take into account the jurisprudence of international bodies in charge of monitoring States’ compliance. The author states that the absence of implementing regulations led to a legal vacuum at the autonomous-community and local levels and that it is in contradiction with the CRPD and the Committee’s jurisprudence.

Regarding article 27, the author insists that, under Act No. 16/1991, the introduction of regulations on assignment to modified duty is not a matter of choice. In the author’s view, the law must be interpreted in accordance with the Convention, which invalidates the State ’s argument that each municipality in Catalonia has discretionary powers in this matter, since responsibility for compliance with the Convention ultimately lies with the State.

Regarding levels of autonomous territorial legislation, the author insists the law on “modified” duty must be interpreted in accordance with the CRPD, which invalidates the State ’s argument that each municipality in Catalonia has discretionary powers in this matter, since responsibility for compliance with the Convention ultimately lies with the State.

The State attaches three administrative decisions issued by the National Social Security Institute whereby assignment to modified duty is found to be compatible with disability status in the case of firefighters in Catalonia. The author questions the State ’s contention that a finding of permanent total disability results in mandatory retirement, thereby disqualifying a person who is no longer in active service from performing modified duties.

State ’s additional observations

The State recalls that, international treaties become part of the domestic legal order in accordance with article 96 of the Constitution, as “rules of domestic law”, but that they are all subject to the Constitution. Thus, whether or not to award disability pensions, as provided for under the Convention, is a matter for the domestic courts, which are required to take account of article 10 of the Constitution in conjunction with the rest of the legal system as a whole.

The State refers to regulations not previously invoked, namely European Union Council Directive 2000/78/EC, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation. The preamble of the Directive (para. 17) states that “this Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not … capable … to perform the essential functions of the post concerned”. The Directive has primacy over national law, since membership of the European Union presupposes the integration of legal systems and supra-nationality, and not only collaboration, as is the case with the United Nations conventions.

Author’s additional observations

The author insists that the purpose of the communication is to highlight the fact that the State failed to uphold the provisions of the Convention and disregarded articles 10 and 96 of the Constitution when deciding on the author’s claim that he had been discriminated against. With regard to European Union Council Directive 2000/78/EC, referred to by the State, the author submits that, under article 2 (a) thereof, direct discrimination is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation. The author points out that the outcome of his case might have been different if it had been considered by a council that had introduced modified-duty regulations. In conclusion the author reiterates the requests made in his initial submission.

Committee’s consideration of admissibility and the merits

Consideration of admissibility

The Committee finds that article 2 (c) of the Optional Protocol does not constitute a barrier to the admissibility of the present communication, as the communication has not been and is not being examined under another procedure of international investigation or settlement.

The Committee notes that the State has not raised any issues related to the admissibility of the communication. The Committee finds that the author has exhausted the remedies available under domestic law regarding the fundamental rights to equality and non-discrimination and to access to public employment.

The Committee notes that the author, in the claims filed with the ordinary courts, does not present any arguments concerning the right to effective judicial protection and its relationship to possible violations of the right of persons with disabilities to have access to justice. Thus, the author has not exhausted domestic remedies regarding article 13 (2) of the CRPD and declares this part of the communication inadmissible under article 2 (d) of the Optional Protocol.

the Committee declares 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 articles 3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (3) of the CRPD.

Consideration of the merits

Regarding article 5, the Committee finds that the present case discloses one of the forms of discrimination prohibited by the CRPD, whether it is viewed as direct discrimination or as a denial of reasonable accommodation. The Committee recalls 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 the present case, the Committee notes that the possibility of evaluating the barriers to the author’s retention within the police force was ruled out because he was deprived of his status as a public official upon his mandatory retirement and had no opportunity to request reasonable accommodation that would have enabled him to perform modified duties. The Committee also notes that the State has failed to demonstrate that other types of duties that the author might have been able to perform were not available.

Regarding article 27 (1), the Committee requires State to recognize the right of persons with disabilities to retain their employment, on an equal basis with others; to take all appropriate steps, including through legislation, 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. The Committee finds that the present case discloses discrimination in relation to continuance of employment, stemming 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.

Regarding article 4 (1) (a), the State has a general obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the CRPD, including on work and employment. The Committee notes that the absence of regulations at the local level renders all those with “permanent total disability” status ineligible for assignment to modified duty. This undermines such persons’ right to work, as occurred in the author’s case.

Regarding to article 4, all local, autonomous-community and national provisions that bar individuals from being assigned to modified duty without providing for an assessment of the challenges and opportunities that persons with disabilities may have, and that thereby violate the right to work, must be modified and harmonized.

Conclusions

The Committee concludes that the State has failed to fulfil its obligations 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); and 5 (1), (2) and (3) of the Convention and recommended:

Regarding author:

(i) to afford him the right to adequate compensation, including any legal costs incurred in filing the present communication.

(ii) to take measures to ensure that the author is given the opportunity to undergo an assessment of fitness for alternative duties to evaluate his potential to undertake modified duties or other complementary activities, including any reasonable accommodation that may be required.

In general:

(i) to take all necessary measures to align the modified-duty regulations of the Figueras municipal police (ordinance) and their application with the principles enshrined in the Convention and the recommendations contained in the present Views, ensuring that assignment to modified duty is not restricted only to persons categorised as with a “partial disability”;

(ii) to harmonize the variety of local and regional regulations governing the assignment of public officials to modified duty in accordance with the principles enshrined in the Convention and the recommendations contained in the present Views.

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)