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Case Comment

Nyusti and Takacs v Hungary: decision of the UN Committee on the Rights of Persons with Disabilities

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***E.H.R.L.R. 419** The Nyusti and Takács v Hungary decision is only the second view (*quasi judgment*) decided on the merits by the UN Committee on the Rights of Persons with Disabilities under the Optional Protocol to the 2006 UN Convention on the Rights of Persons with Disabilities. The case concerns ATMs which were inaccessible to the two blind applicants. The Committee found Hungary in breach of its obligations to provide accessible environment to people with disabilities. This case-note sets out the facts of the decision, and reviews some of its notable features. The Committee has clarified the State's responsibility to prevent non-State actors from discriminating, and it has ensured that the State obligation on accessibility which is set out in the Convention is justiciable by individual applicants. The case-note then provides some wider implications of the case, key to which is the European Commission's proposed accessibility act.

Introduction

In April 2013 the UN Committee on the Rights of Persons with Disabilities published its view (which means judgment) on the merits in a communication (application) received under the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities (CRPD). The Optional Protocol allows individuals to submit a communication to the Committee, after exhausting domestic remedies, if they believe that a CRPD provision has been violated by a State that has ratified the CRPD and the Optional Protocol. The case is significant because it is only the second one on the merits which the Committee has published.

Facts

The case was brought by Szilvia Nyusti and Péter Takács, two people in their thirties who were both clients of a Hungarian bank called OTP, the first applicant having been a client of the bank since 1996 and the second since 2003. Their contract with the bank entitles them to a bankcard so that they can withdraw money from ATMs (automated telling machines). The applicants brought the case as they could not use the ATMs as other people can, because they both have visual impairments. Many of the bank's ATMs lack both a braille font on the keypad and voice prompts which would have enabled the applicants to use them.

In May 2007 Nyusti and Takács won a case against OPT before the Metropolitan Court in Budapest. They had sued the bank about its inaccessible ATMs. The court held that OTP had violated their right to equal treatment and human dignity, an important constitutional principle in Hungary. Strangely, the court ***E.H.R.L.R. 420** found that the two applicants had suffered *direct discrimination* because as people with visual impairments they could not use the services provided by the ATMs to the same extent as other clients, despite paying the same fees. The Metropolitan Court ordered OTP to ensure that there is one accessible ATM in each capital of all Hungarian counties and one in each district in Budapest. It further ordered a further four ATMs in districts where the applicants lived.

In July 2007 the applicants appealed to the Metropolitan Court of Appeal, arguing that as customers

of the bank they should not be forced to use specific ATMs. They wanted to stop the discrimination fully rather than settle for a partial solution, and demanded access to the bank's full range of ATMs. They asserted that it would cost the bank 0.12 per cent of its annual net income to retrofit all its ATMs. The bank contested this, arguing that making all ATMs accessible would, "motivate blind or visually impaired persons to use the ATMs without help, which would endanger not only the security of property but also personal safety of blind or visually impaired clients of the OTP." The appeal court rejected the applicant's appeal, rehearsing points under domestic law that are not relevant for the purpose of this case note. It did, however, disagree with the lower court's finding of direct discrimination and replaced this with a (surely correct) finding of indirect discrimination, stating that despite the fact that everyone could use the ATMs under the same conditions, the applicants were put in a less favourable situation compared to other clients due to their disability.

The applicants appealed to the Supreme Court, which issued a judgment in February 2009 largely upholding the ruling of the Metropolitan Court of Appeal. Having exhausted Hungarian legal remedies the applicants sent an individual communication to the UN Committee on the Rights of Persons with Disabilities under the Optional Protocol to the CRPD. Hungary ratified both the CRPD and its Optional Protocol in July 2007 and both instruments came into force in May 2008.

1. State responsibility to prevent discrimination by non-State actors

The case provides further guidance to States as to their obligations to ensure that private entities make accessible products and services. Article 4 of the CRPD sets out the general obligations on States Party to the Treaty. Paragraph (e) of art.4 sets out a duty to "take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise". The wording sets a high bar. It requires not just an action plan, not some steps, not reasonable measures, but *all appropriate* ones. As a private company, the OTP bank is a "private enterprise" for the purposes of the CRPD, so the CRPD Committee was interested to examine the measures which the Hungarian government had taken to prevent the OTP bank from exercising disability-based discrimination.

The CRPD further establishes a duty on the State to create an accessible environment. To this aim, the State must "develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public" (art.9(2)(a)). This provision does not merely oblige the State to organise accessible government-run services like hospital or schools, but the text requires that services provided to the public be accessible. This clearly includes banking services such as ATMs. In case this is not clear enough to States, the CRPD specifies that in fulfilling its accessibility obligation, States must ensure that companies "take into account all aspects of accessibility for persons with disabilities".¹

In its judgment the CRPD Committee notes the Hungarian government's commitment to ensure that all ATMs are accessible to everyone with disabilities. Apparently the government had suggested to OTP that it prioritise the accessibility of newly-procured ATMs and in this regard had secured a promise from OTP to retrofit its entire network of ATMs within four years. The government had also requested the national Financial Supervisory Authority to identify regulatory measures to ensure disabled customers ***E.H.R.L.R. 421** have access to banking services. Despite these impressive-sounding commitments, the CRPD Committee found that the two applicants and people similarly situated still do not have access to all ATMs operated by OTP. On this basis it found the Hungarian State in violation of its obligations under art.9(2)(b) of the CRPD.

2. Accessibility is justiciable

The applicants argued their case not only under art.9 CRPD, but also under art.5, which sets out the prohibition on disability-based discrimination. Disability-based discrimination 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".² The definition then specifies that a failure to provide reasonable accommodation constitutes discrimination. Reasonable accommodation itself is defined as the "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".³ Strangely, given the provision's clear relevance in this case, the Committee refused to look at the case under art.5 on non-discrimination. It

offered no explanation why. The applicants argued their case also under art.12, which concerns legal capacity, a claim which the Committee dismissed, which seems to have been the correct approach. It offered no explanation why.

In contrast to art.5 which sets out a right (to non-discrimination), art.9 CRPD sets out the State's obligation (on accessibility) and nowhere in art.9 does the word "right" appear. The purpose of the provision is to, "enable persons with disabilities to live independently and participate fully in all aspects of life". This wording signposts to art.19 of the CRPD where the substantive right to independent living is set out. To this end, art.9 sets out a range of measures which it expects States Parties to take so that people with disabilities have "access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas." These measures include providing "in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms".⁴ Article 9 therefore sets out extensive duties on the State. Before this case it was not known whether a CRPD State obligation was justiciable. It would have been interesting to read some legal reasoning about why or how a State obligation on accessibility gives rise to a justiciable claim, but the Committee offers none.

3. Separation of powers

In the remedies section of the decision, the CRPD Committee sets out general recommendations, sensibly calling on the government to ensure that legislation does not result in discrimination. Law reform is something usually within the competence of a government. The Committee then places a responsibility on the Hungarian government to ensure that "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".⁵ More specifically, to prevent a repetition of the narrow way in which the Hungarian courts dealt with this case, the CRPD Committee recommends that the government provide regular training to judges "on the scope of the Convention and its Optional Protocol [...] in order for them ***E.H.R.L.R. 422** to adjudicate cases in a disability-sensitive manner".⁶ The Committee took a similar approach to judicial training in its only other case decided on the merits, HM v Sweden, in December 2010.

Judicial training on the CRPD and on non-discrimination more generally is undoubtedly sensible and much needed. That said, the CRPD Committee has opened itself up to the critique that it is inappropriate for it to have suggested that the executive branch of government should supervise or be responsible for ensuring the quality of the judicial branch. While this sort of recommendation is music to the ears of some governments, it will raise alarm bells for governments for whom the rule of law is more important. The risk is that they may well ignore the Treaty body's recommendation to prevent the perception of governmental interference with judicial decision-making.

In litigation conducted at the European Court of Human Rights government agents often find themselves defending dubious decisions of their country's courts which have failed for whatever reason to provide the applicant with an effective remedy. The government itself (or an arm of government such as the general prosecutor) may have been a party in these allegedly faulty domestic proceedings. And more likely than not the government was on the winning side of the litigation, provoking the individual to utilise the international justice system. Judgments of the European Court of Human Rights are often highly critical of domestic judgments and, silently, judges. But the Court refrains from recommending these judges undergo training. Presumably one of the reasons for this approach is the difficulty in pinpointing the cause of the faulty judgment. Just as qualified drivers sometimes drive dangerously, trained judges will sometimes issue low quality judgments.

There is nothing in the Nyusti and Takács judgment to suggest that the CRPD Committee had before it any evidence that the Hungarian judges involved in domestic proceedings at first instance, appeal or Supreme Court level lacked training in the CRPD or non-discrimination law. The recommendation to undergo judicial training seems therefore not to be evidence-based, and may infuriate Hungarian judges and government officials alike, rather than nudge them into a space where judges apply the CRPD to good effect. Likely the CRPD Committee was encouraged to make the judicial training recommendation because the Treaty itself is so training-focused. For example, the provision on access to justice places an obligation on States Parties to "promote appropriate training for those working in the field of administration of justice".⁷ The way to ensure implementation of this duty is to

ask governments to report on it in their State reports, which they must submit within two years of entry into force of the CRPD in their jurisdiction and thereafter every four years.⁸ The CRPD Committee has already examined Hungary's compliance with the CRPD in September 2012. Its resultant concluding observations fail to mention a single word about Article 13 or access to justice.⁹ By encouraging a government to interfere with the judiciary as part of a remedy of an individual complaint, the CRPD Committee has opened itself to criticism of constitutional over-reach.

4. Indirect discrimination need not be intended

The lower court found that the two applicants had suffered direct discrimination, perhaps because of the confusing way in which the Hungarian Equal Treatment Act sets out the distinction. The ATM case clearly is one of indirect discrimination. In 2009 the UN Committee on Economic, Social and Cultural Rights issued a helpful general comment on the right to non-discrimination in which it states that indirect discrimination "refers to laws, policies or practices which appear neutral at face value, but have a *E.H.R.L.R. 423 disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination".¹⁰

The CRPD does not distinguish between direct and indirect discrimination, but its definition of discrimination includes the indirect mode by stating that the effect (not just the intention) of the differential treatment can constitute discrimination. Mental health laws specifically legalise actions which would otherwise be arbitrary detention and assault: this could be framed as direct discrimination. But most discrimination against people with disabilities is indirect discrimination. Such discrimination need not be intended, and indeed in the instant case there was no evidence that the OTP bank wanted to discriminate against blind customers. Indirect discrimination is often about people being dis-abled to do activities (like work) or use things (like ATMs) because the employer (in the case of work) or the bank (in the case of an ATM) has not made any reasonable adjustments. In the Nyusti and Takács case the Metropolitan Court of Appeal was correct to re-label the differential treatment as indirect discrimination. Given that the CRPD Committee declined to examine the case under the non-discrimination provision of art.5 CRPD, it missed an opportunity to comment on this point.

5. Safety invoked to justify disability-based discrimination

Lawyers representing the OTP bank deployed some creative legal arguments in defending the litigation in the Hungarian courts. In trying to convince judges that the bank need not refit ATMs to make them accessible, OTP argued that accessible ATMs pose a banking security risk for blind people, "due to their special situation". Before the Metropolitan Court of Appeal, OTP lawyers put forward the argument that retrofitting the ATMs would "motivate blind or visually impaired persons to use the ATMs without help" (which is exactly what the applicants wanted). Enabling blind people to withdraw their own money from an ATM, "would endanger not only the security of property but also the personal safety of blind or visually impaired clients of the OTP".

The CRPD Committee rejected these arguments, which thanks to the international litigation are now documented in the archive of human rights. Lawyers for OTP attempted to justify disability-based discrimination by pedalling an image of the disabled person as a pitiful incapable person who needs protection in their own best interests and for their personal safety. It is this line of argument, rather than the person with disability, which is deserving of pity.

6. Implications for the EU

In the general remedy section of the judgment, the CRPD Committee recommends that the Hungarian government adopt minimum standards for banking accessibility, and put in place a legal framework "with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones."¹¹ Such benchmarks are currently being worked on at European Union level. Accessibility is a key concern for the EU. In 2007 the Commission issued Mandate 420 whose purpose is to develop accessibility standards for the built environment (which includes ATM machines). The mandate points out that "accessible built environments are economically attractive", and then lays out a process of developing a set of technical specifications, and a mechanism through which people responsible for public procurement can make easy use of harmonised requirements when ordering goods. *E.H.R.L.R. 424¹²

In November 2010 the European Commission adopted the European Disability Strategy 2010–2020. One of the Strategy's eight areas for action is accessibility, which is framed as "a precondition for participation in society and in the economy". The strategy sets out proposals for the Commission to "use legislative and other instruments, such as standardisation, to optimise the accessibility of the built environment, transport and ICT". Furthermore the strategy commits the Commission to explore the feasibility of "adopting regulatory measures to ensure accessibility of products and services, including measures to step up the use of public procurement".¹³ In December 2010 the EU acceded to the CRPD, meaning that it must adhere to CRPD standards within its legal competencies and programmes. Compliance of its Disability Strategy and Mandate 420 with art.9 CRPD (set out above) is now a relevant concern.

To this end, the Commission is considering introducing a European Accessibility Act. The new legislation may include developing specific standards for particular sectors to improve the functioning of the internal market for accessible products and services. Through a public consultation the Commission wished to "identify those goods and services that should be covered by a European initiative", which would be likely to be goods and services which, "are for common use by the public (such as ATMs), and that are important for inclusion and participation in society".¹⁴ The consultation ran from December 2011 to February 2012 but the results are not yet public.

Banking accessibility is only one of the many sectors which need to be adjusted to fully reach an accessible environment, which is the utopia of art.9 CRPD. It would be wasteful of resources for individual Member States to embark on developing standards at national level. A much better idea (from the point of view of the Member States, taxpayers, and individual consumers) is for these standards to be harmonised across the EU, to ensure that goods and services are accessible both within the Member State where the person lives, and those to which they travel for work, study or leisure. "[P]roactively identifying solutions to reduce social exclusion of disabled persons" was one of the key political objectives of the Commission when it introduced the public consultation on the Accessibility Act.¹⁵

There is no draft text of the accessibility act, but according to one think tank, it will probably "harmonise accessibility requirements, stimulate innovation through the use of European standards, increase market incentives and public procurement, and improve the inclusion and participation of persons with disabilities in society and the economy."¹⁶ Whatever the resultant legislative proposal, it seems sensible in the light of the Nyusti and Takács case that the Commission proposes a European Accessibility Act with standards enforceable at EU level to avoid a fragmented approach, currently a major barrier for people with disabilities being equal consumers, traders, tourists, and workers.

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^{*}. A shortened version of this article originally appeared on the author's blog, <http://www.mdac.info/olivertalks>.

^{1.} Article 9(2)(b) of the CRPD.

^{2.} Article 2 of the CRPD.

^{3.} Article 2 of the CRPD.

^{4.} Article 9(2)(d) CRPD.

^{5.} Para.10(2)(c) of the judgment.

^{6.} Para.10(2)(b) of the judgment.

^{7.} Article 13(2) CRPD. This echoes a provision in paragraph (i) of the Preamble, in which States commit "[t]o promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights."

^{8.} Article 35 CRPD.

9. UN Committee on the Rights of Persons with Disabilities, concluding observations with regard to Hungary, September 17-28, 2012.
10. UN Committee on Economic, Social and Cultural Rights, General comment 20 (2009), para.10.
11. Para.10(2)(a) of the judgment.
12. European Commission, "Standardisation Mandate to CEN CENELEC and ESTI in Support of European Accessibility Requirements for Public Procurement in the Built Environment", December 21, 2007, M/420.
13. European Commission, "European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe", COM(2010) 636, November 15, 2010.
14. European Commission, Consultation Document European Accessibility Act, December 12, 2011, p.2.
15. European Commission, Consultation Document European Accessibility Act, December 12, 2011, p.2.
16. Annika Ahtonen and Romain Pardo, "The Accessibility Act—Using the single market to promote fundamental rights", European Policy Centre, March 13, 2013.

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