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Disability Council International (DisabCouncil)

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Article 27 of the CRPD and the right of persons with disabilities to serve in the Armed Forces

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1. Introduction (the military service exemption to the rule of non-discrimination on the ground of disability in the practice of European states before the adoption of the CRPD)

a. The 2000 EC Directive on equal employment and the military service exemption

1. In 1999 the EU Council proposed the adoption of an anti-discrimination Directive establishing a general framework for equal employment and occupation, to give effect to Article 13 of the Treaty of Amsterdam on the European Community. The initial draft of the Directive incorporated an absolute prohibition of discrimination in employment on any grounds including disability. However UK secured an exemption to the rule allowing Member states to discriminate on the basis of disability with regard to service in the Armed Forces.¹

2. Sir Charles Guthrie, Chief of Defense Staff tried to justify the position adopted by the UK government arguing that “to have disabled people serving in the army, navy or air force would be “detrimental” to the armed forces.”² The UK Ministry of Defense further argued that the discrimination of persons with disabilities was “absolutely necessary to maintain military effectiveness”, and that ““Everyone has to be physically fit and able to fight at the front line.”³

3. Disability rights organizations reacted saying the approach was a misunderstanding of the concept of equality of opportunities. Bert Massie, the then chairman of the UK Disability Rights Commission, said: “It's ridiculous to exclude disabled people from serving in the armed forces because of some outdated stereotype.” And suggested that they could be considered “for non-combat roles in logistics, supplies or communications”.⁴

¹Article 3/4 of the Council Directive reads exactly the following way: “Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.” See ‘Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation’, published in *Official Journal L 303, 02/12/2000 P. 0016 – 0022*.

² See ‘Protests at the Military ban on disabled’, *The Guardian*, 21 December 2000.

³ *Ibid.*

⁴ *Ibid.* See also ‘Disabled People in the Armed forces’, *The Guardian*, 20 December, 2000.

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b. *The case Glor vs. Switzerland: overruling of the military service exemption*

4. Whatever it is, the UK official position in this regard appears in contradiction with the European Convention for the protection of human rights and fundamental freedoms, as recently interpreted by the European Court of human rights in the case *Glor vs Switzerland*.⁵

5. Council Directive 2000/78/EC on a general framework for equal treatment in employment and occupation specifically provides that “in accordance with Article 6 of the Treaty on European Union, the European Union *is founded* on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, *as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms* and as they result from the constitutional traditions common to the Member States, as general principles of Community law” (Preamble) (emphasis added). EC directives must therefore conform to the European human rights Convention.

6. The European Court of Human Rights in the case *Glor vs. Switzerland*, held that banning persons from service in the Army on the basis of disability represents discrimination contrary to article 14 of the European Convention on human rights, since such persons can be accorded a less physically demanding job and that Switzerland failed in its obligation to grant “reasonable adjustments” in order to allow such persons to serve in the Army.⁶

⁵ See Case *Glor vs. Switzerland*, European Court of Human Rights (ECtHR), 30 April 2009, Application No. 13444/04.

⁶ See Case *Glor vs. Switzerland*, *Ibid*. The case concerned a Swiss national who suffered from diabetics, and who required 4 daily injections of insulin. The Swiss Army medical services refused to support his enlistment on the basis that he was disabled and unfit for service in the Armed Forces. The Government, at the court, supported the Army’s position arguing that enlisting such a person in the Army would not only be “dangerous but irresponsible” (para. 57). While the court noted that defining the criteria for efficiency of the Army was within the competence of States, it said it failed to understand what could have prevented Switzerland from providing such a person with other less physically demanding jobs that could have enabled him to serve his nation. The court also said there were a number of activities in the Army which required less of a physical constraint and could very well be adapted to the situation of persons with disabilities. The court noted in support of its position that a number of States had legislation providing for alternatives inside the Army to active front line activities, and that usually these persons were recruited to positions adapted to the degree of their impairments and their professional qualifications (para. 94).

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7. Although the issue of the military service exemption in the Council Directive 2000/78/EC was not raised, since Switzerland is not an EU member, it is important that the Court virtually found unconvincing the “unfitness” justification and the argument that the Army could not have two-tier Forces (disabled and non disabled) for fear of reflecting on the morale of those in front line activities.⁷ Employment of persons with disabilities requires removing barriers in their way, through provision of reasonable accommodation, and this cannot be considered as discriminatory by anyone.⁸

c. Subsequent developments

8. Despite the decision of the European Court of human rights, three European countries (UK, Cyprus and Greece) subsequently entered reservations to the CRPD to the effect that consistent with the Council Directive 2000/78/EC, they were excluding themselves from the obligation to employ persons with disabilities in the Armed Forces.

9. The first important thing to note is that none of these countries have made an interpretative declaration to Article 27 (on work and employment), rather they made reservations. This means these States were aware that the obligation incumbent on them under Article 27 indeed required extending the principle of non discrimination to service in the Armed Forces.

10. The provisions in Article 27 offer indeed no ambiguity, and the prohibition of discrimination in employment in the Armed Forces applies to all those States that have made no specific reservation excluding Armed Forces from its ambit.

11. Therefore, the question which begs clarification is only whether any reservations made to Article 27 could be lawful in light of the object and purpose of the Convention. This issue will be dealt with below.

⁷ UK officials also argued that “recruiting disabled people would impact on morale, operational effectiveness and would create a two-tier military organization”, see ‘Disabled should be able to join armed forces’, The telegraph, 17 June 2009.

⁸ We should also note that in most Armies enlisted women are not allowed frontline combat roles. In addition in a number of States, personnel who are injured during combat action are kept in the Army but they do not go to the front line either. No one has ever considered these exceptions discriminatory.

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2. Article 27 of the CRPD: the scope of the prohibition of discrimination on the basis of disability in all forms of employment and the right of persons with disabilities to serve in the Army

12. Article 46 of the CRPD Convention states that reservations that go against its object and purpose are not permitted. The Convention defines its purpose in Article 1 as the “promotion and protection of the full and equal enjoyment of all rights by persons with disabilities” and these persons are defined as including those “with short or long term impairments *which in interaction with various barriers may hinder their participation in society.*”

How this purpose translates in the area of work and employment?

13. Under Article 27 (work and employment) States parties have recognized “the right of persons with disabilities to work, on an equal basis with others” and have undertaken the commitment to “safeguard and promote the realization of the right to work” by taking appropriate steps, which includes adoption of legislation in order to

“a) Prohibit discrimination on the basis of disability with regard to all matters concerning “all forms of employment”, and in this connection to

“i) Ensure the provision of reasonable accommodation to persons with disabilities in the workplace”

14. The scope of the actions required from States in order to fulfill the obligation to prohibit discrimination on the basis of disability in all forms of employment is defined in particular in Article 4 (general obligations) which requires States,

“d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention”

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15. The prohibition of engaging in any practice that is inconsistent with the Convention is particularly appealing to the need to ensure the removal of reservations that deny to persons with disabilities the right to engage in a particular type of activity such as service in the Army, when done not on the basis of the person's own option and desire, but for sole reason of the very disability which is the object of protection against discrimination under the Convention. To enter a reservation in such circumstances is to deny the very *raison d'être* of the treaty, which the State has adopted with other States.

16. The Convention is intended to extend the principle of equal treatment to cover those situations in which hitherto an exception was made on the basis of disability. It makes no sense to enter an agreement whose purpose is exactly to remove such discrimination on disability grounds, and yet make a reservation to exempt itself from that obligation.

17. Article 3 of the Convention states that the ultimate purpose of the measures to ensure the right to work and employment is the realization of the principles of

"a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons";

"c) Full and effective participation and inclusion in society";

"d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity";

"e) Equality of opportunities"

18. The goal of respecting the inherent dignity of persons with disabilities will not be achieved if we left the Armed Forces out of the scope of the prohibition against discrimination, as the objective of the Convention is exactly to promote recognition of the merits and contributions of persons with disabilities in all areas of productive life in society and to combat stereotypes and prejudices against them.

19. The Convention asks to look beyond the impairments of persons with disabilities to see whether their skills cannot be otherwise productively employed in other types of activities including if needed through provision of reasonable adjustments. The rule fully applies to service in the Armed Forces and any reservations seeking an exemption should accordingly be considered as invalid, and consistent with the obligation enshrined in Article 4 of the Convention to refrain from acts that defeat its purpose, they should be freely removed by the relevant States.

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20. Further to this, it is also important to note that a more general purpose of any codification exercise is the progressive development of the relevant norms. Every new convention always breaks new grounds and sets new common denominators in the protection of the relevant rights. The CRPD Convention, by extending its protection to *all forms of employment* takes a step further and involves with no exception all areas of human activity including the Army, where States are also required to provide reasonable adjustments and strike a balance between the needs of the particular activities, the skills of the persons with disabilities concerned and the degree and form of their impairments taken in context with the existing barriers that need adjusting.

21. Accordingly, it certainly cannot serve the purpose of the adoption of the Convention, if the country decided to enter a reservation in order to avoid an obligation that would require it to change its national legislation⁹, or justify non-compliance with the provisions of the Convention by relying on its own national legislation.¹⁰

⁹See for example the cases of Greece, Cyprus, and UK. In its initial report to the CRPD Committee, UK states (para. 307): “*The UK’s reservation in respect of service in the Armed Forces remains in place. Service in the Armed Forces was exempt from the employment provisions of the DDA, because Armed Forces personnel must be combat effective in order to meet a worldwide need to deploy, and to ensure that military health and fitness remain matters for Ministry of Defence Ministers based on military advice, not the courts. The continuing need for this exemption was reviewed when the Equality Act 2010 was developed, and it was concluded that it is still required. The reservation reflects this position.*”). See UN Doc CRPD/C/UK/1. Greece entered a reservation to article 27 on 31 May 2012 stating the following: “*The provisions of Article 27 paragraph 1 of the Convention on the Rights of Persons with Disabilities shall not apply with respect to employment and occupation in the armed and security forces in so far as it relates to a difference of treatment on grounds of disability concerning the service thereto, as provided in Article 8 paragraph 4 of the Law 3304/2005 for the implementation of the principle of equal treatment, adopted pursuant to Articles 3 paragraph 4 and 4 of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.*” Likewise Cyprus entered the following reservation on 27 June 2011: “*Whereas the Persons with Disabilities Law, as this has been harmonized with the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, prescribes in section 3A thereof that the said Law shall not apply as regards employment: (a) to the armed forces, to the extent that the nature of the work requires special abilities which cannot be exercised by persons with disabilities...the Republic of Cyprus declares that it ratifies the Convention with a reservation in respect of Article 27(1) of the Convention, to the extent that the provisions thereof are in conflict with the provisions of section 3A of the Persons with Disabilities Law.*”

¹⁰ See for example cases of the Czech Republic and Denmark. In its initial report to the CRPD Committee, the Czech Republic states (pag. 67): “*The prospective service of persons with disabilities as professional soldiers is limited by the requirements imposed on the service of professional soldiers by legal regulations. Provisions of paragraph 1 e) of Article 3 of the Act on Professional Soldiers¹⁰ stipulates an obligatory condition for the call to*

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22. The Convention was exactly adopted to provide new grounds in terms of the level of protection accorded to persons with disabilities in all areas, with particular emphasis on cases which were hitherto exempt in certain national jurisdictions from the required protection, such as service in the Armed Forces.

23. It is not surprising therefore that the States enshrined a specific undertaking in Article 4 (general obligations) to the effect that they should

*“b) take all appropriate measures, including legislation, **to modify or abolish** existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”* (emphasis added)

24. Accordingly States parties should change their legislation, rather than enter reservations or justify non-compliance with the existing national legislation. The Convention was exactly adopted with the purpose to change national laws, practice and customs detrimental to the fundamental rights of persons with disabilities, their inherent dignity and self-worth.

Conclusions

25. A number of States, who ratified the CRPD Convention have either entered reservations or justify their violation of the Convention with the need to respect their own existing national laws (that discriminate against persons with disabilities by not allowing them to

service – fitness for duty. This is also one of the reasons for obligatory service termination - the loss of fitness is determined by an assessment committee, or the service authority is obliged not to allow a soldier to carry out duties which require such level of fitness that the soldier cannot meet¹⁰. Therefore, persons with disabilities may only serve during their temporary incapacity to work until their disability is legally confirmed, which means termination of their service at the same time.” See UN Doc. CRPD/C/CZE/1. Likewise Denmark in its initial report states (pag. 35): *“Disability policy initiatives are formed on the basis of current legislation in the area of the Ministry of Defence. The Ministry of Defence is exempted from the prohibition against differential treatment. Due to the physical and mental requirements of military service, discrimination on account of age and disability is permitted as being in good physical condition and health is an ultimate requirement as concerns operations safety on international missions.”* See UN Doc. CRPD/C/DNK/1.

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serve in the Armed Forces). In Europe the justification is that these laws conform to the exemption accorded under the Council Directive 2000/78/EC on the grounds of disability.

26. However, service in the Army more than in other cases, illustrates the existing stereotypes and misconceptions about the abilities of persons with disabilities; such stereotypes are reinforced by unwillingness to accommodate the interests of persons with disabilities.

27. These customs and practices in certain countries constitute serious violations of the Convention on the Rights of Persons with Disabilities, which must be stopped.

Recommendations

- i) **Modify or abolish discriminatory national legislation.** Consistent with the relevant provisions of the Convention, States parties should modify their national legislation and lift the exemption to non-discrimination in employment. This would be consistent with the Convention which breaks a new ground in the protection of the rights of persons with disabilities in order to include their full and unhindered right to service in the Army. It is the national law that needs to conform to the Convention and not the other way round.
- ii) National legislation and implementation policies should also provide for the extension of the principle of **reasonable accommodation** to cover the hiring of persons with disabilities for non-combat roles in the Army, taking into account the skills of the persons, the type and degree of their impairments and work that such persons can perform with reasonable accommodation not imposing undue burden.
- iii) **Adopt and develop affirmative action measures.** It is also important to extend affirmative measures adopted in relation to employment in other areas (such as for example disability employment quotas) to cover service in the Army.¹¹

¹¹An example in hand to follow is given by the practice of Argentina. In its initial report to the CRPD it notes (para. 507): *"In addition, the Ministry of Defence, by decree No. 118/07, started a jobs programme for persons with disabilities in the Argentine Navy. Under this programme, the candidates' profiles and disabilities and*

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- iv) **Implement an efficient mechanism of redress and enforcement.** Article 5 of the Convention (equality and non discrimination), requires States to guarantee “equal and effective legal protection against discrimination on all grounds”. It is important to ensure that persons with disabilities have the legal remedies to contest violations of their rights including the possibility of addressing the CRPD Committee under the Optional Protocol when the relevant State is a party to it. In this regard, a reservation to Article 27 should not be an impediment to petitioning the Committee, on the contrary, it should represent a unique chance for the Committee to decide with authority on its lawfulness in light of the object and purpose of the Convention.
- v) **Remove reservations** on Article 27 (service in the Army), as they run against the object and purpose of the Convention.

descriptions of the positions to be filled are evaluated. Candidates are selected, hired and trained, and follow-up is provided for workers with disabilities in order to comply with the quotas established in Act No. 22431 and amendments thereto.” See UN Doc. CRPD/C/ARG/1.