

IN THE EUROPEAN COURT OF HUMAN RIGHTS

(APPLICATION No 23682/13)

JOŠKO GUBERINA

APPLICANT

AGAINST

CROATIA

RESPONDENT

WRITTEN COMMENTS SUBMITTED JOINTLY

BY

CROATIAN UNION OF ASSOCIATIONS OF PERSONS WITH DISABILITIES

EUROPEAN DISABILITY FORUM

INTERNATIONAL DISABILITY ALLIANCE

DECEMBER 2013

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I. Introduction

1. These written comments are jointly submitted by the Croatian Union of Associations of Persons with Disabilities (SOIH), the European Disability Forum (EDF) and the International Disability Alliance (IDA) pursuant to leave granted by the President of the First Section on 7 November 2013 in accordance with Rule 44(3)(a) of the Rules of Court.¹
2. The present case concerns the application of Croatian tax legislation on the Applicant's purchase of a house. According to the statement of facts, the Applicant challenges the refusal by the authorities to grant him a tax exemption on the purchase of a house based on the latter's argument that his formerly owned apartment fulfilled his and his family's housing needs. The Applicant raises the fact that the previous residence was not equipped with a lift and thereby required the Applicant and his family to carry his growing disabled son up and down the stairs. As a result, that property did not meet the housing needs of his family, whereas the subsequently acquired house does so because it is accessible.
3. This case presents the Court with an opportunity to examine States' obligations to refrain from exercising disability based discrimination in the implementation of a right which the State has voluntarily attributed - in this case, the right to a tax exemption falling under protection of property. Furthermore, it opens up consideration by the Court of that the manner of application of legislation must reasonably accommodate the particular case of the Applicant and refrain from disproportionately hindering the right to respect for family and home on an equal basis with others, failing which could constitute discrimination by association on the grounds of disability.
4. These comments set forth the latest international human rights standards with respect to the rights of persons with disabilities and in particular concerning the prohibition of discrimination by association, reasonable accommodation, accessibility, right to an adequate standard of living related to housing, the right to live and be included in the community, and right to family and home. They also provide information on laws and practices of the Croatian tax exemption law as well as comparative legislation from other jurisdictions on particular housing and tax measures and exemptions pertaining to persons with disabilities. They demonstrate that the particular individual needs and situations of persons with disabilities need to be taken into account by the State authorities to ensure non-discrimination, including the provision of reasonable accommodation as a critical component to ensuring the rights of persons with disabilities on an equal basis with others.

II. International standards on the rights of persons with disabilities

5. It has been established that in interpreting the provisions of the European Convention on Human Rights (hereinafter the 'Convention') and the scope of the States' obligations in specific cases, the European Court of Human Rights (hereinafter the 'Court') will look "*for any consensus and common values emerging from the practices of European States and specialised international instruments... as well as giving heed to the evolution of norms and principles in international law.*"² It is respectfully submitted that international and comparative standards should inform the Court's interpretation in this case.

United Nations Convention on the Rights of Persons with Disabilities

6. In considering the responsibility of member States to uphold the rights of persons with disabilities, the Court is encouraged to have regard for the latest international standards on the human rights of persons with disabilities, namely the provisions of the United Nations Convention on the Right of Persons with Disabilities (hereinafter 'CRPD') and its guiding

¹ For Interest of Interveners see Annex to the written comments.

² *Opuz v Turkey*, Application no 33401/02, judgment of 9 June 2009, para 164

principles and values, which include respect for inherent dignity, autonomy, including the freedom to make one's own choices, non-discrimination, full and effective participation in society, respect for difference, equality of opportunity, and accessibility.³

7. To date, the CRPD counts 139 States Parties, including Croatia which was among the first States to ratify the CRPD on 15 August 2007. Further, 25 out of the 28 member states of the European Union have ratified or acceded to the CRPD,⁴ and the CRPD is the first international human rights instrument to which an inter-governmental body is a party, i.e. the European Union, which acceded to it on 23 December 2010. Within the Council of Europe, 41 of the 47 members are States Parties to the CRPD.⁵ Indeed, the Court astutely recognised in 2009 in *Glor v Switzerland*, that the CRPD reflects “a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment,”⁶ which rings even truer today given the growing number of States Parties to the CRPD within Europe and globally.
8. The CRPD presents a significant paradigm shift in disability rights discourse, moving from a medical and charity based approach on disability in which persons with disabilities were considered as objects of treatment or charity, to a social model and human rights approach which recognises persons with disabilities as subjects of their own rights. The CRPD recognises that due to the historically marginalised place of persons with disabilities in society, concerted steps and specific measures are necessary to accelerate or achieve de facto equality of persons with disabilities in society.⁷
9. The Court has also recognised that particular considerations should be taken with respect to the rights of persons with disabilities given that they were historically subject to prejudice with lasting consequences resulting in their social exclusion. Hence, the Court's jurisprudence is clear that any interference with the rights of persons belonging to particularly vulnerable groups is required to be subject to strict scrutiny, and only very weighty reasons could justify any restriction.⁸ Moreover, where the State act or omission “may prove to be contradictory to the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced”.⁹

Accessibility, non-discrimination and reasonable accommodation

Accessibility

10. Accessibility is enshrined as both a principle of the CRPD and a stand alone provision which reflects the importance of removing barriers posed in society– be they physical, environmental, communicational, informational or attitudinal – to ensure access to and equal opportunities for the realisation of all human rights.¹⁰ Article 9 of the CRPD on accessibility states:

“to enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to

³ Convention on the Rights of Persons with Disabilities, *adopted* Jan. 24, 2007, art. 3, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (entered into force 3 May 2008) [hereinafter CRPD]

⁴ Finland, Ireland and the Netherlands all signed the CRPD on 30 March 2007 and have yet to ratify the instrument, whereas Switzerland has neither signed nor ratified.

⁵ Besides the three EU member states which are not a party to the CRPD, there is also Liechtenstein, Monaco

⁶ *Glor v Switzerland*, Application no 13444/04, 30 April 2009, para 53; the Court made explicit reference to the CRPD in the *Glor* case even though Switzerland had not ratified (and still has not) the CRPD.

⁷ See Article 5(4), CRPD

⁸ *Alajos Kiss v. Hungary*, no 38832/06, 20 May 2010, para 42, *ZH v Hungary*, Application no. 28973/11, judgment of 8 November 2012, para 29

⁹ *Glor v Switzerland*, Application no 13444/04, 30 April 2009, para 84

¹⁰ Accessibility is enshrined in the CRPD as a principle in Article 3(f) impacting on all provisions of the CRPD, as well as in a stand alone provision- Article 9. See also Preamble (v), Article 3, Article 9, CRPD

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, which shall include the identification and elimination of obstacles and barriers to accessibility.”

11. The CRPD Committee is currently drafting a General Comment on accessibility (Article 9, CRPD) which therein recognises accessibility as a “pre-condition” for independent life and full and equal participation of persons with disabilities in society.¹¹ It is one of the first General Comments being undertaken by the CRPD Committee, which highlights its significance within the CRPD and its role in effecting the paradigm shift which the instrument enshrines.

Non-discrimination

12. The CRPD recognises the denial of accessibility in the context of discrimination, and obliges States to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities, equal and effective legal protection against discrimination on all grounds” (Article 5(2), CRPD).
13. The CRPD presents a fully developed concept of equality which moves beyond formal equality of treating persons identically, and encompasses the prohibition of all acts that have the “purpose or effect” of impairing or nullifying human rights, thereby covering both direct and indirect discrimination.¹² Human rights discourse today recognises that the same treatment for all does not necessarily result in substantive equality, but that non-discrimination also means that persons in different situations should be treated differently.
14. Article 5(3) of the CRPD sets out that “in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.” The provision of adjustments and adaptations is an integral part of the non-discrimination obligation on States, and the failure to provide “reasonable accommodation” is a form of disability-based discrimination recognised by the CPRD.¹³ Reasonable accommodation thus aims to remove the specific disadvantage to which a particular disabled individual would otherwise be exposed in order to ensure that human rights can be enjoyed on an equal basis with others.¹⁴

Reasonable accommodation

15. Article 2 of the CRPD defines reasonable accommodation as:

“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.”
16. While the concept of reasonable accommodation first emerged in the United States to combat discrimination on the basis of religion in the labour market¹⁵ with the obligation for employers to reasonably accommodate the religious practices of employees without undue hardship, it was soon raised to prominence in the context of disability with the introduction in 1990 of the *Americans with Disabilities Act*.¹⁶ It was equally adopted within the United Nations and appears in General Comment no 5 on Persons with Disabilities¹⁷ of the

¹¹ Draft General Comment on Article 9 of the Convention, CRPD Committee, para 1, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>, last accessed 20 December 2013.

¹² Article 2, CRPD

¹³ See Article 2, Article 5(3), CRPD

¹⁴ See Anna Lawson, “Disability Equality, Reasonable Accommodation and the Avoidance of Ill-Treatment in Places of Detention: The Role of Supranational Monitoring and Inspection Bodies”, *International Journal of Human Rights*, August 2012 (forthcoming)

¹⁵ Reasonable accommodation in employment and vocational training is not a novel concept for the 27 Member States of the European Union, and has been present in all national jurisdictions since the transposition of Council Directive 2000/78/EC.

¹⁶ See Leticia de Campos Velho Martel, “Reasonable Accommodation: the New Concept from an Inclusive Constitutional Perspective”, *Sur International Journal on Human Rights*, June 2011

¹⁷ CESCR Committee, General Comment no 5, Persons with Disabilities, 15 December 1994, para 15

Committee on Economic, Social and Cultural Rights (CESCR Committee), and more recently in their General Comment no 20 on non-discrimination.¹⁸ The EU Framework directive on equal treatment in employment and occupation also sets out the obligation to provide reasonable accommodation to guarantee compliance with the principle of equal treatment in relation to persons with disabilities.¹⁹ A Proposed Directive on the principle of equal treatment outside employment and occupation is currently being negotiated at the EU Parliament and Council.²⁰ This Directive - once adopted - will protect persons with disabilities against discrimination and require the provision of reasonable accommodation in other areas of life such as access to and supply of goods and services, education, social protection, etc.

17. Reasonable accommodation has been a feature of the Court's own jurisprudence to the extent that it upholds the right of individuals to non-discrimination and other rights by treating individuals in different circumstances differently.²¹ The result has been the finding of violations of the rights of persons with disabilities for the failure by the State to take steps to provide alternatives or to adapt to the individual's circumstances and needs.²² In *DG v Poland*, the Court stated that where conditions of detention were not suitable for a prisoner with disabilities and the State was "not making sufficient efforts to *reasonably accommodate* his special needs raises a serious issue under the Convention", which led to the finding of a violation.²³
18. It is inherent in the concept of reasonable accommodation that considerations for effective participation and exercise of rights must be made in response to the circumstances of a particular disabled individual. The obligation to provide reasonable accommodation is necessarily carried out on a case by case basis in order to offer a solution which corresponds to the individual concerned whose specific nature of disability, lived experiences, preferences and needs will vary from others, including those belonging to the same disability constituency. Further, it aims to ensure a proportionate and reasonable means to remove a barrier by a duty bearer, and the nature of the obligation will vary according to the particular individual and circumstances, the barrier(s) and duty bearer involved. Reasonable accommodation must be provided with the intrinsic recognition that there is no one size fits all solution, and it is fundamentally individual oriented. As such, inherent dignity of persons with disabilities is a central element to be considered in the context of reasonable accommodation; in making adjustments or adaptations, it is

¹⁸ CESCR Committee, General Comment no 20, Non-Discrimination in Economic, Social and Cultural Rights, E/C.12/GC/20, 2 July 2009, paras 9, 28

¹⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), Article 5, "This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

²⁰ The Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final, 2.7.2008.

²¹ *Thlimmenos v Greece* Application no 34369/97, judgment of 6 April 2000, para 44.

²² See *Price v UK*, Application no 33394/96, judgment of 10 July 2001, *Vincent v France*, Application no 6253/03, judgment of 24 October 2006, *Mouisel v France*, Application no 67263/01, judgment of 14 November 2002, *Khudobin v Russia*, Application no 59696/00, judgment of 26 October 2006, *Xiros v Greece*, Application no 1033/07, judgment of 9 September 2010, *Kupczak v Poland*, Application no 2627/09, judgment of 25 January 2009, *Groni v Albania*, Application no 25336/04, 7 July 2009, *Logvinenko v Ukraine*, Application no 13448/07, 14 October 2010, *Raffray Taddei v France*, 36435/07, judgment of 21 December 2010, *Vasyukov v Russia*, Application no 2974/05, judgment of 5 April 2011, *Vladimir Vasilyev v Russia*, Application no 28370/05, judgment of 10 January 2012, *Artyunyan v Russia*, Application no 48977/09, judgment of 10 January 2012, *Grzywaczewski v Poland*, Application no 18364/06, judgment of 31 May 2012, *DG v Poland*, Application no 45705/07, judgment of 12 February 2013. In each of these instances, the Court conducted a review of the measures taken by the authorities with respect to the specific circumstances and needs of the individual prisoners, persons with disabilities and/or persons with chronic illnesses. The Court concluded that the authorities failed to take measures to ensure they were accommodated in terms of accessible or adapted facilities nor did they have access to adequate medical care during their detention (in police custody or prison, or secure and adapted measures during prison transport) thereby leading the Court to find that the treatment surpassed the minimum severity necessary for a finding of Article 3 violations. These cases point to the fact that disabled prisoners were disadvantaged in comparison to their non-disabled inmates and the appropriate steps were not taken to remove that disadvantage which caused them suffering and distress beyond that associated with detention. In other words, the failure to provide reasonable accommodation to prisoners with disabilities resulted in them being subjected to inhuman and degrading treatment.

²³ Violation of Article 3, ECHR, see *DG v Poland*, Application no 45705/07, judgment of 12 February 2013, para 176

necessary to balance the reasonableness of costs with the respect for the inherent dignity of persons with disabilities.²⁴

Intimate link between accessibility and reasonable accommodation

19. Accessibility and reasonable accommodation ultimately have the same goal of ensuring effective enjoyment and exercise of rights on an equal basis with others, yet they are still distinct. The first important distinction between the two relates to the target group of the measures: general accessibility measures foreseen in Article 9 of the CRPD must be provided in anticipation of the accessibility needs of the disabled population, whereas reasonable accommodation includes specific measures directed at a particular individual with a disability. Reasonable accommodation should be seen as complementary to general accessibility measures and can never replace the efforts to be made across all sectors. As the CRPD Committee states in its draft General Comment on accessibility, “reasonable accommodation can be used as a means to ensure accessibility for an individual with disability in a particular situation. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is provided taking the dignity, autonomy and choices of the person into account.”²⁵
20. Certainly, there is an intimate link between accessibility and reasonable accommodation. The more that accessibility is implemented across the board, the less need there could be to provide reasonable accommodation (particularly in terms of environmental accessibility), and up until accessibility is fully achieved and even when achieved, there will continue to be the need to provide reasonable accommodation to overcome barriers which remain for individualised situations in order to ensure effective participation and enjoyment and exercise of rights by persons with disabilities on an equal basis with others. Furthermore, while accessibility may be subject to progressive realisation, the provision of reasonable accommodation, like the prohibition of discrimination, is an immediate obligation.²⁶

Prohibition of discrimination by association

21. In the present case, the Applicant is the father of a disabled child and does not himself have a disability, which raises the question of whether the Applicant can claim to be a victim of discrimination on the basis of disability. International human rights law has developed to ensure that the prohibition of discrimination also protects against discrimination by association, i.e. where an individual is discriminated against not on the grounds of their own characteristic but due to their relation to someone else. The CRPD Committee has elaborated its interpretation of non-discrimination to include protection of discrimination by association,²⁷ and the CESCR Committee’s General Comment no 20 on non-discrimination also explicitly includes as a prohibited ground “association with a group

²⁴ Draft General Comment on Article 9 of the Convention, CRPD Committee, para 24, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>, last accessed

²⁵ Draft General Comment on Article 9 of the Convention, CRPD Committee, para 23, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>, last accessed

²⁶ Article 2, CRPD defines the denial of reasonable accommodation as a form of disability based discrimination. The CRPD Committee has elaborated that “the duty to provide reasonable accommodation is immediately applicable and not subject to progressive realization” Concluding Observations on Spain CRPD/C/ESP/CO/1, 2011, para 44. See also CESCR Committee General Comment no 3 on the nature of States’ Party’s obligations: “while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate general comment... is the “undertaking to guarantee” that relevant rights “will be exercised without discrimination ...”; CESCR Committee General Comment no 20 on non-discrimination, 2009, E/C.12/GC/20, para 7: “Non-discrimination is an immediate and cross-cutting obligation in the Covenant.”

²⁷ CRPD Committee Concluding Observations on Peru, 2012, CRPD/C/PER/CO/1, para 7(b): Define denial of reasonable accommodation and discrimination by association as forms of disability-based discrimination; Spain, 2011, CRPD/C/ESP/CO/1, para 20: The Committee urges the State party to expand the protection of discrimination on the grounds of disability to explicitly cover multiple disability, perceived disability and association with a person with a disability, and to ensure the protection from denial of reasonable accommodation, as a form of discrimination, regardless of the level of disability.

characterised by one of the prohibited grounds (e.g. the parent of a child with a disability).”²⁸

22. Prohibition of discrimination by association has been incorporated into the caselaw of the European Court of Justice; in *Coleman*,²⁹ the applicant who was directly discriminated against on the ground of disability was not herself disabled, but it was the fact of the disability (of her child) that led to her being treated less favourably than other employees in the workplace. The ECJ held that the general prohibition of discrimination on the basis of disability under the EU Framework directive³⁰ applies not only to persons with disabilities but also to persons who are discriminated against because of their association with a disabled person. The ECJ recognised that the “purpose of the directive... is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies not to particular category of person but by reference to the grounds mentioned in Article 1.”³¹
23. Parallels can be drawn to the present case in which the Applicant argues the denial of a tax exemption was based on the absence of consideration for the specific housing needs of his disabled son; he asserts therefore that he was treated less favourably due to his relation with his son and the fact that his housing needs were determined by the needs of his child with a disability. The disadvantage suffered affects not only the disabled son whose participation and enjoyment of rights are negatively impacted upon, but also that of the Applicant, as his father, given that they are subjected to the same barriers to participation and enjoyment of rights through association with his son.
24. Several jurisdictions, including Austria³², Belgium³³, Bulgaria³⁴, Ireland³⁵ and the United Kingdom³⁶ have recognised the need to protect against discrimination by association on the grounds of disability. In Croatia, the Anti-discrimination Act defines discrimination in Article 1, 2 as “placing any person, or a person related to that person by kinship or other relationship, in a less favourable position on the ground [of disability] shall be, within the meaning of this Act, deemed to be discrimination”.³⁷

III. Housing rights and persons with disabilities

Positive measures to ensure equal access to housing for persons with disabilities

25. There has been an increasing call by international human rights mechanisms for positive measures to be taken by States to ensure equal access to housing by persons with disabilities. Article 28 of the CRPD on the right to an adequate standard of living and social protection includes both measures to ensure non-discriminatory access to housing and assistance for disability-related needs as well as assistance for disability-related expenses. This recognises the reality that assistive devices, and costs of adaptations and support towards accessibility of housing which are required by persons with disabilities are often borne by the individual themselves and act as obstacles to their participation and enjoyment of rights on an equal basis with others in society. Measures of assistance for

²⁸ CESCR Committee, General Comment no 20 on non-discrimination, 2 July 2009, E/C.12/GC/20, para 16

²⁹ Case C-303/06, *S Coleman v Attridge Law and Steve Law*, Grand Chamber judgment of the European Court of Justice, 17 July 2008

³⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16)

³¹ Case C-303/06, *S Coleman v Attridge Law and Steve Law*, Grand Chamber judgment of the European Court of Justice, 17 July 2008, para 38

³² Austrian Federal-Equal Treatment Act, Federal Law Gazette I Nr. 66/2004 last amended by BGBl. I Nr. 7/2011 and Federal Disability Act, Federal Law Gazette I Nr. 65/2004, last amended by BGBl I Nr. 120/2012

³³ The Framework Decree for the Flemish equal opportunities and equal treatment policy of 10 July 2008, Moniteur belge, 23 September 2008, pp. 49410-49424

³⁴ Protection against Discrimination Act, 1 January 2004, Prom. SG. 86/30 Sep 2003

³⁵ Section 6(1)(b), Employment Equality Act 1998-2004

³⁶ UK Equality Act 2010

³⁷ Anti-discrimination Act, Official Gazette 85/2008, 112/2012

disability related expenses, such as subsidies and tax exemptions on home ownership or rent, common to many countries (see below), are examples of State efforts to ensure equal opportunities for an adequate standard of living, including with respect to housing needs. Very closely related, under Article 19, the CRPD recognises the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including choosing where and with whom to live. The CRPD Committee has hence called on States to allocate more resources to setting up more subvented mainstream residential homes and strengthening policies promoting establishment of accessible living facilities to secure the de facto possibility of free choice of accommodation.³⁸

26. The CESCR Committee has reaffirmed that the right to adequate housing includes accessibility for persons with disabilities,³⁹ as well as elaborating that persons with disabilities must be accorded full and sustainable access to adequate housing resources and that housing law and policy should take into account their special needs.⁴⁰ The UN Special Rapporteur on adequate housing has called for “improving and properly enforcing anti-discrimination legislation in the field of housing, increasing shelter allowances and social assistance rates to realistic levels, and providing adequate support services for persons with disabilities.”⁴¹
27. The European Social Charter’s Article 15 on the right of persons with disabilities to independence, social integration and participation in the life of the community also includes enabling access to housing of persons with disabilities as a means to promote their full social integration and participation in the life of the community. The European Committee of Social Rights has elaborated the needs of persons with disabilities must be taken into account in housing policies, including the construction of an adequate supply of suitable, public, social or private, housing. Further, financial assistance should be provided for the adaptation of existing housing.⁴²
28. The Charter of Fundamental Rights of the European Union states that the Union recognises and respects the right to housing assistance so as to “ensure a decent existence for all those who lack sufficient resources.”⁴³ European Union law requires Member States to adopt national legislation protecting against discrimination in housing on grounds of sex⁴⁴ and racial or ethnic origin.⁴⁵ The Union plans to extend its own protection to cover grounds relating to religion or belief, disability, age or sexual orientation through the future Proposed Directive on the principle of equal treatment in the principle of the access to and provision of goods and services, including housing.⁴⁶ 19 of the 28 EU Member States, including Croatia have already gone further by extending the prohibition on discrimination in housing to, among other grounds, disability.⁴⁷

³⁸ See CRPD Committee Concluding Observations on Hong Kong, 2012, CRPD/C/CHN/CO/1, para 70

³⁹ CESCR Committee General Comment no 5 on persons with disabilities, E/1995/22(SUPP)

⁴⁰ CESCR Committee General Comment No 4 on the right to adequate housing, E/1992/23. The Special Rapporteur on adequate housing has also underlined not only that housing should be physically and economically accessible to persons with disabilities, but that they should be able to effectively participate in the life of the community where they live. He has recommended to States that “adequate housing must be accessible to all. Thus, such disadvantaged groups as older persons, children, persons with disabilities, the terminally ill, HIV-positive individuals, persons with persistent medical problems, victims of natural disasters, people living in disaster-prone areas and other groups should be assured some degree of priority in housing law and policy.” (Report on United States, 12 February 2010, [A/HRC/13/20/Add.4](#), para 62).

⁴¹ Report on Canada, Special Rapporteur on adequate housing, 17 February 2009, [A/HRC/10/7/Add.3](#), para 91

⁴² European Committee of Social Rights, Conclusions on Italy, 2003

⁴³ Article 34 (3) Charter of Fundamental Rights of the European Union, 2000/C 364/01

⁴⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

⁴⁵ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

⁴⁶ The Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final, 2.7.2008.

⁴⁷ Austria, Belgium, Bulgaria, Croatia, Czech Republic, France, Germany, Hungary, Ireland, Latvia, Luxembourg, Netherlands, Norway, Portugal, Romania, Slovakia, Slovenia, Sweden and the United Kingdom: European Network of Legal Experts in non-discrimination field, Discrimination in Housing, 25 February 2013, p.20-21: <http://www.non-discrimination>

Comparative law and practices on housing rights of persons with disabilities

29. The shortage of accessible housing as a trend across most States requires positive steps to ensure that persons with disabilities have access to housing which meets their needs. For example, the majority of EU Member States have already taken positive measures to ensure access to housing and assistance for disability related needs for persons with disabilities - either by recognising the right to reasonable accommodation,⁴⁸ granting financial assistance in terms of subsidies or tax exemptions or providing public housing solutions.
30. In Spain, the obligation to provide reasonable accommodation in housing for persons with disabilities is recognised by law.⁴⁹ In Finland, a person with severe disabilities has the right to claim reimbursement from the municipalities for all costs related to adapting their home, including lifts and alarms.⁵⁰ Persons with any kind of disability can obtain reimbursement for 40 to 70 % of the costs to remove barriers.⁵¹ In Denmark, persons with disabilities can receive subsidies from the municipalities to adapt/renovate existing living facilities.⁵²
31. A large number of EU Member States provide financial support for buying or adapting housing to the needs of persons with disabilities.⁵³ In Denmark, families with a child with a disability can obtain financial assistance for buying a house that is accessible or can be made accessible.⁵⁴ In Ireland, grants are available to persons with disabilities to improve the accessibility of their homes⁵⁵. In Italy, the costs for the adaption of a lift or a ramp are eligible for tax exemption.⁵⁶ The responsible Agency publishes every year a manual on the exemptions for persons with disabilities and has specialised and trained staff on disability rights and accessibility issues.
32. Several States also provide reductions or exemptions on local property taxes for persons with disabilities in order to allow them to live in a house adapted to their needs. In Ireland, an exemption of the local property tax charge is granted for a residential property purchased, built or adapted to make it suitable for occupation by a person with a disability.⁵⁷ In Belgium, the regional property tax can be reduced by 7.52% for a minor with a disability residing in the home of the property owner.⁵⁸ In the United Kingdom, the Disabled band reduction scheme⁵⁹ makes sure disabled people do not pay more Council Tax if they need a bigger property or to adapt their home because of their disability.⁶⁰ In France, holders of a disability allowance⁶¹ are exempt from property tax on their principal residence.

discrimination.net/content/media/Discrimination%20in%20Housing%20-%20EN.pdf

⁴⁸ Austria, Belgium, Cyprus, Ireland, the Netherlands, Spain and the UK: European Network of Legal Experts in the non-discrimination field, Country reports, 2011, Discrimination in Housing, 25 February 2013, p.20-21: <http://www.non-discrimination.net/content/media/Discrimination%20in%20Housing%20-%20EN.pdf>

⁴⁹ Law 51/2003 on equal opportunities, non-discrimination and full accessibility. Reasonable accommodations include measures to adapt the physical environment to improve the accessibility of living spaces for persons with disabilities.

⁵⁰ Section 12, Support and Assistance for Disabled Decree 1987/759. The costs made need to be reasonable and are necessary to enable a person to live independently.

⁵¹ Act on Residential Renovation and Energy Saving Grants, 1021/2002.

⁵² Boligændringer bevilges efter Lov om Social Service § 116

⁵³ Bulgaria, Czech Republic, Denmark, Finland, Germany, Ireland, Italy, Malta and Sweden: European Network of Legal Experts in non-discrimination field, Discrimination in Housing, 25 February 2013, p.35: <http://www.non-discrimination.net/content/media/Discrimination%20in%20Housing%20-%20EN.pdf>

⁵⁴ Lov om social service § 41

⁵⁵ [S.I. No. 670 of 2007](#), Housing adaptation grants for older people and people with a disability, Regulations 2007

⁵⁶ 36% of the renovation cost can be exempted from the tax declaration over five years, Article 1 of Law 27 December 1997, n. 449 concernente detrazioni per interventi di ristrutturazione del patrimonio edilizio privato, and Article 2, par 2, of the Law of 23 December 2000, n. 388. See www.agenziaentrate.gov.it.

⁵⁷ Section 2 of the Finance (Local Property Tax) (Amendment) Act 2013

⁵⁸ Article 3 of the Flemish Decree concerning provisions amending the Income Tax Code with regard to the property tax, 9 June 1998

⁵⁹ The Council Tax Reduction Schemes (Default schemes) (England), Regulations 2012, No. 2886

⁶⁰ The property must be the main home of at least one disabled person. The property must have an extra bathroom, kitchen or other room for the disabled person and/or extra space inside the property for using a wheelchair.

⁶¹ Article L. 821-1 and following of the Social Security Code (Amended by ACT No. 2012-1404 of 17 December 2012 - Art 85 (V))

33. In Croatia, on the state level, the issue of housing of the persons with disabilities is primarily regulated by the provisions of the Social Housing Act,⁶² which has a programme of social housing stimulated by public funds for satisfying housing needs and improving the quality of housing of a wide range of citizens (not solely for people with disabilities). On the regional level, there are some possibilities for persons with disabilities to obtain long term leases of adapted apartments owned by the local and regional government, in particular, the City of Zagreb rents a substantial number of adapted apartments to persons with disabilities in accordance with the Decisions of the Apartment Lease.⁶³

IV. Obligation to refrain from discriminating in the application of laws, Article 1 of Protocol no 12

34. For the purposes of non-discrimination, the Court's jurisprudence under Article 14 extends to the application of additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide- in this case an entitlement to a tax exemption,⁶⁴ thereby allowing examination of the allegation of discrimination in the enjoyment of this right.

35. Article 14 was not invoked in the present case, but Article 1 of Protocol no 12; the latter is broader and extends the scope of protection to "any right set forth by law". The Court's jurisprudence elaborates that the scope of protection of Article 1 of Protocol no 12 goes even beyond that to provide that no one may be discriminated against by a public authority (Article 1(2) of Protocol no 12).⁶⁵ The Explanatory Report on Article 1 of Protocol no 12 lists four categories of cases where a person is discriminated against:

- i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

36. In the present case, it is the application of the tax exemption clause under Article 11(9) of the Real Property Transfer Tax Act which is at issue. The claim was dismissed on the grounds that the Applicant's flat was sufficiently sized for his family and had all necessary infrastructure such as water, electricity and other public utilities. The subsequent appeals also failed as each instance endorsed the reasoning of the lower administrative bodies, all the while refraining to make any reference to the fact that the flat which was purported to satisfy his and his family's housing needs did not have a lift and hence failed to meet the particular needs of his disabled son. It would appear that this falls as a case under category iii (advanced by the Explanatory Report of Protocol no 12) concerning the refusal by the public authorities to grant the Applicant a tax exemption under this Act.

Differential treatment

37. This Act sets out how the real property transfer tax is calculated and paid, who is subject to it, concerning what kind of property, and also includes the tax exemptions available. The relevant exemption is directed at Croatian citizens who are first time home buyers or first time home buyers of property which meets their housing needs, and the law explains that

⁶² Official Gazette no 109/01, 82/04, 76/07

⁶³ Official Gazette of the City of Zagreb no 22/09, 3/12

⁶⁴ *Sejdić and Finci v Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, Grand Chamber judgment of 22 December 2009, para 39. *Savez crkava "Riječ života" and Others v Croatia*, Application no 7798/08, judgment of 9 December 2010, para 58. This principle is well entrenched in the Court's case-law (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits)*, 23 July 1968, § 9, Series A no. 6; *Stec and Others v. the United Kingdom* (dec.) [GC], nos. [65731/01](#) and [65900/01](#), § 40, ECHR 2005-X; and *E.B. v. France* [GC], no. [43546/02](#), § 48, ECHR 2008-....).

⁶⁵ *Savez crkava "Riječ života" and Others v Croatia*, Application no 7798/08, judgment of 9 December 2010, para 104

this shall be considered to be “any such accommodation which has basic infrastructure and satisfies hygiene and technical requirements.”

38. Neither the exemption clause nor the entire Act contains any reference to accessibility standards or criteria which requires consideration of the particular needs of individuals in the context of housing (such as accessibility of the living spaces, possibility to move freely in the house or flat, etc). The only criteria that are taken into account are the criteria of compliance with the construction and minimal technical requirements. As such, the Act is based on the hygiene and technical requirements of the housing needs of non-disabled persons. As an example, Article 11 on criteria for tax exemptions lists in subsection 9(3) the limits of number of people permitted to reside in the property calculated in proportion to the dimensions of the size (square meters) of the property. Such clearly defined limits would not satisfy the housing needs of most persons with disabilities who have reduced mobility and need to make use of assistive devices or support which would require a residence with more space and/or the residence comprising of more persons, taking into account caregivers.

Objective and reasonable justification

39. The determination of the Applicant’s right to a tax exemption adhered strictly to the letter and resulted in the refusal of the tax exemption in accordance with the law. The law considered exclusively the criteria of housing needs based on non-disabled persons and hence manifested a difference of treatment between non-disabled and disabled persons who have specific housing needs with respect to accessibility.⁶⁶ Regarding whether there was objective and reasonable justification for this less favourable treatment, it is necessary to establish whether this distinction pursued a legitimate aim. Failing an explanation in the law itself, it could be construed that the tax exemptions for first home buyers, as is the case in many jurisdictions, is to facilitate first time home ownership or ownership of homes which meet housing needs, by removing the added expense of taxes- in efforts to increase home ownership to strengthen the economy and strengthen and stabilise communities.
40. The Court’s task will be to determine whether there is a reasonable relationship of proportionality between the means used to seek the purported aim of the State in establishing the tax exemption clause, whether there was a fair balance struck between the protection of the interests of the community and respect for the Applicant’s rights. If the purported aim behind the clause is indeed along the lines of that stated above- to encourage first time home ownership of property which meets housing needs, as well as the greater interest to strengthen the economy and communities, it therefore did not encompass persons with disabilities within the scope of those who could benefit- either from facilitated access to home ownership, or as members of strengthened and stabilised communities. On the contrary, the provision worked against the interest of the Applicant and others in his position- whose opportunities to benefit from the tax exemption were considerably reduced due to specific housing needs which the law ignored. Considering that persons with disabilities face significant barriers to accessible and affordable housing generally, the provision would have acted to increase the disparity of access to home ownership between persons without disabilities and persons with disabilities by facilitating access by the former group while increasing the burden on the latter group.

Lack of alternatives

41. Additionally, the increased barrier to accessible home ownership for persons with disabilities, and particularly in the case of the Applicant, put at risk his interests and the enjoyment and exercise of several other rights. First, there are very few viable alternatives

⁶⁶ While the CRPD entered into force in Croatia in 2007, specific obligations to carry out legal harmonisation of laws to ensure non-discrimination are lacking. The Real Property Transfer Tax Act has been subject to amendment since CRPD ratification, yet no amendments were effected relating to the criteria to open up the possibility to consider the specific housing needs of persons with disabilities, nor accompanying measures of awareness-raising or training to ensure the prohibition of disability-based discrimination in the application of this law.

for assistance in home ownership which meets his housing needs. As elaborated above (see para 33), there are some measures taken by the Croatian government to ensure access to accessible housing for persons with disabilities. While these programmes are to be commended, the demand for such accessible housing solutions continue to outweigh the supply, and it would appear that the steps being taken by the State concentrate on leasing adapted apartments to persons with disabilities rather than encouraging their home ownership. The fact that there is a smaller choice of accessible property available and their ineligibility to tax exemptions for property purchases exacerbates disproportionately enjoyment of their right to an adequate standard of living, right to home and family as well as the right to live and be included in the community.

Disproportionate prejudicial impact upon other rights

42. Living in inaccessible homes hinders participation in the life of the community and leads to isolation and segregation not only of the disabled individual but also of their family. If an individual cannot live in dignity at home with the adaptations and support required, due to its inaccessible nature or insufficient space for caregivers, it could be that the only affordable and available alternative is to be placed in a residential institution adapted to their needs.⁶⁷ Yet such placement infringes on the right to live in the community and leads to separation from home and family. This was considered in the *HM v Sweden* case (see below para 44) in which the CRPD Committee also found a violation of Article 19 of the CRPD on the right to independent living and inclusion in the community. This was based on the fact that the author was denied a waiver by the local municipality for authorisation to build a hydrotherapy pool on her property for rehabilitation purposes linked to her degenerative illness, and the only other viable alternative for her to have access to this rehabilitation was to be placed into specialised institutional care.⁶⁸ Moreover, for children, institutionalisation⁶⁹ also violates their right to family, can be harmful for their development, put them at heightened risk of violence and abuse, and be contrary to their best interest.⁷⁰

Lack of reasonable accommodation in the means used

43. Reasonable accommodation was not provided by having regard in the consideration of the tax exemption to the particular needs and inherent dignity of the disabled child and his family and how the apartment fell short of those needs, not to mention any estimation of purported undue burden which could arise from granting such an exemption. The failure to provide reasonable accommodation amounts to disability based discrimination (Articles 2 and 5(3) of the CRPD).
44. Similarly, in the first views of the CRPD Committee adopted with respect to a communication under the Optional Protocol to the CRPD, in *HM v Sweden*,⁷¹ the Committee observed that a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different. In this case, the Committee found that the denial of reasonable accommodation to allow a departure from the existing standards to take into

⁶⁷ Croatia residential institutions for children and adults with disabilities continue to be prevalent despite efforts towards deinstitutionalisation. See "Once You Enter, You Never Leave" Deinstitutionalization of Persons with Intellectual or Mental Disabilities in Croatia, September 2010

⁶⁸ *HM v Sweden*, Communication no 3/2011, CRPD Committee, [CRPD/C/7/D/3/2011](http://www.unhcr.org/refugees/refugees/3/2011/04/19/12Apr12HMvSweden.html), 19 April 2012, para 8.9

⁶⁹ State of the World's Children: Children with Disabilities, UNICEF, 2013 p 42-46, <http://www.unicef.org/sowc2013/report.html>

⁷⁰ CRC Committee, General Comment no 14 on the right of the child to have his or her best interests taken as a primary consideration, 2013, CRC/C/GC/14_

⁷¹ *HM v Sweden*, Communication no 3/2011, CRPD Committee, [CRPD/C/7/D/3/2011](http://www.unhcr.org/refugees/refugees/3/2011/04/19/12Apr12HMvSweden.html), 19 April 2012. This case concerns a local municipality's refusal to grant a building permit to a woman with a degenerative illness, who could not leave her home without great risk, for installation of a hydrotherapy pool on her property for the purposes of rehabilitation and maintaining her health. The Committee found that the State failed to provide reasonable accommodation and fulfil its obligations concerning non-discrimination, living independently and being included in the community, health and rehabilitation resulting in violations of Articles 5(1), 5(3), 19(b), 25 and 26, read alone and in conjunction with Articles 3 (b), (d) and (e), and 4(1) (d) of the Convention.

account the particular needs of a woman with a degenerative illness, and which would not amount to “disproportionate or undue burden” on the State, constituted disability based discrimination under the CRPD.⁷²

45. Given that the tax exemption clause of the Real Property Transfer Tax Act was conceptually tailored to the needs of non disabled persons, it could not but disproportionately prejudice the opportunities to be granted a tax exemption concerning the housing needs of persons with disabilities, and the law did not permit for any individualised examination of housing needs, nor was reasonable accommodation provided to do so. As such, this law indirectly discriminates against persons with disabilities who require accessible housing measures.
46. The means used by the State were not proportional to the aim sought given that the authorities could have examined the Applicant’s tax exemption claim in light of his personal situation – the fact that his previous home was inaccessible, unsuitable for his disabled son, and thus did not meet his housing needs. The indiscriminate denial of the tax exemption without the provision of reasonable accommodation by way of an individualised assessment, and based exclusively on the clause’s criteria which were defined by the housing needs of non-disabled persons, cannot be considered compatible with the legitimate grounds for restricting the Applicant’s right.

V. Conclusion

47. Persons with disabilities often face challenges in their access to housing on account of the lack of accessible homes, lack of measures to facilitate access and general disregard for the specific housing needs of persons with disabilities. While there is increasing recognition both globally and at the European and national levels for concerted efforts to be made to ensure the enjoyment of rights by persons with disabilities on an equal basis with others, much remains to be done to institutionalise the prohibition of disability based discrimination, in particular where laws are formulated based on the standards and needs of non-disabled persons. States should be guided in eliminating discrimination against persons with disabilities and an essential element is the obligation to provide reasonable accommodation to ensure that in particular cases, where there is no cause for undue burden, both public and private actors take the steps needed to accommodate the individual’s needs and to uphold their dignity in the enjoyment of their rights, failing which will constitute disability based discrimination. Furthermore, the substantive inequality and prejudice on the grounds of disability which affect the rights of non-disabled persons on account of their relation with a person with a disability must also be subject to protection as a recognised form of discrimination.

⁷² *HM v Sweden*, Communication no 3/2011, CRPD Committee, [CRPD/C/7/D/3/2011](#), 19 April 2012, paras 8.4, 8.5

ANNEX - INTEREST OF INTERVENERS

The *Croatian Union of Associations of Persons with Disabilities* (SOIH) is the umbrella organisation of thirteen national associations of persons with all types of disabilities, and 250 grass root societies throughout Croatia. SOIH regularly organises symposiums of persons with disabilities, receiving representatives from the European Disability Forum and European countries, which figure as one of the largest conferences of persons with disabilities in the region comprising 300 participants. SOIH has a good partnership with the Croatian government and its institutions, which as a result, led Croatia to be the fourth country to ratify the UN Convention of the Rights Persons with Disabilities. SOIH is actively working on accessibility issues- its team has developed a guide through 10 counties and 48 major Croatian cities showing their state of accessibility. In the 10 Croatian counties, SOIH formed and equipped IT centers where training is conducted for people with disabilities so that they acquire qualifications that make them more employable in the labour market. In 2001, SOIH established the SOIH Women with disabilities Network which is very active in the struggle against violence, women's human rights and specially in the field of empowerment of women with disabilities. It also established a Center for Legal Aid for persons with disabilities. SOIH is a member of the European Disability Forum.

The *European Disability Forum (EDF)* is an independent non-governmental organisation which represents the interests and defends the rights of 80 million people with disabilities in the European Union, and is a member of IDA. EDF is the only European pan-disability platform run by persons with disabilities and their families. Created in 1996 by its member organisations, EDF ensures that decisions concerning persons with disabilities are taken with and by persons with disabilities. EDF has previously submitted third party interventions to the Court in *Dordevic v Croatia* (Application No 41526/10) and *Gauer and Others v France* (Application no 61521/08), of which the latter was submitted jointly with IDA and other NGOs. EDF and IDA have also intervened in *Mihailovs v Latvia* (Application no 35939/10). EDF and IDA's participation in third party interventions is aimed at raising the Court's attention to the latest international human rights standards concerning persons with disabilities.

The *International Disability Alliance (IDA)* is a unique, international network of global and regional organisations of persons with disabilities. Established in 1999, each IDA member represents a large number of national disabled persons' organisations (DPOs) from around the globe, covering the whole range of disability constituencies. IDA thus represents the collective global voice of persons with disabilities counting among the more than 1 billion persons with disabilities worldwide, the world's largest – and most frequently overlooked – minority group. Currently comprising eight global and four regional DPOs,⁷³ IDA's mission is to advance the human rights of persons with disabilities as a united voice of organisations of persons with disabilities utilising the Convention on the Rights of Persons with Disabilities and other human rights instruments. IDA fulfils its mission by also submitting third party interventions to the Court and has done so in the past with EDF in *Gauer and Others v France* (Application no 61521/08), *Mihailovs v Latvia* (Application no 35939/10), *DG v Poland* (Application no 45705/07, judgment of 12 February 2013), and *Semikhvostov v Russia* (Application no 2689/12).

⁷³ IDA members are: Disabled Peoples' International, Down Syndrome International, Inclusion International, International Federation of Hard of Hearing People, World Blind Union, World Federation of the Deaf, World Federation of the DeafBlind, World Network of Users and Survivors of Psychiatry, Arab Organization of Disabled People, Pacific Disability Forum, Red Latinoamericana de Organizaciones no Gubernamentales de Personas con Discapacidad y sus familias (RIADIS), and the European Disability Forum.