



Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Communication No. 1/2010

Views adopted by the Committee at its ninth session (15-19 April 2013)

<i>Submitted by:</i>	Szilvia Nyusti and Péter Takács (represented by counsel, Tamás Fazekas, Hungarian Helsinki Committee)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Hungary
<i>Date of communication:</i>	11 March 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 70 decision, transmitted to the State party on 20 September 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	16 April 2013
<i>Subject matter:</i>	Failure by the State party's authorities to eliminate discrimination on the ground of disability by a private credit institution and to ensure that persons with visual impairments have an unimpeded access to the services provided by ATMs on an equal basis with other clients
<i>Substantive issues:</i>	Equal and effective legal protection against discrimination on the ground of disability; reasonable accommodation; accessibility of information; right to control one's own financial affairs
<i>Procedural issues:</i>	Level of substantiation of a claim <i>ratione temporis</i>
<i>Articles of the Convention:</i>	5, paragraphs 2 and 3; 9 and 12, paragraph 5
<i>Articles of the Optional Protocol:</i>	2 (e) and (f)

Annex

Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (ninth session)

concerning

Communication No. 1/2010*

Submitted by: Szilvia Nyusti and Péter Takács (represented by counsel, Tamás Fazekas, Hungarian Helsinki Committee)

Alleged victims: The authors

State party: Hungary

Date of communication: 11 March 2010 (initial submission)

The Committee on the Rights of Persons with Disabilities, established under article 34 of the Convention on the Rights of Persons with Disabilities,

Meeting on 16 April 2013,

Having concluded its consideration of communication No. 1/2010, submitted to the Committee on the Rights of Persons with Disabilities by Szilvia Nyusti and Péter Takács under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5 of the Optional Protocol

1. The authors of the communication are Szilvia Nyusti, a Hungarian national born 8 May 1979 (the first author), and Péter Takács, a Hungarian national born 31 May 1977 (the second author). The authors claim to be victims of a violation by Hungary of their rights under article 5, paragraphs 2 and 3; article 9 and article 12, paragraph 5, of the Convention on the Rights for Persons with Disabilities (the Convention). The Optional Protocol to the

* The following members of the Committee participated in the examination of the present communication: Mr. Mohammed Al-Tarawneh, Mr. Munthian Buntan, Ms. Maria Soledad Cisternas Reyes, Ms. Theresia Degener, Mr. Hyung Shik Kim, Mr. Lofti ben Lallahom, Mr. Stig Langvald, Ms. Edah Wangechi Maina, Mr. Ronald McCallum, Ms. Diane Mulligan, Mr. Martin Babu Mwesigwa, Ms. Safak Pavey, Ms. Ana Pelaez Narvaez, Ms. Silvia Judith Quan-Chang, Mr. Carlos Rios Espinosa, Mr. Damjan Tatic and Mr. Germán Xavier Torres Correa.

Pursuant to rule 60 of the Committee's rules of procedure, Committee member Mr. László Gábor Lovász did not participate in the adoption of the present Views.

Convention entered into force for the State party on 3 May 2008. The authors are represented by counsel, Tamás Fazekas, Hungarian Helsinki Committee.

Factual background

2.1 Both authors are persons with severe visual impairments. Independently of each other they concluded contracts¹ for private current account services with the OTP Bank Zrt. credit institution (OTP), according to which they are entitled to use banking cards. However, the authors are unable to use the automatic teller machines (ATMs) without assistance, as the keyboards of the ATMs operated by OTP are not marked with Braille, nor do the ATMs provide audible instructions and voice assistance for banking card operations. The authors pay annual fees for banking card services and transactions equal to the fees paid by other clients. However, they are unable to use the services provided by the ATMs at the same level as sighted clients, therefore they receive less services for the same fees.

2.2 On 11 April 2005, the authors' legal representative lodged a complaint with OTP, requesting changes to the ATMs in the proximity of his clients' homes.² The claim was based on Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (the Equal Treatment Act), and asserted that after the entry into force of the Act, OTP was obliged to comply with the requirement of equal treatment and provide services of equal quality to its clients. The complaint was rejected by OTP on 16 June 2005.

2.3 On 5 August 2005, the authors brought a civil action under articles 76 and 84 of Act IV of the 1959 Civil Code (the Civil Code) to the Metropolitan Court. In their action, they asked the court to recognize that OTP violated their personal rights, namely the right to equal treatment. They explained that OTP is directly discriminating against them, because due to their disability, they receive less services of a lesser quality in comparison to other clients of OTP, despite the fact that they pay exactly the same fees. The authors claimed that, according to article 84(1)(d) of the Civil Code, OTP was obliged to bring this infringement to an end by retrofitting all the ATMs operated by OTP. In case this relief could not be granted, the authors requested the Metropolitan Court to order the retrofitting of the ATMs operated by OTP throughout the country on an equal basis and on the basis of balanced territorial distribution.³ The authors sought non-pecuniary damages of 300,000 Hungarian forint each, pursuant to article 84(1)(e) of the Civil Code for harm suffered to their human dignity.

2.4 In their initial civil action, the authors referred to articles 8 and 30(1)(b) of the Equal Treatment Act, to Act XXVI of 1998 on Securing the Rights and Equal Opportunities of Persons with Disabilities (the Disabilities Act) and to the provisions regarding accessibility in Act LXXVIII of 1997 on the Formation and Protection of the Built Environment (the Built Environment Act). According to the Built Environment Act, an ATM is part of a building, and as such, accessibility requirements apply to it.

2.5 On 3 October 2005, OTP requested that the authors' civil action be dismissed. In its opinion, the extra services demanded by the authors would constitute positive

¹ The contract between the first author and OTP was concluded on 1 November 1996 and renewed on 1 January 2006. The second author concluded the contract with OTP on 23 December 2003.

² The complaint of 11 April 2005 reads in the relevant part as follows: "Please kindly inform me in writing which OTP ATMs in Budapest near my clients' home address, are suitable for their unrestricted use. If you do not have such ATMs, please retrofit them as necessary within 15 days and kindly inform me about this."

³ The civil action of 5 August 2005 reads in the relevant part as follows: "We request that the [...] Court obliges [OTP] to cease the situation of infringement and to retrofit some of its ATMs to ensure their accessibility".

discrimination, which could only be prescribed by law. Consequently, a court could not impose an obligation on OTP to undertake such measures. OTP further claimed that it was primarily a governmental obligation to ensure unimpeded access to buildings for persons with disabilities and that the ATMs operated by OTP were not “buildings” from the standpoint of the Built Environment Act. For these reasons, the accessibility requirements of the Built Environment Act did not apply to OTP. OTP also claimed that since both contracts were concluded by the authors prior to the entry into force of the Equal Treatment Act, the latter was not applicable to the legal relationship in question. Moreover, according to article 5(b) of the Equal Treatment Act, ATMs did not fall within the definition of “places open to the public for provision of services and products”.

2.6 OTP further explained that, by providing banking card services, it did not discriminate against the authors either directly or indirectly, since OTP’s relations with them within the framework of the execution of the contracts did not constitute an “active behaviour” for the purposes of the Equal Treatment Act. With reference to article 7(2) of the Equal Treatment Act, OTP argued that adjustment of ATMs would create increased banking security risks for visually impaired clients “due to their special situation”. Furthermore, such adjustment would impose an unexpected financial burden on OTP. OTP also asserted that some of the ATMs could not be retrofitted. Finally, OTP claimed that, by imposing on it an obligation to provide the services requested by the authors, the court would interfere into the contractual relationships between the parties and thus violate OTP’s constitutional right to freedom of contract.

2.7 On 14 May 2007, the Metropolitan Court ruled that OTP had violated the authors’ right to human dignity and equal treatment. The Court concluded that OTP’s behaviour resulted in direct discrimination, because due to the authors’ visual impairments they could not use the services provided by the ATMs to the same extent as other clients, despite having paid the same fees.⁴ The Court held that the services requested by the authors could not be considered as positive discrimination and emphasized the difference between the right to equality and equality of chances. Whereas the right to equality imposes on service providers an obligation to provide equal services for equal fees, it does not necessarily mean that the services have to be provided to every client in the identical manner. Rather, a different way of providing services is required to ensure that clients with visual impairments can access ATMs on their own and at any time, just like other clients who pay the same fees.

2.8 The Metropolitan Court held that OTP had to ensure that its clients with visual impairment could access the information necessary for using the ATMs. It found therefore that OTP was at fault for not retrofitting its ATMs since 27 January 2004 when the Equal Treatment Act entered into force. The Court ordered OTP to retrofit within 120 days at least one of its ATMs in the capital towns of each county, one in each district of Budapest, and four ATMs in the districts where the authors reside. The Court took into account that retrofitting of the ATMs could be carried out at the same time as the annual maintenance services and that the cost incurred must be calculated per ATM type, and not per ATM. The Court also took into account that approximately one-third of the 1,800 ATMs in question could not be retrofitted and that purchasing replacement ATMs would constitute a significant financial burden for OTP.

2.9 In response to the arguments put forward by OTP, the Metropolitan Court held that article 5 of the Equal Treatment Act extended the scope of its application to all civil

⁴ Reference is made to article 8(g) of the Equal Treatment Act, according to which “a provision constitutes direct discrimination if it results in less favourable treatment of a person or a group than comparable persons or group solely because of their perceived or actual disability”.

relations, irrespective of whether the parties thereto were public or civil sector operators, where services were provided to numerous clients. The Court also established that even contract offers made prior to the entry into force of the Equal Treatment Act are covered by its provisions, since the aim of the Act is to make the principle of non-discrimination applicable to any relationship where a larger number of clients could be involved.

2.10 The Metropolitan Court also granted pecuniary damages in the amount of 200,000 Hungarian forint to each author. In establishing the amount of pecuniary damages, the Court took into consideration, *inter alia*, that OTP had recently purchased new ATMs that could not be retrofitted and that it had not taken any measures to facilitate the authors' access to the services provided by the ATMs, even after the entry into force of the Equal Treatment Act. Moreover, OTP proposed to terminate the authors' contracts, referring to the increased security risks.

2.11 On 2 July 2007, the authors appealed the first instance decision to the Metropolitan Court of Appeal, requesting that all ATMs be made accessible,⁵ and that the amount of compensation be raised to 300,000 Hungarian forint each. The authors asserted that their activities should not be limited only to those cities where ATMs were to be made accessible further to the decision of the Metropolitan Court, as they were entitled to freedom of movement and the right to choose their place of residence. The aim of the litigation was to put an end to the discrimination fully, and not partially. Therefore, in the authors' opinion, the 120 days set by the Metropolitan Court would be insufficient to make all the ATMs accessible. In their view, the objective could be achieved if a gradual course of action were taken, with a series of appropriate deadlines. Finally, the authors argued that the cost of retrofitting the ATMs would amount to only 0.12 per cent of the yearly net income of OTP in 2006, which could not be considered a disproportionate financial burden.

2.12 OTP submitted its appeal against the first instance decision on 13 July 2007, reiterating its request that the authors' civil action be dismissed. OTP emphasized that the Metropolitan Court did not specifically indicate the legal provision requiring it to retrofit the ATMs after 27 January 2004 and that would constitute a violation of human rights, should OTP fail to comply with the obligation. The number and location of the ATMs was determined in a "broad spectrum" that could not be justified and could not be identified as an essential need of the authors as they were residents of Budapest. OTP further argued that the retrofitting would "motivate blind or visually impaired persons to use the ATMs without help, which would endanger not only the security of property but also the personal safety of blind or visually impaired clients of OTP". OTP also denied the allegations made by the authors that it had threatened to close their accounts and that it had purchased new ATMs that could not be retrofitted. OTP claimed that retrofitting the ATMs would infringe upon the freedom of contract, as intervention into contractual legal relationships was possible solely on the basis of expressed and clear authorization by a legal statute. As to the authors' claim for pecuniary damages, OTP argued that the fact that blind or visually impaired persons had to be assisted in using the ATMs did not infringe upon their human dignity. Therefore, in the absence of any specific harm, the authors' claim for pecuniary damages was groundless.

2.13 On 10 January 2008, the Metropolitan Court of Appeal rejected the authors' appeal. It held that the Metropolitan Court was right in concluding that the provisions of the Disabilities Act were inapplicable to the legal dispute in question, because the provisions of

⁵ The appeal of 2 July 2007 against the judgement of the Metropolitan Court reads in the relevant part as follows: "We request the [...] Metropolitan Court of Appeal to require [OTP] to retrofit all of its ATMs into accessible ATMs (that is, exceeding the level defined in the judgment of the first instance [court] in a manner defined in [that] judgment".

the said Act applied to the removal of barriers with regard to the built environment, whereas the authors' civil action was related to the banking card services provided by the ATMs and, thus was outside the scope of the Disabilities Act. Moreover, the Act in question imposed an obligation on the State to enforce the rights of persons with disabilities, but it is dependent on the "strength of the national economy". The Metropolitan Court of Appeal therefore held that the Disabilities Act did not contain any provisions that would be applicable to the parties in relation to the authors' civil action, and that the provisions of the Constitution, the Civil Code and the Equal Treatment Act should be applied instead. The Metropolitan Court of Appeal further declared that the first instance court was also correct in concluding that the legal relationship at issue fell within the personal and temporal scope of the Equal Treatment Act. Otherwise, the Metropolitan Court of Appeal reached a decision differing from the decision of the first instance court for the following reasons. The Metropolitan Court of Appeal held that there was an indirect discrimination in the authors' case, rather than a direct discrimination.⁶ The Court of Appeal also concluded that the mere fact that the authors needed or might need assistance from other members of the society due to their disability did not violate their human dignity and that, therefore, it may not be considered as a humiliation to the authors as human beings. The Court further established that OTP was entitled to the freedom of concluding contracts and that this freedom must be respected, not only when signing a contract, but also when amending it. Thus, the Court may not, upon request by one party to a contract, intervene into a longstanding contractual relationship and oblige OTP to fulfil an obligation which did not constitute a part of the contractual agreement. The Court also accepted the argument of OTP that, due to the increased personal safety risks, retrofitting would not ensure that the authors could use the ATMs on their own. Finally, the Court of Appeal found that the authors were not entitled to request retrofitting of all the ATMs operated by OTP in Hungary. It held that this kind of request would not be justified by the constitutional principle of freedom to choose one's place of residence. The Metropolitan Court of Appeal concluded, therefore, that OTP was exempted from the obligation to provide for such equal treatment under the Equal Treatment Act.

2.14 On 14 April 2008, the authors submitted a request for an extraordinary judicial review to the Supreme Court, in which they asked the Court to alter the decision of the Metropolitan Court of Appeal.⁷ In addition to their initial arguments, the authors asserted that the qualification of discrimination as being direct or indirect was irrelevant to the legal dispute, since the rules regarding exemption from the obligations of equal treatment were the same in both cases. The authors referred to the opinion of the Equal Treatment Advisory Board,⁸ according to which failure to comply with the accessibility requirement of the Disabilities Act qualified as indirect negative discrimination because disabled persons received less favourable treatment than non-disabled persons, as their movement and access to services were impeded and restricted. The authors also argued that freedom of contract was not a basis for exemption from the obligation to apply the Equal Treatment Act, because freedom of contract may not be regarded as a constitutional fundamental

⁶ The Metropolitan Court of Appeal found that, although everyone may use the ATMs under the same conditions, the authors were put in a less favourable situation compared to the other clients due to their disability.

⁷ The appeal of 14 April 2008 against the judgement of the Metropolitan Court of Appeal reads in the relevant part as follows: "We are requesting the [...] Supreme Court [...] to require [OTP] to retrofit all of its ATMs to ensure their accessibility".

⁸ Reference is made to the opinion of the Equal Treatment Advisory Board, 10.007/3/2006.TT.

right.⁹ The authors challenged the assessment of the Metropolitan Court of Appeal that the reliance by persons with disabilities on the assistance of other members of the society did not violate their human dignity, and argued that such approach contradicted the requirement of equal treatment and article 70A of the Constitution.

2.15 OTP requested the Supreme Court to uphold the decision of the Metropolitan Court of Appeal and reiterated its arguments concerning the freedom of contract. According to OTP, the authors concluded their respective contracts of their own free will and with full knowledge and acceptance of the conditions in relation to the services provided by OTP.

2.16 The Supreme Court delivered its decision on 4 February 2009, rejecting both the request for judicial review by the authors and the request for judicial review by OTP. The Supreme Court shared the opinion of the Metropolitan Court of Appeal that the ATMs designed for sighted persons put blind or visually impaired persons in a disadvantageous situation, even though it seemed that they may use the ATMs under the same conditions as everybody else. The disadvantageous situation is induced by the fact that there is no Braille on the ATMs, and the owner of the banking card does not have voice assistance support when using the machines. The Supreme Court also agreed with the arguments of the second instance court with regard to OTP's exemption from the obligation to provide for equal treatment under the Equal Treatment Act. Furthermore, the Supreme Court asserted that the parties concluded a contract for private current account services, the content of which may be freely established by the parties. The Court stated that the authors took note of the contractual terms, including the facility of limited use, and by signing the contract, they agreed to their disadvantaged situation through implied conduct.

2.17 The authors submit that they have exhausted all effective domestic remedies and that this matter has not been and is not currently being examined under any other procedure of international investigation or settlement. With reference to article 2 (f) of the Optional Protocol, which renders inadmissible any communication when the facts thereof occurred prior to the entry into force of the Optional Protocol for the State party concerned unless said facts continued after that date, the authors argue that the Committee is not precluded from the examination of their communication. They submit that the relevant facts have continued after the entry into force of the Optional Protocol and that the last decision in relation to the present communication was adopted after the entry into force of the Optional Protocol for the State party.

The complaint

3.1 The authors submit that the State party has enacted norms prohibiting discrimination against persons with disabilities, and has included remedies for the violation of these provisions. However, Hungary does not entirely fulfil its obligations by mere enactment of these norms. It is up to the relevant authorities who act on behalf of the State to apply and interpret these norms in such a manner so as to ensure efficient accessibility. The authors submit that the reasoning of the Metropolitan Court shows that it is possible to interpret the State party's legal framework in accordance with the Convention, thus ensuring the protection specified in it. Nevertheless, the Metropolitan Court of Appeal and the Supreme Court have interpreted the laws contrary to the Convention, therefore the protection afforded by the State cannot be considered sufficient or efficient. The authors claim, therefore, that by misinterpreting the law, the authorities acting on behalf of the State party did not ensure their rights as provided for in the Convention.

⁹ Reference is made to the decisions of the Constitutional Court, 229/B/1998 and 61/1992 (XI.20). The authors also make a distinction between the "freedom of contract" and the "freedom to enter into contracts".

3.2 The authors argue that, due to their disability, they have suffered direct discrimination in accessing the services provided by the ATMs compared to OTP's sighted clients. They submit that, in defining discrimination, both the Metropolitan Court of Appeal and the Supreme Court ignored the opinion of the Equal Treatment Advisory Board, according to which "[...] failure to ensure accessibility for the disabled constitutes a violation of equal treatment, thus failure to ensure unimpeded access falls within the scope of the Equal Treatment Act. [...] Dereliction of the duty to ensure accessibility constitutes direct discrimination, since it means that persons with disabilities are treated less favourably in accessing services when compared to persons without disabilities [...]"¹⁰ Furthermore, only the Metropolitan Court has correctly applied the reasonableness test in deciding whether the necessary adjustments of the ATMs would impose a disproportionate financial burden on OTP (para. 2.8 above). The criterion of "human dignity" used by the Metropolitan Court of Appeal in applying the reasonableness test (para. 2.14 above), however, is not only irrelevant in deciding whether there were reasonable grounds for differentiation in treatment, but it also runs counter to the primary goals of the Convention, such as respect for inherent dignity, individual autonomy of persons with disabilities and their inclusion in society.

3.3 The authors submit that, by not intervening at their request in a longstanding contractual relationship between them and OTP in order to impose on OTP an obligation of equal treatment, which had not been included in the contract, the Metropolitan Court of Appeal and the Supreme Court have violated the State party's obligations under article 5, paragraph 2, of the Convention 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.

3.4 In light of the above, the authors conclude that they are victims of a violation by the State party of their rights under article 5, paragraphs 2 and 3; article 9 and article 12, paragraph 5, of the Convention, and are therefore entitled to just compensation.

The State party's observations on the admissibility and merits

4.1 On 22 November 2010, the State party informed the Committee that it would not challenge the admissibility of the present communication.

4.2 On 21 March 2011, the State party submitted its observations on the merits of the communication. It states that, based on the Hungarian regulations in force, the judgment of the Supreme Court of 4 February 2009 was sound, but adds that the problem outlined in the communication is real and requires a fair settlement.

4.3 The State party puts forward three aspects in order for a solution acceptable to all parties to be found. Firstly, steps are to be taken to change the accessibility of the ATMs and other banking services, including accessibility not only for the blind, but also for persons with other disabilities. Secondly, given the related costs and technical viability, the above target can only be achieved gradually, by procuring and installing new ATMs facilitating physical and info-communication accessibility as a basic condition. Finally, although the communication concerns the services provided by a specific bank, the above-mentioned requirements would have to be met by each and every Hungarian financial institution.

4.4 Based on the above considerations, the State Secretary for Social, Family and Youth Affairs of the Ministry of National Resources sent a letter to the President-CEO of OTP on 18 March 2011, asking him to provide information on their possible plans and

¹⁰ <http://www.egyenlobanasmod.hu/index.php?g=hirek/TTaf200610.htm>

commitments related to the ATMs operated by the bank. The State Secretary suggested that in the future OTP give priority to the accessibility of the machines when new ATMs are procured.

4.5 Taking into account that ensuring accessibility should not be the duty of one bank only, the State Secretary has contacted the President of the Hungarian Financial Supervisory Authority requesting it to identify possible regulatory tools and incentives for all financial institutions.

The authors' comments on the State party's observations

5.1 On 19 December 2011, the authors provided their comments on the State party's observations. The authors submit that they welcome the fact that the State Secretary for Social, Family and Youth Affairs has contacted OTP and the Hungarian Financial Supervisory Authority in relation to their communication. They consider, however, that the State Secretary's official response to the Committee is contradictory. The State Secretary argues on the one hand that the Supreme Court's reasoning on the authors' case is sound while admitting on the other that there exists a "real" problem requiring "fair settlement". In the authors' opinion, the Supreme Court decided their case in a manner that failed to "fairly settle this real problem", although in the earlier decision on the same case, the Metropolitan Court interpreted the State party's legal framework in compliance with the Convention.

5.2 The authors argue that if, in the opinion of the State Secretary, the Supreme Court's decision is in full compliance with the State party's law, then Hungary has violated the Convention by not adopting the necessary legislative measures for its implementation at the national level. They specifically refer to the State party's obligations under articles 4 and 5 of the Convention. If, however, the State Secretary is wrong in his assessment and the State party's law can be interpreted in compliance with the Convention – a position the authors take –, then Hungary has violated the Convention due to the Supreme Court's failure to uphold the appropriate interpretation. The said failure is attributable to the State party, as it bears responsibility for ensuring judicial protection of the rights of persons with disabilities and correct interpretation of the law by the judiciary in a manner consistent with the State party's obligations under the Convention.

5.3 The authors maintain that the Metropolitan Court of Appeal and the Supreme Court ruled contrary to the spirit of the Convention, thus violating their rights guaranteed under the provisions invoked in the authors' initial submission to the Committee. Furthermore, the Metropolitan Court of Appeal and the Supreme Court also violated their obligation to interpret the State party's law in a way that is compliant with the Convention. The authors also maintain that these courts have misinterpreted and misapplied the Equal Treatment Act, as well as the international directives relevant to their communication and, in particular, provisions thereof which relate to the definition of discrimination and to exoneration. According to them, the fact that the Metropolitan Court interpreted the State party's legal framework in compliance with the said directives makes the failure of the Metropolitan Court of Appeal and the Supreme Court to do the same even more conspicuous.

5.4 The authors recall that the State Secretary outlines three aspects of the ATMs accessibility in his response, arguing that these are important for ensuring a "solution acceptable to everybody": first, steps are to be taken to change the accessibility of the ATMs; second, this change can only be achieved gradually, given the costs involved; third, the change would create obligations for every bank in Hungary. The authors submit, in this regard, that while it is unlikely that every single ATM in Hungary would become accessible within a short period of time, their own situation and that of the other persons with visual impairments remains unchanged due to the Supreme Court's failure to give effect to their

rights. The authors add that the attitude of OTP towards the special needs of the persons with disabilities is illustrated by the fact that it had bought 384 new ATMs while the court proceedings at the national level were still ongoing, although 300 of them could not be retrofitted to make them accessible for persons with disabilities. OTP went as far as to offer to close the authors' their accounts in order to put an end to their contractual relationship.

5.5 The authors state that, having considered the costs associated with retrofitting and installing ATMs which are accessible for persons with disabilities, the Metropolitan Court, in its decision, ordered a few moderate steps towards the integration of persons with disabilities into the society. This decision, however, was appealed by OTP. The authors submit, in this regard, that the financial burden for OTP of defending itself against continued lawsuits will soon outweigh the costs of making the ATMs accessible for persons with disabilities.

5.6 The authors express their agreement with the State Secretary in that the obligation to provide equal access to services for persons with disabilities would need to be extended to all financial institutions operating on the State party's territory, in order to ensure the integration of persons with disabilities into society. They note that other banks in Hungary, unlike OTP, have already made efforts to install ATMs that are accessible for persons with disabilities. The authors submit that failure on the part of the largest financial institution in Hungary – OTP – to provide services to persons with disabilities could have a negative impact on the rate of installation of disability-compliant ATMs by other banks.

5.7 The authors conclude by saying that together with other persons who have visual impairments, they continue to face discriminatory treatment by OTP due to the failure of the Supreme Court to give effect to their rights provided for in the international treaties ratified by Hungary. In particular, they are requested to pay the same amount of fees as non-disabled clients without, however, being able to receive the same level of services. This discriminatory treatment prevents persons with visual impairments in Hungary from achieving independence and full integration into society, and thus violates their human dignity. According to the authors, the State party's courts have failed to protect their rights under the Convention and this failure cannot be rectified by merely sending letters to OTP and the Hungarian Financial Supervisory Authority as that does not create legal obligations.

5.8 The authors therefore maintain their initial claims and request the Committee to establish that the State party has violated its obligations under the Convention.

The State party's further observations

6.1 On 12 March 2012, the State party submitted its observations on the authors' comments on the merits. It points out that it concurs with the decision of the Supreme Court in the authors' case and fully accepts it. It adds that due to the principles of the rule of law and the separation of powers, the State party cannot reassess the final decision made by an independent judicial body or the reasoning thereof.

6.2 The State party recalls that, further to the submission of the present communication to the Committee, the State Secretary for Social, Family and Youth Affairs had sent a letter to the President-CEO of OTP requesting him to provide information on the possible plans and commitments related to the accessibility of the ATMs operated by the bank. The State Secretary specifically suggested that the accessibility of the ATMs be treated as high priority throughout the bank's future procurements.

6.3 In his response of 11 April 2011, the President-CEO of OTP first of all indicated that the bank had placed great emphasis on the physical accessibility of the ATMs, as a result of which 90 per cent of its branches and the ATMs located there were made accessible for persons with limited mobility. The President-CEO also underlined that the bank could first and foremost take responsibility for the accessibility of the ATMs located

in the premises of its own branches. In the case of ATMs located outside of such premises, it was often impossible to ensure full accessibility, due to the “features of the environment”. In many cases, the lessors of the buildings accommodating the ATMs are not open to performing the necessary adjustments. Nevertheless, OTP has committed itself to retrofitting all of its ATMs within the framework of a four-year programme in order to make them suitable for independent use by persons with visual impairments. In the State party’s view, this commitment, which is in line with the principle of reasonable accommodation enshrined in the Convention, may bring about a notable and substantive development in the circumstances of the present communication.

6.4 The State party further recalls that the State Secretary for Social, Family and Youth Affairs had also sent a letter to the President of the Hungarian Financial Supervisory Authority (HFSA) dated 18 March 2011, requesting him to review regulatory instruments and incentives that would apply to all financial institutions. In his response of 26 April 2011, the President of HFSA stated that several steps had already been taken in order to improve the situation of persons with disabilities. The President of HFSA issued Recommendation No. 1/2011 (IV.29) “On the principles of consumer protection expected from financial institutions,” which establishes the following under section III.3: “HFSA considers it best practice for financial institutions to pay extra attention to those consumers with limited ability to represent their own interests, such as minors, the elderly, the disabled and the seriously ill, as well as those who struggle with comprehension of complex terms and information.”¹¹ The State party submits that the significance of the said recommendation lies in its applicability to all financial institutions. Moreover, its implementation is monitored by HFSA. The President of HFSA also expressed his readiness to work out further directives in cooperation with organizations representing the interests of the blind and partially sighted, in order to ensure the independent use of banking services by as many persons with visual impairments as possible.

6.5 The State party concludes that the positive feedback received from the President-CEO of OTP and the President of HFSA will in the long term promote equal access of persons with disabilities to banking services.

The authors’ comments on the State party’s further observations

7.1 On 31 May 2012, the authors recalled that, according to the State party, the decision of the Supreme Court was in full compliance with the State party’s law. In this connection, the authors reiterate their earlier line of argument (para. 5.2 above). They agree that the State party cannot reassess the final decision made by an independent judicial body nor the reasoning thereof. They submit, however, that the State’s obligation is not to reassess a court decision but to ensure (judicial) protection of the rights of persons with disabilities. If the court has failed to provide the necessary protection, then the State party is obliged to take responsibility for this failure. In the current context, acknowledgment by the Ministry of National Resources of an erroneous application of the otherwise Convention-compliant law would not be a violation of the separation of powers principle; otherwise, States Parties could never be called to account for judicial decisions that are contrary to the Convention.

7.2 While the authors welcome the State party’s aspirational statement affirming the importance of ensuring accessibility of the ATMs in future procurements, they point out that the Government has yet to take a legally-binding action to this effect, despite having all necessary means available at its disposal for doing so. With reference to article 4, paragraph 1(a), of the Convention, the authors submit that sending a legally non-binding letter does not meet this burden.

¹¹ The English translation of the relevant excerpt was provided by the State party.

7.3 The authors applaud OTP's efforts to ensure physical accessibility of its branches. They recall, however, that under article 9 of the Convention, "accessibility" is not limited to removing physical barriers, but also includes eliminating obstacles to information, communications and other services. The authors note the acknowledgement made by OTP itself that its accessibility efforts have been concentrated on persons with limited mobility and not on persons with visual impairments, although the present communication concerns the latter group.

7.4 The authors maintain that the State party has failed to take appropriate measures to ensure and promote "the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination," as set out in article 4 of the Convention. They add that the deadlines defined in the Disabilities Act for the implementation of accessibility measures are systematically disregarded and no national accessibility plan has been elaborated.¹² According to the authors, it is particularly distressing that the State party's law does not define any concrete and enforceable measures in connection with the accessibility of information and communications.

7.5 The authors conclude that the broader definition of discrimination that is embodied in the concept of reasonable accommodation, as set out in article 2 of the Convention, has yet to be introduced into the State party's law. If the State party fails to honor its obligation to provide legal remedies for discrimination to the full extent required by the Convention, the rights of persons with disabilities will continue to be infringed upon. The authors, therefore, maintain their initial claims and request the Committee to establish that the State party has violated its obligations under the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Committee on the Rights of Persons with Disabilities must, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

8.2 The Committee notes that the Optional Protocol entered into force for the State party on 3 May 2008 and that the judgment of the Supreme Court, dated 4 February 2009, was delivered after that date. The Committee also notes that the State party does not challenge the admissibility of the present communication and that the relevant facts, which are the subject of the communication – inaccessibility of the banking card services provided by the ATMs operated by OTP for the authors – continued after the entry into force of the Optional Protocol for the State party. Accordingly, the Committee considers that it is not precluded, by article 2 (f) of the Optional Protocol from examining the present communication.

8.3 The Committee further notes that the authors have invoked a violation of article 12, paragraph 5, of the Convention, without, however, providing further substantiation as to how this provision may have been violated, given that according to the information before the Committee, their legal capacity to control their own financial affairs has not been restricted. Therefore, the Committee considers that this part of the communication is insufficiently substantiated, for purposes of admissibility, and is thus inadmissible under article 2 (e) of the Optional Protocol.

¹² Reference is made to the list of issues submission prepared by the Hungarian Disability Caucus for the seventh session of the Committee on the Rights of Persons with Disabilities (April 2012).

8.4 The Committee considers that the authors have sufficiently substantiated, for purposes of admissibility, their claims under article 5, paragraphs 2 and 3, and article 9 of the Convention. In the absence of other impediments to admissibility, the Committee declares these claims admissible and proceeds with its examination of the merits.

Consideration of the merits

9.1 The Committee on the Rights of Persons with Disabilities has considered this communication in the light of all the information received, in accordance with article 5 of the Optional Protocol and rule 73, paragraph 1, of the Committee's rules of procedure.

9.2 The Committee notes that the authors' initial complaint to OTP focused on the lack of reasonable accommodation, i.e. failure by OTP to provide for individual measures by retrofitting some of its ATMs in the proximity of the authors' homes in order to adjust the banking card services provided by these ATMs to the authors' specific needs and so that they become accessible for persons with visual impairments. The Committee further notes that the authors' civil action before the Metropolitan Court and their appeals before the Metropolitan Court of Appeal and the Supreme Court, as well as their communication before the Committee go further and raise a broader claim, i.e. the lack of accessibility for persons with visual impairments to the entire network of ATMs operated by OTP. In light of the fact that the authors opted to frame their communication before the Committee under this broader claim – more specifically, whether the State party has taken appropriate measures to ensure the accessibility of the banking card services provided by the entire network of ATMs operated by OTP for persons with visual impairments –, the Committee considers that, in the circumstances of the present communication, the totality of the authors' claims should be examined under article 9 of the Convention and that it is therefore unnecessary for it to separately assess whether the State party's obligations under article 5, paragraphs 2 and 3, of the Convention have been fulfilled.

9.3 As to the authors' claim under article 9 of the Convention that the State party has failed to fulfil its obligations by not ensuring accessibility of the banking card services provided by the ATMs operated by OTP for persons with visual impairments on an equal basis with others, the Committee notes the State party's assertion that the judgment of the Supreme Court of 4 February 2009 was "sound" (para. 4.2 above) and that the State party "concur[s] with" and "fully accepts" it (para. 6.1 above). In the Committee's view, the State party thus effectively takes a position that, under its existing legal framework, the obligation to provide for accessibility of information, communications and other services for persons with visual impairments on an equal basis with others does not apply to private entities, such as OTP, and does not affect contractual relationships.

9.4 In this regard, the Committee recalls that under article 4, paragraph 1(e), of the Convention, States Parties undertake "to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise". To this end, States Parties are required pursuant to article 9 of the Convention to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to, inter alia, information, communications and other services, including electronic services, by identifying and eliminating obstacles and barriers to accessibility. States Parties should, in particular, take appropriate measures to 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, para. 2(a), of the Convention), and ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities (art. 9, para. 2(b)).

9.5 In the present communication, the Committee notes, firstly, that the State party has acknowledged the fact that the accessibility of the ATMs and other banking services for

persons with visual and other types of impairments was a real problem that required a solution acceptable to all parties involved (paras. 4.2 and 4.3 above). It then notes that the State party has already identified three aspects to achieve this objective, namely (1) the accessibility of the ATMs and other banking services by all persons with disabilities; (2) the gradual achievability of such comprehensive accessibility due to costs involved; and (3) accessibility of the ATMs and other banking services provided by all financial institutions operating on the State party's territory, and not only by OTP. The Committee also notes that the State Secretary for Social, Family and Youth Affairs of the Ministry of National Resources suggested to the President-CEO of OTP that OTP give priority in the future to the accessibility of newly procured ATMs, and that the latter had promised to retrofit the entire network of its ATMs within four years on a voluntary basis. Finally, the Committee notes that the State Secretary also requested the President of the Hungarian Financial Supervisory Authority to identify possible regulatory tools and incentives applicable to all financial institutions to ensure accessibility to their services for persons with disabilities, and that the latter had issued a recommendation "On the principles of consumer protection expected from financial institutions" (para. 6.4 above).

9.6 While giving due regard to the measures taken by the State party to enhance the accessibility of the ATMs operated by OTP and other financial institutions for persons with visual and other types of impairments, the Committee observes that none of these measures have ensured the accessibility to the banking card services provided by the ATMs operated by OTP for the authors or other persons in a similar situation. The Committee finds accordingly that the State party has failed to comply with its obligations under article 9, paragraph 2 (b), of the Convention.

10. The Committee on the Rights of Persons with Disabilities, acting under article 5 of the Optional Protocol to the Convention, is of the view that the State party has failed to fulfil its obligations under article 9, paragraph 2(b), of the Convention. The Committee therefore makes the following recommendations to the State party:

1. Concerning the authors: the State party is under an obligation to remedy the lack of accessibility for the authors to the banking card services provided by the ATMs operated by OTP. The State party should also provide adequate compensation to the authors for the legal costs incurred during domestic proceedings and the costs incurred in filing this communication;

2. General: the State party is under an obligation to take measures to prevent similar violations in the future, including by:

(a) Establishing minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other types of impairments. The Committee recommends that the State party create a legislative 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. The State party should also ensure that all newly procured ATMs and other banking services are fully accessible for persons with disabilities;

(b) Providing for appropriate and regular training on the scope of the Convention and its Optional Protocol to judges and other judicial officials in order for them to adjudicate cases in a disability-sensitive manner;

(c) Ensuring that its legislation and 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.

11. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the present Views and recommendations of the Committee. The State party is also requested to publish the Committee's Views, to have them translated into the official language of the State party and widely disseminated, in accessible formats, in order to reach all sectors of the population.

[Adopted in English, French, Spanish and Arabic, the English text being the original version. Subsequently to be issued also in Chinese and Russian as part of the Committee's biannual report to the General Assembly.]
