United Nations CRPD/C/24/D/36/2016

Convention on the Rights of Persons with Disabilities

Distr.: General
4 May 2021

Original: English

Committee on the Rights of Persons with Disabilities

Decision adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 36/2016*, **

Communication submitted by:	G.J.D. (represented by counsel, Glenn Floyd)
Alleged victim:	The author
State party:	Australia
Date of communication:	29 March 2016 (initial submission)
Document references:	Decision taken pursuant to rules 64 and 70 of the Committee's rules of procedure, transmitted to the State party on 1 April 2016 (not issued in document form)
Date of adoption of decision:	19 March 2021
Subject matter:	Forced hospitalization and treatment
Procedural issues:	Exhaustion of domestic remedies; substantiation of claims; victim status
Substantive issues:	Equal recognition before the law; liberty and security of the person; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from exploitation, violence and abuse; right to respect for physical and mental integrity
Articles of the Convention:	12, 14, 15, 16, 17 and 21
Articles of the Optional Protocol:	1 (1) and 2 (d) and (e)

1.1 The author of the communication is G.J.D., a citizen of Australia born in 1975. The author claims that by subjecting him to forced hospitalization in a psychiatric hospital with involuntary treatment, including electroconvulsive therapy, the State party has violated his rights under articles 12, 14, 15, 16, 17 and 21 of the Convention. The author is represented

* Adopted by the Committee at its twenty-fourth session (8 March–1 April 2021).

** The following members of the Committee participated in the consideration of the communication: Rosa Idalia Aldana Salguero, Soumia Amrani, Danlami Umaru Basharu, Gerel Dondovdorj, Vivian Fernández de Torrijos, Gertrude Oforiwa Fefoame, Odelia Fitoussi, Mara Cristina Gabrilli, Amalia Eva Gamio Ríos, Samuel Njuguna Kabue, Kim Mi Yeon, Robert George Martin, Floyd Morris, Jonas Ruskus, Markus Schefer, Saowalak Thongkuay and Risnawati Utam. Pursuant to rule 60 (1) (c) of the Committee's rules of procedure, Rosemary Kayess did not participate in the examination of the present communication.

by counsel and by his father. The Optional Protocol entered into force for the State party on 19 September 2009.

1.2 On 1 April 2016, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, issued a request for interim measures under article 4 of the Optional Protocol, requesting the State party to take all necessary measures to ensure the suspension of forced electroconvulsive therapy on the author, pending the examination of the communication by the Committee.

1.3 On 9 December 2016, pursuant to rule 70 (8) of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to grant the State party's request for the admissibility of the communication to be examined separately from the merits. On the same date, the Committee, acting through its Special Rapporteur on new communications and interim measures, granted the State party's request to lift the request for interim measures.

A. Summary of the information and arguments submitted by the parties

Facts as submitted by the author

2.1 The author notes that he has been diagnosed with psychosocial disabilities and was, at the time of the submission of his complaint, undergoing psychiatric care at Eastern Health's Upton House mental health facility in the State of Victoria. He claimed that he was being subjected to forced hospitalization and treatment at the facility, including by electroconvulsive therapy. He challenged his hospitalization through a habeas corpus writ before the Supreme Court of Victoria. The Court dismissed the author's complaint on 22 March 2016. The author alleges that any further appeal to higher courts, including by submitting an appeal to the High Court, would be extremely costly and not efficient, insofar as it would focus only on the applicable legislation, without focusing on the individual circumstances of his case.

2.2 On 3 March 2016, the author appealed against his enforced treatment, including the electroconvulsive therapy, to the Mental Health Tribunal. He notes that he presented reports by two independent psychiatrists before the Tribunal, according to which he had full capability to exercise informed consent regarding his treatment, which included the right to refuse to undergo treatment against his will. The Tribunal dismissed the appeal and upheld the decision concerning the author's treatment.

Complaint

3. The author claims that the State party has violated his rights under articles 12, 14, 15, 16, 17 and 21 of the Convention in relation to his alleged compulsory hospitalization and treatment, including the administration of electroconvulsive therapy, provided to him at Eastern Health's Upton House mental health facility in Victoria.

State party's observations on admissibility

4.1 On 1 June 2016, the State party submitted its observations on the admissibility of the communication. The State party submits that the communication should be found to be inadmissible as: (a) the author has not exhausted domestic remedies, as required under article 2 (d) of the Optional Protocol; (b) the complaint is manifestly ill-founded under article 2 (e) of the Optional Protocol; and (c) the communication has not been submitted validly on behalf of the alleged victim, as required under article 1 (1) of the Optional Protocol.

4.2 The State party notes that it does not accept the material facts as asserted on behalf of the author in relation to the admissibility of the communication. It argues that the author has omitted a large quantity of pertinent factual information, including details of the legal guardianship asserted by his father, the inpatient treatment order made by the Mental Health Tribunal, the order authorizing electroconvulsive therapy made by the Mental Health Tribunal, and the judgment of the Supreme Court of Victoria in the author's unsuccessful habeas corpus application, in which he contended that the Mental Health Tribunal was acting outside of its power under the Mental Health Act 2014 of the State of Victoria. The State

party argues that the author has also omitted any factual information relating to any other relevant court or tribunal hearings or other methods of relief or resolution that he could have undertaken. It notes that States parties are explicitly required under article 22 (2) of the Convention to protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others, and observes that in the absence of appropriate authorizations for release by the author, it is not able to access a number of documents, in accordance with domestic privacy law, which are central to the allegations contained in the communication.

4.3 The State party provides information on the applicable legal framework. It notes that in the State of Victoria, compulsory mental health treatment is regulated by the Mental Health Act 2014. The Act sets out the criteria for compulsory mental health treatment and establishes the Mental Health Tribunal. The Act establishes a supported decision-making model. Substitute decision-making is only used as a last resort. The model of supported decision-making enables and supports compulsory patients to make decisions about their treatment and determine their individual path to recovery. A presumption of capacity is the foundation of the supported decision-making model and the Act provides that all persons are presumed to be able to make treatment decisions. The Mental Health Act 2014 seeks to minimize the use and duration of compulsory treatment to ensure that the treatment is provided in the least restrictive and intrusive manner possible. It achieves this by introducing specific criteria for compulsory treatment, creating treatment orders that operate for a fixed duration and requiring timely oversight by an independent mental health tribunal. The Mental Health Act 2014 establishes the Mental Health Tribunal as an independent body. The Tribunal makes treatment orders for patients. The Tribunal must be satisfied that all the treatment criteria apply to the patient before making a treatment order. In coming to its decision, the Tribunal must take a holistic approach that considers a range of factors, including the patient's recovery goals and treatment preferences and the views of the nominated person,[1] carer or guardian, and must take into account any second psychiatric opinion report. Each division of the Tribunal consists of three members: a lawyer, a registered medical practitioner and a member of the community. A party to a Tribunal hearing (such as a patient or the authorized psychiatrist) may request a written statement of reasons for a Tribunal determination. A party to a Tribunal hearing may also apply to the Victorian Civil and Administrative Tribunal for review of any decision made by the Mental Health Tribunal within 20 business days after a Tribunal determination or, if the patient has requested a written statement of reasons, within 20 business days of receiving the statement of reasons. The Tribunal may refer a question of law to the Supreme Court of Victoria for determination. This may occur at the request of a party or on the initiative of the Tribunal.

4.4 The State party argues that electroconvulsive therapy is considered an effective treatment for some mental illnesses. It notes, however, that the decision to prescribe electroconvulsive therapy should be based on a thorough physical and psychological evaluation of each person, taking into account their present condition, past history and treatment responsiveness, the impact of the illness on their quality of life, and their views and preferences. The Mental Health Act 2014 provides that electroconvulsive therapy may not be performed on a patient who does not have the capacity to give informed consent for such therapy, without the approval of the Mental Health Tribunal. It seeks to maximize the patient's autonomy wherever possible. Where a patient does not have capacity to consent to electroconvulsive therapy, the Tribunal must decide whether electroconvulsive therapy is the "least restrictive treatment". For this purpose, the Tribunal will consider the patient's views and preferences about electroconvulsive therapy and any beneficial alternative treatments that are reasonably available, and the reasons for the patient's views and preferences, including any recovery outcomes the patient would like to achieve; the views and preferences of the patient, expressed in an advance statement; and the views of the nominated person, guardian or carer. The Tribunal will also consider whether electroconvulsive therapy is likely to remedy the mental illness or lessen the ill-effects, and consider any second psychiatric opinion that has been obtained by the patient and given to the psychiatrist. A patient may

[1] A person nominated by the patient who will be able to receive information and to support the patient for the duration of the compulsory treatment order. The nominated person will assist the patient in exercising their rights and help represent the patient's interests.

apply to the Victorian Civil and Administrative Tribunal for a review of a decision of the Mental Health Tribunal to approve an application for electroconvulsive therapy.

4.5 The State party notes that the author has mental health conditions and a number of complex health and other needs. At the time of his residence at Eastern Health's Upton House mental health facility, he was subject to an inpatient treatment order made by the Mental Health Tribunal in accordance with the provisions of the Mental Health Act 2014.

4.6 The State party submits that victim status has not been established under the Optional Protocol in regard to the author. It notes that his father has authorized counsel to bring the complaint on behalf of his son before the Committee, but that no documents have been provided to support the assertion that the author's father is his legal guardian.

4.7 The State party further submits that the author has not demonstrated that he has exhausted all domestic remedies which are available with respect to his allegations under the Convention, and that the communication should therefore be found to be inadmissible. It argues that a number of domestic remedies were available to the author with respect to the allegations, including seeking redress from the Mental Health Tribunal which is the primary body responsible for determining whether a person requires compulsory mental health treatment. The author could have applied to the Mental Health Tribunal for revocation of the inpatient treatment order or of the order for treatment by electroconvulsive therapy. The State party notes that no evidence has been provided as to why the author did not do this. If he had utilized this remedy and been unsatisfied with the outcome, it would have been open to him to apply to the Victorian Civil and Administrative Tribunal for a merits review of any decisions made by the Mental Health Tribunal relating to the imposition, revocation or continuance of the inpatient treatment order or the order for electroconvulsive therapy. There are no fees to make an application to the Victorian Civil and Administrative Tribunal for review of a decision made under the Mental Health Act 2014. By applying to the Victorian Civil and Administrative Tribunal for a merits review, it would have been open to the author to make submissions relating to the Charter of Human Rights and Responsibilities Act. Under section 38 of the Charter, it is unlawful for a public authority to act in a way that is incompatible with a human right, or, in making a decision, to fail to give proper consideration to a relevant human right. It was also open to the author to appeal a decision of the Victorian Civil and Administrative Tribunal to the Supreme Court of Victoria on a question of law under section 148 of the Victorian Civil and Administrative Tribunal Act 1998, or to seek a Supreme Court injunction or writ of mandamus. Under Victorian legislation, it was also open to him to lodge a complaint with the Mental Health Complaints Commissioner. The Commissioner is an independent, specialist complaints body established under the Mental Health Act 2014 to provide an accessible and timely complaints mechanism for persons with mental health conditions. The Commissioner is authorized to accept, assess, manage and investigate complaints relating to mental health service providers in Victoria. The Commissioner would have been able to receive and investigate a complaint by the author relating to his treatment and, if satisfied that the treatment was in contravention of the Mental Health Act 2014 or Regulations, would have been able to serve a compliance notice on the mental health service provider. The State party argues that the author has provided no information as to whether he has made attempts to pursue any of these domestic remedies. It therefore submits that he has failed to exhaust all available domestic remedies in respect of his claims.

4.8 On 10 August 2016, the State party submitted further observations on the complaint, and requested the Committee to withdraw its request for interim measures as the author was no longer residing in the State of Victoria or undergoing treatment there.

Author's comments on the State party's observations on admissibility

5.1 On 14 August 2016, the author provided his comments on the State party's observations. He maintains that the communication is admissible.

5.2 The author notes the State party's claim that he has not substantiated his assertion that he authorized his father to submit the communication on his behalf to the Committee. He refers to a statement that he signed, which is dated 31 July 2016, in which he confirms that he has authorized his father and counsel to submit the complaint to the Committee.

5.3 The author maintains that he has exhausted all available domestic remedies. He notes that he appealed to the Mental Health Tribunal on 3 March, 3 April and 18 May 2016, challenging his involuntary treatment order, and, additionally, submitted a habeas corpus complaint before the Supreme Court of Victoria on 22 March 2016 to challenge his involuntary treatment order. He also submitted a subsequent request for injunctive relief before the Supreme Court of Victoria, on 26 April 2016, in order to challenge the forced treatment by electroconvulsive therapy. He further claims that any additional attempt to exhaust domestic remedies would be unreasonably prolonged or unlikely to bring effective relief. He argues that an appeal before the Victorian Civil and Administrative Tribunal was not sought as he claims that that Tribunal is an administrative body that "cannot rule on matters of law or intrinsic procedural fairness".

State party's further submission

6.1 On 9 November 2016, the State party submitted further observations on the admissibility of the complaint. It reiterates its submission that the communication should be found to be inadmissible for failure to exhaust domestic remedies and failure to substantiate the claims for purposes of admissibility.

6.2 The State party reiterates its argument that it was, and remains, open to the author to lodge an appeal with the Victorian Civil and Administrative Tribunal and to lodge a complaint with the Mental Health Complaints Commissioner relating to his treatment order. It notes that the author appears to have made two applications to the Supreme Court of Victoria on uncertain legal grounds, and argues that the correct avenue of appeal, described in its initial observations on the admissibility of the complaint, remains open to the author. It argues that the author has failed to substantiate the assertion that recourse to the Mental Health Tribunal, the Victorian Civil and Administrative Tribunal or the Commissioner would be unreasonably prolonged or ineffective.

B. Committee's consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee, and has not been and is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's submission that victim status has not been established under the Optional Protocol on behalf of the author, as it has not been established that the author authorized his father and his counsel to bring the complaint on his behalf before the Committee. The Committee notes that the author subsequently confirmed, in a statement signed by him on 31 July 2016, that he authorized his father and counsel to submit the complaint on his behalf to the Committee. The Committee therefore considers that it is not precluded under article 1 (1) of the Optional Protocol from considering the present communication.

7.4 The Committee further notes the State party's submission that the author's complaint should be declared inadmissible under article 2 (d) of the Optional Protocol for failure to exhaust domestic remedies. It notes the State party's argument that a number of domestic remedies were available to the author with respect to his claims, including: (a) seeking redress from the Mental Health Tribunal, with an application to that Tribunal for revocation of the inpatient treatment order or the order for treatment by electroconvulsive therapy; (b) appealing any decisions made by the Mental Health Tribunal relating to the imposition, revocation or continuance of the inpatient treatment order or the order for electroconvulsive therapy to the Victorian Civil and Administrative Tribunal for a merits review; (c) appealing any decision by the Victorian Civil and Administrative Tribunal to the Supreme Court of Victoria on a question of law under section 148 of the Victorian Civil and Administrative Tribunal Act 1998, or seeking a Supreme Court injunction or writ of mandamus; and (d) lodging a complaint with the Mental Health Complaints Commissioner relating to his claims.

It also notes the State party's information that an application to the Victorian Civil and Administrative Tribunal for review of a decision made under the Mental Health Act 2014 under Victorian legislation does not entail any legal fees. The Committee further notes the author's submission that he challenged his treatment order before the Mental Health Tribunal, and by submitting a habeas corpus complaint to the Supreme Court of Victoria on 22 March 2016 and a subsequent request for injunctive relief on 26 April 2016. It notes his claims that any additional attempt to exhaust domestic remedies would be unreasonably prolonged or unlikely to bring effective relief.

7.5 The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no reasonable prospect of being successful, authors of communications must exercise due diligence in the pursuit of available remedies, and that mere doubts or assumptions about the effectiveness of domestic remedies do not absolve authors from exhausting them.[2] In the present case, the Committee notes that it is undisputed between the parties that the author did not appeal any decision of the Mental Health Tribunal to the Victorian Civil and Administrative Tribunal and that he did not submit a complaint before the Mental Health Complaints Commissioner. The Committee also notes the State party's information that the author could have challenged any potential decision of the Victorian Civil and Administrative Tribunal before the Supreme Court of Victoria. The Committee takes note of the author's argument that any additional attempt made by him to exhaust domestic remedies would have been unreasonably prolonged or unlikely to bring effective relief. It notes, however, that the author has not provided any further information, documentation or argumentation as to why he considers that the exhaustion of domestic remedies in this regard would have been unreasonably prolonged or ineffective. Therefore, the Committee considers that the author has failed to exhaust available domestic remedies, and finds that the communication is inadmissible pursuant to article 2 (d) of the Optional Protocol.

7.6 Having thus concluded, the Committee will not separately examine the admissibility grounds under article 2 (e) of the Optional Protocol.

C. Conclusion

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 (d) of the Optional Protocol;

(b) That the present decision shall be communicated to the State party and to the author.

[2] *D.L. v. Sweden* (CRPD/C/17/D/31/2015), para. 7.3; *E.O.J. et al. v. Sweden* (CRPD/C/18/D/28/2015), para. 10.6; and *T.M. v. Greece* (CRPD/C/21/D/42/2017), para. 6.4. See also *V.S. v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3; *García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2; and *Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3.