Government Offices of Sweden

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Ministry for Foreign Affairs
Department for International Law, Human Rights
and Treaty Law

Committee on the Rights of Persons
with Disabilities
Office of the High Commissioner
for Human Rights
United Nations
CH-1211 GENEVA 10
Switzerland

Communication No. 45/2018
Mr Richard Sahlin v. Sweden

Dear Members of the Committee,

1. The Secretariat of the United Nations (High Commissioner for Human Rights) transmitted, on 27 February, a Note (ref. no. G/SO214/48 SWE (5) 45/2018) to the Permanent Mission of Sweden to the United Nations Office at Geneva regarding a request by the Committee related to communication No. 45/2018, submitted to the Committee on behalf of Mr Richard Sahlin (hereinafter 'the complainant'), under the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

2. In the abovementioned Note, the Committee requested that the Swedish Government provide, by 27 August 2018, written information and observations in respect of both the admissibility and the merits of the complaint. In response to this request, we have the honour to submit the following on behalf of the Government.

1. Pertinent Swedish Legislation

3. First of all, it should be noted that there are provisions on equality and non-discrimination in the Swedish Constitution. According to Chapter 1, Article 2 of the Instrument of Government, public institutions shall promote the opportunity for all to attain participation and equality in society. Furthermore, it is stated that public institutions shall combat discrimination of persons on grounds of, *inter alia*, disability.

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1.1 The Discrimination Act etc.

4. Domestic provisions of relevance to the present case are found in the Discrimination Act (*Diskrimineringslagen*, 2008:567). Of particular relevance is Chapter 1, Section 4, where inadequate accessibility is regarded as a form of discrimination. The definition of 'inadequate accessibility' is that "a person with disability is disadvantaged through a failure to take measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes, and with consideration to:

– the financial and practical conditions;
– the duration and nature of the relationship or contact between the operator (*verksamhetsutövaren*) and the individual; and
– other circumstances of relevance".

5. The provision on inadequate accessibility as a form of discrimination entered into force in January 2015. The purpose of the provision was, *inter alia*, to align the Discrimination Act with the Convention. The scope of inadequate accessibility is further elucidated in the *travaux préparatoires* (Govt Bill 2013/14:198 p. 125–128) where it is stated *inter alia*:

6. A first necessary precondition of the prohibition of discrimination is that an individual person has been disadvantaged. Being disadvantaged means that a person – e.g. a job applicant – is placed on a less favourable footing or misses out on an improvement, benefit, service measure, etc. Treatment is disadvantageous if it can be said to result in damage or disadvantage for the person in question. The decisive factor is the fact that a negative effect occurs, not the reason that may be behind the disadvantage.

7. Another criterion is failure to take accessibility-enhancing measures, which may simply mean passiveness, i.e. no accessibility measures at all are taken. It may also mean action, but involving measures that are inadequate.

8. The 'comparable situation' criterion is also crucial to the provision. The comparable situation criterion means that a comparison must be made between the situation for a person with a disability and the situation for others who do not have the disability in question. The comparison is only fair if the persons are in situations where it is reasonable or natural to compare them with each

other. In working life, the comparison primarily concerns the ability of a person with disability to do a given job, compared with other job applicants or employees who do not have the same disability. The employer is not allowed to take account of restrictions to the ability to do the job that may be caused by the disability if, by taking reasonable measures, the employer can eliminate or reduce the effects of the disability such that the main duties associated with a job can be carried out.

9. 'Accessibility measures' primarily mean measures that can be classified as support or personal service, information and communication, and the physical environment. The assessment of what measures can reasonably be required in a given case should be based on the requirements that may apply to the situation in question under other legislation or statutes. It should not be considered reasonable to demand measures that go beyond such requirements. Anyone who has met such requirements should thus be able to assume that no further requirements follow from the Discrimination Act. In the area of working life, it is primarily the Work Environment Act (1977:1160) that sets requirements that are pertinent to the prohibition of discrimination on grounds of lack of accessibility.

10. A measure can only be considered reasonable if the operator is able to bear the costs of it. It should not be considered reasonable to demand costly measures; costs should be reasonable, and it should be possible to finance them within the framework of regular public or private activities. If a measure would have major consequences for private or public activities, it cannot be considered reasonable. With respect to practical conditions, it cannot be considered reasonable to demand a measure that is entirely impossible to implement, either in purely factual terms or because there are legal obstacles to the operator taking the measure.

11. In general, it can be considered reasonable, in an employment or other contractual relationship between an employer and an employee or in other relationships of a more long-term and personal nature, to demand measures that go beyond what can be demanded in brief and restricted contacts between an individual and an operator, e.g. when making an enquiry of a government agency.

12. It should be added that according to the *travaux préparatoires* an employer is obliged to inquire into the possibility of reducing or eliminating the

limitations that the disability entails through support and adjustment measures (Govt Bill 2013/14:98 p. 70). The *travaux préparatoires* also state that the prohibition of discrimination through inadequate accessibility should not entail a change of established law in the area of working life (*arbetslivsområdet*) regarding what reasonable measures can be demanded (Govt Bill 2013/14:98 p. 65). Accordingly, appropriate measures may include the procurement of occupational assistive devices or adjustments to the workplace. They may also involve changing how work is organised, working hours or tasks (Govt Bill 1997/98:179 p. 51 f. and 85 f.).

13. The Equality Ombudsman (*Diskrimineringsombudsmannen*, translated in the complainant's submitted translation of the Labour Court judgment of 11 October 2017 into 'The Discrimination Ombudsman') is responsible for monitoring compliance with the Discrimination Act. Moreover, the Ombudsman has the right to take legal action on behalf of a person who feels that he or she has been discriminated against, which is done without cost for the individual. Certain interest organisations are also entitled to take legal action. Furthermore, the Ombudsman is to work to ensure that discrimination linked to disability does not occur in any area of society, and for equal rights and opportunities regardless of disability. The Ombudsman is to provide advice and other support so as to help enable anyone who has been subjected to discrimination to claim their rights. The authority is also tasked with providing information and training, proposing legislative amendments to counter discrimination, and taking any other appropriate measures.

14. Chapter 6 in the Discrimination Act contains provisions on the procedural rules to be applied in the disputes under the Act. Disputes are dealt with under the Labour Disputes Judicial Procedure Act (*Lagen om rättegången i arbetstvister*, 1974:371) and these cases are normally brought before the Labour Court. Such cases are either brought directly before the Labour Court as the first and only instance – as in the case in question – or before the District Court as the first instance with the possibility to appeal to the Labour Court.

15. Furthermore, Swedish protection against discrimination is based on various EC directives on non-discrimination, including Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter 'the Employment Equality Framework Directive'). The Employment Equality Framework

Directive has been implemented in Swedish law through, *inter alia*, the Discrimination Act.

16. The Employment Equality Framework Directive includes disabilities as grounds of discrimination. It includes prohibitions on direct and indirect discrimination. Prohibitions on discrimination apply in working life in a broad sense, in terms of conditions for access to employment, self-employment or exercising a profession, access to vocational guidance, vocational training, advanced vocational training, retraining and professional training, employment and working conditions and membership of, participation in and benefits from employee organisations, employer organisations and professional organisations.

17. Article 5 of the Employment Equality Framework Directive states that the employer 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. Furthermore, recital 21 states that, to determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

1.4 State-funded measures involved in the employment process in question

18. As the costs of interpretation in the case before the Labour Court were calculated including a wage subsidy and support for everyday interpretation (see the judgment under the headline 'Costs in accordance with the framework of public procurement contract'), a short description of the applicable law may be of value.

1.4.1 Wage subsidy

19. The Swedish Public Employment Service (*Arbetsförmedlingen*) may provide wage subsidies to persons with a disability that impairs their capacity to work and who need to find employment or to strengthen their opportunities to retain employment. The subsidy is paid provided that the work and supportive measures are designed to help improve the person's work capacity in relation

to the requirements of the relevant position. Wage subsidies are regulated by the Regulation on special measures for persons with a disability that impairs their capacity to work (*Förordning om särskilda insatser för personer med funktionsnedsättning som medför nedsatt arbetsförmåga*, 2017:462).

20. Employers can apply for wage subsidies when they employ a person with a disability that impairs his/her work capacity, such as a hearing impairment or reduced mobility. The person must be unemployed and registered as a job seeker with the Swedish Public Employment Service. The Swedish Public Employment Service can then cover part of the salary during the period of employment. Wage subsidies are intended to compensate for any adaptations that may be necessary at the workplace, such as adapting working hours, work duties, supervision and the opportunity to test occupational aids. The level of the subsidy depends on the adaptation and support the person needs. Together with the employer, the Swedish Public Employment Service draws up a plan to increase the employee's work capacity. The employee must have a wage that is in line with collective agreements and other benefits that are essentially equivalent to collective agreements in the industry.

21. An employment position with a wage subsidy is a normal position, but it must be adapted according to the conditions and needs of the job seeker. This could be a matter of adapting the workplace and the work duties, but also of adapted working hours.

22. The level of a wage subsidy is affected by the wage costs and work capacity of the person the employer wants to employ. Together with the employer and the employee, the Swedish Public Employment Service makes an assessment of the employee's work capacity. The employer can receive a subsidy for that part of the wage costs that does not exceed a gross salary of SEK 18 300 per month for a full-time position. It is also possible to receive a development allowance for development measures that contribute to developing the person's work capacity.

23. The Swedish Public Employment Service is required to carry out checks ahead of all decisions on wage subsidies to ensure that the support is based on the correct grounds and goes to the right recipient. The purpose of the checks is to ensure that no employer or organiser is subject to a trading prohibition, has a tax debt that has been referred to the Swedish Enforcement Authority for collection or has a record of non-payment of debts that is not insignificant.

24. In 2016, on average slightly more than 90 000 persons with disabilities per month were employed with different kinds of financial support from the Swedish Public Employment Service. Of those, on average 29 270 were employed with wage subsidies.

1.4.2 Everyday interpretation

25. Under Section 3b of the Health and Medical Services Act (*Hälso- och sjukvårdslagen*, 1982:763, replaced by Chapter 8, Section 7 in the new Health and Medical Service Act, 2017:30) it is the responsibility of the county councils to offer interpreting services for everyday life to persons who have been deaf since childhood, are deaf-blind, have become deaf in adulthood or have hearing impairments and are resident within the county council area or registered as resident under Section 16 of the Swedish Population Registration Act and permanently reside in the county.

26. According to the *travaux préparatoires* of the provision on 'everyday interpretation' in the Health and Medical Services Act, everyday interpretation concerns a wide range of everyday situations that it is neither possible nor desirable to specify. Certain areas are given as an indication, including interpretation at private and public health care appointments (with e.g. district nurses, occupational therapists, physiotherapists), appointments with dentists, the Swedish Social Insurance Agency, social services and various government agencies. The *travaux préparatoires* also state that interpreters can be needed when obtaining legal assistance, or when making significant purchases, carrying out banking errands, participating in information sessions in the workplace, trade union meetings, parent-teacher meetings and driving licence training, attending weddings, confirmations, christenings and funerals, etc. According to the *travaux préparatoires*, the term 'everyday interpretation' also includes giving *inter alia* deaf persons the equivalent opportunities to other persons to enjoy meaningful leisure and recreation. This could mean, for example, an interpreter for a deaf-blind person on a recreational trip, or at activities in associations in which they may participate. Certain basic interpreting services in working life are also included in the term 'everyday interpretation'. According to the *travaux préparatoires*, given the varying situations that can arise due to the needs of the individual and changes in working life, it would not be appropriate to specify the occasions on which interpreting services might be needed, beyond for taking up a new position, and at introduction and training at a company or other workplace. Finally, the *travaux préparatoires* state that it should be possible

to offer everyday interpretation to persons employed in daily activities under the Act concerning Support and Service for Persons with Certain Functional Impairments (Govt Bill 1992/93:159, p. 202).

27. The *travaux préparatoires* also state that it is not possible to define the term 'everyday interpretation' in detail and establish who is responsible for ensuring interpreting services in every individual case. It is assumed that the county councils will give everyday interpretation meaning through their practical activities such that the basic needs of deaf etc. groups for interpreting services will actually be met (Govt Bill 1992:93:159, p. 157).

28. Moreover, it should be mentioned that the Budget Bill for 2018 states that it is important that the skills of everyone in working life can be utilised. This requires functioning communication between employers and employees. The Government therefore intends to implement an initiative to increase the availability of interpreting services in working life, with a view to strengthening the labour market opportunities of women and men who are deaf or deaf-blind, or have a hearing impairment. SEK 15 million per year for three years (2018–2020) has been set aside to this end (Govt Bill 2017/18:1, Uo9).

29. There is also a targeted government grant of SEK 75 million annually for interpreting services, allocated to county councils by the National Board of Health and Welfare. According to available data, the county councils also set aside approximately SEK 156 million of their own resources (data for 2014, Ministry Publications Series 2016:7, page 21).

2. The Facts

30. Most of the facts of relevance to the present communication are stated in the Labour Court's judgment of 11 October 2017. The Committee has been provided with an English version of the judgment by the complainant (appendix to the communication) and the Government therefore refers to that ruling concerning the facts of the communication. Some further facts regarding the domestic proceedings of relevance to the Committee's examination of the present communication will be presented in connection with the Government's observations on the merits below. However, at this juncture, the Government finds it appropriate to give an account of some additional information that does not appear in the judgment.

2.1 The appeals process

31. After the university decided on 17 May 2016 to cancel the employment process concerning the complainant, he appealed the decision to the Higher Education Appeals Board (*Överklagandenämnden för högskolan*). He requested that the Board revoke the university's decision and claimed that the university had violated the prohibition on discrimination in the form of inadequate accessibility in combination with general principles of administrative law. Moreover, he stated, *inter alia*, that the university had not examined whether redistribution of working tasks or technological solutions could reduce his need for interpretation and that, according to the *travaux préparatoires* to the Discrimination Act, the university was obligated to strike a careful balance between his legitimate claim to equal treatment and the university's financial conditions. He furthermore requested that the Board, if it should come to the conclusion that it was not competent to examine his appeal, should submit his appeal to the Administrative Court for an assessment of whether the university's decision could be appealed according to the Administrative Procedure Act (*Förvaltningslagen*, 1986:223) and Article 6.1 of the European Convention on Human Rights. In that connection, he stated that matters of public employment concerned civil rights according to the European Court of Human Rights' case-law and that the matter should also be seen in the light of the prohibition of discrimination in Article 14 of the European Convention on Human Rights.

32. On 1 July 2016, the Board dismissed the appeal and stated that the complainant's appeal could not be adjudicated by the Board according to the Higher Education Ordinance (*Högskoleförordningen*, 1993:100), the Discrimination Act or any other provisions. However, the Board submitted the complainant's appeal to the Administrative Court in Stockholm according to his request.

33. On 26 January 2017, the Administrative Court in Stockholm dismissed the complainant's action and stated, *inter alia*, the following. A person whom a decision concerns may, according to Section 22 of Administrative Procedure Act, appeal against it provided that the decision affects him or her adversely and that the decision is subject to appeal. From Section 22a of the same Act, it follows that appeals can be made to a general administrative court, but that this does not apply to decisions concerning employment matters. Södertörn University's decision concerned an employment matter, and for this reason it

cannot be subject to adjudication by an administrative court under these provisions. However, according to Section 3 of the Administrative Procedure Act, the provisions on appeals in the Act shall always apply if it is necessary in order to provide for everyone's right to a fair trial in the determination of their civil rights or obligations as laid down in Article 6.1 of the European Convention on Human Rights. The university's decision does not, according to the Court, concern a civil right within the meaning of the European Convention on Human Rights. Accordingly, complainant's action was dismissed.

34. The complainant appealed the Administrative Court's decision to the Administrative Court of Appeal in Stockholm which, on 7 April 2017, decided not to grant leave to appeal.

35. The Administrative Court of Appeal's decision could be appealed to the Supreme Administrative Court and included a reference to an annex with information on how to appeal. However, the complainant did not appeal the decision.

2.2 Some facts regarding the Equality Ombudsman's supervision and the process in the Labour Court

36. Subsequent to the cancellation of the employment process, the complainant reported the university's decision to the Equality Ombudsman and claimed that he had been subject to discrimination. The Ombudsman decided to initiate supervision based on the facts given by the complainant. As part of that supervision, the Ombudsman wrote to the university on 16 June 2016, asking for the university's views on the complainant's statements to the Ombudsman and asking the university several questions. One question was whether it was possible for the university to offer the complainant alternative work tasks that would incur lower interpreting costs. The Ombudsman also put forward that the complainant had suggested that he could teach in ways other than via classroom instruction, including, *inter alia*, supervising and tutoring students by email, conducting examinations and teaching groups via online chat-rooms and, additionally, recording his lectures. The Ombudsman stated further that the complainant had also suggested that he could perform administrative and research tasks.

37. The university replied on 8 July 2016 and stated, *inter alia*, the following. Södertörn University has announced a position as a lecturer in public law … The working tasks mainly consist of teaching, and it is a question of a 'teaching position' (*undervisningstjänst*). It is not consistent with the university's recruitment needs to change the duties of the current position to the extent that would be necessary in order to significantly reduce the costs of interpretation. Nor is it possible to redistribute the working tasks of teaching to other employees at the university to significantly reduce the costs of interpretation. The absolute majority of the teaching must, for financial reasons, take place in large groups and not by distance supervision of individual students. The suggestion to conduct teaching via online chat-rooms or through recorded lectures would involve excessively far-reaching changes of the public law programme at Södertörn University to be considered reasonable. Even if some degree of such changes could be made, these changes cannot be expected to lead to a significant change in the need for interpretation support.

38. On 16 November 2016, the Equality Ombudsman brought action against the State before the Labour Court.

39. The Labour Court held a preparatory hearing on 4 April 2017, at which a judge, a recording clerk, two Equality Ombudsman litigation lawyers, a university attorney and the university's chief of staff were present. The hearing lasted for one hour.

40. The main hearing was held on 30 August 2017. In addition to the five judges and the court secretary, two Equality Ombudsman litigation lawyers, a university attorney, the complainant and two sign-language interpreters were present. The hearing lasted for one hour and 50 minutes.

2.3 Some clarifications

41. With regard to the facts, the Government also finds it necessary to make the following clarifications.

42. Firstly, the complainant refers to 'unused contributions' of SEK 187 million, which he claims to be the university's surplus for the year 2016 (pages 3 and 6 of the communication, cf. page 2). This, however, is incorrect. 'Unused contributions' refers to payments, principally for research from external financiers, which have not yet been put to use in the university's activities.

These unused contributions, intended for specific research projects, research centres and areas of research, are accordingly already earmarked and cannot be used for other purposes in the university's activities.

43. Secondly, the complainant makes note of the university's agency capital (*myndighetskapital*) in the communication (page 2). Agency capital is the surplus that may accrue when a public university does not make use of all the public research and educational funding it receives. The agency capital of Swedish public universities generally fluctuates from year to year. As a result, this capital is not an annual source of income and it must be used for the same purpose for which the university received it.

44. Finally, the complainant refers to what he calls "a surplus" of SEK 36.5 billion in the central government budget for 2016 (page 7 of the communication, cf. page 5 of the communication). In response to this, it should be noted that one key element of the fiscal policy framework is the legislated, disciplined central government budget process in which different expenditures are set against each other and any increases in expenditure are considered in the context of pre-determined fiscal space defined by the expenditure ceiling and the surplus target. Measures to promote and protect the rights and possibilities of persons with disabilities are found within several different expenditure areas in the budget. To further be noted is that in 2016, Sweden's national debt amounted to SEK 1 292 billion.

3. On the Admissibility

45. According to article 2(c) of the Optional Protocol, the Committee shall consider a communication from an individual inadmissible when the same matter has been or is being examined under another procedure of international investigation or settlement. The Government is not aware of the present matter having been, or being, subject to any other such investigation or settlement. It is assumed, however, that this will be ascertained by the Committee in the course of its examination of the admissibility of the present communication.

3.1 Whether the complainant has exhausted all available domestic remedies

46. Article 2(d) of the Optional Protocol precludes the Committee from considering any communication from an individual when all available domestic remedies have not been exhausted.

47. The Committee has held that domestic remedies need not be exhausted if they objectively have no prospect of success, but that mere doubts as to the effectiveness of those remedies do not absolve the author from the obligation to exhaust them (communication No. 31/2015, *D.L. v. Sweden*, decision of inadmissibility adopted on 24 March 2017, para. 7.3).

48. The complainant did not appeal the abovementioned decision of 7 April 2017 by the Administrative Court of Appeal in Stockholm (see paras. 31–35 above). The Government notes that, if successful, an appeal to the Supreme Administrative Court could have led to a finding that the complainant was entitled to appeal the decision of the university and, ultimately, to an examination of his claim that the university's decision should be revoked. There is nothing to suggest that an appeal to the Supreme Administrative Court would have had no prospect of success or would have been unreasonably prolonged. The Government therefore questions whether the complainant, in a situation similar to that in the abovementioned case of *D.L. v. Sweden*, can be considered to have exhausted all available domestic remedies. The Government nevertheless leaves this to the Committee to decide.

3.2 The communication is manifestly ill-founded

49. Irrespective of the outcome of the Committee's examination relating to article 2(c) and (d) of the Optional Protocol, the Government maintains that the communication is manifestly ill-founded and thus inadmissible pursuant to article 2(e) of the Optional Protocol. A general reference is made in this context to what is stated below on the merits.

3.3 At least a part of the communication should be declared inadmissible

50. Should the communication not be declared inadmissible in its entirety, the Government submits that part of the communication should be declared inadmissible according to the following.

51. Article 2(d) applies as well to parts of communications regarding specific issues raised before the Committee (cf. communications No. 21/2014, *F. v. Austria*, Views adopted on 21 August 2015, para. 7.3, and No. 7/2012, *Marlon James Noble v. Australia*, Views adopted on 2 September 2016, para. 7.8). In this connection, it should be noted that according to the Human Rights Committee, the author of a communication must have brought a substantive complaint in the domestic courts in respect of any allegation subsequently brought before the Human Rights Committee (e.g. communications No. 1118/2002, *Deperraz and Delieutraz v. France*, decision of inadmissibility adopted on 17 March 2005, para. 6.4, and No. 904/2000, *Van Marcke v. Belgium*, Views adopted on 7 July 2004, para. 6.3).

52. Turning to the present communication, the complainant claims that the "denial of satisfactory inquiry in regards [sic] to other possible adjustments to [his] needs and employment conditions is a violation of the right to a reasonable accommodation in itself" (page 6 of the communication). However, the Labour Court's judgment clearly shows that the complainant did not raise any issue relating to a lack of inquiry into accommodation measures before the Labour Court. The dispute before the Court (see the judgment under the heading 'The dispute') exclusively concerned the costs and reasonability of deaf interpretation, or in other words, in line with General Comment No. 6 (2018), the parties agreed on what accommodation was reasonable, i.e. what measures were needed and the extent of those measures, but disagreed on the costs of those measures and whether the measures would constitute a disproportionate or undue burden (cf. General Comment No. 6 (2018), para. 25(a) and (b)).

53. As stated above (para. 12), employees are obligated to inquire into possible accommodation measures and such measures can include, *inter alia*, changing how work is organised, working hours or tasks. However, the Labour Court can only adjudicate on issues raised by the parties to the dispute (according to Chapter 5, Section 3 of the Labour Disputes Judicial Procedure Act, and Chapter 17, Section 3 of the Swedish Code of Judicial Procedure

(*rättegångsbalken*, 1942:740)). Since the complainant did not raise any issue regarding a lack of inquiry into accommodation measures before the Labour Court, the Court was precluded from assessing whether the university should have made such inquires.

54. Consequently, the complainant did not give the domestic authorities the full possibility of examining the circumstances invoked before the Committee. The Government notes that, if successful, invoking the lack of inquiry before the Labour Court could have led to a finding that the complainant had been subject to discrimination. The Government submits that there is nothing to suggest that invoking these circumstances before the Labour Court would have had no prospect of success or made the process unreasonably prolonged.

55. Accordingly, the complainant's suggestion of violations of the Convention should be declared inadmissible to the extent the claim concerns a lack of inquiry into accommodation measures.

4. On the Merits

56. The complainant has based his complaint before the Committee on articles 5 and 27 of the Convention. He submits, essentially, that his rights have been violated as he has been denied reasonable accommodation because 1) the university and, in particular, the Labour Court made an erroneous proportionality assessment of the costs of deaf interpretation and 2) the university failed to inquire into other accommodation measures than deaf interpretation. With regard to the suggested wrongful proportionality assessment, the Government understands the complainant to suggest that Sweden's inability to finance and provide clear obligations concerning reasonable accommodation was a contributing factor to the violation.

4.1 The Convention provisions mainly in question

57. First of all, Article 5 of the Convention prohibits all discrimination on the basis of disability and guarantees all persons with disabilities equal and effective legal protection against discrimination on all grounds. The provision further states that States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided in order to promote equality and eliminate discrimination.

58. The concept of 'reasonable accommodation' is defined in Article 2 of the Convention 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".

59. The Committee's views on the normative content of the duty to provide reasonable accommodation has been further developed in General Comment No. 6 (2018), where it is stated, *inter alia*, that both terms 'disproportionate or undue burden' "refer to the same idea: that the request for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party" (para. 25(b)) and, furthermore, that "[p]otential factors to be considered include financial costs, resources available (including public subsidies), the size of the accommodating party (in its entirety), the effect of the modification on the institution or the enterprise, third-party benefits, negative impacts on other persons and reasonable health and safety requirements" (para. 26(e)).

60. Article 27 of the Convention essentially states that States Parties shall recognise the right of persons with disabilities to work on an equal basis with others, and that States Parties shall safeguard and promote the realisation of the right to work. This shall be done by taking appropriate steps, including through legislation, to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment (para. (1)(a)), to protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances (para. (1)(b)), to employ persons with disabilities in the public sector (para. (1)(g)) and to ensure that reasonable accommodation is provided to persons with disabilities in the workplace (para. (1)(i)).

4.2 The Labour Court's proportionality assessment did not violate the Convention

61. In the present communication, the main question is whether the Labour Court's proportionality assessment of the deaf interpretation measures amounts to a violation of the complainant's rights under articles 5 and 27 of the Convention.

62. As a starting point, the Government would like to stress that the Committee has held that, when assessing the reasonableness and proportionality of accommodation measures, States Parties enjoy a certain margin of appreciation, and that it is generally for the courts of States Parties to the Convention to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice (Communication No. 5/2011, *Jungelin v. Sweden*, Views adopted on 2 October 2014, para. 10.5).

63. As regards, firstly, the proceedings before the Labour Court, the following should be taken into account. The proceedings before the Labour Court involved not only written submissions from the two parties, i.e. Södertörn University and the Equality Ombudsman, but also an oral preparatory hearing and an oral main hearing before the Court. The complainant was present at the main hearing and the proceedings there were interpreted to sign language. This provided an opportunity for both sides to present their views in written and oral form and to provide written and oral evidence (although no oral evidence was presented). As a result, the Labour Court had a good opportunity to take on board all of the case material first hand. Accordingly, the Labour Court had a very good basis for making its assessment of the case. Furthermore, the Equality Ombudsman acted as a plaintiff in the proceedings at the request of the complainant and thus his case was pursued by a public authority specialised in the subject of discrimination, which ensured that his views and interests were properly voiced and safeguarded. In addition, it should be noted that the Labour Court is a specialised court with expertise in assessing claims concerning discrimination. Five members of the Labour Court took part in the hearing and deliberations, and they reached the unanimous conclusion that the claims of the Equality Ombudsman should be rejected.

64. Secondly, as regards the examination and assessment of the Labour Court, the Government would like to make a general reference to the judgment. The Committee has been provided with an English version of the judgment by the complainant and the Committee is thus able to fully acquaint itself with the Court's reasoning. The Government will therefore refrain from an exhaustive account but notes that, in short, the Labour Court found the following.

65. The Court made a thorough survey of relevant national and EU law and jurisprudence, the Convention and the Committee's views. The Court then proceeded with the question of the interpretation costs and made its

subsequent proportionality assessment based on the cost of SEK 520 000 annually, asserted by the Equality Ombudsman. The Court subsequently concluded that three facts led to a demand of greater accessibility measures in the present case, i.e. that the university was a) a state authority, b) with a large budget for personnel, and c) that the employment in question was intended to be full-time. However, the university's annual cost for interpretation services would in practice correspond to the pre-tax salary of the complainant, excluding employer's fees (the Court making a reference to the Labour Court case AD 2010 No. 13, which was assessed by the Committee in the abovementioned communication *Jungelin v. Sweden*). The Court moreover emphasised that it was not a question of a one-time expense and that the measure would not benefit other workers with disabilities (cf. dissenting opinion in *Jungelin v. Sweden*, para. 5, stating, *inter alia*, that the benefit for other employees with disabilities must also be taken into account). Finally, the Court held that it could not find that the Convention, the Employment Equality Framework Directive or the Discrimination Act and the *travaux préparatoires* supported finding it reasonable to require an employer, in a situation such as the present one, to take on accommodation measures of the current type at an annual cost of about SEK 500 000. The Labour Court's conclusion was that the accommodation measures that the university would have had to take in order to employ the complainant were not reasonable (i.e. proportional) and therefore the university had not discriminated against him.

66. The judgment undoubtedly shows that the Labour Court made a full and thorough examination, based on the Convention, national law and EU law.

67. Furthermore, the Government argues that the assessment made by the Labour Court involved applying the same kind of 'proportionality test' that the Committee would have had to apply in an assessment under articles 2, 5 and 27 of the Convention. In its application of the proportionality test, the Labour Court took a stance on whether the accommodation measures required to put the applicant in a comparable situation to a person without disabilities would constitute a disproportionate burden for the employer, and gave consideration to factors such as financial costs, resources available, including public subsidies, the size of the accommodating party, possible third-party benefits and the length of the relationship between the duty bearer and the rights holder (cf. General Comment No. 6 (2018), paras. 25(e) and 27). Accordingly, the Labour Court's assessment required scrutiny of economic factors and, in addition, an element of balancing the different interests involved, i.e. the employer's

interests on the one hand and the complainant's on the other. The Government submits that such an approach must be viewed as in line with the Convention.

68. In this connection, the Government notes that the complainant raises what he considers to be the negative consequences of the judgment for all deaf persons applying for employment in Sweden (page 6 f. of the communication). Such a far-reaching interpretation of the judgment to the detriment of deaf persons is not warranted since the Court clearly based its judgment on the specifics of the complainant's case. It should also be added that the Court's assessment, as mentioned above (para. 53), was limited to the circumstances on which the Ombudsman had chosen to base the claim of discrimination.

69. The complainant furthermore claims that the judgment is in stark contrast to the requirements of the Convention and refers to paragraph 41 of General Comment No. 2 (2014) (page 5 of the communication). However, that General Comment concerns article 9 and accessibility. Thus, the quoted paragraph has no clear bearing on the question of proportionality of the accommodation measures in the present communication (cf. General Comment No. 6 (2018) paras. 24 and 41).

70. In view of the above, it can be concluded that the domestic proceedings before the Labour Court and the Court's assessment maintained a high standard, and that there is no indication that the proceedings were arbitrary or otherwise flawed, or amounted to a denial of justice. Nor is there any indication that they lacked effective guarantees to protect the complainant against discrimination. The fact that the ruling of the Labour Court was to the complainant's disadvantage has, in itself, no bearing on this conclusion. Accordingly, and in line with what has been stated above concerning the doctrine of the margin of appreciation (see para. 62), the Government contends that the Committee should accept the Labour Court's conclusion that the measures that would have been necessary to place the complainant in a situation comparable to that of a person without his disability would impose a disproportionate or undue burden on the university. Consequently, the Labour Courts assessment did not amount to a violation of the complainant's rights under articles 5 and 27 of the Convention.

4.3 No violation due to a suggested lack of public funding or clear obligations

71. The complainant suggests that "the violation could have been prevented by the State either by specifically funding reasonable accommodation directly from the State budget, or specifically ensuring that state universities and public authorities have the financial preconditions and clear obligations [to] provide reasonable accommodation" (page 4 of the communication).

72. When it comes to clear obligations to provide reasonable accommodation, the Government refers to the Discrimination Act and the regulation of inadequate accessibility that were inserted in the Act precisely to align the Act with the Convention on this point (see para. 5 above). These rules are sufficiently clear and precise.

73. Regarding the complainant's quite general claim of lack of funding, the Government firstly questions that there is a sufficient connection between the suggested lack of public funding and the alleged wrongful proportionality assessment by the Labour Court. There are no indications of a specific connection between the suggested lack of funding and the Labour Court's conclusion. Accordingly, this part of the communication seems to concern state funding of accommodation measures in general. Furthermore, the general questions raised by the complainant in this part of the communication are clearly better suited for the reporting procedure under articles 35–36 of the Convention, since a full and thorough analysis of the State's funding would require not only an examination of all different ways in which the State's resources in some way contribute to providing accommodation for persons with different kinds of disabilities, but an examination of all other ways in which the State's resources are used to facilitate persons with disabilities' enjoyment of their rights and freedoms.

74. Should the Committee come to a different conclusion, the State Party must enjoy a particularly wide margin of appreciation when deciding in what way it should use its resources to fund accommodation for persons with disabilities under the Convention. As with other question of public funding, it is a matter of complex political democratic decisions balancing different interests.

75. In this connection, it should be noted that the European Court of Human Rights has held that the margin of appreciation available to states and national authorities in implementing social and economic policies should be a wide one (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, para. 46, Series A no. 98 and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, para. 97, ECHR 2003-VIII). As for the Human Rights Committee, a State's margin of discretion will vary depending on the context, but the Committee has applied a wide margin of appreciation or discretion when it comes to economic issues. See for example *Kitok v. Sweden*, (communication No. 197/1985, Views adopted on 27 July 1988, para 9.2), where the Committee held that "the regulation of economic activity is normally a matter for the State alone". Another relevant example is the case of *Love et. al. v. Australia* (communication No. 983/2001, Views adopted on 25 March 2003, para 8.2), concerning age discrimination, where the Committee found no violation because, *inter alia,* "reasons related to employment policy may be behind legislation or policy on mandatory retirement age". In a separate opinion, one member of the Committee added that "the limitations of certain economic and social rights, in particular the right to work … require scrutiny of various economic and social factors, of which the State party concerned is ordinarily in the best position to make objective and reasonable evaluation and adjustment. This means that the Human Rights Committee should respect the limitations of those rights set by the State party concerned unless they involve clearly unfair procedural irregularities or entail manifestly inequitable results."

76. Turning to the present communication, considerable funding was – as the judgment clearly shows – available to facilitate the employment of the complainant in the form of support through everyday interpretation (described above in paras. 25–29) and, more importantly, an annual wage subsidy (see paras. 19–24 above). In fact, the wage subsidy would cover nearly 30 percent of the annual interpretation costs (SEK 220 000 out of SEK 740 000). Thus, the state funding in the complainant's case must be considered sufficient, especially considering the wide margin of appreciation that should be enjoyed by the State.

77. In this connection, it should also be stressed that the fact that the abovementioned state funded measures were the only ones involved in the Labour Court's judgment does not necessarily mean that other funding measures were not available. Since the Equality Ombudsman did not question that the costs of interpretation should be calculated with consideration of the

support in the form of wage subsidy and everyday interpretation alone, nor the extent of those measures, the Court was precluded from considering the possibility of other funding measures.

78. In conclusion, and with regard to what has been stated above, the suggested lack of public funding or clear obligations reveals no violation of the complainant's rights under the Convention.

4.4 No violation due to a lack of inquiry

79. The complainant claims that his rights have been violated since the university failed to inquire into adjustment measures other than deaf interpretation.

80. As stated above (paras. 50–55), this part of the complainant's communication should be declared inadmissible. Should the Committee come to a different conclusion, the Government refers to the university's reply of 8 July 2016 to the Equality Ombudsman (see para. 37 above) where the university concluded, in essence, that the proposed measures would involve disproportionate changes to the advertised post as lecturer. The Government finds no reason to question the university's conclusion or reasoning. Moreover, the complainant has not substantiated that further inquiries could or should have led the university to arrive at another conclusion. Accordingly, the suggested lack of inquiry does not constitute a violation of the complainant's rights under the Convention.

81. In conclusion, and with reference to what has been submitted in the preceding paragraphs, the Government maintains that the present communication reveals no violation of the Convention.

5. Summary

82. Concerning **admissibility**, the Government leaves to the Committee to decide, under article 2(d) of the Optional Protocol, whether the complainant's failure to appeal the Administrative Court of Appeal's decision of 7 April 2017 means that he has failed to exhaust all available domestic remedies.

83. In any event, the Government contends that the present communication should be declared inadmissible

- under article 2(e) of the Optional Protocol since the communication is manifestly ill-founded and

- in part under article 2(d) of the Optional Protocol, since the complainant has, in part, not exhausted all available domestic remedies.

84. Concerning the **merits**, the Government contends that the present communication reveals no violation of the Convention.

Please accept, Members of the Committee, the assurances of our highest consideration.

Gunilla Isaksson
Deputy Director

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Legal Adviser