

APPLYING EU ANTI-DISCRIMINATION LAW
SEMINAR FOR MEMBERS OF THE JUDICIARY
Tallinn, 22-23 September 2022

DISCRIMINATION ON THE GROUNDS OF DISABILITY

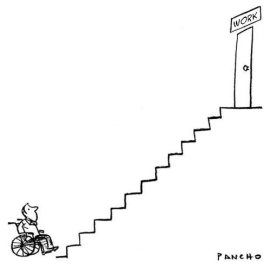
Galya Valkova
Judge, Sofia District Court



Funded under the Rights, Equality and Citizenship Programme
2014-2020 of the European Commission

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Disability?



<https://www.coe.int/en/web/compass/disability-and-disablism>

Medical model
↓
Social model
↓
Human rights model

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EU Law

► Charter of Fundamental Rights of the European Union

Article 21. *Non-discrimination*

1. *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, **disability**, age or sexual orientation shall be prohibited.*

► Treaty on the Functioning of the European Union

Article 10

*In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation.*

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► [Directive 2000/78/EC of 27 November 2000](#) establishing a general framework for equal treatment in employment and occupation.

In force: 2.12.2000

Article 2

Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) **direct discrimination** shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) **indirect discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular **disability**, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

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- ▶ [Directive 2000/78/EC of 27 November 2000](#) establishing a general framework for equal treatment in employment and occupation.

... Art. 2

(i) that provision, criterion or practice is objectively **justified** by a legitimate aim and the means of achieving that aim are **appropriate and necessary**, or

(ii) as regards persons with a particular **disability**, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

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- ▶ [Directive 2000/78/EC of 27 November 2000](#) establishing a general framework for equal treatment in employment and occupation.

Article 5

Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, **reasonable accommodation** shall be provided.

This means that employers shall take

- **appropriate** measures,
- where **needed in a particular case**,
- to **enable** a person with a disability
- to have access to, participate in, or advance in employment, or to undergo training,

unless such measures would impose a **disproportionate burden** on the employer.

This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

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- ▶ **Directive 2000/78/EC of 27 November 2000** establishing a general framework for equal treatment in employment and occupation.

(20) Appropriate measures should be provided, i.e.

- effective and
 - practical measures
- to adapt the workplace to the disability,

for example

1. *physical*
 - adapting premises and equipment.
2. *organisational*
 - patterns of working time,
 - the distribution of tasks or
3. *educational nature*
 - the provision of training or
 - integration resources.

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- ▶ **Convention on the Rights of Persons with Disabilities (CRPD)**

Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities

Art. 216 TFEU

Article 5

Equality and non-discrimination

1. States Parties **recognise** that all persons are equal before and under the law and are entitled without any **discrimination** to the equal protection and equal benefit of the law.
2. States Parties shall **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. In order to **promote equality and eliminate discrimination**, States Parties shall take all appropriate steps to ensure that **reasonable accommodation** is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

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▶ Convention on the Rights of Persons with Disabilities

Article 2 Definitions

'Discrimination on the basis of disability' means

- any distinction, exclusion or restriction on the basis of disability
- which has the purpose or effect of
- impairing or nullifying the recognition, enjoyment or exercise,
- on an equal basis with others,
- of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

It includes all forms of discrimination, including **denial of reasonable accommodation**.

'Reasonable accommodation' means 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.

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▶ Convention on the Rights of Persons with Disabilities

- ▶ Preamble - disability is an **evolving concept**.

Article 1 Purpose

Persons with disabilities include those who have

- **long-term**
- **physical, mental, intellectual or sensory impairments** which
- **in interaction with various barriers**
- **may hinder their full and effective participation in society**
- on an equal basis with others.

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Case-law

THE COURT OF JUSTICE OF THE EUROPEAN UNION

▶ C-13/05 - Chacón Navas

The concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. It must therefore be probable that it will last for a long time.

(disability ≠ sickness)

▶ C-303/06 - Coleman

The prohibition of direct discrimination is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on **the disability of his child, whose care is provided primarily by that employee**, such treatment is contrary to the prohibition of direct discrimination

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Case-law

C-335/11 HK Danmark and C-337/11 Skouboe Werge (Joined Cases)

- It should be noted, as a preliminary point, that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions, and consequently they prevail over acts of the European Union (Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 50 and the case-law cited).
- It should also be recalled that **the primacy of international agreements concluded by the European Union over instruments of secondary law** means that those instruments must as far as possible be **interpreted** in a manner that is **consistent with those agreements** (Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet and Others* [2012] ECR, paragraph 39 and the case-law cited).

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► HK Danmark (C-335/11 and C-337/11)

The concept of 'disability' in Directive 2000/78 must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.

The state of health of a person with a disability who is fit to work, albeit only **part-time**, is capable of being covered by the concept of 'disability'.

It should be noted here that **the definition of the concept of 'disability' within the meaning of Article 1 of Directive 2000/78 comes before the determination and assessment of the appropriate accommodation measures** referred to in Article 5 of the directive. Such measures are intended to accommodate the needs of disabled persons. They are therefore the consequence, not the constituent element, of the concept of disability. Similarly, the measures or adaptations referred to in recital 20 in the preamble make it possible to comply with the obligation under Article 5 of the directive, but do not apply unless there is a disability.

A reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.

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► C-356/12 - Glatzel

EU legislature, by laying down the provision whose validity is challenged, has weighed the requirements of road safety and the right of persons affected by a visual disability to non-discrimination in a manner which cannot be regarded as disproportionate in relation to the **objectives pursued**.

► C-363/12 - Z.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed of a surrogacy arrangement **does not constitute discrimination on the ground of disability**.

The validity of that directive cannot be assessed in the light of the United Nations Convention on the Rights of Persons with Disabilities, but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention.

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► C 354/13 - Karsten Kaltoft

That concept of 'disability' must be understood as referring **not only to the impossibility of exercising a professional activity, but also to a hindrance to the exercise of such an activity.**

The concept of 'disability' within the meaning of Directive 2000/78 **does not depend on the extent to which the person may or may not have contributed to the onset of his disability.**

It should be noted that obesity does not in itself constitute a 'disability' within the meaning of Directive 2000/78, on the ground that, by its nature, it does not necessarily entail the existence of a limitation as referred to in paragraph 53 of this judgment.

However, in the event that, under given circumstances, the obesity of the worker concerned **entails a limitation** which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, **obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78.**

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► C 395/15 - Mohamed Daouidi

- the fact that the person concerned finds himself or herself in a situation of temporary incapacity for work, as defined in national law, for an indeterminate amount of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person's capacity can be classified as being 'long-term', within the meaning of the definition of 'disability' laid down by that directive, read in the light of the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009;
- - the evidence which makes it possible to find that such a limitation is 'long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does **not display a clearly defined prognosis** as regards short-term progress or the fact that that **incapacity is likely to be significantly prolonged** before that person has recovered; and
- - in the context of the verification of that 'long-term' nature, the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data.

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▶ [C-406/15](#) - Milkova

In the event that Article 7(2) of Directive 2000/78, read in the light of the United Nations Convention on the Rights of Persons with Disabilities and in conjunction with the general principle of equal treatment, precludes legislation of a Member State such as that at issue in the main proceedings, the obligation to comply with EU law would require that the scope of the national rules protecting employees with a particular disability should be extended, so that those protective rules also benefit civil servants with the same disability.

▶ [C-270/16](#) - Carlos Enrique Ruiz Conejero

Article 2(2)(b)(i) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by that worker, unless that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim, which is a matter for the referring court to assess.

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▶ [C-397/18](#) - Nobel Plásticos Ibérica

Dismissal for ‘objective reasons’ of a disabled worker on the ground that he or she meets the selection criteria taken into account to determine the persons to be dismissed, namely having

- productivity below a given rate,
- a low level of multi-skilling in the undertaking’s posts and
- a high rate of absenteeism,

constitutes indirect discrimination on grounds of disability within the meaning of that provision,

unless the employer has beforehand provided that worker with reasonable accommodation, within the meaning of Article 5 of that directive, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities.

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► **Case C-16/19 - Szpital Kliniczny**

Directive 2000/78 is intended to protect a worker who has a disability, for the purposes of that directive, against **any** discrimination on the basis of that disability, not only as compared with workers who do not have disabilities, **but also as compared with other workers who have disabilities.**

Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that:

- – the practice adopted by an employer and consisting in the payment of an allowance to workers with disabilities who have submitted their disability certificates after a date chosen by that employer, and not to workers with disabilities who have submitted those certificates before that date, may constitute **direct discrimination** if it is established that that practice is based on a criterion that is inextricably linked to disability, inasmuch as it is such as to make it impossible for a clearly identified group of workers, consisting of all the workers with disabilities whose disabled status was necessarily known to the employer when that practice was introduced, to satisfy that temporal condition;
- – that practice, although apparently neutral, may constitute **discrimination indirectly based on disability** if it is established that, without being objectively justified by a legitimate aim and without the means of achieving that aim being appropriate and necessary, it puts workers with disabilities at a particular disadvantage depending on the nature of their disabilities, including whether they are visible or require reasonable adjustments to be made to working conditions.

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► **C-795/19 - Tartu Vangla**

By reason of the nature of a prison officer's duties and of the context in which they are carried out, the fact that his or her auditory acuity must satisfy minimum standards of sound perception laid down by national legislation may be regarded as a 'genuine and determining occupational requirement' within the meaning of Article 4(1) for the purposes of employment as a prison officer.

As Regulation No 12 seeks to preserve the safety of persons and public order, it must be held that that regulation pursues **legitimate objectives.**

Before being dismissed the applicant in the main proceedings had been employed as a prison officer for more than 14 years to the satisfaction of his immediate superiors. However, it appears from the same information that Regulation No 12 did not allow his employer to conduct, prior to his dismissal, checks in order to ascertain whether it was possible to take appropriate measures, in accordance with Article 5 of Directive 2000/78, such as

- use of a hearing aid,
 - exemption, for him, from the obligation of performing tasks requiring him to meet the minimum standards of sound perception prescribed, or
 - assignment to a post which does not require those standards to be reached,
- and no indication is provided as to the possible disproportionate nature of the burden which would be imposed by such measures.

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► **C-795/19 Tartu Vangla**

Article 2(2)(a), Article 4(1) and Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation which imposes an **absolute bar** to the continued employment of a prison officer whose auditory acuity does not meet the minimum standards of sound perception prescribed by that legislation,

without allowing it to be ascertained **whether that officer is capable of fulfilling those duties,**

where appropriate after the adoption of reasonable accommodation measures for the purposes of Article 5 of that directive.

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► **Case C-824/19 - Komisia za zashtita ot diskriminatsia and VA**
(Commission for Protection against Discrimination, Bulgaria)

Article 2(1) and (2), Article 4(1) and Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in the light of Article 5(2) of the United Nations Convention on the Rights of Persons with Disabilities, approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009, must be interpreted as meaning that Member States must take appropriate measures to integrate **a person who is blind into the working environment, and to allow him or her, wherever possible, to pursue the paid activity of juror in criminal proceedings.**

In the absence of provisions in national criminal procedural law relating to minimum physical requirements for a professional juror or to his or her physical health in general, Article 2(1) and (2), Article 4(1) and Article 5 of Directive 2000/78, read in the light of Article 5(2) of the United Nations Convention on the Rights of Persons with Disabilities, mean that a **blind person who fulfils the criteria under national law to be a paid juror in criminal proceedings and who has been admitted to work as a juror in a court of law cannot be totally excluded from participating in those cases based on his or her presumed inability to perform the duties of a juror on account of his or her disability.**

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- ▶ [Case C-824/19](#)
- ▶ OPINION OF ADVOCATE GENERAL SAUGMANDSGAARD ØE

There are, however, cases where sight seems to be a necessary faculty for the proper performance of the duties of a juror. These are cases where evidence decisive to the verdict consists of photographs, video surveillance recordings, graphics or drawings, and where its assessment depends entirely or largely on the visual impression which it makes.

This is the case, for example, in cases of murder, physical assault, including sexual assault, or fraud by means of forged documents, where the evidence is based primarily on visual media. While it is true that a description of photographs or films and discussion of them at the hearing will enable a juror to form an opinion, this will not be the result of the direct impression which the photographs or films have on him or her. **Moreover, even if a blind juror could be personally assisted by an impartial third party, the latter's intervention might influence the former's perception of the photographs and films.** At the very least, the juror would be unable to **form his or her own opinion directly** from that evidence but would have to do so indirectly through the third party.

Apart from such cases, it remains to be determined whether sight may be regarded as constituting a genuine and determining occupational requirement for performance in full of the activity of a juror in criminal proceedings. In that regard, it is important to point out that, in the absence of regulation in that area by EU law, **determination of the rules of criminal procedure is essentially a matter for national law alone.** In particular, neither Article 6 ECHR nor Article 47 of the Charter governs the admissibility of evidence as such, since this is primarily a matter for the national law of the Member States. The same applies to the rules relating to the assessment of evidence obtained in criminal proceedings against persons suspected of having committed criminal offences.

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- ▶ [Case C-824/19 VA](#)

In the present case, as is apparent from the information in the reference for a preliminary ruling, VA was **excluded from any participation** in criminal proceedings, irrespective of the matters concerned and without any investigation as to whether **reasonable accommodation**, such as material, personal or organisational assistance could be offered to her.

It also appears, subject to determination by the referring court, that that measure goes beyond what is necessary, in so far as it is clear from the reference for a preliminary ruling that, after the introduction of electronic allocation of jurors in August 2016, VA participated, in that capacity, in the judgment of numerous criminal matters. As noted both by the Commission in its written observations and by the Advocate General in point 100 of his Opinion, that fact is such as to indicate that VA is capable of performing those duties in accordance with the rules of criminal procedure.

Article 2(2)(a) and Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in the light of Articles 21 and 26 of the Charter of Fundamental Rights of the European Union and of the United Nations Convention on the Rights of Persons with Disabilities, approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009, must be interpreted as meaning that they preclude that a blind person be totally deprived of any possibility of performing the duties of a juror in criminal proceedings.

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Committee on the Rights of Persons with Disabilities

Performance of jury duty by deaf persons

Communication No. 35/2016, J.H., 31 August 2018:

every time a person with disabilities is summoned to perform jury duty, a thorough, objective and comprehensive assessment of his/her request for adjustment is conducted and all reasonable accommodation is duly provided to enable his or her full participation.

Communication No. 13/2013, Michael Lockrey, 1 April 2016,

Furthermore, while the confidentiality principle of jury deliberations must be observed, the State party does not provide any argument justifying that no adjustment, such as a special oath before a court, could be made to enable the person assisting with steno-captioning to perform his or her functions without affecting the confidentiality of the deliberations of the jury.

International Principles and Guidelines on Access to Justice for Persons with Disabilities

August 2020

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► Case C-485/20 HR Rail SA

Directive applies to conditions for access to employment, to self-employment or to occupation, and also to access to all types and to all levels of vocational **guidance**, vocational **training**, advanced vocational training and **retraining**. It is clear from the wording of that provision that it is sufficiently wide to cover the situation of a worker undertaking a **traineeship** following recruitment by his or her employer.

The concept of **'worker'**, within the meaning of Article 45 TFEU, which is the same as that referred to in Directive 2000/78 extends to a person who serves a traineeship or periods of apprenticeship in an occupation that may be regarded as practical preparation related to the actual pursuit of the occupation in question, provided that the periods are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer.

Where a worker becomes permanently incapable of remaining in his or her job because of the onset of a disability, **reassignment to another job** may constitute an appropriate measure in the context of **reasonable accommodation** within the meaning of Article 5 of Directive 2000/78.

Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the concept of 'reasonable accommodation' for disabled persons, within the meaning of that article requires that a worker, including someone undertaking a traineeship following his or her recruitment, who, owing to his or her disability, has been declared incapable of performing the essential functions of the post that he or she occupies, be **assigned to another position for which he or she has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer.**

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General comment No. 6 (2018) on equality and non-discrimination

Committee on the Rights of Persons with Disabilities

The **human rights model of disability** recognizes that disability is

- a social construct and
- impairments must not be taken as a legitimate ground for the denial or restriction of human rights.

It acknowledges that disability is one of several layers of identity.

Hence, disability laws and policies must take the diversity of persons with disabilities into account.

It also recognizes that human rights are interdependent, interrelated and indivisible.

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General comment No. 6 (2018) on equality and non-discrimination

Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in:

- (a) a fair redistributive dimension to address socioeconomic disadvantages;
- (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
- (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
- (d) an accommodating dimension to make space for difference as a matter of human dignity.

The Convention is based on inclusive equality

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General comment No. 6 (2018) on equality and non-discrimination

- The principles/rights of equality and non-discrimination are a **cornerstone** of the international protection guaranteed by the Convention.
- Promoting equality and tackling discrimination are cross-cutting obligations of **immediate realization**. They are not subject to progressive realization.
- Discrimination “on the basis of disability” can be against persons who have a disability at present, who have had a disability in the past, who have a disposition to a disability that lies in the future, who are presumed to have a disability, as well as those who are associated with a person with a disability.

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General comment No. 6 (2018) on equality and non-discrimination

Article 5 (3) on reasonable accommodation

- As an ex nunc duty, reasonable accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights.
- The reasonableness of an accommodation is a reference to its **relevance, appropriateness and effectiveness** for the person with a disability. An accommodation is reasonable, therefore, if it **achieves the purpose** (or purposes) for which it is being made, and is **tailored to meet** the requirements of the person with a disability.
- **The burden of proof** rests with the duty bearer who claims that his or her burden would be disproportionate or undue.

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General comment No. 6 (2018) on equality and non-discrimination

“Procedural accommodations” in the context of access to justice should not be confused with reasonable accommodation; while the latter is limited by the concept of disproportionality, procedural accommodations are not.

reasonable accommodation
≠
procedural accommodations

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General comment No. 6 (2018) on equality and non-discrimination

Article 13 on access to justice

The rights and obligations with respect to equality and non-discrimination outlined in article 5 raise particular considerations with respect to article 13, which, among others, call for the provision of **procedural** and age-appropriate **accommodations**.

An illustration of a procedural accommodation is the recognition of **diverse communication methods** of persons with disabilities standing in courts and tribunals.

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General comment No. 6 (2018) on equality and non-discrimination

In order to ensure effective access to justice, processes must **allow participation** and be **transparent**.

Actions that **enable participation** include:

- (a) Delivery of **information in an understandable and accessible manner**;
- (b) Recognition and **accommodation of diverse forms of communication**;
- (c) **Physical accessibility** throughout all stages of the process;
- (d) Financial assistance in the case of **legal aid**, where applicable, and subject to statutory tests of means and merits.

Suitable measures that can protect persons who are unable to defend themselves against discrimination, even when provided with support, or whose options are greatly limited by fear of the negative consequences of such attempts, are actions in public interest (*actio popularis*).

Furthermore, in order to provide **transparency**, a State party action must ensure that all relevant information is accessible and available and that there is adequate recording and reporting of all relevant claims, cases and court orders.

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Thank you!

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