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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

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Case Document No. 6

Validity v. Finland
Complaint No. 197/2021

**RESPONSE FROM VALIDITY TO THE GOVERNMENT'S
SUBMISSIONS ON THE MERITS**

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Department of the European Social Charter
Directorate General Human Rights and Rule of Law
Council of Europe
F-67075 Strasbourg Cedex
E-mail address: social.charter@coe.int

WRITTEN RESPONSE
to the Government's Observations on the Merits of the Collective
Complaint

Validity v. The Republic of Finland
No. 197/2020

COMPLAINANT:

Validity Foundation – Mental Disability Advocacy Centre

Address: Impact Hub, Ferenciek tere 2, 1053 Budapest, Hungary

Contact: tel.: + 36 1 780 5493; e-mail: validity@validity.ngo; ann@validity.ngo

Registered foundation number (Hungary): 8689

In partnership with:

Law Firm Kumpuvuori Ltd.

Address: Verkatehtaankatu 4, ap. 228, 20100 TURKU, Finland

Contact: tel.: +358 50 552 0024; e-mail: laki@kumpuvuori.fi

Registration number (Finland): 2715864-1

European Network on Independent Living - ENIL

Address: Mundo J, 7th Floor, Rue de l'Industrie, 1000 Brussels, Belgium

Contact: tel: + 32 2 893 25 83; e-mail: secretariat@enil.eu

Registration number (Belgium): 0628829521

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I. Introduction

1. By its letter of 17 November 2021, the European Committee of Social Rights (*hereinafter* “the Committee”) provided the Complainant organisation (*hereinafter* also “Validity”) with the Written Observations of the Government of the Republic of Finland (*hereinafter* also “Observations”) on the merits of Complaint no. 197/2020 (*hereinafter* also “the Complaint”). The Committee invited Validity to submit a written response in reply by 7 January 2022. Validity, together with the Law Firm Kumpuvuori Ltd. and the European Network on Independent Living (ENIL), partners in the present Complaint, have reviewed the Government’s Observations and hereby respectfully submits their comments.
2. In the written response, we firstly dispute factual claims of the Government which lack evidentiary support. In the second part, we reiterate that in the context of the covid-19 pandemic, the obligation to protect the life and health of social care institutions residents required releasing the residents with appropriate supports in the community. The Government failed to effectively engage with this core argument of the Complaint which, in Validity’s view, is partly attributable to their lack of understanding of the fundamental concepts on which the Complaint relied: the right to live independently and be included in the community, and the corresponding state obligation to deinstitutionalise social services. In the third part, we restate that the measures adopted by the Government in relation to persons with disabilities residing in social care institutions were not lawful, non-discriminatory, reasonable or necessary, and violated Articles 11, 14 and 15 in conj. with Article E of the European Charter on Social Rights (*hereinafter* also “the Charter”).
3. In this response, Validity addresses the merits only to the extent that they need to be clarified, refined, or expanded upon in light of the Observations. Validity reiterates all arguments raised in its initial Complaint and requests the Committee not to interpret their silence on any of the questions as an agreement with the Government’s position. Therefore, this response should be read in conjunction with the submitted Complaint.

II. Facts presented by the Government

4. Before addressing the legal argumentation of the Government, Validity wishes to respond to several factual claims by which the Government disputed the complainant’s account. Firstly, the Government asserted that the measures at question were merely

recommendations. Persons with disabilities were allegedly never prevented from leaving the housing service units (§ 32 of the Observations). While contacts with family members and friends were limited, engagement was encouraged and facilitated by other “safe means” (§ 28 of the Observations). The Government did not specify these claims and provided no evidence to support them.

5. These claims, as showed and evidenced in the Complaint, do not correspond to reality. The instructions were effectively understood and applied as legally binding prohibitions. They were enforced, and sanctions were applied in case of a breach (including inability to return to the housing service unit). Following these instructions, the management of housing service units applied firm restrictions on freedom of movement, including the prohibition to leave the institution or to accept any visits, including visits of support persons, assistants, or therapists. The Finnish legal system is firmly based on written law, and it is customary to accept written instructions of the Government as legally binding.¹ §§ 17-37 of the Complaint contain translated excerpts of the instructions whose language and ethos clearly indicates that the measures were not recommendations but orders. Similarly, the Information notes of various service providers detailed in the same part of the Complaint unequivocally show that service providers understood that they had an obligation to “obey” the Government instructions. Residents of the housing service units were effectively prohibited and prevented from leaving the units and from accepting any kinds of visits inside. In the period discussed in the present Complaint, the only “safe means” through which contacts were promoted and facilitated was by phone or electronic communication, by far not sufficient as a means of human contact, and inaccessible to many persons with disabilities.
6. Secondly, the Government claimed that the consultations with persons with disabilities and their representative organisations (§§ 127-129 of the Complaint) were ensured in sufficient quality. The Government claims to have been receiving regular reports about persons with disabilities from their representative non-governmental organisations since spring 2020 (§ 34 of the Observations). They also claim to have met with representatives of persons with disabilities twice in spring 2020 to discuss the accessibility of a mobile phone application (*ibid.*, § 54). The Government did not specify the nature of this exchange, its aims, nor what kinds of information were shared. No evidence or documentation was provided. According to online sources² containing excerpts of several reports submitted to the Government by organisations of persons with intellectual disabilities, the reports criticize the complete isolation of housing service units, and the legal uncertainty as to whether the Government instructions must be respected. It also acknowledges that in most cases, the housing service units providers interpret them as

¹ See, for instance, a survey conducted and published in 2014 by a Finnish newspaper showing the Finnish people’s strict acceptance of written rules, available online at: <https://yle.fi/news/3-7013790>

² The excerpts of the reports are available at: <https://www.tukiliitto.fi/toiminta/tukiliitto-vaikuttaa/koronan-aiheuttamat-haasteet/>

binding, and impose, therefore, isolation of their residents.³ To our knowledge, the Government did not respond to these concerns. Law Firm Kumpuvuori Ltd, partner in this complaint, requested in December 2021 the full reports by organisations of persons with intellectual and developmental disabilities from the Government to assess whether they indeed support the Government claims. The firm did not receive a response before the deadline for the submission of this written response. Once the reports will be shared, we will inform the Committee about their contents.

7. In our view, however, it is apparent that this exchange did not amount to an effective consultation with representatives of people with disabilities about the pandemic response and measures aimed at protecting people in residential social services. According to Validity's and its partners' knowledge, such consultation only took place through the consultative body established by the Government (§ 43 of the Complaint). The only representative of persons with disabilities was invited for such consultation in mid-May 2020 (ibid.). All measures challenged in this Complaint, therefore, were adopted without consultation with people with disabilities and their representative organisations.

³ See ibid. "**18 June 2020: "The visiting prohibition can not concern all persons living in housing service units of persons with disabilities. (...)** Room for legal interpretation and unclear instructions leave the heads of the units too much alone. (...) The Cabinet gave out its new guidelines (17.6.) as the Covid situation got easier. The society is opened up and there are less restrictions. However, the 24/7 visiting prohibition concerning housing service units still remains valid as a main rule. Organisations of persons with intellectual disabilities consider it as wrong and unreasonable, that all persons with disabilities living in housing service units are considered as same and categorically belonging to a risk group. For example, in housing service units of persons with intellectual disabilities, a lot of persons in normal health condition live there, and do not belong to a risk group."

3 April 2020: "Covid is taking its toe on persons with intellectual disabilities living alone and the families of special children (...) Practices of isolation of clients and protection of other clients in relation to self-determination and restrictive measures raise questions in group housing units. The capacity of persons with intellectual disabilities to cope with exceptional situation varies and demanding behaviour increases, if there is not enough daily activity.

9 April 2020: "Exceptional circumstances challenge housing service units. Worries relating to access to care, own coping and income takes its toes on persons with disabilities and their families. (...) "The Covid situation has its impact on lives of persons with intellectual disabilities, for example because the housing service units have difficulties to get replacement employees. The staff of the housing service units do not have access to Covid tests. There are not enough protective equipment in housing service units". (...) There are challenges of getting out of the units, and in some units going out is totally prohibited. Further instructions are awaited from the Ministry of Health and Social Affairs. In many places there is not knowledge on that the service of personal assistance can be continued (...) Especially personal assistance to leisure activities has been decreased. Rules on visiting to housing service units vary from municipality to municipality. Families struggle whether to take the person with disability home, or not to visit them because of the visiting prohibitions. Some end up in taking them home, which leads to very burdening situations. (...) Worries on getting to health care burdens. The discussions on restricting health care has risen worries among persons with disabilities and their close ones. Parents have worries and fear on getting health care and general fear on equal access to health care, and general fear of discrimination."

8. Thirdly, the Government also claimed that persons with disabilities residing in social care homes obtained sufficient accessible information about the virus (§ 54 of the Observations). The Government did not describe the location of the information allegedly made available did not specify what kind of information was made available and did not enclose any evidence. The complainant and its partner organisations are only aware of certain pieces of information having been made available on the Government website. No accessible information about the means of protection against the virus or access to healthcare services were available in the institutions themselves in the subject period. The persons with disabilities prevented to leave institutions did not have access to information about potential legal remedies, either, as detailed in the Complaint (§ 83 and §§ 132-133).
9. In summary, the Government did not effectively counter the Complaint's factual claims considering the nature of the Government pandemic instructions, consultation with persons with disabilities, and accessibility of information for persons with disabilities. It failed to demonstrate that, in fact, persons with disabilities could have left the institutions, and their contact with family and friends was facilitated by "safe means". Nor did they succeed in showing that persons with disabilities and their representative organisations were consulted about the pandemic measures concerning them and that they had access to timely, accurate and accessible information concerning the pandemic, means of protection against the virus, access to healthcare, or available legal remedies against interferences with their rights. These conclusions are important for assessing the strength of the Government legal arguments which are disputed below.

III. The obligation to deinstitutionalise during the pandemic

10. Validity's challenge to the Government response to the pandemic was structured into two main arguments. The first one, detailed in subsection A of the Grounds of the Complaint (part III), focused on how the covid-19 pandemic reinforces the Government obligation to deinstitutionalise social services. The second one, detailed in subsection B of the same part, argued that the Government's response did not comply with the basic requirements with interference with Charter rights. In this section, we wish to reiterate the first argument and dispute the Government's claim that isolating the institutional residents from the outside world was the only and necessary response to the pandemic, outweighing all the implied interferences with human rights.
11. The centre claim of the Government Observations was that the interference with human rights of persons with disabilities was outweighed by the need to protect the health and lives of persons with disabilities in the housing service units (§ 27). This argument rests on an important yet unpronounced assumption that the protection of the right to health and lives required such drastic response because no other response would have been capable of reaching the aim. The Complaint presented an array of evidence that this is not true. The evidence showed that, on the contrary, institutions increase the danger posed by the virus to their residents, not decrease it (§§ 66-73 of the Complaint). Institutions are confined spaces with large numbers of residents in which viruses may spread like a fire.

While this risk did not materialise in Finland, it did in other countries (such as Portugal, Spain, or Great Britain). The very research cited by the Finnish Government in § 25 of their Observations shows that the institutional setting was the most likely and prevalent source of infection by COVID-19.⁴ It also indicates that the main reason people with intellectual disabilities disproportionately die of COVID-19 is the lack of access to quality healthcare.⁵ Out of 79 people reported in the cited research as having died from COVID-19, the likely source of infection was other residents or staff in their care home (52 %).⁶

12. The London School of Economics published in May 2021 a convincing analysis demonstrating that the obligation to deinstitutionalise was intensified due to the pandemic, not the opposite, as claimed by the Government.⁷ The argument that isolated institutions are protected from outside danger is an illusion. For one, institutions employ personnel who still need to come and leave, eventually likely to bring the outside danger in. The closed doors of the institution do not prevent this transfer; they only allow it to spread all the faster within. This is the reason why international bodies insist that to prevent the spread of the virus in institutional settings, as it tragically happened in some countries, it is necessary to facilitate emergency deinstitutionalisation and release persons with disabilities in the community with appropriate and sufficient support services (§§ 71-73 of the Complaint).
13. The Government engages with this proposition by claiming that by doing so, it would probably have violated the Charter provisions (§ 32 of the Observations). In this paragraph, the Government manifests a disturbing lack of awareness of the obligations stemming from the United Nations Convention on the Rights of Persons with Disabilities (“UN CRPD”) which it ratified more than five years ago. “Deinstitutionalisation” does not imply only releasing people from institutions. It inevitably encapsulates also ensuring sufficient range of independent living arrangements and supports. The UN CRPD General Comment no. 5 on the right to independent living (CRPD/C/GC/5, 27 October 2017, mainly §§ 21, 28-37, 39) describes why such services are at the heart of the right to live independently and included in the community.
14. Similarly, emergency deinstitutionalisation is not a mere “moving of persons elsewhere” (§ 32 of the Observations) and leaving them without support, potentially putting them in danger. It requires a plan ensuring that all persons released in the community have access

⁴ See point 3. 3. of the cited paper: “For 79 people who died from confirmed or suspected COVID-19, the likely source of infection was other residents or staff in their care home (52%), a recent hospital stay (27%) or a source in the community (18%).” Heslop, Pauline et al. “Deaths of people with intellectual disabilities: Analysis of deaths in England from COVID-19 and other causes”, *Journal of Applied Research in Intellectual Disabilities*, 16 July 2021. Available at: <https://onlinelibrary.wiley.com/doi/10.1111/jar.12914>

⁵ Ibid, point 4, conclusions.

⁶ Ibid, point 3. 3.

⁷ LSE, Crystallising the Case for Deinstitutionalisation: COVID-19 and the Experiences of Persons with Disabilities, A report on request of the United Nations Special Rapporteur on the Rights of Persons with Disabilities. May 2021. Available at: <https://www.lse.ac.uk/cpec/assets/documents/CPEC-Covid-Desinstitutionalisation.pdf>

to the support they may need through generally available services, disability-specific services, formal or informal support networks, housing arrangements, and others. Resources, including examples of successful emergency deinstitutionalisation strategies, are available, for instance, at the European Network of Independent Living,⁸ Disability Rights International,⁹ or Validity website.¹⁰ Even an emergency and speedy deinstitutionalisation always requires ensuring sufficient, appropriate, and quality community-based support services helping people with disabilities live independently.

15. In this context, we would like to bring to the Committee's attention that ours is not the first complaint to an international body which highlights Finland's failure to support independent living of persons with disabilities. The first individual communication to the UN CRPD Committee concerning Finland, pending since 2018, demonstrates that people with intellectual disabilities do not have equal access to personal assistance. Such personal assistance is, by law, conditioned upon the person's "capacity to define the content and way of organising personal assistance", which effectively hinders the ability of persons with intellectual disabilities to obtain it. Removing this discriminatory criterion from the law to allow persons with intellectual disabilities to access personal assistance is, therefore, one rather easy step Finland can readily make to support independent living of persons with disabilities after deinstitutionalisation. However, the pandemic measures took Finland in the completely opposite direction of closing people in the existing institutions.
16. Validity wishes to reiterate that housing service units are institutions within the meaning of the UN CRPD, despite the Government claiming otherwise.¹¹ As explained in § 16 of the UN CRPD General Comment no. 5 on the right to independent living, institutions are not defined solely by their scale or design. They are defined first and foremost by the loss of personal choice and autonomy and by imposing a certain lifestyle on their residents. Even if they offer a certain degree of choice and control, these are usually limited to specific areas of life and do not change their segregating character. As emphasised by the UN CRPD Committee, "*nor even individual homes can be called independent living arrangements if they have other defining elements of institutions or institutionalisation.*" (CRPD/C/GC/5, 27 October 2017, § 16). Those are "*the lack of control over day-to-day decisions; lack of choice over whom to live with; rigidity of routine irrespective of personal will and preferences; identical activities in the same place for a group of persons*

⁸ ENIL, Emergency deinstitutionalisation, a joint call for action now! 11 June 2021, available at: <https://enil.eu/news/emergency-deinstitutionalisation-a-joint-call-to-act-now/>; or at:

<https://www.youtube.com/watch?v=ew5WM-OGMPc>

⁹ DRI, Safety through Inclusion: The Case for Emergency Deinstitutionalization – webinar series, 4 June 2020, available at: <https://www.driadvocacy.org/june-2020-webinar-series/>

¹⁰ Validity, Legal strategies to pursue emergency deinstitutionalisation during the pandemic, October 2020, available at: <https://validity.ngo/projects-2/tackling-torture-against-persons-with-disabilities-in-the-context-of-the-covid-19-pandemic-webinar-series-2/#essentialservices>

¹¹ In § 32, the Government claims that institutional care has been replaced with service housing "which provides more home like living conditions".

under a certain authority; a paternalistic approach in service provision; supervision of living arrangements; and usually also a disproportion in the number of persons with disabilities living in the same environment.“ (ibid.) In § 50 of the Complaint, we explained why all of the above also applies to the housing service units. It is, therefore, untrue that only 452 persons were in institutional care in Finland in 2019. In reality, it was many thousands more (see § 42 of the Complaint).

17. In conclusion, the fact that the risk that the virus spreads in institutional settings in Finland cannot be used as an argument why institutions should be maintained, and hardly implies that isolating persons with disabilities within the institutions was the only available and reasonable response to the pandemic. We submit that the core claims presented in the Complaint have not been effectively challenged. The Government failed to adopt appropriate steps to protect the health of residents of housing service units and failed to ensure that residents have equal access to healthcare, violating Article 11 of the Charter.

IV. The impermissibility of the disputed measures

a. Legality and non-discrimination

18. In the subsection B of the Grounds of the Complaint (part III), we argued that disputed measures did not comply with the basic requirements with interference with Charter rights: *(i) lawfulness, (ii) necessity and proportionality, (iii) reasonableness, (iv) absence of direct and indirect discrimination, (v) attention to the rights of disadvantaged individuals and groups; (vi) protection of the minimum core content of the right(s); (vii) genuine involvement of affected; and (viii) access to meaningful review.* (§ 101-102 of the Complaint, citations omitted). In this part of the response, we show that the Government did not successfully disprove the disputed measures' lack of legality and discriminatory nature. In the following one, we will dispute the Government claims that the measures were reasonable and necessary. As the Government did not engage with other listed requirements, we respectfully refer the Committee to the arguments detailed in the Complaint (§§ 125-131).
19. The Government challenged the claim of unlawfulness of the measures in question mainly by insisting that they were mere “recommendations”. Because the instructions were not allegedly legally binding, the Government is not responsible for the ensuing interferences with rights (§§ 17, 27, 29 of the Observations). This claim was disproved both in the Complaint and in the paragraphs above. The instructions were effectively formulated, understood, and applied as orders restricting the freedom of movement of persons residing in housing service units, prohibiting their visits, including from healthcare and social services personnel.
20. In the complainant’s view, the fact that the instructions themselves had to be carried out by social service providers whose actions constituted the immediate interference does not modify the Government responsibility. The Government is responsible for ensuring a system in which the Charter rights are not only respected but also protected and fulfilled.

This means that the failure to establish a system ensuring that private parties, such as the social service providers, respect the human rights of individuals is effectively a human rights violation committed by the state. In the present case, moreover, it was effectively the Government that instructed the social service providers to carry out the interference. It was based on their instructions that the interferences with the rights of the housing service units residents were carried out. The Government demonstrably did not act to ensure that the instructions are implemented in a way compliant with human rights guarantees.

21. As argued in the Complaint, the instructions lacked sufficient legal basis. The Government did not challenge the lack of legality in their Observations. The complainant, therefore, respectfully refers the Committee to the Complaint detailing why the interference was unlawful (§ 111-122 of the Complaint).
22. The claim of discriminatory nature of the measures was challenged by the Government by three arguments: restrictions on the freedom of movement were also introduced in relation to the rest of the population and enforced in relation to the whole Uusimaa region (§ 17, 29); the instructions in question concerning housing service units affected all residing in these facilities (§ 31); and the measures were justified by the increased danger the virus may pose to certain at-risk persons (§§ 24-27).
23. The first point relies on the claim that all inhabitants recommended to limit their social contacts and that the Uusimaa region was isolated completely for a short period of time. Validity submits that neither of the two situations was remotely comparable to that of the people residing in housing service units isolated from the outside world for months. First, people in the Uusimaa region were isolated from the rest of Finland but could leave their homes, meet their friends and relatives, use healthcare and social services as long as they stayed within the region. While the restriction on their freedom of movement was very real, it implied none of the impacts suffered by persons with disabilities residing in housing service units (§§ 111-112 of the Complaint).
24. Secondly, it is inappropriate to compare the Government instructions isolating the housing service units to the recommendations for the whole population to limit social contacts. As detailed above, the instructions were not formulated, understood, and applied as recommendations but as orders, and they were enforced as such. This was not the case for the rest of the population who was recommended to limit social contacts. It is decidedly radically different to recommend people residing in their own homes to limit their contacts and to instruct providers of social services to limit the social contacts of their residents. In the first case, people remain in control of their own lives, residing in their chosen homes, often together with their close ones, and make the decision to limit their social contacts themselves. In the second case, this decision is taken on behalf of the people by a third party, a social service provider, and effectively amounts to a prohibition of contacts, and restriction of the freedom of movement. Institutions cannot be, on any level, compared with homes. As argued above, the pandemic only highlighted this fact.

25. The second and third points made by the Government to dispute the discriminatory nature of the measures were that they also applied to the older persons residing in the housing service units, and that for both groups they were justified by their specific vulnerability to the virus. However, while elderly persons are indeed generally considered an at-risk group, and the Government has communicated this information throughout the pandemic, this is not the case for persons with disabilities. As iterated throughout the Complaint (mainly §§ 125-126), persons with disabilities residing in housing service units are a very diverse group of people. Many of them do not have any kind of illnesses which may increase their susceptibility to the virus. This claim was confirmed by the Minister of Justice, who likewise asserted in an interview in Helsingin Sanomat on 23 May 2020 that persons with disabilities as such are not an at-risk group unless the specific person has disease due to which that would be the case.
26. The Government claim (§ 30 of the Observations) that “a major part of all persons with disabilities belong to the risk group” is presented without any evidentiary support and appears to derive from false stereotypes rather than actual data. On the other hand, the available research shows that people with disabilities are made more vulnerable to the virus by diminished access to healthcare and the institutional settings they often reside in.¹² According to the available evidence, the increased susceptibility to the virus faced by certain persons with disabilities is attributable to society’s failure to treat people with disabilities as equals. An appropriate remedy cannot be a further restriction of rights but rather removing the sources triggering this inequality: safeguarding the right to independent living and effective equal access to quality healthcare.

b. Necessity and reasonableness

27. The core argument presented in the Observations was that the interferences with rights were necessary for the protection of life and health of persons with disabilities and that they were a reasonable measure in that it balanced this aim with other engaged rights. While the Government claim to have done such balancing (§ 10 of the Observations), it is not apparent either from their argumentation or from available public documents.
28. In the paragraphs above, we showed that the argument that the interferences were indeed necessary to protect persons residing in the housing service units from the virus presents a logical fallacy. It assumes that the measures prohibiting all social contacts did indeed contribute or were likely to contribute to such protection, considering the scientific knowledge of the day. While this may have been true for other settings or other situations, we presented arguments and evidence that it did not work when it came to isolating residents of institutions, including the housing service units. As reiterated throughout the Complaint, during the pandemic, institutions are not places of safety but places of danger. Isolating their residents within did not protect them. It exposed them to increased risk at the cost of violating their rights. The Government failed to effectively challenge the presented scientific and legal arguments and demonstrate that isolating people within the

¹² See above para 11 of this written response.

institutions indeed amounted to a necessary interference with their rights with a view to protecting their life and health.

29. The reasonableness requirement, moreover, implies that a careful balancing of competing rights and interests is carried out. For instance, while an indeterminate lockdown would likely lead to almost complete eradication of the pandemic, such measure was not introduced in any European state. It would amount to such severe interference with the human rights of the general population that it could not have been outweighed by the presented aim. Persons with disabilities were not shown the same consideration as the rest of the population. The false idea of protection seems to have overridden all other considerations.
30. We respectfully submit that the restrictive measures interfered with Articles 11, 14 and 15 in conj. with Article E of the Charter. While they were introduced to protect people in housing service units, they were not capable of reaching that aim and, therefore, could not have been justified by this legitimate aim. The measures were, moreover, unlawful, and discriminatory towards persons with disabilities, breaching the fundamental requirements of a justified interference with rights enshrined in the Charter.

V. Conclusion

31. The Government Observations argued that their pandemic measures introduced in relation to persons with disabilities residing in social care institutions were justified by the protection of life and health of the residents and necessary for reaching that aim. They were allegedly an outcome of a careful balancing of competing rights and interests at hand. In this response, we maintain that these arguments are false. Firstly, we reiterated our argument that isolating people within institutions increases the danger posed to them by the pandemic. This means that the pandemic reinforced the obligation to deinstitutionalise social care services in a speedy manner. Secondly, we repeated why the Government response was not permissible in light of the requirements of the Charter. In this response, we reiterated why it was unlawful, discriminatory, and was not necessary and reasonable.
32. In conclusion, we maintain the conclusion presented in the Complaint that the Government response to the coronavirus pandemic in spring 2020 violated the rights of persons with disabilities under Article 11 (right to health), Article 14 (right to social services) and Article 15 (right to independence and inclusion in the community) in conj. with Article E of the Charter.

In Budapest, 7 January 2022



Šárka Dušková

Litigation Manager, Validity