

HUMAN RIGHTS COMMITTEE

Pauger v. Austria

Communication No. 716/1996

9 July 1997

CCPR/C/60/D/716/1996*

ADMISSIBILITY

Submitted by: Dietmar Pauger

Victim: The author

State party: Austria

Date of communication: 22 January 1996 (initial submission)

Documentation references: Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 15 August 1996 (not issued in document Form)

Date of present decision: 9 July 1997

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision of admissibility

1. The author of the communication is Dietmar Pauger, an Austrian citizen and widower of a former school teacher in the Austrian civil service. He claims to be a victim of a violation by Austria of article 26 of the International Covenant on Civil and Political Rights. The present communication is a follow-up to a previous complaint the author had submitted to the Human Rights Committee for consideration under the Optional Protocol.

The facts as submitted by the author

2.1 The author's first wife, a school teacher in the State party's civil service in the region of Styria (Steiermark), died on 23 June 1984. With effect of November 1985, the author was entitled to a widower's pension, which was calculated on the basis of the transitional provisions of the Eight

Amendment to the Austrian Pensions Act (Pensionsgesetz). Until January 1995, this Amendment only provided for a reduced widower's pension, amounting to two thirds of the full pension entitlement. Widows, however, were entitled to the full pension.

2.2 The author initiated proceedings with a view of securing a full widower's pension; before the State party's Constitutional Court, he contended that the provisions of the Eight Amendment to the Austrian Pensions Act were discriminatory and, therefore, unconstitutional. The Constitutional Court ruled that the transitional provisions reflected continuing changes in society with respect to the principle of equality of sexes and dismissed the author's appeal on 3 October 1989.

2.3 The author subsequently submitted a communication to the Human Rights Committee, alleging a violation of article 26 of the Covenant 1/. On 30 March 1992, the Committee found that the award of a reduced widower's pension to the author, calculated on the basis of the transitional provisions of the Eighth Amendment to the Pensions Act, constituted unlawful discrimination on the grounds of sex, in violation of article 26 of the Covenant. According to the author, the State party's authorities have failed to readjust and re-calculate his pension entitlement(s), in spite of the findings of the Committee of 30 March 1992.

2.4 On 4 October 1991, the author remarried. Under Section 21 of the Austrian Pensions Act, Mr. Pauger was entitled to a one-time lump-sum payment (Abfindungszahlungen) in the amount of 70 monthly pension payments to which he was entitled at the time of his re-marriage, and which replaced his previous pension entitlements. The Styria Regional Education Board (Landesschulrat) accordingly commuted the author's entitlement to a widower's pension and awarded a lump-sum payment of AS 423,059, calculated on the basis of his reduced pension entitlements.

2.5 On 8 November 1991, Mr. Pauger appealed against the decision of the Styria Regional Education Board, arguing that the calculation of the lump-sum should be based on his full pension entitlement. On 9 January 1992, the regional government of Styria dismissed the appeal.

2.6 The author further appealed this decision to the Supreme Administrative Court (Verwaltungsgerichtshof) of Austria. On 28 September 1993, the Court found that the one-time lump-sum payment had to be considered as a single payment of the monthly instalments the applicant would receive in the years following his remarriage. As the author would have been entitled to a full pension from 1 January 1995 onwards, the 70 monthly instalments had to be calculated differently depending on the dates of reference. Those instalments corresponding to pension payments before 1 January 1995 had to be calculated on the basis of reduced pension entitlements, and the remainder on the basis of full pension entitlements. In January 1994, the lump-sum payment was recalculated by the Styria Regional Education Board on the basis of the criteria laid down by the Supreme Administrative Court, and raised to AS 500,612.

2.7 Not satisfied with this solution, the author filed a complaint with the European Commission of Human Rights 2/. By decision of 9 January 1995, the European Commission held that the author's application concerned essentially the same issues as his previous communication under the Optional Protocol to the Human Rights Committee, namely discrimination, both in as much as his claim to a widower's pension and the applicability of the transitional provisions of the Eighth Amendment to his pension entitlements was concerned. The Commission concluded that the "same matter" had

already been submitted to (and decided by) another procedure of international investigation or settlement, and dismissed the author's application pursuant to article 27, paragraph 1(b), of the European Convention on Human Rights and Fundamental Freedoms.

2.8 On the requirement of exhaustion of domestic remedies, the author explains that he did not apply to the Constitutional Court for redress, because he considered that such an action would inevitably fail in the light of the Constitutional Court's decision on essentially the same matter of 3 October 1989. He therefore submits that all available domestic remedies have been exhausted.

2.9 As to the reservation to article 5, paragraph 2(a), of the Optional Protocol entered by Austria upon ratification of the Protocol, pursuant to which the Committee is precluded from considering a communication if the same matter has been examined by the European Commission on Human Rights, Mr. Pauger contends that his case was declared inadmissible on the ground that the Commission considered that it lacked competence to examine the matter, and that in contrast to other cases, the alleged violations of the European Convention were not even considered by the Commission. He argues that the Commission's decision to declare his case inadmissible cannot be regarded as an "examination" of the "same matter", within the meaning of the reservation to article 5, paragraph 2(a), of the Optional Protocol entered by Austria, and that the Human Rights Committee is not precluded from considering his case.

The complaint

3. It is submitted that the lump-sum payment of AS 500,612 finally awarded by the Styria Regional Education Board is AS 133,976 less than would be a lump-sum payment calculated on the basis of full pension entitlements a widow would be able to claim. The author contends that this constitutes sex-based discrimination against him, in violation of article 26 of the Covenant.

State party's admissibility observations and author's comments

4.1 By a submission of 11 October 1996, the State party invokes its reservation to article 5, paragraph 2(a), of the Optional Protocol, pursuant to which the Committee may only consider a communication if it has ascertained that the same matter has not been examined by the European Commission of Human Rights. In the instant case, it is said to be clear that the European Commission was seized of the "same matter".

4.2 The State party rejects the author's view that since the European Commission did not deal with the merits of his claim and declared his case inadmissible on the ground that the Human Rights Committee had already examined the "same matter", the complaint had not been "examined" and that the reservation accordingly does not apply. The State party explains that "the purpose of the reservation is to ensure that where the European Commission has been seized of a matter, whatever the Commission's decision may have been, the UN Human Rights Committee cannot be seized of the same matter. The reasons why the reservation was entered were (a) to avoid subjecting the European Commission to review by another international organ and (b) to avoid the emergence of diverging case-law of different international organs. These aims of the reservation refer to all types of decisions issued by the European Commission".

4.3 It is noted that in its January 1995 decision, the European Commission examined the case with reference to the Human Rights Committee's Views of 30 March 1992 and found that the author's communication to the Human Rights Committee and his case before the Commission essentially concerned the same issue (page 5 of European Commission's decision). Austria therefore concludes that the reservation to article 5, paragraph 2(a), of the Optional Protocol applies, and that the Committee has no jurisdiction to consider the present case.

4.4 Subsidiarily, the State party argues that the case constitutes an abuse of the right of submission within the meaning of article 3 of the Optional Protocol: the legal issue is the same as that in two previous cases examined by two international instances of investigation or settlement and has already been settled.

5.1 In his comments, the author considers that the Committee's Views of March 1992 only decided his case up to that moment in time and did not give the State party a right to violate his rights under the Covenant thereafter. Therefore, it must be admissible to introduce a new communication alleging sex-based discrimination since March 1992. And if this (new) complaint is deemed inadmissible under the European Convention of Human Rights by the European Commission, then the Human Rights Committee should be allowed to consider the complaint - otherwise, no international instance would be competent. Mr. Pauger thus contends that his communication should be deemed admissible.

5.2 The author further argues that the Austrian reservation to article 5, paragraph 2(a), of the Optional Protocol does not apply in his case, because the European Commission merely declared his complaint inadmissible, without examining the merits of his claims. To his mind, the aims of the Austrian reservation advanced by the State party - to avoid subjecting the European Commission to review by another international body and to avoid the emergence of diverging case-law of different international bodies - would not be contradicted if the Human Rights Committee declared his complaint admissible.

5.3 According to the author, the European Commission's ratio decidendi of 9 January 1995 has no relevance to his case before the Committee. He further disagrees with the Commission's opinion that the present communication concerns the "same matter" as that already examined by the Committee in the Views of March 1992, given that the present communication basically is based on facts which occurred since that date.

5.4 The author refutes the Convention that his complaint is an abuse of the right of submission. Rather, he argues, it is the State party which has abused its authority, since it took no measures to remedy the violation of article 26 found by the Committee. On the contrary, some Government officials publicly disavowed the Committee's View, which makes it necessary, in the author's opinion, to examine the matter once again.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has noted the author's argument that a further complaint to the Constitutional Court of Austria would be futile in his situation, as the Constitutional Court had already adjudicated on basically the same issue in its judgment of 3 October 1989. The State party has not challenged the requirements of article 5, paragraph 2(b), of the Optional Protocol have been met in the present case.

6.3 With respect to the author's claim under article 26, the Committee notes that the author's complaint submitted to the European Commission on Human Rights was based on the same events and facts as the complaint he now submits under the Optional Protocol. It recalls that in respect of article 5, paragraph 2(a), of the Optional Protocol, Austria entered the following reservation upon ratification: "The Republic of Austria ratifies the Optional Protocol ... on the understanding that, further to the provisions of article 5(2) of the Protocol, the Committee ... shall not consider any communication from an individual unless it has ascertained that the same matter has not been examined by the European Commission of Human Rights established by the European Convention for the protection of Human Rights and Fundamental Freedoms".

6.4 In the instant case, the Committee is seized of the "same matter" as the European Commission was. As to whether the European Commission "examined" the matter, the Committee begins by noting that the Commission declared the author's complaint inadmissible on the basis of article 27, paragraph 1(b), of the European Convention, because it considered in turn to be seized of the "same matter" as had been before the Human Rights Committee in the author's first complaint to the Committee (communication No. 415/1990). The Committee observes that the European Commission declared the author's application inadmissible on procedural grounds, without examining in any way the merits of the author's claim. In so doing, it admitted that there were some differences in the author's first application to the Human Rights Committee and his subsequent application to the European Commission, but that the two cases concerned "essentially the same issue". On this basis, the Committee considers that the European Commission did not "examine" the author's complaint, since it declared it inadmissible on procedural grounds, which related to the earlier examination of the same issue by the Human Rights Committee.

6.5 In the light of the above considerations, the Committee is of the opinion that it is not precluded by the Austrian reservation to article 5, paragraph 2(a), of the Optional Protocol, from considering the present communication.

7. The Human Rights Committee therefore decides:

(a) the communication is admissible in so far as it appears to raise issues under article 26 of the Covenant;

(b) that, pursuant to article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of the present decision, written explanations or statements clarifying the matter and the measures, if any, taken by it;

(c) that any explanations or statements received from the State party shall be transmitted by the Secretary-General under rule 93, paragraph 3, of the Committee's rules of procedures, to the author,

with the request that any comments he may wish to submit thereon should reach the Committee within six weeks of the date of the transmittal;

(d) that this decision shall be communicated to the State party and to the author.

(Done in English, French and Spanish, the English text being the original version.)

Notes:

1/ Communication No. 415/1990.

2/ Application No. 24872/94

*All persons handling this document are requested to respect and observe its confidential nature.