

## HUMAN RIGHTS COMMITTEE

### Krausser v. Austria

Communication No. 890/1999

23 October 2002

CCPR/C/76/D/890/1999

### ADMISSIBILITY

*Submitted by: Mr. Emmerich Krausser*

*Alleged victim: The author and his mother*

*State party: Austria*

*Date of communication: 27 September 1999 (initial submission)*

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 2002,

Adopts the following:

#### **Decision on admissibility**

1.1 The author of the communication is Mr. Emmerich Krausser, an Austrian citizen, currently residing in Blumenau, Brazil. He claims to be the victim of violations by Austria of articles 2, 12, 14, 17 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

1.2 Austria became a State party to the Covenant on 10 December 1978. The Optional Protocol entered into force for Austria on 10 March 1988.

#### **Facts as submitted by the author**

2.1 The author married to one Elvira Krausser on 15 September 1978. In November 1978, a

daughter was born. On 25 July 1980, the County Criminal Court (Bezirksgericht für Strafsachen, Graz) convicted the author for actual bodily harm against his wife and sentenced him to pay a fine that could be substituted by 20 days of prison. The author's request for a retrial was rejected on 16 March 1981. The author brought various criminal charges against his wife and others in the course of 1980 and 1981 which did not lead to formal opening of proceedings.

2.2 On 11 March 1981, the County Court (Bezirksgericht für Zivilsachen Graz) granted custody over the author's daughter to the author's wife, after she had moved out of their apartment.<sup>1/</sup> On 14 May 1981, the appeal of the author against this decision was rejected. On 7 July 1981, the County Court ordered the enforcement of its decision, i.e. the delivery of the child by the author to his wife. When execution failed, the author's wife submitted to the Public Prosecutor information against the author for withholding a minor from the custody holder.<sup>2/</sup> The police questioned the author on 19 August 1981 upon his return from a summer holiday in Yugoslavia and criminal investigations were discontinued on 26 August 1981; the author was informed accordingly. The Public Prosecutor resumed the procedure on 10 September 1981 upon new information laid by the County Court. On 6 November 1981, the District Court ordered the author's detention and issued an international arrest warrant. Sometime in autumn 1981, the author and his daughter left Austria for Brazil.<sup>3/</sup> In August 1982, the author's mother was convicted for aiding and abetting the author at the withholding of a child from the person entitled to have custody.

2.3 On 27 November 1989, the author applied for a regular passport for all countries, valid for 10 years, at the Austrian Consulate in Curitiba, Brazil. On 12 February 1990, the Consulate refused the issuance of a passport on the basis of the Austrian Passport Law (Passgesetz 1969),<sup>4/</sup> because the author left Austria in knowledge of a criminal procedure pending against him and intending to escape criminal investigation. On 1 March 1990, the Consulate rejected the author's complaint. On 18 September 1990, the Federal Ministry of Interior (Bundesministerium für Inneres) rejected the formal appeal (Berufung) of the author on the basis of information received by the competent District Criminal Court (Landesgericht für Strafsachen Graz) that an international warrant for the author's arrest (Haftbefehl) was still in force. On 29 September 1994, the Federal Administrative Court (Verwaltungsgerichtshof) rejected the author's appeal against the decision of the Federal Ministry of Interior, because it was not submitted within the legal deadline.

2.4 Meanwhile, a new application for a regular passport was rejected in all instances. On 29 September 1992, the Federal Constitutional Court (Verfassungsgerichtshof) rejected a request for legal aid by the author to appeal the decision of the Federal Ministry of Justice, stating that there was no grounds for the assumption that the decision was based on an unlawful general regulation or that in applying the pertinent legal provisions, the ministry had apparently committed an error affecting constitutional law. Nevertheless, between 15 February 1993 and 2 July 1994, the author submitted nine further applications for a passport; all of them were rejected. With a view to receiving a passport, the author applied also for Brazilian citizenship in March 1993. The application was rejected on the basis of information received by the Ministry of Justice of Brazil from the Austrian Embassy that the author was sought by the Austrian authorities for a criminal offence penalized with more than one year of imprisonment.

2.5 On 9 January 1992, the author requested a legal aid lawyer for the criminal procedure pending

against him and claimed financial compensation for costs that would be incurred by his appearance before the investigating judge in Austria. On 2 September 1992, the District Criminal Court rejected his request and argued that a defence lawyer was not required at the early stage of the procedure and that the author did not provide sufficient details on his financial situation. On 26 April 1993, a request by the author to receive a copy of his criminal record was rejected in view of the arrest warrant, in accordance with Austrian law. The District Criminal Court rejected a new request for legal aid regarding the criminal procedure on 28 January 1996.

2.6 On 27 October 1993, the Federal Ministry of Justice (Bundesministerium für Justiz) issued a letter of safe conduct (Geleitbrief) for the author's appearance before the District Criminal Court and the arrest warrant was abrogated until 1 March 1994. However, the author did not appear at the court. On 12 July 1994, the Federal Ministry of Justice issued another letter of safe conduct valid until 1 August 1995. The Austrian Embassy issued a passport valid one year, until 1 September 1995. On 21 August 1995, the District Criminal Court recalled the arrest warrant upon request by the Office of the Public Prosecutor (Staatsanwaltschaft beim Landgericht Graz). On 2 October 1995, the Austrian Embassy in Brasilia issued a passport valid until 2 October 2005. All appeals pending with the Federal Administrative Court (Verwaltungsgerichtshof) against decisions rejecting the author's application for a passport were stayed.

2.7 On 2 July 1997, the Higher District Court (Oberlandesgericht Wien) rejected the author's request for legal aid to claim compensation for misconduct against the State party, because the relevant legislation (Amtshaftungsgesetz) does not provide for such a claim against the decisions of courts in appeal procedures. On 10 September 1997, the department of finance (Finanzprokuratur) rejected a compensation claim by the author, among other reasons, as statute-barred. The competent courts also rejected subsequent requests for legal aid in the same matter. On 26 February 1999, the Constitutional Court (Verfassungsgerichtshof) rejected a request by the author for legal aid to claim compensation for misconduct by various authorities of the State party.

## **The complaint**

3.1 The author submits that his conviction on a charge of domestic violence was based on inconclusive facts, as appeared from subsequent expert opinions collected by him. The author claims that failure of the courts to change the decision entails a violation of article 14, paragraph 6, of the Covenant. Furthermore, the Public Prosecutor discontinued investigations of charges of false representation brought by the author against the expert witnesses heard during the trial. The author claims that he was discriminated against in violation of article 26 of the Covenant.

3.2 The author claims that the judicial procedure leading to the decision of the County Court to grant the custody over his daughter to his wife violated articles 14, paragraph 1; 17 and 26 of the Covenant. The author submits that the report by the social worker and the police report taken into account by the Court were not reliable and had been produced without his participation.

3.3 The author claims that he had not been aware of an ongoing criminal investigation against him in Austria, when he left the country. The author claims that he left Austria to escape ongoing injustice. The author submits that he was fired from his job after police officers had searched for him

in his absence and that because of his previous conviction for domestic violence he was unable to find a new job. Therefore, the author had to leave Austria. The author submits that he learned of the pending criminal investigation only in February 1996, when he received the decision of the District Court rejecting his request for legal aid.

3.4 The author further submits that his mother was wrongfully convicted of complicity in withholding of a minor from the rightful custodial parent. The author claims that the procedure against his mother violated article 14, paragraph 1, 2, 3 (d), (e), (f), (g), and 5, of the Covenant. The author argues that his mother attended only primary school in Yugoslavia and is unable to understand the official German language used by the Austrian courts. In addition, she had already sight and hearing deficits in 1980. The author claims that the State party forced her to testify against herself by interrogating her without the presence of a defence lawyer.

3.5 The author claims that the Austrian Embassy in Brazil knew of his residence and business address at least since December 1989. The author submits that, therefore, the State party was able to request his extradition to Austria or his prosecution in Brazil. Furthermore, the author claims that the Austrian authorities could have interrogated him any time in Brazil since 1990. The author claims that he has been denied a public hearing and that he has been presumed guilty without possibility for defence in violation of article 14 of the Covenant.

3.6 The author claims that he had financial problems and was unable to hire a lawyer or travel to Austria himself. He attaches various income tax declarations that should indicate his financial situation. The author argues that the Austrian Embassy was fully aware of his financial situation; nevertheless, the authorities forced him to return to Austria. The author claims that the State party violated article 12 of the Covenant in denying him a passport and preventing him from leaving Brazil. In treating him differently from people in a comparable situation in Austria, the author claims that the State party violated article 26 of the Covenant.

3.7 The author claims that, furthermore, his financial and personal situation was not sufficiently taken into account by the courts when rejecting his claims for legal aid. With reference to article 2, paragraph 3, of the Covenant, the author claims that it must have been possible for him to claim compensation for financial losses caused by misconduct of authorities before the courts of the State party.

3.8 The author submits that the Austrian Embassy submitted false information to the Ministry of Justice of Brazil when the latter was considering his request for citizenship. The author claims that the State party obstructed the naturalization of the author in Brazil and, thus, violated article 15 of the Universal Declaration of Human Rights. The author submits further that the same information was brought to the attention of his employer, who dismissed him in December 1994 after the author had failed to meet a final deadline to settle his affairs and receive a passport. The author claims that due to his damaged reputation he was unable to find a new job and, as a consequence, is unable to support his family. The author claims compensation for the financial damage caused by the State party.

3.9 The author refers to the decision of the District Criminal Court of 28 February 1996 that rejected his request for legal aid and alleges that the court informed him that at the preliminary stage of the

procedure he would be required to meet the investigative judge without the presence of an attorney or the public prosecutor. On the basis of this meeting, it would be decided whether he would be formally accused. The author claims that this practice violates article 14, paragraph 3 (g), of the Covenant as he might be forced into confession during that meeting.

### **State party's observations on admissibility and merits**

4.1 By submission of 24 March 2000, the State party argues that the author has failed to exhaust available domestic remedies and that, therefore, the communication is inadmissible. The State party indicates that the author failed to file complaints with the Federal Administrative Court (Bescheidbeschwerde) on the lawfulness of the decisions of the Federal Ministry of Justice within the legal deadline of six months. Such a complaint would have allowed the court to consider any violation of human rights and quash the administrative decision.<sup>5/</sup> However, the author's various complaints have not been successful as they were filed out of time. Furthermore, the State party submits that the author's request for a passport was already satisfied in September 1994, when he was issued a passport with a validity period of one year.

4.2 In its further submission of 12 May 2000 on the admissibility and merits, the State party alleges that the author was aware of the criminal investigation pending against him when he left Austria. The State party argues that, upon resumption of the procedure, the Public Prosecutor served a writ of summons that was deposited with the author's registered address and subsequently deposited at the post office. The author had not indicated to the authorities of the State party that he left his permanent address and the investigation officials received the information that the author stayed with the child at his permanent address during weekends. Therefore, pursuant to Austrian law, service of the information was assumed.

4.3 Already on 21 August 1990, and therefore, prior to the first decision of the Austrian Consulate in Curitiba on the author's complaint against the rejection of issuing a regular passport for all countries, valid for 10 years, the Austrian Embassy in Brasilia informed the author of the possibility of issuing a passport for only a short period that would enable him to return to Austria, provided that he committed in writing to appear before the courts. Instead, the author submitted numerous requests for issuing a passport with a regular validity period. Furthermore, in its decision of 15 April 1992, the Federal Ministry of Interior explained to the author that the rejection of his request was not a penalty, but merely a measure designed to guarantee the administration of justice.

4.4 With regard to the first letter of safe conduct, the State party submits that the author, through his own fault and despite being summoned, failed to appear before the District Court on 28 February 1994. With regard to the second letter of safe conduct, the State party submits that the District Court had informed the author that the time of the hearing could largely depend on his availability. Following his request, the author received a passport with limited validity of one year. However, the author did not appear before the District Court within the deadline of the letter of safe conduct.

4.5 On 9 August 1995, the public prosecutor's office revoked the detention order and the arrest warrant, because these measures had so far proven to be ineffective. Therefore, the reason for denying the author a passport were removed and the author was issued a passport, valid for a period

of 10 years. Complaints of the author pending at the Administrative Court were no longer dealt with, because the issue was moot.

4.6 As to the alleged violation of article 2, paragraph 3, of the Covenant following the rejection of his various requests for legal aid to claim compensation for misconduct of officials, the State party refers to the cases of *Lestourneaud v. France* 6/ and *K.L. v. Denmark* 7/ and submits that this provision can only be violated in conjunction with one of the substantive provisions of the Covenant. Furthermore, since the compensation claims of the author were not in accordance with the relevant national legislation, the provision of legal aid was not required in the interest of justice and had to be rejected by the competent authorities.

4.7 As to the alleged violation of article 12, paragraph 2, of the Covenant with regard to the refusal of the Austrian Consulate to issue a passport valid for all countries and for a regular period of 10 years, the State party argues that the author was offered a passport with limited validity period to return to Austria. Therefore, the refusal did not constitute an interference with the author's right to freedom of movement. Should the Committee come to different conclusions, however, the State party argues that the interference was provided for by law, necessary to protect public order and consistent with the other rights contained in the Covenant and, therefore, justified pursuant to article 12, paragraph 3, of the Covenant. The State party submits that this provision of the Covenant was clearly drafted to include measures to secure criminal prosecution. The State party refers to the cases of *Gonzales v. Peru* 8/ and *Peltonen v. Finland* 9/ and adds that it was, in fact, the author's own behaviour that prevented his return, including making his return dependent on the bearing of necessary expenditures for his return by the State party, which is not foreseen in national law.

4.8 The rejection of the application for a passport, furthermore, did not violate the author's right to presumption of innocence as provided for in article 14, paragraph 2, of the Covenant. Comparable with other coercive measures in the criminal investigation, the refusal of a passport is a preventive measure for securing the administration of justice. With regard to the principle of separation of powers in the Austrian constitutional system, the administrative authorities are excluded from reviewing measures issued within a criminal investigation process, when deciding on the issuance of a passport.

4.9 As to the alleged violation of article 14, paragraph 3 (d), of the Covenant, the State party argues that Austrian national law provides for legal aid in cases where a person lacks necessary financial means and the assignment of a lawyer is necessary in the interest of justice. With regard to the criminal procedure, the State party submits that the case of the author was still in the preliminary stage of investigation, where the law does not require the presence of a lawyer and, thus, the appointment of a legal aid lawyer was not necessary in the interest of justice. With regard to the other procedures initiated by the author, the State party submits that legal aid was granted, at least, for the procedure before the Administrative Court regarding his appeal against the first decision of the Austrian Consulate in Curitiba rejecting his application for a passport. When requests for legal aid were rejected later, the respective court examined in detail the requirements for legal aid and gave full reasoning for its decision.

4.10 As to the alleged violation of article 14, paragraph 3 (g), of the Covenant, the State party

submits that the author did not claim that he was actually compelled to incriminate himself, but complains of future acts he fears, if neither the Public Prosecutor nor the defence lawyer have to be present in the preliminary investigation. The State party refers to the case of *Aumeeruddy-Cziffra and 19 other Mauritian Women v. Mauritius* <sup>10/</sup> and argues that the author failed to substantiate that the use of physical force or torture during the hearing is more than a theoretical possibility.

4.11 The State party claims further that the author failed to substantiate a violation of article 17 of the Covenant. The author's submission did not set out that the State party committed international and unlawful acts on the author's honour and reputation based on false allegations.

4.12 As to the alleged violation of article 26 of the Covenant, the State party submits that the author maintained that he did not enjoy the same protection of the law as Austrians living in Austria, but failed to set out how he was discriminated against. Furthermore, the author failed to substantiate that the denial of a passport based on the relevant national legislation and reviewed by courts was arbitrary. The State party adds with regard to the arrest warrant issued for the author that the same measure would also be taken against a person staying in Austria and might have the same financial and personal implications.

### **Comments by the author**

5.1 In his submission of 25 September 2000, the author claims that all effective legal remedies have been exhausted in his case. The author concedes that a legal aid attorney was appointed for the procedure before the Administrative Court regarding his request of a regular passport of 4 July 1994, however, that procedure ended with a decision of 29 September 1994 that the author missed the deadline for the appeal. The author submits that he appealed to both the Administrative Court and the Constitutional Court within the time limit as soon as he had received the positive decision on legal aid. However, the Austrian Consulate in Curitiba failed to forward his appeal in time. The author argues that taking into account the submission by the State party that the Administrative Court could have considered violations of the Covenant, the rejection of legal aid arbitrarily deprived him of his rights laid down in articles 14, paragraph 1; 26 and 2, paragraphs 2 and 3, of the Covenant.

5.2 The author challenges the contention of the State party that his claim had been satisfied when a passport was issued with temporary validity, on 16 September 1994. This passport had been issued for him to appear at the District Criminal Court and not for unlimited use for business. At that time, a decision of the Federal Ministry of Interior on his latest appeal was still outstanding. The author claims that the issuance of a regular passport was only meant to cover illegal acts and acknowledged previous violations of article 12, paragraph 2, of the Covenant.

5.3 The author submits that the intention to protect public order within the meaning of article 12, paragraph 3, of the Covenant turned, in his case, into a request to hear a suspect in a preliminary investigation. The author argued that this interrogation could have been held in Brazil any time. Furthermore, the author claims that the restriction of his right was not proportionate to a legitimate purpose and did not constitute the less severe means. While it could be proportionate to refuse a person a passport in his own country while criminal procedures are pending, in the present case the author was forced by the State party to return to his country to stand criminal investigation although

the State party was aware of his difficult financial situation. Furthermore, the refusal of a passport was not consistent with other rights of the Covenant, in particular articles 26 and 14, paragraphs 1 and 2.

### **Examination of admissibility**

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

6.2 With regard to article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the author has not submitted his case to another instance of international investigation or settlement.

6.3 With regard to article 5, paragraph 2 (b), of the Optional Protocol the Committee notes the State party's submission that the author failed to exhaust available domestic remedies. The Committee notes that the author submitted various similar applications for a regular passport that had all been rejected by the authorities of the State party. It appears from the file that the appeal of the decision on the first request of the author of 27 November 1989 was finally rejected by the Federal Administrative Court on 29 September 1994 for being filed out of time. No other final decision on any further request of the author for a regular passport appears from the submissions of the Parties. With respect to the author's article 12 claim, the Committee concludes that the author did not exhaust domestic remedies, and that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's claims concerning the decision against his mother for aiding and abetting the author in the withholding of his daughter from the custodial parent, the Committee recalls that it can only examine individual petitions presented by the alleged victims themselves or by duly authorized representatives. The Committee notes that the author did not submit any written evidence of his authority to act on behalf of his mother. Therefore, the Committee concludes that the author has no standing before the Committee in this regard, within the meaning of article 1 of the Optional Protocol.

6.5 With regard to the author's remaining claims presented above in paragraphs 3.1, 3.3, 3.5, 3.7, 3.8 and 3.9, the Committee considers that the author has not substantiated, for purpose of admissibility, any of his claims of a violation of the Covenant. In the light of this conclusion of inadmissibility under article 2 of the Optional Protocol, the Committee need not address other admissibility conditions, including the issue whether the Committee is precluded *ratione temporis*, from considering some of the author's claims.

7. The Committee therefore decides:

- (a) The communication is inadmissible under articles 1, 2 and 5 (2) (b) of the Optional Protocol;
- (b) This decision shall be transmitted to the State party and to the author.



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[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlèlèè Ahanhango, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

## Notes

1/ Section 144 Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch): "Die Eltern haben das minderjährige Kind zu pflegen und zu erziehen, sein Vermögen zu verwalten und es zu vertreten; sie sollen bei Ausübung dieser Rechte und Erfüllung dieser Pflichten einvernehmlich vorgehen. Zur Pflege des Kindes ist bei Fehlen eines Einvernehmens vor allem derjenige Elternteil berechtigt und verpflichtet, der den Haushalt führt, in dem das Kind betreut wird."

2/ Section 195 Austrian Penal Law (Strafgesetzbuch).

3/ It is not known when or where the author was divorced from his wife. However, it appears from the file that the author married in Brazil.

4/ Section 14, paragraph 1 (3) a, of the Passport Law (Passgesetz) 1992.

5/ Article 131 of the Federal Constitution; section 42, paragraph 2, of the Administrative Court Act.

6/ Case No. 861/1999, decision of 3 November 1999.

7/ Case No. 81/1980, decision of 27 March 1981.

8/ Case No. 263/1987, decision of 28 October 1992.

9/ Case No. 492/1992, decision of 21 July 1994.

10/ Case No. 35/1978, decision of 9 April 1981.