

HUMAN RIGHTS COMMITTEE

Kollar v. Austria

Communication No. 989/2001 **

30 July 2003

CCPR/C/78/DR/989/2001*

ADMISSIBILITY

Submitted by: Walter Kollar (represented by Mr. Alexander H. E. Morawa)

Alleged victim: The author

State party: Austria

Date of communication: 6 December 2000 (initial submission)

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

Meeting on 30 July 2003

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication, is Mr. Walter Kollar, an Austrian citizen, born on 3 August 1935. He claims to be a victim of violations by Austria¹ of articles 14, paragraph 1, and 26 of the Covenant. He is represented by counsel.

1.2 Upon ratification of the Optional Protocol on 10 December 1987, the State party entered the following reservation: “On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

The facts as submitted by the author

2.1 Since 1978, the author was employed as independent examining doctor (*Vertrauensarzt*) and, as of February 1988, as senior medical doctor (*Chefarzt*) at the Salzburg Regional Medical Health Insurance for Workers and Employees (*Salzburger Gebietskrankenkasse für Arbeiter und Angestellte*).

2.2 On 22 September 1988, following accusations of illegal and inappropriate conduct against the author and his former supervisor, the Chairman of the Insurance unsuccessfully sought approval by the employees' representative committee (*Betriebsrat*) to suspend the author from his function.

2.3 On 23 September 1988, the employer brought criminal charges against the author, which were ultimately not pursued by the prosecutor. The employer then initiated an equally unsuccessful private criminal prosecution.

2.4 On 27 October 1988, the Board of the Insurance initiated disciplinary proceedings against the author and suspended him on reduced pay. On 22 February 1989, a disciplinary committee was constituted. The author was accused of inappropriate conduct involving personal enrichment, at the expense of his employer. On 22 January 1990, the disciplinary committee, having met several times *in camera*, found the author guilty on certain counts, such as illegal prescription of medication to the financial detriment of his employer, a violation of his loyalty and confidentiality duties by holding a press conference on the charges against his former supervisor, and the illegal admission of patients to a specific rehabilitation centre. No appeal from this decision was possible.

2.5 On 23 January 1990, the Insurance purported to dismiss the author from service on the basis of the disciplinary committee's findings, allegedly without having complied with certain procedural requirements. After complying with these requirements, the Insurance, on 9 November 1990, stated that it considered the first dismissal effective and, in any event, dismissed the author from service a second time.

2.6 On 14 December 1988, the author appealed against his suspension of 27 October 1988 before the Salzburg Regional Court (*Landesgericht Salzburg*) which, by decision of 15 February 1989, dismissed his action. On 19 September 1989, the Linz Court of Appeal (*Oberlandesgericht Linz*) dismissed his appeal; but the Supreme Court (*Oberste Gerichtshof*), on 28 February 1990, allowed the author's appeal and referred the case back to the Regional Court, holding that it had not been established whether sufficient grounds for the suspension existed. On 7 August 1990, the Salzburg Regional Court again rejected the author's claim. This decision was upheld by the Linz Court of Appeal on 29 January 1991. On 10 July 1991, the Supreme Court again granted the author's appeal, holding that the lower courts had again failed to establish sufficient grounds for the author's suspension. On 13 July 1992, the Salzburg Regional Court rejected the author's legal action for the third time. Both the Linz Court of Appeal, on 9 March 1993, and the Supreme Court, on 22 September 1993, dismissed the author's appeal.

2.7 The author also brought a legal action against his first dismissal from service, dated 23 January 1990. On 9 October 1990, the Salzburg Regional Court, acting under its labour and social

law jurisdiction, granted the author's claim. On 11 June 1991, the Linz Court of Appeal and, on 6 November 1991, the Supreme Court dismissed the employer's appeal, holding that the employment relationship between the author and his employer remained effective.

2.8 On 16 November 1990, the author brought a legal action against his second dismissal from service, dated 9 November 1990. Despite his objection, the proceedings were suspended on 19 March 1991, pending the final outcome of the proceedings against the first dismissal. Subsequent to the Supreme Court's decision of 6 November 1991, legal proceedings in respect of the second dismissal resumed, and, on 25 November 1993, the Salzburg Regional Court rejected the author's claim. On 29 November 1994, the Linz Court of Appeal and, on 29 March 1995, the Supreme Court, dismissed the author's appeals, finding him guilty of negligent breaches of duty, which justified his dismissal.

2.9 On 7 February 1996, the author lodged an application with the former European Commission on Human Rights, alleging violations of his rights under articles 6, 10, 13 and 14 of the European Convention on Human Rights and Fundamental Freedoms, as well as article 2, paragraph 1, of Protocol No. 7 thereto. This application was never examined by the Commission. Instead, the European Court of Human Rights, sitting as a panel of three judges, on 17 March 2000 (after the entry into force of Protocol No. 11), declared the application inadmissible. With regard to the author's complaints about the disciplinary proceedings instituted by his employer, the Court held that "the role of the Health Insurance Office was that of a private employer, the disciplinary proceedings complained of were not conducted by a body exercising public power, but were internal to the applicant's workplace for the purpose of establishing whether or not he should be dismissed [...]"². The Court concluded that this part of the application was incompatible *ratione personae* with the Convention. With respect to articles 13 and 14 of the Convention as well as article 2 of Protocol No. 7, the Court found that the matters complained of did not disclose any appearance of a violation of these rights.³

The complaint

3.1 The author claims that he is a victim of violations of articles 14, paragraph 1, and 26 of the Covenant because he was denied equal access to an independent and impartial tribunal, as the Austrian courts only reviewed the findings of the disciplinary committee for gross irregularities.

3.2 By reference to the Committee's decision in *Nahlik v. Austria*⁴, the author contends that article 14, paragraph 1, of the Covenant also applies to the proceedings before the disciplinary committee. He submits that the disciplinary committee denied him a public hearing by meeting *in camera*. The exclusion of the public was not necessary to protect his patients' right to privacy, since their names could have been replaced by acronyms. The author claims that his right to a fair hearing has been violated because the principle of 'equality of arms' was infringed in several ways. Firstly, the prosecuting party was given an opportunity to discuss the charges against him with the chairman of the disciplinary committee, while his defence was not provided such an opportunity. Moreover, the time he was given to prepare his defence was disproportionately short. Since the committee's chairman refused to receive his lawyer's written reply to the written accusations of the prosecuting party, the defence was required to present all arguments orally during the hearings. As a result, a

medical expert who testified before the committee had no access to the written submissions of the defence, relying solely on the prosecuting party's submissions.

3.3 Furthermore, the author claims that the disciplinary committee lacked the impartiality and independence required by article 14, paragraph 1, of the Covenant. Despite repeated complaints which were never decided upon by the disciplinary committee, the committee was composed of, in addition to the chairman, two members appointed by the employer and two members appointed by the employees' representative committee (*Betriebsrat*) who were subordinate to the employer. Similarly, the author's motion to replace at least one member by a medical expert was not decided upon.

3.4 The author contends that the committee's chairperson was biased since he privately discussed the case for several hours with the prosecuting party and because he rejected his written reply to the charges, pretending that it had been submitted after the expiry of the deadline and by pasting over the original note, in the file, with an instruction to transmit the submission to the prosecuting party. Moreover, the chairman reportedly also ignored various procedural objections of the defence, manipulated the records of the hearings and intimidated the author's defense lawyer as well as, on one occasion, a medical expert testifying in the author's favour. By reference to the Committee's Views in *Karttunen v. Finland*⁵, the author concludes that the chairperson displayed a bias, in violation of article 14, paragraph 1, of the Covenant.

3.5 The author also claims that he was discriminated against, contrary to articles 14, paragraph 1, and 26 of the Covenant, which require that objectively equal cases be treated equally. In support of this claim, he submits that his former supervisor, who faced similar charges, was treated differently during disciplinary proceedings and was ultimately acquitted. In the supervisor's case, three members of the disciplinary committee were replaced by senior medical doctors at the supervisor's request, while not a single member of the committee was replaced by a medical doctor in the author's own case, even though his request to that effect was based on identical arguments and formulated by the same lawyer. Moreover, his former supervisor was acquitted of the charge of having issued private prescriptions using health insurance forms, on the ground that this practice had already been established by his predecessor. Furthermore, despite an agreement between one of the author's predecessors and the Salzburg Regional Medical Health Insurance permitting such use of health insurance forms, the author was found guilty by the committee on the same charge. The committee argued that, since the predecessor had concluded the agreement in his personal capacity, the author could have invoked it only after a renewal *ad personam*.

3.6 With regard to the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol, the author argues that the same matter "has not been examined by the European Commission of Human Rights". Thus, his complaint was declared inadmissible not by the European Commission but by the European Court of Human Rights. Moreover, the Registry of the European Court failed to advise him of its concerns about the admissibility of his application, thereby depriving him of an opportunity to clarify doubts or to withdraw his application in order to submit it to the Human Rights Committee. The author also argues that the European Court did not even formally decide on his complaint that the extremely limited review by the Austrian courts of the disciplinary committee's decision violated his right to an independent and impartial tribunal established by law (article 6,

paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms).

3.7 The author contends that there are substantial differences between the Convention articles and the Covenant rights invoked by him. Thus, a free-standing discrimination clause similar to article 26 of the Covenant cannot be found in the European Convention. Furthermore, article 14, paragraph 1, of the Covenant guarantees a right to equality before the courts which is unique in its form. By reference to the Committee's decision in *Nahlik v. Austria*⁶, the author adds that the scope of applicability of that provision has been interpreted more broadly than that of article 6, paragraph 1, of the European Convention.

The State party's observations

4.1 By note verbale of 17 September 2001, the State party made its submission on the admissibility of the communication. It considers that the Committee's competence to examine the communication is precluded by article 5, paragraph 2 (a), of the Optional Protocol read in conjunction with the Austrian reservation to that provision.

4.2 The State party argues that the reservation is applicable to the communication because the author has already brought the same matter before the European Commission of Human Rights, resulting in the subsequent examination of the application by the European Court of Human Rights, which assumed the tasks of the Commission following the reorganization of the Strasbourg organs pursuant to Protocol No. 11.

4.3 In the State party's opinion, the fact that the European Court rejected the application as being inadmissible, does not mean that the Court has not "examined" the author's complaints, as required by the Austrian reservation. The Court's reasoning that "there is no appearance of a violation of the applicant's rights"⁷ and that the matters complained of "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols"⁸ clearly showed that the decision to dismiss the application on grounds of admissibility "also comprises far reaching aspects on the merits".

4.4 While admitting that the European Court did not examine the nature of the disciplinary proceedings against the author, the State party emphasizes the Court's finding that it cannot be held responsible for disputes between private employers, such as the Regional Health Insurance Board for Workers and Employees, and their employees.

Comments by the author

5.1 By letter of 15 October 2001, the author responded to the State party's submission, reiterating that, based on the ordinary meaning as well as the context of the State party's reservation, the Committee is not precluded from examining his communication. He insists that the Austrian reservation does not apply to his communication since the same matter was never "examined" by the European Commission. He compares the Austrian reservation to similar but broader reservations to article 5, paragraph 2 (a), of the Optional Protocol made by 16 other States parties to the European Convention, and submits that the State party is the only one that refers to an examination "by the

European Commission of Human Rights”.

5.2 The author considers it irrelevant that the State party, when entering its reservation, intended to prevent a simultaneous and successive consideration of the same facts by the Strasbourg organs and the Committee, arguing that the intent of the party making a reservation is merely a supplemental means of interpretation under article 32 of the Vienna Convention on the Law of Treaties, which may only be utilized when an interpretation pursuant to article 31 of the Vienna Convention (ordinary meaning, context, and object and purpose) proves insufficient.

5.3 By reference to the jurisprudence of the European and the Inter-American Courts of Human Rights, the author emphasizes that reservations to human rights treaties must be interpreted in favour of the individual. Any attempt to broaden the scope of the Austrian reservation must therefore be rejected, especially since the Committee disposes of adequate procedural devices to prevent an improper use of parallel proceedings at its disposal, such as the concepts of “substantiation of claims” and “abuse of the right to petition”, in addition to article 5, paragraph 2 (a), of the Optional Protocol.

5.4 The author concludes that the communication is admissible in the light of article 5, paragraph 2 (a), of the Optional Protocol, since the Austrian reservation does not come into play. Subsidiarily, he submits that the communication is admissible insofar as it relates to the alleged violations of his rights in the disciplinary proceedings, and to the lack of an effective remedy to have these proceedings reviewed by a court of law, because the European Court of human Rights failed to examine his complaints in that regard.

Additional observations by the State party

6.1 By note verbale of 30 January 2002, the State party made an additional submission on the admissibility of the communication in which it explained that the Austrian reservation was made on the basis of a recommendation by the Committee of Ministers, suggesting that member States of the Council of Europe “which sign or ratify the Optional Protocol might wish to make a declaration [...] whose effect would be that the competence of the UN Human Rights Committee would not extend to receiving and considering individual complaints relating to cases which are being or already have been examined under the procedure provided for by the European Convention”⁹.

6.2 The State party argues that its reservation differs from similar reservations made by other member States pursuant to that recommendation only insofar as it directly addresses the relevant Convention mechanism, for the sake of clarity. All reservations aim at preventing any further international examination following a decision of one of the mechanisms established by the European Convention. It would, therefore, be inappropriate to deny the Austrian reservation its validity and continued scope of application on the mere basis of an organizational reform of the Strasbourg organs.

6.3 Moreover, the State party contends that, following the merger of the European Commission and the “old” Court, the “new” European Court can be considered the “legal successor” of the Commission since several of its key functions, including decisions on admissibility, establishment

of the facts of a case and making a first assessment on the merits, were formerly discharged by the Commission. Given that the reference to the European Commission in the State party's reservation was specifically made in respect of these functions, the reservation remains fully operative after the entry into force of Protocol No. 11. The State party contends that it was not foreseeable, when it entered its reservation in 1987, that the protection mechanisms of the European Convention would be modified.

6.4 The State party reiterates that the same matter was already examined by the European Court which, in order to reject the author's application as being inadmissible, had to examine it on the merits, if only summarily. In particular, it follows from the European Court's rejection of the complaints concerning the disciplinary proceedings that the Court considered the merits of the complaint prior to taking its decision.

Additional comments by the author

7.1 By letter of 25 February 2002, the author notes that nothing prevented the State party from entering a reservation upon ratification of the Optional Protocol precluding the Committee from examining communications if the same matter has already been examined "under the procedure provided for by the European Convention", as recommended by the Committee of Ministers, or from using the broader formulation of a previous examination by "another procedure of international investigation or settlement", as other member States of the European Convention did.

7.2 Moreover, the author submits that the State party could even consider entering a reservation to that effect by re-ratifying the Optional Protocol, as long as such a reservation could be deemed compatible with the object and purpose of the Optional Protocol. What is not permissible, in his view, is to broaden the scope of the existing reservation in a way contrary to fundamental rules of treaty interpretation.

7.3 The author rejects the State party's argument that key tasks of the "new" European Court, such as decisions on admissibility and ascertainment of the facts of a case, were originally within the exclusive competence of the European Commission. By reference to the Court's jurisprudence, he argues that the "old" European Court also consistently dealt with these matters.

7.4 The author challenges the State party's contention that the reorganization of the Convention organs was not foreseeable in 1987, by quoting parts of the Explanatory Report to Protocol No. 11, which summarize the history of the "merger" deliberations from 1982 until 1987.

Issues and proceedings before the Committee

8.1 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 communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has invoked the reservation it made under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims

that have previously been “examined” by the “European Commission on Human Rights”. As to the author’s argument that the application which he submitted to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission’s tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee observes, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, that the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.

8.3 The Committee considers that a reformulation of the State party’s reservation, upon re-ratification of the Optional Protocol, as suggested by the author, only to spell out what is in fact a logical consequence of the reform of the European Convention mechanisms, would be a purely formalistic exercise. For reasons of continuity and in the light of its object and purpose, the Committee therefore interprets the State party’s reservation as applying also to complaints which have been examined by the European Court.

8.4 With respect to the author’s argument that the European Court has not “examined” the substance of his complaint when it declared the application inadmissible, the Committee recalls its jurisprudence that where the European Commission has based a declaration of inadmissibility not solely on procedural grounds¹⁰, but on reasons that comprise a certain consideration of the merits of the case, then the same matter has been “examined” within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.¹¹ In the present case, the European Court went beyond an examination of purely procedural admissibility criteria, considering that the author’s application was inadmissible, partly for incompatibility *ratione personae*, partly because it disclosed no appearance of a violation of the provisions of the Convention. The Committee therefore concludes that the State party’s reservation cannot be denied simply on the assumption that the European Court did not issue a judgment on the merits of the author’s application.

8.5 As regards the author’s contention that the European Court has not examined his claims under article 6, paragraph 1, of the Convention regarding the proceedings before the disciplinary committee, and that it has not even formally decided on his complaint related to the limited review of the decision of the disciplinary committee by the Austrian courts, the Committee notes that the European Court considered “that the disciplinary proceedings complained of were not conducted by a body exercising public power, but were internal to the applicant’s workplace for the purpose of establishing whether or not he should be dismissed”. On this basis, the Court concluded that the author’s right to an effective remedy (article 13 of the European Convention and article 2, paragraph 1, of Protocol No. 7) had not been violated.

8.6 The Committee further observes that, despite certain differences in the interpretation of article 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant by the competent organs, both the content and scope of these provisions largely converge. In the light of the great similarities between the two provisions, and on the basis of the State party’s reservation, the Committee considers itself precluded from reviewing a finding of the European Court on the

applicability of article 6, paragraph 1, of the European Convention by substituting its jurisprudence under article 14, paragraph 1, of the Covenant. The Committee accordingly finds this part of the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the same matter has already been examined by the European Court of Human Rights.

8.7 With regard to the author's claim under article 26 of the Covenant, the Committee recalls that the application of the principle of non-discrimination in that provision is not limited to the other rights guaranteed in the Covenant and notes that the European Convention contains no comparable discrimination clause. However, it equally notes that the author's complaint is not based on free-standing claims of discrimination, since his allegation of a violation of article 26 does not exceed the scope of the claim under article 14, paragraph 1, of the Covenant. The Committee concludes that this part of the communication is also inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[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.]

Notes:

* Made public by decision of the Human Rights Committee.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

1. The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988.

2. European Court of Human Rights, 3rd Section, decision on admissibility, Application no. 30370/96 (Walter A.F. Kollar against Austria), 17 March 2000, at para. 1.

3. *Ibid.*, at para. 3.

4. Communication No. 608/1995, *Nahlik v. Austria*, decision on admissibility adopted on 22 July

1996, at para. 8.2.

5. Communication No. 387/1989, views adopted on 23 October 1992, at para. 7.2.

6. Communication No. 608/1995, decision adopted on 22 July 1996, at para. 8.2.

7. See European Court of Human Rights, 3rd Section, decision on admissibility, Application no. 30370/96 (Walter A.F. Kollar against Austria), 17 March 2000, at para. 2.

8. See *ibid.*, para. 3.

9. Council of Europe, Committee of Ministers Resolution (70) 17 of 15 May 1970.

10. See, for example, Communication No. 716/1996, *Pauger v. Austria*, Views adopted on 25 March 1999, at para. 6.4.

11. See, for example, Communication No. 121/1982, *A.M. v. Denmark*, decision on admissibility adopted on 23 July 1982, at para. 6; Communication No. 744/1997, *Linderholm v. Croatia*, decision on admissibility adopted on 23 July 1999, at para. 4.2.