

## HUMAN RIGHTS COMMITTEE

### Althammer et al. v. Austria

Communication No. 998/2001

8 August 2003

CCPR/C/78/D/998/2001

### VIEWS

*Submitted by:* Mr. Rupert Althammer et al. (represented by counsel, Mr. Alexander H. E. Morawa)

*Alleged victim:* The author

*State party:* Austria

*Date of communication:* 22 April 1998 (initial submission)

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

Meeting on 8 August 2003,

Having concluded its consideration of communication No. 998/2001, submitted to the Human Rights Committee on behalf of Mr. Rupert Althammer et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The authors of the communication are Mr. Rupert Althammer and 11 other Austrian citizens residing in Austria. They claim to be victims of a violation by Austria of article 26 of the Covenant. The authors are represented by counsel. **(1)** The Optional Protocol entered into force for Austria on

10 March 1988.

### The facts as submitted by the authors

2.1 The authors are retired employees of the Social Insurance Board in Salzburg (Salzburger Gebietskrankenkasse). Counsel states that they receive retirement benefits under the relevant schemes of the Regulations A of Service for Employees of the Social Insurance Board (Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern).

2.2 Amongst various monthly entitlements, the Regulations provided for monthly household entitlements of ATS 220 and children's entitlements of ATS 260 per child for those with children up to the age of 27. On 1 January 1996, an amendment to the regulations came into effect which abolished the monthly household entitlement and increased the children's benefits to ATS 380 per child.

2.3 On 8 February 1996, the authors filed a lawsuit in the Salzburg District Court seeking a declaratory judgement that the Salzburg Regional Social Insurance Board was under an obligation to continue paying them the household entitlement as part of their income as retired employees. The District Court dismissed the authors' claim on 11 June 1996. The Court stressed that retirement benefits are not rights protected against subsequent changes of the legal framework (*wohlerworbene Rechte*) provided that such changes are based on objective grounds and respecting the principle of proportionality. It concluded that the abolition of household entitlements did not concern essential aspects of retirement benefits but a supplementary allowance, was moderate in its extent (0.4-0.8 % of the retirement benefits), and justified by the fact that the decision to use, in times of financial constraints, the limited financial means for an increase of the children's benefits was based on legitimate motives of social policy. The authors' appeal was dismissed by the Appeals Court (Oberlandesgericht Linz) on 22 April 1997 in a judgment upholding this reasoning. The Supreme Court (Oberster Gerichtshof) rejected a further request for revision on 7 January 1998. All domestic remedies are thus said to be exhausted.

2.4 Counsel explains that Regional Social Insurance Boards are public law institutions and that the Regulation is a legislative decree (Verordnung) regulating almost all employment related matters of the Board, *inter alia* the amount of retirement benefits and their calculation, including increase or periodical adjustment. Counsel submits that many similarities exist between occupational pension schemes (Betriebsrenten) offered by private employers and the scheme based on the Regulation. However, the Regulation can be changed, unilaterally, by legislative decree of the State party.

### The complaint

3.1 The authors allege that the amendment to the Regulations constitutes a violation of article 26 of the Covenant. The authors claim that although the amendment of the Regulations is objective on the face of it, it is discriminatory in effect, considering that most retirees are heads of households with a spouse as dependent and no longer have children under the age of 27. The impact of the amendment is therefore greater for retired than for active employees as it effectively abolishes the

supplement for retirees' dependents altogether. It is argued that this adverse effect was foreseeable and intended.

3.2 The authors recall that the amendment is the third step in a series of modifications aimed at reducing the income of retired employees (for the earlier modifications, see cases Nos. 608/1995 **(2)** and 803/1998 **(3)**). It is stated that the cumulative effect of the reductions brings the present case within the threshold of manifest arbitrariness, in violation of the principle of equality before the law. It is further stated that the courts' failure to take the cumulative effect of the amendments into consideration by limiting their review to the isolated amendment in each case, failed to ensure that the authors enjoyed equal and effective protection against discrimination within the meaning of article 26 of the Covenant.

3.3 Counsel states that the same facts are also the subject of an application which the authors presented to the European Commission of Human Rights claiming a violation of the right to property (article 1 of the First Additional Protocol to the European Convention). He claims that this does not preclude the admissibility of the communication as the Covenant does not contain the right to property and the European Convention does not contain a provision which corresponds to article 26 of the Covenant.

#### State party's observations on the admissibility of the communication

4.1 By submission of 25 September 2001, the State party objects to the admissibility of the communication. It notes that the present communication was already transmitted to it as part of communication No. 803/1998. It argues therefore that the communication is inadmissible for violation of the principle of *ne bis in idem*.

4.2 The State party further notes the authors' applications to the European Commission on the basis of the same facts as before the Committee were transferred to the European Court pursuant to article 5(2) of Protocol No. 11 and that the Court declared them inadmissible on 12 January 2001 because they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

4.3 The State party recalls its reservation in relation to article 5 (2) (a) of the Optional Protocol **(4)**, to the effect that it does not recognize the Committee's competence to consider any communication from an individual when the same matter has been examined by the European Commission of Human Rights. The State party explains that the purpose of the reservation was exactly to prevent successive consideration of the same facts by the Strasbourg organs and the Committee. In this connection, the State party points out that article 14 of the European Convention contains a discrimination ban which forms an integral part of all other rights and freedoms under the Convention. Even though the authors did not raise the breach of article 14 in conjunction with article 1 of the First Protocol, the State party asserts that the Court considers other provisions of the Convention *ex officio*. In this connection, the State party refers to the European Court's consideration in the authors' applications that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention. The State party concludes therefore that the authors in substance are presenting the same matter.

4.4 Furthermore, the State party argues that the European Court has examined the matter within the meaning of article 5(2)(a), as its decision of inadmissibility was not based on formal reasons but of reasons of merit. In this context, the State party refers to the Committee's prior jurisprudence.(5)

4.5 As to the mention in its reservation of the European Commission of Human Rights, the State party recalls that at the time it made the reservation in 1987, the European Commission was the only instrument of international investigation or settlement under the European Convention on Human Rights and Fundamental Freedoms to which an individual complainant could resort. Following the reorganisation of the Strasbourg organs through Protocol No. 11, the European Court has now taken over the tasks previously discharged by the Commission and should thus be seen as the successor of the Commission with regard to applications lodged by individuals. The State party concludes that its reservation is thus equally valid for applications now being examined by the European Court.

#### The authors' comments on the State party's submission

5.1 By letter of 15 October 2001 the authors respond to the State party's observations and submit that the present communication is not identical to communication No. 803/1998, even if it was initially considered jointly with this communication. Counsel submits that the authors of the communications are not identical and that the two communications concern two distinct alleged violations of the authors' rights under the Covenant.

5.2 As to the State party's objection under article 5(2)(a) of the Optional Protocol and its reservation in this respect, counsel argues that when applying or interpreting a reservation, one should first ascertain whether the terms used are in itself sufficiently clear and unambiguous, and only if they are not, one may examine the context, object and purpose of the reservation. The reservation invoked by the State party is unambiguous in the sense that it excludes communications examined by the European Commission of Human Rights. Counsel argues therefore that the reservation has lost its field of application following the entry into force of Protocol No. 11 to the ECHR and there is thus no obstacle under article 5(2)(a) of the Optional Protocol to the admissibility of the present communication.

5.3 Concerning the State party's arguments on the interpretation of the reservation, counsel argues that even at the time when the State party entered its reservation, it was the European Court of Human Rights or the Committee of Ministers that rendered final and binding decisions, that the individual was very much a party to the proceedings before the Court, and that the Commission was basically a fact-finding and screening body.

5.4 In reply to the State party's statement about the scope of its reservation, counsel argues that the Vienna Convention on the Law of Treaties prohibits resort to supplemental means of interpretation when the ordinary meaning, context and object and purpose are clear and claims that what the State party wanted to say cannot replace what it did say.

5.5 Counsel also argues that treaties safeguarding human rights, and even more so reservations,

must be interpreted in favour of the individual and that any attempt to broaden the scope of a reservation must be categorically rejected.

5.6 With regard to the question whether or not the European Court has examined the same matter, counsel refers to the Committee's jurisprudence in this regard and concludes that the same matter is a petition that concerns the same individuals, facts and allegations of breaches of fundamental rights and freedoms. Counsel notes that the present case concerns the same facts and persons as in the application to the European Court of Human Rights but raises entirely different claims, since the communication to the Committee concerns rights that are protected exclusively by the Covenant (the right to equality) and the application under the European Convention concerns the right to property which is protected exclusively by that Convention and not by the Covenant. In this regard, counsel argues that article 14 of the ECHR does not provide for an independent right to material equality, but is an accessory right which does not offer the same protection as article 26 of the Covenant. Counsel refutes the State party's argument that the European Court considers other provisions ex officio when authors specify the provisions of the Convention. In this connection, counsel quotes from a letter received from the Secretariat of the Court pointing out objections to the admissibility of the applications on the ground of article 1 of the First Additional Protocol only without reference to article 14 of the Convention. He further argues that it appears from the letter that the Court rejected the admissibility of the application *ratione materiae* because the entitlements under pension schemes do not amount to property rights, and thus did not analyze the effect of the amendments.

#### State party's additional observations

6.1 By submission of 25 January 2002, the State party reiterates its arguments on the admissibility of the communication. With regard to its reservation concerning article 5(2)(a) of the Optional Protocol, the State party notes that it entered this reservation in accordance with a recommendation by the Committee of Ministers on 15 May 1970, in order to prevent the possibility of successive applications to the different bodies. Seen in this context, it cannot be concluded from the wording of the reservation that the State party meant to diverge from the recommendation issued by the Committee of Ministers. The State party also refers to the domestic procedure concerning the ratification of the Optional Protocol: it recalls that the European Court is the legal successor to the European Commission and considers that counsel's argument about the role of the Commission has no bearing on the legal succession, especially since the State party's reservation was made in respect of the Commission's duty to decide on the admissibility of an application and to make a first assessment on the merits. The State party also rejects counsel's argument that its interpretation extends the scope of the reservation, as it has the same significance today as it had when entered. Moreover, the State party argues that it was by no means foreseeable in 1987 that the protection mechanism of the Convention would be modified.

6.2 With regard to the authors' argument that their applications were not examined by the ECHR within the meaning of the reservation, the State party argues that a rejection of a complaint by the ECHR pursuant to article 35, paragraphs 3 and 4, of the Convention presupposes an examination of the merits, so that the admissibility proceedings include, if only summary, a substantive assessment of a claim of a violation of the Convention. The State party reiterates therefore that the

communication should be declared inadmissible in the light of its reservation to article 5 (2) (a).

6.3 With regard to the merits of the communication, the State party notes that the wording of the present communication is exactly the same as that of the communication which was sent to the State party as part of communication No. 803/1998, and it refers to its submissions in respect of the earlier communication. In these submissions, the State party argued that the effect of the amendments cannot be said to be of a discriminatory nature. The State party explains that the Regulations of Service is not a decree, but a collective agreement to which the authors are party and which is concluded between the Association of Social Insurance Institutions and the trade union.

6.4 The State party further argues that the cancellation of the household benefits does not constitute discrimination as this measure equally affects working and retired persons. The cancellation has been calculated to constitute a reduction of between 0.4 and 0.8% of the total pension payment, which according to the State party cannot be regarded as unreasonable.

#### Author's comments on the State party's additional observations

7.1 By letter of 3 March 2002, the authors reiterate that the present communication is distinct from the original communication No. 803/1998. They add that it is not their decision whether to add the communication to the file of case No. 803/1998 or to deal with it as a new case.

7.2 The authors challenge the State party's explanations of the *raison d'être* of its reservation and note that the recommendation of the Committee of Ministers was wider than the reservation actually made. The authors also point out that of the 35 States that are both party to the Optional Protocol and the European Convention only 17 States have made a reservation under article 5(2)(a) of the Optional Protocol. They argue that the reference to the State party's intent cannot absolve it from the text of its reservation. The authors also take issue with the State party's statement that the scope of the reservation is not extended by its wider interpretation, and argue that without such interpretation the reservation would not apply at all.

7.3 Counsel also takes issue with the State party's analysis of the functions of the European Commission and the European Court, and moreover submits that discussions about the merger of the Commission and the Court already were under way since 1982, that is before the date of the State party's reservation, and that modifications of the European human rights protection system were thus foreseeable at the time.

7.4 The authors reiterate that the abolition of the household benefits is discriminatory in effect, because it affects retired employees to a greater extent than active employees who are more likely to benefit from the increase in children's entitlements than retired employees. They note that the State party has not addressed these arguments in its submissions.

7.5 By further letter of 23 April 2002, counsel submits recent data on the financial effects of the amendments to the regulations. It is said that for retired employees, the loss of income caused by the cumulative effect of the 1992 amendment (subject of communication No. 608/1995), the 1994 amendment (subject of communication No. 803/1998) and the 1996 amendment, subject of the

present communication, over the period 1994-2001 varies from ATS 34,916.00 to ATS 141,757.00.  
(6)

#### Issues and proceedings before the Committee

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

8.2 The Committee has noted the State party's argument that the communication is inadmissible because it had earlier been transmitted as part of communication No. 803/1998. The Committee observes that its decision of 21 March 2002 declaring inadmissible communication No. 803/1998 does not relate in any way to the contents of the present communication. Consequently, the Committee has not yet considered the claim contained in the present communication and the State party's objection in this regard can therefore not be upheld.

8.3 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.

8.4 Having concluded that the State party's reservation applies, the Committee needs to consider whether the subject matter of the present communication is the same matter as the one which was presented under the European system. In this connection, the Committee recalls that the same matter concerns the same authors, the same facts and the same substantive rights. The Committee on earlier occasions has already decided that the independent right to equality and non-discrimination embedded in article 26 of the Covenant provides a greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention. The Committee has taken note of the decision taken by the European Court on 12 January 2001 rejecting the authors' application as inadmissible as well as of the letter from the Secretariat of the European Court explaining the possible grounds of inadmissibility. It notes that the authors' application was rejected because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols as it did not raise issues under the right to property protected by article 1 of Protocol No. 1. As a consequence, in the absence of an independent claim under the Convention or its Protocols, the Court could not have examined whether the authors' accessory rights under article 14 of the Convention had been breached. In the circumstances of the present case, therefore, the Committee concludes that the question whether or

not the authors' rights to equality before the law and non-discrimination have been violated under article 26 of the Covenant is not the same matter that was before the European Court.

8.5 The Committee has ascertained that the authors have exhausted domestic remedies for purposes of article 5, paragraph 2(b), of the Optional Protocol.

9. The Committee therefore decides that the communication is admissible.

### Consideration of the merits

10.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The authors claim that they are victims of discrimination because the abolition of the household benefits affects them, as retired persons, to a greater extent than it affects active employees. The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.<sup>(7)</sup> However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts (paragraph 2.3 above), was based on objective and reasonable grounds. For these reasons, the Committee concludes that, in the circumstances of the instant case, the abolition of monthly household payments, even if examined in the light of previous changes of the Regulations of Service for Employees of the Social Insurance Board, does not amount to discrimination as prohibited in Article 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any of the rights contained in the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued 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. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo

Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

### Notes

1. An earlier communication submitted by many of the same authors was registered under No. 803/1998 and declared inadmissible by the Committee on 21 March 2002.
2. See CCPR/C/57/D/608/1995, Committee's decision of 22 July 1996 declaring the communication inadmissible.
3. See CCPR/C74/D/803/1998, Committee's decision of 21 March 2002 declaring the communication inadmissible.
4. When ratifying the Optional Protocol on 10 December 1987, the State party entered the following understanding: "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."
5. Communication No. 452/1991 (*Glaziou v. France*), declared inadmissible on 18 July 1994.
6. 1 euro is 13.7603 ATS
7. See the Committee's general comment No. 18 on non-discrimination and the Committee's Views adopted on 19 July 1995 in case No. 516/1992 (*Simunek et al. v. the Czech Republic*) (CCPR/C/54/D/516/1992, para. 11.7)