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International Covenant on Civil and Political Rights

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Decision

Communication No. 1793/2008

Submitted by:	Béatrice Marin (not represented by counsel)
Alleged victim:	The author
State party:	France
Date of communication:	5 May 2008 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 14 August 2008 (not issued in document form)
Date of decision:	27 July 2010
Subject matter:	Legality of the procedure by which the author contested her results in a competitive examination for the recruitment of administrative judges
Procedural issues:	Examination of the same question before another international settlement body; inadmissibility *ratione materiae*; inadmissibility due to insufficient substantiation of allegations
Substantive issues:	Right to a fair trial
Article of the Covenant:	14, paragraph 1
Articles of the Optional Protocol:	2; 3; 5, paragraph 1

[Annex]

* Made public by decision of the Human Rights Committee.

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ninety-ninth session)

concerning

Communication No. 1793/2008*

Submitted by:	Béatrice Marin (not represented by counsel)
Alleged victim:	The author
State party:	France
Date of communication:	5 May 2008 (initial submission)

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

Meeting on 27 July 2010,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 5 May 2008, is Ms. Béatrice Marin, a French national. She claims to have been the victim of a violation by France of article 14, paragraph 1, of the International Covenant on Civil and Political Rights. She is not represented by counsel. The Covenant and the relevant Optional Protocol entered into force for France on 4 February 1981 and 17 May 1984, respectively.

1.2 On 13 August 2008, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communication should be examined separately from the merits.

The facts as submitted by the author

2.1 On 14 and 15 April 2005, the author sat two written tests in order to qualify for the competitive examination organized by the Council of State (Conseil d'État) for the recruitment of judges to the administrative court and the administrative court of appeal. On 3 June 2005, the results of the qualifying tests were communicated on the Council of

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The texts of individual opinions signed by Committee members Mr. Michael O'Flaherty, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Zonke Zanele Majodina, Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli are appended to the present decision.

State's website. The author saw that, as she had not attained the minimum score required, she had not qualified to sit the oral examination. Her marks were subsequently sent to her by mail.

2.2 Not understanding why she had done so poorly, on 8 June 2005 the author requested that she be sent copies of her two written tests as soon as possible. Upon receipt of the copies, she claims to have noticed a glaring irregularity in the marking procedure: her papers had not been marked twice as required in the regulations for the competitive examination, and the examiner of each of her two papers had not been authorized by the orders of the Ministry of Justice (orders of 26 January and 23 March 2005).

2.3 On 16 June 2005, the author filed an application with the Council of State for a temporary suspension injunction and an application on the merits, as well as an urgent application for the protection of a fundamental freedom (*référé liberté*). In the applications, she cited a serious and manifestly illegal violation of the equality of treatment of the candidates, and requested that the Council of State annul the marking of her two qualifying tests and order the administration to mark them again. She also requested that, depending on the results of the second marking, the Council of State order the administration to allow her to sit the oral examinations.

2.4 In two rulings dated 17 June 2005, the Council of State rejected the author's applications on the ground that none of the submissions was likely to bring to light a grave and manifestly illegal violation of a fundamental freedom. The author was informed of the rulings on 23 June 2005.

2.5 On 29 July 2005, the Council of State, being both judge and party, submitted a defence brief in response to the application on the merits filed by the author. Principally, it asked the Council of State (i.e. itself) to reject the application as inadmissible and, in the alternative, it argued that the examination papers had been marked by authorized examiners, although it did not submit any evidence to that effect. The Council of State was also said to have stated that the examiners never sign the examination papers, whereas the invigilator is required to do so. On 30 August 2005, the author submitted a statement of case with a view to showing that the marking procedure was illegal.

2.6 In a ruling dated 29 September 2005, the Council of State declared the application to be inadmissible on the ground that the contested act[1] constituted a preliminary act that was indivisible from the deliberation of the panel that decides on the results of the competitive examination and, as such, could not be appealed. The author stresses that the temporary suspension injunction and the urgent application for the protection of a fundamental freedom were found to be admissible but were rejected by the Council of State, whereas the application on the merits was found to be inadmissible, even though consistent jurisprudence has held that the stages of a competitive examination, such as the "qualification" stage, involve decisions and not preliminary acts and that it should therefore be possible to contest them at any time during the examination without it being necessary to await the publication of the final results on qualification.

2.7 The author adds that, pursuant to article R311-1-4 of the Administrative Code of Justice, the Council of State alone is competent for disputes concerning national competitive examinations. According to the author, this jurisdictional power is contrary to article 14, paragraph 1, of the Covenant, and the Council of State should be competent in all cases set out under article R311-1-4 of the Administrative Code of Justice except when it is itself the organizer of a national competitive examination. She adds that the decisions of the Council of State are not subject to appeal.

[1] Namely, the act of marking the written qualifying examinations.

2.8 The author filed an application with the European Court of Human Rights that was rejected on 29 September 2006 as being incompatible *ratione materiae* with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[2]

The complaint

3. The author contends that, by taking a decision on her three complaints in accordance with its powers under article R311-1-4 of the Administrative Code of Justice, although it was also the organizer of the contested examination that she had taken, the Council of State was both judge and party, and the State party therefore violated article 14, paragraph 1, of the Covenant in her regard. The only possible way of contesting that provision would be to bring the matter before the Council of State, but according to the author, such an appeal would inevitably be rejected, because the Council of State would again be both judge and party.

State party's comments on admissibility

4.1 On 7 August 2008, the State party contested the admissibility of the communication. It invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, which in its view was applicable in the present case because the same question had already been considered by the European Court of Human Rights, which had rejected the author's application as inadmissible on 29 September 2006.

4.2 The State party also argues that the author's allegations were not sufficiently substantiated and were even an abuse within the meaning of article 3 of the Optional Protocol to the Covenant. It notes that the author did not provide any evidence in support of her allegation with regard to the impartiality of the members of the Council of State.[3] It adds that the service of the administrative courts and the administrative courts of appeal (STACAA), which organizes the competitive examination that the author sat for the additional recruitment of judges to the administrative court and the administrative court of appeal, forms part of the administrative activity of the Council of State. The Litigation (Judicial) Division, which deals with the competitive examination in a judicial capacity, is totally independent of that service and performs its task of monitoring legality with complete impartiality.[4] There is a strict separation of the administrative activities and the judicial functions of the Council of State. For those two reasons, the State party considers the communication to be inadmissible.

Author's comments on the State party's submission

5.1 On 1 September 2008, the author maintained that the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol was not an obstacle to the admissibility of her communication, because the European Court of Human Rights had not considered the application on the merits, having merely declared it to be inadmissible. Referring to the Committee's jurisprudence, she adds that, as the rights set out in the European Convention

[2] On the ground that "the procedure contested by the author did not concern either an appeal of her civil rights and obligations or the determination of any criminal charges against her, within the meaning of article 6 of the ECHR. Consequently, the appeal was incompatible *ratione materiae* with the provisions of the Convention within the meaning of article 35, paragraph 3."

[3] The State party cites communications No. 367/1989, *J.H.C. v. Canada*, decision of 5 November 1991, and No. 448/1991, *H.J.H. v. The Netherlands*, decision of 7 November 1991.

[4] The State party indicates in this connection that the Council of State, sitting in its judicial capacity, has already annulled decisions adopted by its administrative services.

on Human Rights differ from the rights embodied in the Covenant and her application was declared inadmissible *ratione materiae* by the European Court of Human Rights, it has not been “considered” in the meaning of the reservation entered by the State party with regard to article 5, paragraph 2 (a), of the Optional Protocol.[5]

5.2 In response to the argument of the State party regarding the strict separation between the administrative and judicial functions of the Council of State and the impartiality of the members of the Litigation (Judicial) Division, the author stresses that the Vice-President of the Council of State supervises not only the General Secretariat, the body responsible for the STACAA (which organizes the competitive examination that she sat), but also the Litigation (Judicial) Division.[6] According to her, the State party cannot therefore maintain that those sections are independent. She adds that two of the members of the panel for the competitive examination that she sat in 2005 held office during the same period as members of the Council of State, one in the Jurisdiction Court of the Council of State, and the other in the Litigation (Judicial) Division.[7] She therefore concludes that the administrative litigation division, some of whose members were on the panel for the competitive examination on which they were called upon at the same time to take judicial decisions, cannot be deemed independent.

Issues and proceedings before the Committee

6.1 Before considering a complaint contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 In conformity with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint lodged by the author was declared inadmissible by the European Court of Human Rights on 29 September 2006 (application No. 29415/05) on the ground that the application was incompatible *ratione materiae* with the provisions of the European Convention on Human Rights, because the procedure contested by the author did not concern either a challenge to her civil rights and obligations in a suit at law or the determination of any criminal charge against her, within the meaning of article 6 of the European Convention. The Committee also recalls that, upon its accession to the Optional Protocol, the State party entered a reservation with regard to article 5, paragraph 2 (a), of the Optional Protocol indicating that the Committee “shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement”.

6.3 The Committee recalls its jurisprudence that the “same matter” within the meaning of article 5, paragraph 2 (a), must be understood as relating to the same author, the same facts and the same substantive rights.[8] It observes that application No. 29415/05 was

[5] The author cites communication No. 441/1990, *Casanovas v. France*, Views of 19 July 1994, para. 5.1.

[6] The author has submitted an organizational chart of the Council of State in support of her allegations.

[7] In support of her allegations, the author has included: (a) a copy of the text of the Official Gazette (18 February 2005) announcing the appointment, inter alia, of two members of the panel for the competitive examination in question who are both presented as members of the Council of State; (b) a copy of the list of members of the Jurisdiction Court for 2005, 2006 and 2007, containing the name of one of the above-mentioned members of the panel; and (c) a copy of a decision by the Council of State (sitting in its judicial capacity) of 7 October 2005, containing the name of the second member of the panel in question, who was said to have taken part in the decision.

[8] See communications No. 1754/2998, *Loth v. Germany*, decision on inadmissibility adopted on 23 March 2010, para. 6.3, and No. 998/2001, *Althammer v. Austria*, Views adopted on 8 August 2003,

submitted to the European Court by the same author, was based on the same facts and related to the principle of equality before the courts and tribunals on the same grounds.

6.4 The Committee observes that the inadmissibility decision of the European Court was justified by the incompatibility *ratione materiae*, of the author's application with the provisions of the European Convention, as the procedure, which the author contested, did not relate to the determination of her civil rights and obligations, nor a criminal charge against her, within the meaning of article 6 of the Convention. The Committee considers that such analysis of the nature of the right invoked by the author constitutes an examination of the communication, and concludes that the same matter has, for the purpose of the reservation entered by the State party, already been considered by the European Court. Consequently, the Committee is precluded by the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol from examining the present communication.

7. The Committee therefore decides:

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

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

[Adopted in English, French and Spanish, the French 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.]

para. 8.4.

Appendix

Individual opinion of Committee members Mr. Michael O'Flaherty, Mr. Prafullachandra Natwarlal Bhagwati and Ms. Zonke Zanele Majodina (dissenting)

We do not consider that the reservation entered by the State party to article 5, paragraph 2 (a), is applicable in the present circumstances. The reservation in the original language (French) excludes matters which are being examined or have already been examined under another procedure of international investigation or settlement:

> "*La France fait une réserve á l'alinéa (a) du paragraphe 2 de l'article 5 en précisant que le Comité des Droits de l'Homme ne sera pas compétent pour examiner une communication émanant d'un particulier si la même question est en cours d'examen ou a déjà été examinée par une autre instance internationale d'enquête ou de règlement.*"

The declaration by the European Court of Human Rights that the author's application to that court was incompatible *ratione materiae* with the European Convention on Human Rights does not constitute an "examination" of the matter.

Accordingly, we consider that the reservation does not serve to preclude the Committee from consideration of this communication.

(*Signed*) Michael **O'Flaherty**

(*Signed*) Prafullachandra Natwarlal **Bhagwati**

(*Signed*) Zonke Zanele **Majodina**

[Done 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.]

Individual opinion of Committee members Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli (dissenting)

Having considered the communication *Marin v. France*, the Committee decided that it was inadmissible under article 5, paragraph 2 (a), of the Optional Protocol. It justified its decision by what we deem to be a misinterpretation of this provision, insofar as it recalled its settled jurisprudence that grounds for declaring a communication inadmissible exist when another international body has already considered the same matter and found the complaint to be inadmissible. In this case, the European Court of Human Rights had considered the same matter and declared it inadmissible. For this reason, the Committee decided to apply the reservation made by France, which does not recognize the competence of the Human Rights Committee if the same matter has already been considered by another international body.

It is very doubtful that the Court genuinely "considered" the matter, since it declared it inadmissible *ratione materiae*, leading to the conclusion that it did not undertake a consideration of the merits of the case. However, even if one is of the contrary opinion, it is not a question of determining whether another international body has already considered the matter, since this ground for inadmissibility is not set forth in the Optional Protocol. In our view, both the letter and spirit of the above paragraph of the Optional Protocol clearly establish that grounds for inadmissibility exist when the matter is being examined by another international body at the time that the Committee embarks on its consideration thereof, and not when it has been submitted and considered in the past.

The wording of the English and French versions of article 5, paragraph 2 (a), of the Optional Protocol is sufficiently clear as to leave no room for any doubt. The English text reads: "2. The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter *is not being examined* under another procedure of international investigation or settlement" (emphasis added). The corresponding French text reads: "2. *Le Comité n'examinera aucune communication d'un particulier sans s'être assuré que: a) La même question* n'est pas déjà en cours d'examen *devant une autre instance internationale d'enquête ou de règlement*" (emphasis added). The Spanish version contains a serious error of translation, since it speaks of inadmissibility when the same matter has already been submitted ("*ha sido sometido ya*") to another international procedure. This has allowed some States parties to interpret this ground for inadmissibility as referring solely to submission in the past of the same matter and not, as is correct, to its concurrent consideration by the other international body. In view of this error of translation, the Committee has repeatedly stated that the English and French versions must take precedence over the erroneous Spanish text, and has decided that the mere submission of an application is insufficient and that the matter must also have been examined by the other international body. However, the Committee has accepted — erroneously in our opinion — that this examination may have taken place in the past, in contradiction of the unequivocal text of article 5, paragraph 2 (a), of the Optional Protocol.

For the above reasons, without prejudging the alleged violation of the Covenant by the State party, we are of the opinion that the Committee should have declared the communication *Marin v. France* to be admissible.

(*Signed*) Rafael Rivas **Posada**

(*Signed*) Fabián Omar **Salvioli**

[Done in English, French and Spanish, the Spanish 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.]