



**International covenant  
on civil and political  
rights**

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HUMAN RIGHTS COMMITTEE  
Eighty-seventh session  
10-28 July 2006

**DECISION**

**Communication No. 1403/2005**

<u>Submitted by:</u>	Erich Gilberg (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	Germany
<u>Date of communication:</u>	11 February 2005 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 June 2005 (not issued in document form)
<u>Date of adoption of decision:</u>	25 July 2006

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\* Made public by decision of the Human Rights Committee.

*Subject matter:* Denial of appointment as civil servant on grounds of age.

*Substantive issues:* Equality before the law and equal protection of the law – Length of court proceedings – Equal access to public service

*Procedural issues:* State party's *ratione temporis* reservation – Level of substantiation of claim – Exhaustion of domestic remedies

*Articles of the Covenant:* 2 (1); 14; 25 (c); and 26

*Articles of the Optional Protocol:* 2 and 5 (2) (b)

[Annex]

**ANNEX****DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL  
PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL  
AND POLITICAL RIGHTS**

Eighty-seventh session

concerning

**Communication No. 1403/2005\***

<u>Submitted by:</u>	Erich Gilberg (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	Germany
<u>Date of communication:</u>	11 February 2005 (initial submission)

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

Meeting on 25 July 2006,

Adopts the following:

**DECISION ON ADMISSIBILITY**

1. The author of the communication is Mr. Erich Gilberg, a German national, born on 28 June 1937. He claims to be a victim of violations by Germany<sup>1</sup> of articles 2, 14, 25 (c) and 26 of the Covenant. He is not represented by counsel. The Covenant and the Optional Protocol

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

<sup>1</sup> Upon ratification of the Optional Protocol, the State Party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement, or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany (c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

to the Covenant entered into force for Germany on 23 March 1976 and 25 November 1993 respectively.

### **Factual background**

2.1 On 25 July 1963, the author obtained a university degree in physics. From 1 October 1963 to 30 June 1969, he was employed as research assistant at Munich University with the status of public employee. On 23 April 1969, he received a Ph.D. in natural sciences. From 1 July 1969 to 31 August 1981, he was employed as research assistant with the temporary status of civil servant (Beamter auf Zeit).

2.2 During these periods, the author was only insured under the obligatory pension scheme. Because of the temporary nature of his employment in each case, he was neither insured under the supplementary occupational pension scheme for public employees, nor under the pension scheme for civil servants.

2.3 From 1 April 1982 to 31 October 1985, the author worked at the European Molecular Biology Laboratory in Heidelberg. Between 1 November 1985 and 30 September 1990, he worked with a private company manufacturing optical devices. On 8 June 1988, he received the degree of doctor habilitatus at Munich University. Between 1 November 1990 and 28 February 1991, he worked in an optical company in Cervino (Italy).

2.4 On 2 May 1990, the author applied for a professorship for technical optics at the University of Applied Sciences (Fachhochschule) in Frankfurt am Main. On 7 September 1990, the Hessian Ministry of Science and Arts (hereafter “the Ministry”) offered to appoint him as public employee, stating that no appointment as civil servant was possible after his fiftieth birthday. The author accepted the offer on 13 September 1990, and on 1 March 1991, he took up his teaching functions. His employment contract provided that he would be covered by the occupational pension scheme, although public employees working as professors are normally excluded from that scheme. On 27 November 1991, he applied for appointment to the status of civil servant, arguing that his net salary was considerably lower than that of a civil servant and that the age limit of 50 years referred to by the Ministry was not established by law. He subsequently repeated his request and invoked a comparable case, in which one Mr. L., who belonged to the same age group as the author and, unlike him, only held a university degree, was appointed to the status of civil servant as professor at the Frankfurt University of Applied Sciences. The Ministry rejected his applications by administrative act on 11 May 1993 and upon review on 6 September 1993.

2.5 On 11 October 1993, the author appealed to the Administrative Court in Frankfurt am Main, which transferred his complaint to the Administrative Court of Wiesbaden. He argued that the impugned decisions had no statutory basis and did not indicate whether the Ministry had duly considered his eligibility for a civil servant post. In its job offer dated 7 September 1990, the Ministry had misinformed him that no appointment to a civil servant post was possible beyond the age of 50, thereby depriving him of an opportunity to make his acceptance dependent on such appointment.

2.6 On 11 April 1994, as part of the written court proceedings, the Ministry submitted that section 48 of the Budget Regulations of the State of Hessen authorizes the Hessian Ministry of Finance to establish age limits for the appointment to civil servant posts. On the basis of section 48, the conditions of access of different age groups to such posts had been defined in

an administrative circular: The appointment of applicants aged 50 to 54 required a special public service need, whereas the appointment of applicants aged 55 to 59 and, in exceptional cases, of university professors aged 60 and older required an urgent public service need. Applicants aged 60 and older other than university professors were not eligible for civil servant posts. A special public service need exists if the appointment to a civil servant post is “urgently indicated”; an urgent public service need exists if no equally qualified candidates are available and if the recruitment or continued employment of the applicant can only be ensured by appointment to a civil servant post. In the case of applicants who are already employed as public employees in the State of Hessen it must be established that they would otherwise quit the public service. The Ministry argued that, at the time of his appointment, the author had already passed the age limit of 50 years and that there was no special public service need for appointing him as a civil servant, let alone an urgent public service need following his 55<sup>th</sup> birthday on 28 June 1992. The author’s case had to be distinguished from that of Mr. L., who, after generally having accepted a similar offer to be appointed as public employee, but well before the date of his actual appointment, had requested to be considered for appointment to the status of civil servant. The Ministry had granted the request because Mr. L. was the only candidate recommended by the Faculty Board and to ensure continuity of teaching during the winter term 1992/93.

2.7 On 20 March 1995, the Wiesbaden Administrative Court quashed the impugned decisions, considering that they were not sufficiently reasoned, and referred the matter back to the Hessian Ministry of Science and Arts, requiring it to make full use of its discretion in applying the criteria set out in the administrative circular concerning the appointment of applicants aged 50 to 54 to a civil servant post.

2.8 On 14 August 1995, the Ministry appealed the judgment to the Higher Administrative Court of Kassel, invoking the absence of a special public service need to appoint the author as a civil servant, as well as the need for a strict application of this requirement to attenuate the massive increase of pension expenditures in the State of Hessen.

2.9 On 13 July 1999, the Higher Administrative Court quashed the Administrative Court’s judgment. By reference to the jurisprudence of the Federal Administrative Court, it held that even in the absence of a statutory law, the State had competence to set age limits for the appointment of civil servants to ensure an adequate balance between the number of years in service and the financial burden for the pension fund. The decision of 6 September 1993 of the Ministry of Science and Arts was sufficiently reasoned, as it stated that the Finance Ministry had refused to give its consent to the author’s appointment as civil servant. The refusal itself was in conformity with the administrative guidelines, since the author had never declared his intention to leave public service in case of rejection of his request to be appointed as civil servant during the administrative or judicial proceedings. The fact that he had agreed to his employment as public employee distinguished him from other professors who had been appointed as civil servants despite having exceeded the age limit. The Court denied leave to appeal. The author did not file a constitutional complaint with the Federal Constitutional Court.

2.10 On 24 August 2001, the author again applied to the Ministry for an appointment as civil servant, as well as for his retroactive exemption from any obligatory insurance from which civil servants are exempted or, subsidiarily, for an adjustment of his employment contract with a view to granting him, throughout the time of his active teaching as well as his

retirement, all privileges enjoyed by civil servants and for the reimbursement of any taxes and contributions paid to obligatory insurance schemes from which civil servants are exempted. He argued that his unfavourable treatment in comparison with other professors of his age group, who had been appointed as civil servants on the ground that it was uncertain whether they would have accepted an appointment as public employee, violated the constitutional non-discrimination clause (article 3 of the Basic Law) as well as the constitutional provision on equal access to public service (article 33, paragraph 2, of the Basic Law). While there was a presumption that applicants from outside the public service of the State of Hessen, such as his colleagues Mr. L. and Mr. E., would not accept any other status than that of a civil servant, applicants from within the Hessian public service, such as the author, had to prove that they would leave public service if their appointment to the status of civil servant were to be denied. Moreover, the Kassel Higher Administrative Court had ignored the fact that the Ministry had intentionally misinformed him that no appointment to a civil servant post was possible beyond the age of 50.

2.11 On 4 October 2001 and, on review, on 13 December 2001, the Hessian Ministry of Science and Arts dismissed the author's application to re-open the proceedings, as lodged out of time.

2.12 On 9 January 2002, the author appealed to the Frankfurt Administrative Court, reiterating that the dismissal of his application of 24 August 2004 violated German constitutional law, international treaties such as, *inter alia*, article 26 of the Covenant and articles 7 (a) (i) and 9, read in conjunction with article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, as well as EU law. On 28 May 2002, the Frankfurt Administrative Court dismissed the appeal, in the absence of a subsequent change of the facts or the law which would have justified re-opening the author's case after it had been decided by a final court decision and after the end of the three-month deadline for applying for such re-opening. The author should have raised the alleged violations of international human rights law during the court proceedings between 1993 and 1999, since all treaties invoked by him had been in force for Germany at that time.

2.13 On 1 and 24 June 2002, the author "extended his claim", invoking article 1, paragraph 2, and article 12, paragraph 4, of the European Social Charter and emphasizing that it was for the courts, rather than for a claimant, to ensure the application of legislation implementing Germany's obligations under international human rights treaties. On 15 July 2002, the Frankfurt Administrative Court declared the author's application for an extension of his claim inadmissible, in the absence of pending court proceedings.

2.14 On 17 September 2002, the author applied for leave to appeal the judgment of the Administrative Court, which had ignored the incompatibility of his treatment with international human rights norms, in particular article 26 of the Covenant. This constituted sufficient grounds for revoking the, albeit final, decisions of the Hessian Ministry of Science and Arts or for re-opening his case. By decision of 24 September 2002, the Higher Administrative Court of Kassel denied leave to appeal, as the author's appointment to a civil servant post was no longer possible under the Hessian Civil Servants Act after he had reached the statutory age limit of 65 years. Revoking the impugned decisions of the Ministry or re-opening the author's case would therefore be a futile exercise.

2.15 On 28 October 2002, the author filed a constitutional complaint with the Federal Constitutional Court alleging violations of the equal treatment clause (article 3 of the Basic Law) and his rights to equal access to public service (article 33, paragraph 2) and to judicial review (article 101, paragraph 1). He invoked international human rights norms, including articles 25(c) and 26 of the Covenant. By reference to the Committee's jurisprudence, he submitted that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" or to a denial of equal protection of the law within the meaning of article 26, arguing that reducing State expenditure was not a legitimate aim in his case. On 2 August 2004, the Federal Constitutional Court rejected the author's complaint.

2.16 On 15 April 2002, the author filed a suit with the Labour Court of Frankfurt, claiming (1) 162,068.93 € compensation for the difference between his salary and that of a professor with the status of civil servant for the time between 1 March 1991 and his retirement on 31 August 2002 plus 18,359.92 € interest; (2) payment of a civil servant pension as of 1 September 2002 equal to the pension that he would have been entitled to had he been appointed as civil servant for lifetime on 1 March 1991; and (3) compensation (plus 4% interest p.a.) for any contributions to the health and infirmity insurance schemes to be paid by him as of 1 September 2002, from which civil servants are exempted, until such time that his entitlement to civil servant allowances has been ascertained by final decision. On 19 February 2003, the Labour Court declared the author's second and third claims inadmissible for lack of specificity and rejected his first claim on the merits, since he had been remunerated on the basis of a valid employment contract and since there was no tort liability on the part of the State of Hessen, which had not violated any duty of care through its refusal to appoint the author to a civil servant post, as confirmed by final judgment dated 13 July 1999 of the Higher Administrative Court of Kassel. The author did not appeal that judgment.

### **The complaint**

3.1 The author claims that the refusal to appoint him as civil servant and his less favourable treatment with regard to remuneration, contributions to the unemployment, health and old age insurance schemes, as well as pension entitlements, discriminated against him, in violation of articles 25(c) and 26 of the Covenant, if compared to civil servants with identical tasks, such as Mr. E. and Mr. L. The length of the appeal proceedings before the Kassel Higher Administrative Court violated his right to a fair trial under article 14, paragraph 1, of the Covenant.

3.2 The author submits that he received the same gross salary and had identical tasks as colleagues with the status of civil servant. The latter was reflected by the fact that in many vacancy notes for public service positions the occupational status of the person to be appointed was left open. As a public employee, he had to pay contributions to the ordinary unemployment and pension schemes and to the occupational pension scheme, thereby reducing his net salary by significant amounts between 1991 and 2002, if compared to the net salary he would have received as a civil servant.

3.3 The author argues that, while he would have received 3,922.84 € monthly pension (75 percent of his last monthly salary in 2002 totaling 5,230.46 €) as a civil servant, from which only 103.09 € would have been deduced as contributions to the health and infirmity insurances, his monthly pension in 2002 only amounted to 1,966.18 € (1,703.82 € from the

obligatory pension scheme and 262.36 € from the occupational pension scheme), from which he had to pay monthly contributions of 305.61 € to the health and infirmity insurances. This was due to the fact that, unlike civil servants who were entitled to health and infirmity allowances, he only benefited from a monthly subsidy of 133.75 € from the obligatory pension scheme. As a retired civil servant he would have been entitled to a thirteenth salary in December each year.

3.4 The author submits that out of the 29 years and 5 months that he worked in public service, only six months have been counted as periods with positive contributions to the occupational pension scheme. Accordingly, his monthly pension of 262.36 € from the occupational scheme resulted from the numbers of years of his school and university education rather than his work in public service. Had all periods during which he worked in public service been counted as periods with contributions to the occupational pension scheme, his monthly pension would have amounted to 3,066.75 €, which was still much less than the pension that he would have received as a civil servant. This discrepancy was to be explained by the fact that contributions to the health, unemployment and pension insurances had steadily increased since the 1950s, without that being compensated by a corresponding increase in the gross salaries of public employees, let alone professors with the status of public employee, who received exactly the same gross salaries as their civil servant colleagues without the additional seven percent normally paid to “adjust” the net salary of public employees to that of civil servants.

3.5 For the author, his treatment as a “second class public servant” is not justified by any reasonable and objective criteria. He rejects as purely fictitious the differences routinely invoked by German courts to justify the less favourable treatment of public employees, i.e. the public law character of the appointment of civil servants as opposed to public employees whose appointment is governed by private law, the obligation of civil servants actively to defend the constitutional order as opposed to the passive duty of public employees not to violate the constitutional order, and the fact that civil servants, unlike public employees, have no right to strike. In particular, the absence of a right to strike for civil servants was irrelevant, since any increases in the gross salaries of public employees negotiated by their trade unions were equally applied to the gross salaries of civil servants.

3.6 Similarly, the author considers that the refusal to appoint him as professor with the status of civil servant was not based on reasonable and objective criteria, as required by articles 25 (c)<sup>2</sup> and 26 of the Covenant. He argues that failure by a State party to comply with its immediate obligation under article 2, paragraph 2, to take steps to give effect to the prohibition of discrimination cannot be justified by reference to economic considerations, such as reducing the expenditures of the pension fund. Nor could the refusal to appoint him as civil servant be justified by his age, given that his colleagues Mr. E. and Mr. L. had been appointed as civil servants, although they belonged to the same age group and despite their lower qualifications. While it was true that Mr. L. had been the only candidate recommended by the Faculty Board, Mr. E. had been recommended together with two other candidates.

3.7 The author claims that the length of the appeal proceedings before the Kassel Higher Administrative Court, which lasted from 14 August 1995 to 13 July 1999, violated his right

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<sup>2</sup> The author refers to General Comment No. 25 [57]: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 1996, at para. 23.

to a fair trial (article 14, paragraph 1), given that there was no public hearing and that the same Court decided his appeal within one week in September 2002, on the basis that he had meanwhile reached retirement age.

3.8 The author submits that same matter is not being examined under another procedure of international investigation or settlement. He was not required to exhaust domestic remedies in the first set of proceedings, because challenging the Higher Administrative Court's decision not to grant leave to appeal its judgment of 13 July 1999 would have been futile in the light of the jurisprudence of the Federal Administrative Court which, in two comparable cases, had recognized the competence of the Executive to define age limits for the appointment to civil servant posts and to refuse such appointment on economic grounds. As for the possibility of lodging a constitutional complaint, his lawyer had advised him that such a complaint would be without reasonable prospect of success, since the Federal Constitutional Court traditionally granted the legislator a wide margin of discretion as regards distinctions based on age. The scope of articles 3, paragraph 1 (non-discrimination), and 33, paragraph 2 (equal access to public service) of the Basic Law was narrower than that of its counterparts in articles 26 and 25 (c) of the Covenant. The lack of prospect of success of this remedy was also demonstrated by the rejection of his constitutional complaint in the second set of proceedings. To appeal the judgment of the Frankfurt Labour Court would have been futile in the light of the jurisprudence of the Federal Labour Court that professors with the status of public employee had no entitlements beyond those contained in the author's contract and that their exclusion from the occupational pension scheme was lawful.

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

4.1 On 1 August 2005, the State party challenged the admissibility of the communication, arguing that the alleged violations have their origin in events occurring prior to the entry into force of the Optional Protocol for Germany and that the author has failed to exhaust domestic remedies.

4.2 The State party invokes its reservation concerning the Committee's jurisdiction *ratione temporis* which, unlike similar reservations made by France, Malta and Slovenia, explicitly refers to the events at the origin of the alleged violation, rather than to the violation itself. It submits that the violations claimed by the author have their origin in the decision dated 11 May 1993 of the Hessian Ministry of Science and Arts rejecting his application for appointment to the status of civil servant, rather than in the decision of 13 July 1999 of the Kassel Higher Administrative Court. Given that the Ministry's decision of 11 May 1993 predated the entry into force of the Optional Protocol for Germany on 25 November 1993, the State party concludes that the communication is inadmissible *ratione temporis* based on the German reservation.

4.3 For the State party, the author did not exhaust domestic remedies, as he failed to challenge the Kassel Higher Administrative Court's denial to grant him leave to appeal its decision dated 13 July 1999 to the Federal Administrative Court, or to lodge a constitutional complaint with the Federal Constitutional Court. Such complaints would not *ab initio* have been futile; the Federal Administrative Court's jurisprudence cited by the author related to different cases involving non-appointment to the status of civil servant of a larger group of employees and, in the second case, of a much younger person. Similarly, the Federal Constitutional Court's jurisprudence invoked by the author concerned an entirely different

field of law, namely social law. The author's failure to avail himself of all available remedies in the first set of proceedings could not be healed by reopening *res judicata* proceedings.

### **Author's comments**

5.1 On 30 October 2005, the author submitted his comments arguing that the State party's reservation *ratione temporis* was inapplicable and that he exhausted domestic remedies. He submits that the German reservation does not apply to his case, since it expressly concerns article 5, paragraph 2 (a), of the Optional Protocol. Given that his case has not been and is not being considered under another procedure of international investigation or settlement, it falls outside the scope of the reservation.

5.2 He further argues that the wording of sub-paragraph b) of the reservation ("having its origin in events occurring prior to the entry into force") was not sufficiently "specific and transparent," as required by General Comment No. 24.<sup>3</sup> The reservation failed to address the fact that human rights violations can have their origin in a series of events, including direct and indirect causes, some of which may have occurred prior and others subsequent to the entry into force of the Optional Protocol for a State party. In his case, the discrimination against him could be linked to events following the entry into force of the Optional Protocol for Germany on 25 November 1993, such as the decision of 13 July 1999 of the Higher Administrative Court of Kassel, as well as to events pre-dating the entry into force, such as the Budget Regulations or the administrative circular of the State of Hessen, or the administrative acts dated 11 May and 6 September 1993 of the Hessian Ministry of Science and Arts rejecting his application for appointment to a civil servant post.

5.3 For the author, the State party's interpretation of its reservation as precluding the Committee's competence to consider a communication in all cases where one of the events giving rise to a complaint occurred prior to the entry into force of the Optional Protocol, is incompatible with the object and purpose of the Optional Protocol. The German reservation was therefore inadmissible, as it effectively sought to preclude the rights obligatory for the State party under the Covenant from being tested before the Committee.

5.4 The author concludes that the Committee's competence *ratione temporis* to consider a communication should be ascertained on the basis of whether or not the alleged violation continued or continued to have effects after the entry into force of the Optional Protocol. This was the case with regard to his discriminatory salary between 1991 and 2002 and his disadvantageous pension benefits received thereafter.

5.5 As regards exhaustion of domestic remedies, the author argues that it would have been futile to appeal the decision of 13 July 1999 of the Higher Administrative Court of Kassel to the Federal Administrative Court, given that the decision was based on the very jurisprudence of the Federal Administrative Court in similar cases, confirming the refusal to appoint individual applicants to the status of civil servant. If the State party argued that one of these cases involved the non-appointment of a much younger applicant than the author, then this only underlined that the Federal Administrative Court would have rejected his appeal.

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<sup>3</sup> CCPR, General Comment No. 24 [52]: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (1994), at para. 19.

5.6 The author submits that the rejection on substantive grounds of his constitutional complaint in the second set of proceedings showed that it would have been equally futile for him to lodge a constitutional complaint with the Federal Constitutional Court in the first set of proceedings. Moreover, his unawareness of the possibility to submit a communication under the Optional Protocol following exhaustion of domestic remedies could not be attributed to him, since he was never advised of that possibility by any of the lawyers and judges involved in the first set of proceedings from 1993 to 1999.

5.7 The author contends that, rather than reopening *res judicata* proceedings, the purpose of the second set of proceedings initiated by him was to revoke what he considers an unlawful, albeit final, administrative act denying his appointment to a civil servant post.

5.8 On 27 January 2006, the author made additional comments, reiterating that the Hessian Ministry of Science and Arts had deliberately misinformed him, in violation of article 25 (c), read in conjunction with article 2, of the Covenant, that his appointment to the status of civil servant was no longer possible after the age of 50.

5.9 The author submits that the Ministry's refusal to appoint him as civil servant, as well as the court decisions confirming this refusal, amounted to a breach of the non-discrimination and equal treatment principles enshrined in international human rights and EU law which prohibited discrimination on grounds of age. Rather than denying his application for leave to appeal the judgment of the Frankfurt Administrative Court because he had meanwhile reached the age of 65, the Higher Administrative Court of Kassel, in its decision of 24 September 2002, would have been bound to interpret his application as a motion for a declaratory judgment (Fortsetzungsfeststellungsklage) on the unlawfulness of the Ministry's conduct. For the author, the Court's failure to proceed accordingly amounted to a denial of justice.

### **Issues and proceedings before the Committee**

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

6.2 The Committee takes note of the State party's invocation of its *ratione temporis* reservation, as well as the author's arguments as to the applicability of that reservation. While acknowledging the force of the author's argument that the reservation's reference to "a violation [...] having its origin in events occurring prior to the entry into force of the Optional Protocol" may give rise to different interpretations concerning the causes and chronology leading to the alleged violation, the Committee observes that, in the present case, it need not pronounce itself on the issue of applicability of the reservation, if the author's communication is inadmissible on other grounds.

6.3 In this regard, the Committee has noted the State party's argument that the author has neither appealed the decision of 13 July 1999 of the Kassel Higher Administrative Court to the Federal Administrative Court, nor filed a constitutional complaint to the Federal Constitutional Court, and thus has failed to exhaust domestic remedies. It has also noted the author's argument that these remedies would have been futile in the light of other decisions taken by these Courts.

6.4 As regards the effectiveness of an appeal against the decision of the Kassel Higher Administrative Court in the first set of proceedings, the Committee recalls that the Court, in its decision of 13 July 1999, denied leave to appeal, informing the author that this denial could only be challenged on the basis of higher jurisprudence supporting his claims, procedural flaws, or if the general importance of his case could be substantiated. The Committee further recalls that the Court confirmed the Ministry's refusal to appoint the author to a civil servant post, *inter alia*, by reference to two cases decided by the Federal Administrative Court. It considers that the author has sufficiently substantiated the similarity between these cases and his own case. It was therefore reasonable for him to expect that an appeal against the decision of the Kassel Higher Administrative Court would have been futile, after that Court had dismissed his claim on similar grounds. The author was therefore not required to challenge the Court's denial to grant leave to appeal for purposes of preparing an appeal to the Federal Administrative Court.

6.5 A different question is whether the author was required to challenge the Kassel Higher Administrative Court's denial to grant leave to appeal in preparation of a constitutional complaint to the Federal Constitutional Court. The Committee recalls that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are *de facto* available to an author.<sup>4</sup> The Committee considers that the author has not shown that the Federal Constitutional Court's jurisprudence invoked by him would *ab initio* have precluded any prospect of success of a constitutional complaint. Similarly, the fact that the Federal Constitutional Court rejected his constitutional complaint in the second set of proceedings cannot be invoked by him to demonstrate the futility of such a complaint in the first set of proceedings. For purposes of article 5, paragraph 2 (b), of the Optional Protocol, the prospect of success of a domestic remedy must be assessed from an *ex ante* perspective to serve as a justification for not exhausting domestic remedies. Lastly, any failure of the author's privately retained counsel to inform him of the requirement, under article 5, paragraph 2 (b), to exhaust domestic remedies must be attributed to the author rather than to the State party.<sup>5</sup> The Committee therefore concludes that the author's claims related to the first set of proceedings are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.6 Insofar as the author's claims relate to the second set of proceedings, the Committee recalls that the Hessian Ministry of Science and Arts rejected his application to re-open the proceedings as lodged out of time and that the Frankfurt Administrative Court confirmed this decision, in the absence of a change of the facts or the law which would have justified re-opening proceedings. It also notes that, by the time the author submitted his renewed application for appointment to the status of civil servant on 24 August 2001, he had almost reached the retirement age of 65 years, after which appointment to the status of civil servant was no longer possible (see the decision of 24 September 2002 of the Higher Administrative Court of Kassel denying leave to appeal the judgment of the Frankfurt Administrative Court

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<sup>4</sup> Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, at para. 6.5; Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.2.

<sup>5</sup> Communication No. 867/1999, *Smartt v. Guyana*, Views adopted on 6 July 2004, at para. 5.4.

on that ground). The Committee recalls its constant jurisprudence that it is generally for the courts of States parties to the Covenant to review the facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such review or application was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>6</sup> It considers that the author has failed to substantiate, for purposes of admissibility, that the decision of the Frankfurt Administrative Court not to re-open *res judicata* proceedings or the Kassel Higher Administrative Court's denial to grant leave to appeal that decision amounted to arbitrariness or to a denial of justice. In the Committee's view, the author has not substantiated, for purposes of admissibility, that the fact that the Higher Administrative Court did not interpret his application for leave to appeal as a motion for a declaratory judgment amounted to a denial of justice, in the absence of any pending proceedings under which such a motion could have been entered. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the authors.

[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.]

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<sup>6</sup> Communication No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004, at para. 8.6; Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.3.