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HUMAN RIGHTS COMMITTEE
Eightieth session
15 March - 2 April 2004

DECISION

Communication No. 990/2001

Submitted by:	Mr. Arthur Irschik (not represented by counsel)
Alleged victim:	The author; his two sons, Lukas and Stefan Irschik
State party:	Austria
Date of communication:	12 December 2000 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 16 July 2001 (not issued in document form)
Date of adoption of decision:	19 March 2004

[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

Eightieth session

concerning

Communication No. 990/2001[**]

Submitted by:	Mr. Arthur Irschik (not represented by counsel)
Alleged victim:	The author; his two sons, Lukas and Stefan Irschik
State party:	Austria
Date of communication:	12 December 2000 (initial submission)

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

Meeting on 19 March 2004

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication are Arthur Irschik ("the author"), born on 4 January 1963, and his two sons, Lukas and Stefan Irschik, born on 11 February 1994 and, respectively, on 16 November 1996; they are Austrian nationals. The author claims that he and his sons are victims of a violation by Austria[1] of article 26 of the International

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, 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. Upon ratification of the Optional Protocol, 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

Covenant on Civil and Political Rights (the Covenant). He submits the communication on his own behalf as well as on behalf of his sons; he is not represented by counsel.

The facts

2.1 The author, a tax consultant, claimed a reduction of his income tax in his tax assessment forms for the years 1996, 1997 and 1998, as his maintenance obligations towards his two children were not (fully) deductible from the taxable base of his income.

2.2 In doing so, he relied on the landmark decision of the Austrian Constitutional Court of 17 October 1997, in which the Court, after having examined *ex officio* the constitutionality of several provisions of the Income Tax Law (Einkommenssteuergesetz) and of the Law on Family Taxation (Familienbesteuerungsgesetz), declared these provisions unconstitutional insofar as they did not allow tax payers with maintenance obligations towards their children to deduct at least half of these expenditures from the taxable base of their income. The Court held that the direct child benefits and child maintenance deductibles available in Austria fell short of compensating for the extra burden placed on parents with obligations to pay maintenance for their children. The fact that such expenditures, which were already taken off their personal budget, formed part of the taxable base (with the exception of the above-mentioned deductibles) placed parents at a disadvantage as compared to persons not liable to pay maintenance.

2.3 Under article 140, paragraph 5[2], of the Austrian Federal Constitution Act (Bundes-Verfassungsgesetz), the Court ruled that the declaration of unconsititutionality would take effect from 1 January 1999, so as to grant the legislator sufficient time to amend the law. In accordance with the so-called "test case legislation" (Anlassfallregelung), the old legislation continued to apply to all cases arising before that date, with the exception of the two "test cases" that had given rise to the proceedings before the Constitutional Court (article 140, paragraph 7[3], of the Federal Constitution Act). In these two cases, which concerned fiscal years 1993 and 1994, respectively, the impugned tax assessments were annulled.

2.4 The author's appeals against the tax assessment invoices for 1996, 1997, and 1998, in which his deduction claims had been rejected, were dismissed by the Vienna Regional

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not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[2] Article 140, paragraph 5, reads, in pertinent parts: "The rescission enters into force on the day of publication [of the Constitutional Court's decision in the Federal Law Gazette] if the Court does not set a deadline for the rescission. This deadline may not exceed 18 months."

[3] Article 140, paragraph 7, reads, in pertinent parts: "If a law has been rescinded on grounds of unconstitutionality [...], all courts and administrative authorities are bound by the decision of the Constitutional Court. The law shall, however, continue to apply to all cases arising before the rescission, with the exception of the test case, unless the Court, in its rescinding judgment, decides otherwise. If the Court, in its rescinding judgment, has set a deadline pursuant to paragraph 5, the law shall apply to all cases arising before the expiry of this deadline, with the exception of the test case."

Finance Directorate (Finanzlandesdirektion für Wien, Niederösterreich und Burgenland). Similarly, his complaints against two of these decisions (concerning tax assessments for the years 1996 and 1997), alleging violations of his constitutionally guaranteed rights to equality before the law and to security of property, were dismissed by the Constitutional Court on 8 June 1999, for lack of reasonable prospect of success. With regard to the 1998 tax assessment, the author did not complain to the Constitutional Court.

2.5 On 11 March 2000, the author, acting on his own behalf and not in the name of his children, submitted an application to the European Court of Human Rights, claiming violations of his rights under articles 6, 8, 12, and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as article 1, paragraph 1, of Protocol No. 1, read in conjunction with article 14 of the Convention. By decision of 11 September 2000, the Court declared the application inadmissible under article 35, paragraph 4, of the Convention, finding that the material before it did "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".

The complaint

3.1 The author claims to be a victim of a violation of article 26 of the Covenant, as the continued application of the repealed provisions of the Income Tax Law and the Law on Family Taxation to his tax assessments for 1996, 1997 and 1998 amounted to discrimination, given that this legislation was no longer applied to the test cases which had given rise to the legal proceedings before the Constitutional Court resulting in the rescission of the said provisions. He claims that his sons are also victims of a violation of article 26, since the denial of the rights to deduct his maintenance expenditures from the taxable base of his income effectively reduced his net income, thereby reducing his children's maintenance entitlements, which were calculated on the basis of a certain percentage of his net income.

3.2 The author considers the preferential treatment of the test cases to be arbitrary, in the absence of any reasonable and objective criteria which would justify the application of less favourable provisions to his and all other cases not benefiting from the test case legislation. This legislation was discriminatory for all parents obliged to pay maintenance for their children, whose complaints were not among the first ones pending at the Constitutional Court, although their financial burden was similar to that of the plaintiffs in the test cases. In lieu of remedy, the author claims a compensation of 255.413,00 AST, based on calculations enclosed with the communication.

3.3 Furthermore, the author submits that the rescinded provisions of the Income Tax Law and the Law on Family Taxation were not adequately amended by the legislator, who, apart from insignificantly increasing maintenance deductibles, merely re-enacted the same legislation, with effect from 1 January 1999.

3.4 The author claims that he has exhausted all effective domestic remedies. Although he could have lodged an appeal with the Administrative Court, after the Constitutional Court dismissed his complaints for fiscal years 1996 and 1997, this remedy would have been ineffective for purposes of invoking the principle of equality, since the Administrative Court is not competent to review the constitutionality of administrative acts, but only their

conformity with lower-ranking law. As regards the tax assessment for 1998, another complaint to the Constitutional Court would have been ineffective in the light of the dismissal, by that Court, of identical complaints concerning tax assessments for 1996 and 1997.

3.5 The author states that the same matter is not being and has not been examined under another procedure of international investigation or settlement, since the rejection of his application by the European Court of Human Rights, declaring it inadmissible for being manifestly ill-founded, was not based on an examination of the merits of his complaint.

State party's observations on the admissibility of the communication

4.1 By note verbale of 17 September 2001, the State party objected to the admissibility of the communication, invoking its reservation to article 5, paragraph 2 (a), of the Optional Protocol, the effect of which was to preclude the Committee's competence to examine the communication, since the same matter had already been examined by the European Court of Human Rights.

4.2 The State party argues that the applicability of its reservation is not impeded by the fact that the European Court of Human Rights declared the author's application inadmissible under article 35, paragraph 4, of the European Convention, because the wording of the Court's decision ("[…] do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols") clearly indicates that the Court examined "far-reaching aspects of the merits in the light of article 35, paragraph 3, of the Convention".

4.3 Although the reservation does not expressly refer to the European Court but to the European Commission of Human Rights, the State party submits that it also applies to cases where the same matter has been examined by the Court, since the Court has taken over the tasks hitherto discharged by the Commission, as a result of the reorganization of the Council of Europe organs.

4.4 Insofar as the author submits the communication on behalf of his children, the State party invokes non-exhaustion of domestic remedies, arguing that he failed to raise violations of his children's constitutional or Covenant rights in the domestic proceedings.

Author's comments on the State party's observations on admissibility:

5.1 By letter of 13 November 2001, the author responded to the State party's submission, challenging the applicability of the State party's reservation in his case. He argues that the same matter was not examined by the European Court of Human Rights, since the Court dismissed his application on purely formal grounds, without addressing the substance of his claims. There was consequently no risk of subjecting the decision of the European Court to review by the Committee, or of diverging case-law of these bodies.

5.2 The reasoning of the Court's decision, declaring the application inadmissible under article 35, paragraph 4, of the Convention, was limited to a standard formula, from which it could not be ascertained what considerations led the Court to conclude that the author's claims were manifestly ill-founded. This conclusion, moreover, constituted an "abusive

exercise" of the Court's power under article 35, paragraph 4, as it was in conflict with the former Commission's jurisprudence that, following a national court's decision to rescind a law, which as such violates the European Convention, that law must be repealed without delay and may not even be applied to cases having arisen before the date of rescission. The author concludes that, in the light of this jurisprudence, his application should have been treated as "manifestly founded", rather than manifestly ill-founded.

5.3 According to the author, a rejection on purely procedural grounds cannot be considered an examination, within the meaning of article 5, paragraph 2 (a), of the Optional Protocol, read in conjunction with the Austrian reservation. Otherwise, each rejection on formal grounds by the European Court would necessarily entail a similar decision by the Committee, *de facto* resulting in its lack of jurisdiction to examine the case on the merits. In a similar case[4], the Committee had therefore decided that the European Commission did not "examine" an application, when it had declared it inadmissible on procedural grounds.

5.4 The author argues that considering a rejection of an application on the ground of being manifestly ill-founded as an "examination of the same matter" would lead to arbitrary results, depending on which one of the inadmissibility grounds enumerated in article 35 of the Convention the Court chooses to base its finding, in cases where more than one may apply.

5.5 With regard to his children, the author claims that no domestic remedies were available to them for purposes of challenging the tax assessment invoices, which were addressed to him exclusively. In the absence of direct applicability of the Covenant in Austria, as well as the necessary implementing legislation, his children were precluded from invoking their Covenant rights before the Austrian courts and authorities. He also emphasizes that he was not acting on behalf of his sons when he submitted his application to the European Court of Human Rights. The Austrian reservation was therefore inapplicable, by logical implication, insofar as the communication relates to his children's rights under article 26 of the Covenant.

State party's observations on the admissibility and merits of the communication:

6.1 By note verbale of 16 January 2002, the State party made additional comments on the admissibility, and this time on the merits, of the communication. It reiterates that the dismissal of the author's application by the European Court of Human Rights, under article 35, paragraph 4, of the Convention, required an examination, if only summarily, of the merits of the complaint. Insofar as the author's children are concerned, the State party argues that any infringement of his Covenant rights, through the impugned tax assessments, "would only trigger reflex actions which are legally irrelevant in the present case".

6.2 In the alternative, if the Committee declares the communication admissible, the State party subsidiarily challenges its merits, arguing 1) that the assessment of taxable income falls outside the scope of the Covenant, 2) that the continued application of the old

[4] Communication No. 716/1996, *Dietmar Pauger v. Austria*, Views adopted on 25 March 1999, UN Doc. CCPR/C/65/D/716/1996, 30 April 1999, at para. 6.4.

legislation to non-test cases was justified by the objective need to grant the legislator enough time for adjusting the rescinded provisions, 3) that the author himself had failed to appeal to the Constitutional Court in time, so as to benefit from the test case effect, and 4) that, even if the relevant legal provisions had been repealed with immediate effect, the author would not have been successful to the full extent of his claim, given that the taxable base of his income for 1996 and 1997 would still have had to be calculated according to the old legislation.

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

7.1 By letter of 15 April 2003, the author, in response to the State party's additional observations, reiterated the arguments of his previous submission, and challenged the State party's contention that the assessment of taxable income falls outside the scope of article 26 of the Covenant. If the Committee had found the discriminatory calculation of a lump-sum payment under the Austrian Pensions Act to be in breach of article 26, then this article must *a fortiori* cover discrimination in the determination of the taxable base of an individual's income.

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 the author's argument that further complaints to the Administrative Court of Austria (regarding tax assessments for 1996 and 1997), as well as to the Austrian Constitutional Court (regarding tax assessment for 1998), would have been futile in his situation, as the Administrative Court was not competent to review the conformity of the contested acts with the constitutional principle of equality, and since the Constitutional Court had already adjudicated on basically the same issue in its decision of 8 June 1999, dismissing the author's claims for lack of reasonable prospect of success. The State party has not challenged this argument. The Committee therefore concludes that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met, insofar as the author claims a violation of his rights under article 26 of the Covenant.

8.3 With respect to the State party's argument that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, read in conjunction with the Austrian reservation to that article, the Committee notes that the author's application submitted to the European Court of Human Rights related to the same facts and issues as the communication pending before the Committee; the only difference is that the author did not act on behalf of his sons before the European Court. While the scope of article 14 of the European Convention is different from article 26 of the Covenant, given that the application of the latter is not limited to the other rights guaranteed in the Covenant, property rights are protected by article 1 of Protocol No. 1 to the European Convention and no separate issue therefore arises under article 26 of the Covenant. Accordingly, the Committee considers that it is seized of the "same matter" as the European Court was, to the extent that the author submits the communication on his own behalf.

8.4 As to the question of whether the European Court has "examined" the matter, the Committee recalls its jurisprudence that where the Strasbourg organshave based a decision of inadmissibility not solely on procedural grounds[5], but on reasons that involve even limited consideration of the merits of the case, the same matter has been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.[6] It considers that, in the present case, the European Court proceeded beyond an examination of purely procedural admissibility criteria, finding that the author's application "[did] not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".[7] The Committee observes that the State party's reservation cannot be denied simply on the assumption that this reasoning reflects a standard formula, from which it may not be ascertained on which considerations the Court's conclusion that the application was manifestly ill-founded was based.

8.5 Regarding the author's contention that the European Court's decision was in conflict with the jurisprudence of the former Commission, the Committee notes that it has no remit to review decisions and judgments of the European Court.

8.6 Accordingly, the Committee concludes that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, insofar as it relates to the author's claim that his rights under article 26 of the Covenant have been violated, since the same matter has already been examined by the European Court.

8.7 Insofar as the author submits the communication in the name of his children, the Committee notes the State party's objection that the author has not raised a possible violation of their constitutional or Covenant rights before the Austrian courts, and has therefore failed to exhaust domestic remedies on their behalf. It equally notes the author's argument that no legal remedies were available to his sons to challenge his tax assessment invoices for 1996, 1997 and 1998, and that the Covenant was not directly applicable under Austrian law. However, the Committee considers that it need not examine the issue of whether domestic remedies have been exhausted, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, with regard to the author's sons, because the author has failed to substantiate, for purposes of admissibility, that any detrimental effects that his tax assessment invoices may have had, directly or indirectly, on his children's maintenance entitlements, would amount to a violation of their rights under article 26 of the Covenant. The Committee therefore concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and article 5, paragraph 2 (a), of the Optional Protocol, the latter as modified by the State party's reservation;

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[5] See Communication No. 716/1996, *Dietmar Pauger v. Austria*, at para. 10.2

[6] See Communication No. 121/1982, *A.M. v. Denmark*, Decision on admissibility adopted on 23 July 1982, UN Doc. CCPR/C/16/D/121/1982, at para. 6; Communication No. 744/1997, *Linderholm v. Croatia*, Decision on admissibility adopted on 23 July 1999, UN Doc. CCPR/C/66/D/744/1997, at para. 4.2.

[7] See Communication No. 744/1997, at paras. 3 and 4.2.

(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.]