



**International covenant
on civil and political
rights**

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HUMAN RIGHTS COMMITTEE
Ninetieth session
9-27 July 2007

DECISION

Communication No. 1468/2006

<u>Submitted by:</u>	Mr. Hermann Winkler (represented by counsel, Mr. Alexander H.E. Morawa)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Austria
<u>Date of communication:</u>	31 January 2006 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 May 2006 (not issued in document form)
<u>Date of adoption of decision:</u>	24 July 2007

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GE.07-43850

Subject matter: Discriminatory treatment of adult adoptees

Procedural issues: “same matter” having been examined by an international procedure of investigation or settlement; Non-exhaustion of domestic remedies; evaluation of facts and evidence

Substantive issues: equality before the courts, arbitrary interference in family life, discrimination

Articles of the Covenant: 2, paragraph 1; 14, paragraph 1; 17 and 26

Articles of the Optional Protocol: 2 and 5, paragraphs 2 (a) and (b)

[Annex]

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

Ninetieth session

concerning

Communication No. 1468/2006**

Submitted by: Mr. Hermann Winkler (represented by counsel,
Mr. Alexander H.E. Morawa)

Alleged victim: The author

State party: Austria

Date of communication: 31 January 2006 (initial submission)

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

Meeting on 24 July 2007,

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Mr. Hermann Winkler, an Austrian citizen born on 23 November 1957. He claims to be the victim of a violation by Austria of article 14, paragraph 1; article 17, read alone or in conjunction with article 2, paragraph 1; and article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Alexander Morawa. Austria became a party to the Optional Protocol on 10 December 1987.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

Factual background

2.1 After losing his parents (in 1968 and 1974 respectively), the author met an elderly childless couple in the mid-1980s, Alfred and Rosa Laubmaier. Rosa Laubmaier owned an apartment in Salzburg, but lived together with her husband in another apartment most of the time, as well as a lakefront property in Upper Austria. Mrs. Laubmaier's only blood relatives were a niece, Mrs. Schwaighofer, and her descendants including Johannes Krauss.

2.2 The author and the Laubmaiers soon developed a personal relationship, and as early as 1985, the Laubmaiers even started to consider the author as a possible adoptive son. Their primary concern was to find a person who would take care of them when they were in need. The author was initially not interested, but several years later, when he began thinking about options for his children's high school education, he seriously considered the proposal. The Laubmaiers and the author concluded a written adoption contract and signed it on 4 and 12 July 1990 respectively. Under Austrian law, adoption confers upon the adoptive parents and children rights equal to those established by biological birth. Adoptions of both minors and adults are effected by a contract between the adoptive parent(s) and the adoptee, though the law imposes certain limits and preconditions on adoptions of adults. With respect to inheritance rights, the law entitles adopted children to the enjoyment of the same status as biological children born in wedlock. Adoption contracts require judicial approval which a competent court will give upon joint petition by the prospective adopting parent(s) and adopted child if the requirements provided for by the law are met. In the case of the author, the adoption contract was not submitted to the court for validation, as requested by the law.

2.3 The author married in 1988 and had 2 children (in 1985 and 1989). As the family had housing problems, his wife and children moved to live with her parents in the province of Styria while the author, a policeman, stayed in Salzburg during the week as he could not obtain a re-assignment to the local police force in Styria. The Laubmaiers wanted the author and his family to move to their apartment in Salzburg, but the family had become accustomed to living in the countryside, and it proved too difficult for the author to move his family back to Salzburg. The Laubmaiers were rather demanding of the author, which was incompatible with his police officer work schedule. Therefore, the Laubmaiers and the author agreed to cancel the adoption contract and signed a notarized document to that effect on 14 November 1990. They nevertheless continued to maintain close relations. On 7 February 1991, the Laubmaiers stated in writing to the author their will to keep the adoption contract of July 1990 despite its cancellation by the notary, thus reinstating the adoption as stipulated in this contract; again, no court approval was sought. In October 1992, the Laubmaiers allegedly drafted a letter declaring that they wanted to revoke the adoption, but they did not give legal effect to this letter, and the parent-child relationship continued until the Laubmaiers' deaths in 1994.

2.4 On 3 November 1988 Mrs. Laubmaier wrote her will, stipulating that her husband would inherit the lakefront property which, in case of his death, would be passed on to her niece, Mrs. Schwaighofer. She also stipulated that Johannes Krauss would receive the Salzburg apartment. On 13 February 1991, Mrs. Laubmaier changed her will of 1988 to the effect that the author was to inherit, after the death of her husband, the lakefront property, instead of her niece Mrs. Schwaighofer. She also deleted from her will the paragraph which gave her great grandnephew, Johannes Krauss, her Salzburg apartment, thus leaving open to whom that apartment would go.

2.5 In early spring 1994, Mrs. Schwaighofer entered into contact with the Laubmaiers and offered her assistance. She was given the use of the Laubmaiers' Salzburg apartment and was entrusted with a savings account that she was allowed to use for herself.

2.6 Mr. and Mrs. Laubmaier died on 14 April and 6 June 1994 respectively. It was discovered that Mrs. Laubmaier had changed her will on 26 May 1994, stating that her niece would inherit everything except for her apartment. This modified will left the ownership issue of the Salzburg apartment unresolved. As Mrs. Schwaighofer did not accept her inheritance and refused to sign a statement of acceptance, the author declared that he would accept the inheritance based on his status as an adopted son.

2.7 On 1 July 1994, the author petitioned the District Court of Oberndorf near Salzburg to approve the adoption contract of July 1990 but forgot to make the necessary arrangements to have his name changed to Laubmaier, which was one requirement of the adoption contract. The District Court rejected his petition, and so did the Regional and Supreme Courts. The latter however indicated that the approval would in principle have had to be given if the author had complied with the name change requirement. After a series of proceedings, the Salzburg Regional Court, on 25 June 1997, authorized the adoption contract. This paved the way for the Salzburg District Court to issue, on 7 July 1999, a decree transferring the inheritance in its entirety to the author.

2.8 Following this transfer of the Laubmaier inheritance, the great grandnephew of the author's adoptive mother, Johannes Krauss, initiated legal proceedings against the author, challenging his entitlement to the inheritance in so far as the Salzburg apartment of the deceased was concerned. He argued that the intention of Mrs. Laubmaier for him to inherit the apartment had survived the various changes in her will, as well as the adoption of the author. On 5 January 2001, the Salzburg Regional Court found in favour of Mr. Krauss and ordered the author to consent to the transfer of the apartment to the nephew. The judgement contains the following paragraphs:

“In sum, the court has the impression that the defendant [the author] has acted in quite a calculating fashion. Having the adoption contract “in his pocket”, he led the Laubmaiers to believe that nothing matters anymore, and thereby avoided having to be close to them, which was no doubt exhausting. The fact that he grabbed both real properties in the inheritance proceedings, although he allegedly had merely been promised the apartment, makes him look bad. That he ignored the wish of the deceased to preserve their family name adds to this picture.”

The author appealed the judgement, and on 14 May 2001, the Linz Court of Appeals dismissed his appeal, but allowed a further appeal to the Supreme Court. On 6 September 2001, the Supreme Court rejected the appeal as inadmissible.

2.9 On 8 November 2001, the author received an anonymous letter alleging that Mrs. Laubmaier's intention was not to give her apartment to Mr. Krauss but rather to him as her adoptive son. With the letter, a note, handwritten by Mrs. Laubmaier on 23 October 1989 and modified on 7 January 1993, was enclosed. Therefore, on 15 November 2001, the author filed a lawsuit asking for proceedings in the Salzburg Regional Court to be reopened. On 30 August 2002, the Court rejected his petition. He appealed to the Linz Court of Appeal, which dismissed the appeal on 19 February 2003 on the basis that the newly discovered evidence was inadmissible. The author filed a further appeal with the

Supreme Court, complaining in particular of the absence of procedural fairness and of a possibility to be heard about the issues which the Court of Appeal had taken into consideration to render its decision. The Supreme Court rejected the appeal on 12 June 2003, but the decision was communicated to the author only on 29 July 2003.

2.10 On 19 August 2003, the author complained to the European Court of Human Rights, alleging breaches of article 6, paragraph 1, of the European Convention of Human Rights and article 1 of the 1st Protocol. His application was declared inadmissible on 24 October 2003, as the application did not disclose any appearance of a breach of the rights guaranteed by the Convention or its Protocols.

The complaint

3.1 The author claims that through the judiciary's manifest arbitrariness against adopted adults, the State party violated his right to equality before the courts under article 14, paragraph 1, as well as his right to equality under Article 26 of the Covenant. He argues that the law imposes certain restrictions on adult adoptions. Adult adoptees and their adopting parents must prove an existing parent-child relationship, while in case of minors, a mere intent to establish such a relationship is sufficient. In addition, those seeking approval of an adoption contract involving an adult adoptee need to demonstrate that concrete circumstances exist to justify the adoption. By identifying adult adoptions as 'weak', the Austrian legal system attaches a certain negative stigma to them, which has very practical effects on how adopted adults are viewed and treated in court cases (especially inheritance matters). Indeed, the author affirms that the trial judge and the Court of Appeal disclosed a discernible trend of actively favouring the distant biological relatives and of discrediting the author.

3.2 To substantiate his claim of bias and arbitrariness, the author refers to the judgement of the Salzburg Regional Court of 5 January 2001¹ in the first set of proceedings, which said he was a 'calculating' individual, having misled his adoptive parents and worked tirelessly to obtain as many material possessions as possible, whereas the author claims his case does not support such conclusions. The author also complains that the court of first instance incorporated judgmental statements into the 'summary of the facts' to discredit the author, without supporting evidence. To him, the purpose of doing so was to create the impression that the author had a monetary motive when agreeing to the adoption. He further states that the bias of the judiciary against him is repeated through the choice of vocabulary used to convey disbelief. Finally, the courts allegedly use evidence "selectively" and to the disadvantage of the author.

3.3 The author requests the Committee to assess how the evidence was handled and how the judges conducted themselves when rendering judgement. He suggests that this will reveal a deep-rooted bias of the judiciary against him because he is an adult adoptee. He asserts that the Committee is equally empowered to examine the interpretation of a will's disposition to the extent that it discloses arbitrariness².

3.4 The author further claims to be the victim of a violation of article 17, read alone and in conjunction with article 2, paragraph 1, as the State party has interfered with his family life. He argues that the relationship between adoptive parents and children falls within the scope of article 17.

¹ Quoted above in para. 2.8.

² The author refers to Communications 301/1988 (§6.4), 567/1993 (§4.4), and 835/1998 (§4.2).

He considers that the right to pass on one's possessions, especially in case of death, to a descendant or other family member, is encompassed in the right to family life.

The State party's admissibility observations

4.1 On 3 July 2006, the State party challenged the admissibility of the communication. It states that the author merely complains about the inheritance proceedings instituted by him with respect to the Salzburg apartment and disagrees with the communication's evaluation of the conduct of, and assessment of evidence in, the inheritance proceedings before the Salzburg Regional Court and its judgement of 5 January 2001.

4.2 The State party challenges the admissibility of the communication on three grounds. It argues that the matter before the Committee is the "same matter" as that which was considered by the European Court of Human Rights (ECHR). It invokes article 5, paragraph 2 (a), of the Optional Protocol and its reservation³, and recalls that the author filed an application in the ECHR on 19 August 2003, which was declared inadmissible on 4 November 2003⁴. The facts underlying the author's complaint to the ECHR and to the Committee are the same. In his application to the ECHR, the author complained about an alleged violation of his right to a fair and unbiased hearing (article 6 of the European Convention) and a violation of the property guarantee.

4.3 The State party recalls that in his communication to the Committee, the author complains of alleged violations of article 2, paragraph 1; article 14, paragraph 1; article 17 and article 26 of the Covenant. According to the State party, articles 14 and 6 of the European Convention are similar, respectively, to articles 2, paragraph 1, and 14 of the Covenant. It concedes that there is no counterpart in the Convention to article 14, paragraph 1, of the Covenant, but understands the complaint to be in substance about the alleged procedural defects of the court proceedings which were also the subject matter in the case before the ECHR. The State party acknowledges that the complaint under article 17 may have to be examined by the Committee. It points out, however, that with regard to that article, the author is exclusively challenging the evaluation of facts and evidence and that in essence the alleged procedural defects are the same as the ones complained of to the ECHR. The State party concludes that the communication has been "examined" by the European Court and is therefore inadmissible.

4.4 The State party contends that the author failed to exhaust domestic remedies. The author complains that the judge conducting the hearing at the Salzburg Regional Court was biased. The Austrian legal system provides for a suitable and effective remedy in such cases: an application may be filed for disqualifying the judge pursuant to section 19, paragraph 2, of the Jurisdiction Act. If the application is accepted, the case is transferred to another judge and the measures taken by the

³ Austria ratified the Optional Protocol "... 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."

⁴ The Court ruled that « In so far as the complaints fall within the competence of the Court, the Court has concluded, based on all the documents at its disposal, that the application does not disclose any appearance of a breach of the rights guaranteed by the Convention or its Additional Protocols.»

challenged judge in the proceedings are null and void. The author did not resort to this remedy and thus failed to exhaust domestic remedies.

4.5 With regard to the author's claims of inequality in the law between child and adult adoptees, the State party notes that he would have had to raise these concerns in the judicial proceedings granting the application, under article 7, paragraph 1, of the Federal Constitution. The Court would then have been under the obligation, under article 140, paragraph 1, of the Constitution, to file a substantiated request with the Constitutional Court for reviewing the laws to be applied in such proceedings. The author could have filed such a request himself, under the same provision of the Constitution. The author did not do so and therefore failed to exhaust domestic remedies.

4.6 The State party argues that the author essentially seeks an examination of the national judicial decision on the merits, in particular in relation to findings of fact and evidence. It claims that the communication is clearly intended to have the Committee operate as a fourth instance, and as an instance to review the judgment of the ECHR.

4.7 According to the State party, the communication may be understood as challenging the Austrian legal system in respect of the adoption of adults. It points out that the author was granted adoption and that therefore he cannot be aggrieved. It notes that abstract review of legal provisions is inadmissible under article 2 of the Optional Protocol.

Author's comments on admissibility

5.1 On 5 September 2006, the author submits that there is no reason to declare the communication inadmissible in relation to article 17. The author further explains that although the facts underlying his complaints to the ECHR and to the Committee are the same, his claims are different. His complaint to the Committee relates to the very aspect of article 14, paragraph 1, which is unique and secures an additional right not contained in the parallel norm of the European Convention: the right to equality before the courts, and the ensuing prohibition of discriminatory practice by the courts. The author is alleging a discriminatory practice by the courts, on the basis of articles 2, paragraph 1, 14, paragraph 1, and 26, read together. That aspect goes beyond formal adherence to rules of procedure and, thus, beyond the scope of article 6, paragraph 1, of the European Convention.

5.2 On the issue of exhaustion of domestic remedies, the author submits that the challenge of trial judges, although formally available in Austrian law, is not an effective remedy to rectify the partiality of a judge as the standard of proof is excessively high. He outlines the general principles and practice in Austria regarding challenge of judges. He refers to the jurisprudence of the Supreme Court⁵ and indicates that in civil cases, as opposed to criminal cases, judges can also be challenged *after* their decision on the merits has been made, if the reasons for the challenge have manifested themselves only when or after the lower court's judgement has been given.

5.3 The author furthermore argues that the partiality of the judge became apparent only in his written judgement of 5 January 2001, in which he demonstrated arbitrariness through use of unfounded expressions of resentment towards the author. As the partiality did not manifest itself prior to the written judgement, the author was not in a position to challenge the judge before he

⁵ See Supreme Court Judgement, 6 Ob 276/05i (15 December 2005).

handed down his decision. He therefore raised the issue in the appeal brief, claiming that several statements of the trial judge were unfounded and constituted an expression of emotionality of the court.

5.4 The author claims that he has not requested a review *in abstracto* of domestic legislation, but rather provided information on the regulatory framework and its application in his case. The violations of his rights do not stem from *what* the courts decided, but rather from *how* they arrived at their conclusion. He therefore contends that his communication is admissible.

Issues and proceedings before the Committee

6.1 Before considering any claim 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.

6.2 The State party has challenged the admissibility of the communication on the ground that the "same matter" has already been examined by the ECHR, in particular with respect to the author's claim under article 14, paragraph 1, of the Covenant. It also notes the author's contention that the claims brought to the ECHR differ from his claims to the Committee. His claim to the ECHR under article 6 of the European Convention was based on an alleged breach of his right to a fair and unbiased hearing, while his claim before the Committee is based on an alleged violation of his right to equality before the courts.

6.3 The Committee recalls that, despite certain differences in the interpretation of article 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant by the competent organs, both the content and scope of these provisions largely converge⁶. In the light of the similarities between the two provisions, and on the basis of the State party's reservation, the Committee must decide whether the decision of the European Court constitutes an "examination" of the "same matter" which is also before the Committee. It recalls its jurisprudence⁷ that an inadmissibility decision which entailed the at least implicit consideration of the merits of a complaint amounts to an "examination", for the purpose of article 5, paragraph 2(a), of the Optional Protocol. It recalls that the European Court should be considered to have gone beyond the examination of purely procedural admissibility criteria when declaring the application inadmissible because it does "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols". The Committee finds that the author's contention that the judgement of the Salzburg Regional Court of 5 January 2001 with its negative evaluation of the author's conduct is evidence of the court's bias and amounts to unequal treatment is in essence identical to his claim of a violation of the principle of procedural fairness as raised in his application to the European Court of Human Rights. The Committee thus considers itself precluded from reviewing the examination of the author's claim by the European Court under article 6, paragraph 1, of the European Convention. It finds this part of the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

⁶ See for example Communication no. 989/2001, *Kollar v. Austria*, Decision on Admissibility of 30 July 2003, paragraph 8.6.

⁷ See Communication No. 1396/2005, *Jesús Rivera Fernández v. Spain*, Decision on Admissibility of 28 October 2005, paragraph 6.2.

6.4 With respect to the author's claim, under article 26 of the Covenant, of inequality in the law between adult and minor adoptees, in particular with respect to the burden that lies with adult adoptees to prove an already existing parent-child relationship, the Committee notes that the State party has identified a remedy available under article 7, paragraph 1, of the Federal Constitution. It further notes that the author has not contested the availability nor the potential effectiveness of this remedy, which he could have availed himself of, had he wished to contest the alleged inequality in the law at the domestic level. Accordingly, it finds this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 On the author's claim under article 17, that the State party has interfered arbitrarily with his family life by deciding the inheritance matters in a discriminatory fashion, the Committee considers that this claim amounts to a claim of review of the evaluation of evidence by the domestic courts. It recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts, unless it can be ascertained that the evaluation or interpretation was clearly arbitrary or amounted to a denial of justice⁸. In the light of the material before the Committee, the author has failed to substantiate, for the purpose of admissibility his claim of arbitrariness. Accordingly, the Committee considers that the author's claim under article 17 is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

- a) That the communication is inadmissible under article 2 and 5, paragraphs 2 (a) and (b), of the Optional Protocol;
- b) That this decision shall be communicated to the State party and to the author, through counsel.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

⁸ See Communication No. 541/1993, *Simms v Jamaica*, inadmissibility decision of 3 April 1995.